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Code of Federal Regulations

48

Chapters 7 to 14
Revised as of October 1, 2008

Federal Acquisition Regulations System

Containing a codification of documents of general applicability and future effect

As of October 1, 2008

With Ancillaries

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Table of Contents

	Page
Explanation	v
Title 48:	
Chapter 7—Agency for International Development	3
Chapter 8—Department of Veterans Affairs	141
Chapter 9—Department of Energy	279
Chapter 10—Department of the Treasury	547
Chapter 12—Department of Transportation	563
Chapter 13—Department of Commerce	627
Chapter 14—Department of the Interior	661
Finding Aids:	
Table of CFR Titles and Chapters	681
Alphabetical List of Agencies Appearing in the CFR	701
List of CFR Sections Affected	711

Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 48 CFR 701.105 *refers to title 48, part 701, section 105.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96–511) requires Federal agencies to display an OMB control number with their information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1986, consult either the List of CFR Sections Affected, 1949–1963, 1964–1972, or 1973–1985, published in seven separate volumes. For the period beginning January 1, 1986, a ''List of CFR Sections Affected'' is published at the end of each CFR volume.

INCORPORATION BY REFERENCE

What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call 202-741-6010.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I). A list of CFR titles, chapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of ''Title 3—The President'' is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the ''Contents'' entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

REPUBLICATION OF MATERIAL

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For a legal interpretation or explanation of any regulation in this volume, contact the issuing agency. The issuing agency's name appears at the top of odd-numbered pages.

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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.
October 1, 2008.

THIS TITLE

Title 48—FEDERAL ACQUISITION REGULATIONS SYSTEM is composed of seven volumes. The chapters in these volumes are arranged as follows: Chapter 1 (parts 1 to 51), chapter 1 (parts 52 to 99), chapter 2 (parts 201 to 299), chapters 3 to 6, chapters 7 to 14, chapters 15 to 28 and chapter 29 to end. The contents of these volumes represent all current regulations codified under this title of the CFR as of October 1, 2008.

The Federal acquisition regulations in chapter 1 are those government-wide acquisition regulations jointly issued by the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration. Chapters 2 through 99 are acquisition regulations issued by individual government agencies. Parts 1 to 69 in each of chapters 2 through 99 are reserved for agency regulations *implementing* the Federal acquisition regulations in chapter 1 and are numerically keyed to them. Parts 70 to 99 in chapters 2 through 99 contain agency regulations *supplementing* the Federal acquisition regulations.

The OMB control numbers for the Federal Acquisition Regulations System appear in section 1.106 of chapter 1. For the convenience of the user section 1.106 is reprinted in the Finding Aids section of the second volume containing chapter 1 (parts 52 to 99).

The first volume, containing chapter 1 (parts 1 to 51), includes an index to the Federal acquisition regulations.

For this volume, Robert J. Sheehan was Chief Editor. The Code of Federal Regulations publication program is under the direction of Michael L. White, assisted by Ann Worley.

Title 48—Federal Acquisition Regulations System

(This book contains chapters 7 to 14)

	Part
CHAPTER 7—Agency for International Development	701
CHAPTER 8—Department of Veterans Affairs	801
CHAPTER 9—Department of Energy	901
CHAPTER 10—Department of the Treasury	1033
CHAPTER 12—Department of Transportation	1201
CHAPTER 13—Department of Commerce	1301
CHAPTER 14—Department of the Interior	1401

CHAPTER 7—AGENCY FOR INTERNATIONAL DEVELOPMENT

EDITORIAL NOTE: Nomenclature changes to chapter 7 appear at 62 FR 40466, July 29, 1997, and corrected at 62 FR 45334, August 27, 1997.

SUBCHAPTER A—GENERAL

Part		*Page*
701	Federal Acquisition Regulation System	5
702	Definitions of words and terms	10
703	Improper business practices and personal conflicts of interest	12
704	Administrative matters	12

SUBCHAPTER B—ACQUISITION PLANNING

705	Publicizing contract actions	13
706	Competition requirements	13
707	Acquisition planning	16
709	Contractor qualifications	16
711	Describing agency needs	16

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

713	Simplified acquisition procedures	18
714	Sealed bidding	18
715	Contracting by negotiation	18
716	Types of contracts	22
717	Special contracting methods	23

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

719	Small business programs	24
722	Application of labor laws to government acquisition	33
724	Protection of privacy and freedom of information	36
725	Foreign acquisition	36
726	Other socioeconomic programs	37

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

727	Patents, data, and copyrights	41

Part		Page
728	Bonds and insurance	41
731	Contract cost principles and procedures	43
732	Contract financing	46
733	Protests, disputes, and appeals	48
	SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING	
734	Major system acquisition	52
736	Construction and architect-engineer contracts	52
737	[Reserved]	
	SUBCHAPTER G—CONTRACT MANAGEMENT	
742	Contract administration	54
745	Government property	56
747	Transportation	56
749	Termination of contracts	56
750	Extraordinary contractual actions	57
	SUBCHAPTER H—CLAUSES AND FORMS	
752	Solicitation provisions and contract clauses	63
753	Forms	91
APPENDIXES A–C TO CHAPTER 7 [RESERVED]		
APPENDIX D TO CHAPTER 7—DIRECT USAID CONTRACTS WITH A U.S. CITIZEN OR A U.S. RESIDENT ALIEN FOR PERSONAL SERVICES ABROAD		91
APPENDIX E TO CHAPTER 7 [RESERVED]		
APPENDIX F TO CHAPTER 7—USE OF COLLABORATIVE ASSISTANCE METHOD FOR TITLE XII ACTIVITIES		117
APPENDIXES G–H TO CHAPTER 7 [RESERVED]		
APPENDIX I TO CHAPTER 7—USAID'S ACADEMIC PUBLICATION POLICY		121
APPENDIX J TO CHAPTER 7—DIRECT USAID CONTRACTS WITH A COOPERATING COUNTRY NATIONAL AND WITH A THIRD COUNTRY NATIONAL FOR PERSONAL SERVICES ABROAD		122

SUBCHAPTER A—GENERAL

PART 701—FEDERAL ACQUISITION REGULATION SYSTEM

Subpart 701.1—Purpose, Authority, Issuance

Sec.
701.105 OMB approval under the Paperwork Reduction Act.

Subpart 701.3—U.S. Agency for International Development Acquisition Regulation

701.301 Policy.
701.303 Publication and codification.

Subpart 701.4—Deviations from the FAR or AIDAR

701.402 Policy.
701.470 Procedure.

Subpart 701.6—Career Development, Contracting Authority, and Responsibilities

701.601 General.
701.602–1 Authority of contracting officers in resolving audit recommendations.
701.602–3 Ratification of unauthorized commitments.
701.603 Selection, appointment, and termination of appointment.
701.603–70 Designation of contracting officers.

Subpart 701.7—Determinations and Findings

701.704 Content.
701.707 Signatory authority.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13236, Apr. 3, 1984, unless otherwise noted.

Subpart 701.1—Purpose, Authority, Issuance

701.105 OMB approval under the Paperwork Reduction Act.

(a) The following information collection and record keeping requirements established by USAID have been approved by OMB, and assigned an OMB control number and approval/expiration dates as specified below:

AIDAR segment	OMB control No.	Expiration date	Burden hours per report
733.7003(c)	0412–0520	08/31/2000	40
752.209–70	0412–0520	08/31/2000	4
752.219–8	0412–0520	08/31/2000	1
752.245–70	0412–0520	08/31/2000	.5
752.245–71	0412–0520	08/31/2000	1
752.7001(a)	0412–0520	08/31/2000	.5
752.7001(b)	0412–0520	08/31/2000	.5
752.7002(j)	0412–0520	08/31/2000	1
752.7003	0412–0520	08/31/2000	8
752.7004(b)(4)	0412–0520	08/31/2000	.5
752.7032	0412–0520	08/31/2000	2
752.7033	0412–0536	08/31/2000	4

(b) The information requested by the AIDAR sections listed in paragraph (a) is necessary to allow USAID to prudently administer public funds. It lets USAID make reasonable assessments of contractor capabilities and responsibility of costs. Information is required in order for a contractor and/or its employee to obtain a benefit-usually taking the form of payment under a government contract.

(c) Public reporting burden for these collections of information is estimated as shown in paragraph (a) of this section. The estimated burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimates or any other aspects of these collections of information, including suggestions for

reducing the burden, to: U.S. Agency for International (USAID), Office of Acquisition and Assistance, Policy Division (M/OAA/P), Room 7.08–082U, 1300 Pennsylvania Avenue, N.W. Washington, D.C. 20523–7801; and Office of Management and Budget (OMB), Paperwork Reduction Project (0412–0520), Washington, D.C. 20503.

[59 FR 33445, June 29, 1994, as amended at 61 FR 39090, July 26, 1996; 62 FR 40466, July 29, 1997; 64 FR 16648, Apr. 6, 1999; 72 FR 19670, Apr. 19, 2007]

Subpart 701.3—U.S. Agency for International Development Acquisition Regulation

SOURCE: 64 FR 42040, Aug. 3, 1999, unless otherwise noted.

701.301 Policy.

(a) *Responsibility*. Subject to the direction of the Administrator, the Director, Office of Acquisition and Assistance (''M/OAA Director'') is responsible for:

(1) Developing and maintaining necessary uniform procurement policies, procedures, and standards;

(2) Providing assistance to the contracting activities as appropriate;

(3) Keeping the Administrator and Executive Staff fully informed on procurement matters which should be brought to their attention; and

(4) All agency head duties and authorities stated in (48 CFR) FAR subpart 1.3, in accordance with (48 CFR) AIDAR 701.601. These responsibilities include but are not limited to developing, issuing, and maintaining the USAID Acquisition Regulation (''AIDAR'', 48 CFR chapter 7), USAID's supplement to the Federal Acquisition Regulation (48 CFR Chapter 1), in coordination with the General counsel and such other offices as may be appropriate.

(b) *Applicability*. (1) Unless a deviation is specifically authorized in accordance with subpart 701.4, or unless otherwise provided, the FAR and AIDAR apply to all contracts (regardless of currency of payment, or whether funds are appropriated or non-appropriated) to which USAID is a direct party.

(2) At Missions where joint administrative services are arranged, procuring offices may apply the Department of State Acquisition Regulation (48 CFR chapter 6) for all administrative and technical support contracts except in defined areas. The Office of Administrative Services will furnish the defined areas and administrative guidelines for procurement to the overseas Missions. Administrative and local support services include the procurement accountability, maintenance and disposal of all office and residential equipment and furnishings, vehicles and expendable supplies purchased with administrative and/or technical support funds, either dollars or local currency.

[64 FR 42040, Aug. 3, 1999, as amended at 72 FR 19670, Apr. 19, 2007]

701.303 Publication and codification.

(a) The AIDAR is USAID's Acquisition Regulation supplementing the FAR (48 CFR chapter 1) and is published as chapter 7 of Title 48, Code of Federal Regulations. AIDAR Circulars shall be used to promulgate changes to the AIDAR and shall be published in compliance with (48 CFR) FAR part 1.

(b) *Appendices.* Significant procurement policies and procedures that do not correspond to or conveniently fit into the FAR system described in FAR 1.1 and 1.303 may be published as Appendices to the AIDAR. Appendices follow the main text of the AIDAR in a section entitled ''Appendices to Chapter 7'' and contain a table of contents and the individual appendices identified by letter and subject title (*e.g.*, ''Appendix D—Direct USAID Contracts with a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad'').

(c) Only the M/OAA Director has the authority to issue internal agency guidance applicable to all agency contracts. The heads of the various USAID contracting activities (see subparts 701.6 and 702.10) may issue operating instructions and procedures consistent with the FAR, AIDAR, and other Agency regulations, policies, and procedures for application within their organizations. One copy of each such issuance shall be forwarded to the Office of Acquisition and Assistance, Policy Division (M/OAA/POL). Insofar as possible,

such material will be numerically keyed to the AIDAR.

[64 FR 42040, Aug. 3, 1999, as amended at 72 FR 19670, Apr. 19, 2007]

Subpart 701.4—Deviations from the FAR or AIDAR

701.402 Policy.

It is the policy of USAID that deviation from the mandatory requirements of the FAR and AIDAR shall be kept at a minimum and be granted only if it is essential to effect necessary procurement and when special and exceptional circumstances make such deviation clearly in the best interest of the Government.

701.470 Procedure.

(a) Deviation from the FAR or AIDAR affecting one contract or transaction.

(1) Deviations which affect only one contract or procurement will be made only after prior approval by the head of the contracting activity. Deviation requests containing the information listed in paragraph (c) of this section shall be submitted sufficiently in advance of the effective date of such deviation to allow adequate time for consideration and evaluation by the head of the contracting activity.

(2) Requests for such deviations may be initiated by the responsible USAID contracting officer who shall obtain clearance and approvals as may be required by the head of the contracting activity. Prior to submission of the deviation request to the head of the contracting activity for approval, the contracting officer shall obtain written comments from the Office of Acquisition and Assistance, Policy Division (M/OAA/P), hereinafter referred to as ''M/OAA/P''. The M/OAA/P shall normally be allowed 10 working days prior to the submission of the deviation request to the head of the contracting activity to review the request and to submit comments. If the exigency of the situation requires more immediate action, the requesting office may arrange with the M/OAA/P for a shorter review period. In addition to a copy of the deviation request, the M/OAA/P shall be furnished any background or historical data which will contribute to a more complete understanding of the deviation. The comments of the M/OAA/P shall be made a part of the deviation request file which is forwarded to the head of the contracting activity.

(3) Coordination with the Office of General Counsel, as appropriate, should also be effected prior to approval of a deviation by the head of the contracting activity.

(b) Class deviations from the FAR or AIDAR: Class deviations are those which affect more than one contract or contractor.

(1) Class deviations from the AIDAR will be processed in the same manner as prescribed in paragraph (a) of this section. Individual heads of contracting activities have authority to approve class deviations affecting only contracts within their own contracting activities, except that the Director, M/OAA, has authority to approve class deviations that affect more than one contracting activity.

(2) Class deviations from the FAR shall be considered jointly by USAID and the Chairperson of the Civilian Agency Acquisition Council (C/CAAC) (FAR 1.404) unless, in the judgement of the head of the contracting activity, after due consideration of the objective of uniformity, circumstances preclude such consultation. The head of the contracting activity shall certify on the face of the deviation the reason for not coordinating with the C/CAAC. In such cases, the M/OAA/P, shall be responsible for notifying the C/CAAC of the class deviation.

(3) Class deviations from the FAR shall be processed as follows:

(i) The request shall be processed in the same manner as paragraph (a) of this section, except that the M/OAA/P, shall be allowed 15 working days prior to the submission of the deviation request to the head of the contracting activity to effect the necessary coordination with the C/CAAC and to submit comments. If the exigency of the situation requires more immediate action, the requesting office may arrange with the M/OAA/P for a shorter review and coordination period. The comments of the C/CAAC and the M/OAA/P shall be made a part of the deviation request

file which is forwarded to the head of the contracting activity.

(ii) The request shall be processed in the same manner as paragraph (a) of this section if the request is not being jointly considered by USAID and the C/CAAC.

(4) Deviations involving basic agreements or other master type contracts are considered to involve more than one contract.

(5) Unless the approval is sooner rescinded, class deviations shall expire 2 years from the date of approval provided that deviation authority shall continue to apply to contracts or task orders which are active at the time the class deviation expires. Authority to continue the use of such deviation beyond 2 years may be requested in accordance with the procedures prescribed in paragraph (a) of this section.

(6) Expiration dates shall be shown on all class deviations.

(c) Requests for deviation shall contain a complete description of the deviation, the effective date of the deviation, the circumstances in which the deviation will be used, a specific reference to the regulation being deviated from, an indication as to whether any identical or similar deviations have been approved in the past, a complete justification of the deviation including any added or decreased cost to the Government, the name of the contractor, and the contract or task order number.

(d) Register of deviations: Separate registers shall be maintained by the procuring activities of the deviations granted from the FAR and AIDAR. Each deviation shall be recorded in its appropriate register and shall be assigned a control number as follows: the symbol of the procuring activity, the abbreviation ''DEV'', the fiscal year, the serial number [issued in consecutive order during each fiscal year] assigned to the particular deviation and the suffix ''c'' if it is a class deviation, e.g. CM–DEV–85–1, CM–DEV–85–2c. The control number shall be embodied in the document authorizing the deviation and shall be cited in all references to the deviation.

(e) Central record of deviations: Copies of approved deviations shall be furnished promptly to the M/OAA/P, who shall be responsible for maintaining a central record of all deviations that are granted.

(f) Semiannual report of class deviations:

(1) USAID contracting officers shall submit a semiannual report to the M/OAA/P of all contract actions effected under class deviations to the FAR and AIDAR which have been approved pursuant to paragraph (b) of this section.

(2) The report shall contain the applicable deviation control number, the contractor's name, contract number and task order number (if appropriate).

(3) The report shall cover the 6-month periods ending June 30 and December 31, respectively, and shall be submitted within 20 working days after the end of the reporting period.

[49 FR 13236, Apr. 3, 1984, as amended at 50 FR 50302, Dec. 10, 1985; 55 FR 6802, Feb. 27, 1990; 56 FR 67224, Dec. 30, 1991; 59 FR 33445, June 29, 1994; 61 FR 39090, July 26, 1996; 72 FR 19670, Apr. 19, 2007]

Subpart 701.6—Career Development, Contracting Authority, and Responsibilities

701.601 General

(a)(1) Pursuant to the delegations in ADS 103.5.10, the M/OAA Director is authorized to act as the Head of the Agency for all purposes described in the Federal Acquisition Regulation (FAR, 48 CFR Chapter 1), except for the authority in (48 CFR) FAR sections 6.302–7(a)(2), 6.302–7(c)(1), 17.602(a), 19.201(c), 27.306(a), 27.306(b), and 30.201–5, or where the ''head of the agency'' authority is expressly not delegable under the FAR or AIDAR. Further, the M/OAA Director is responsible for implementing the procurement related aspects of the Foreign Assistance Act, Executive Order 11223, the Office of Federal Procurement Policy Act, and other statutory and Executive Branch procurement policies and requirements applicable to USAID operations, except for those authorities and responsibilities delegated to the Procurement Executive as specified in ADS 103.5.10f.

(2) The M/OAA Director has specified authority to:

(i) Select and appoint contracting officers and terminate their appointments in accordance with section 1.603

of the Federal Acquisition Regulation; and

(ii) Exercise in person or by delegation the authorities stated in subpart 1.4 of the Federal Acquisition Regulation with regard to deviations from that regulation.

(b) Except as otherwise prescribed, the head of each contracting activity (as defined in 702.170) is responsible for the procurement of supplies and services under or assigned to the procurement cognizance of his or her activity. The heads of USAID contracting activities are vested with broad authority to carry out the programs and activities for which they are responsible. This authority includes authority to execute contracts and the establishment of procurement policies, procedures, and standards appropriate for their programs and activities, subject to government-wide and USAID requirements and restrictions, such as those found at 701.376–4 and particularly 701.603–70, the USAID policy regarding the direct-hire status of contracting officers.

(c) The authority of heads of contracting activities to execute contracts is limited as follows:

(1) Director, Office of U.S. Foreign Disaster Assistance. Authority to execute contracts for disaster relief purposes during the first 72 hours of a disaster in a cumulative total amount not to exceed $500,000. Authority to execute simplified acquisitions up to $50,000 at any time. May issue warrants for simplified acquisitions up to $50,000 to qualified individuals on his or her staff.

(2) Director, Center for Human Capacity Development (G/HCD). Authority to execute simplified acquisitions up to $10,000. Unlimited authority for procuring participant training based on published catalog prices, using M/OAA/E approved forms. May issue warrants for simplified acquisitions up to $10,000 to qualified individuals on his or her staff.

(3) Overseas heads of contracting activities. Authority to sign contracts where the cumulative amount of the contract, as amended, does not exceed $250,000 (or local currency equivalent) for personal services contracts or $100,000 (or local currency equivalent) for all other contracts. May issue warrants for simplified acquisitions up to $50,000 to qualified individuals on his or her staff.

[53 FR 4980, Feb. 19, 1988, as amended at 55 FR 6802, Feb. 27, 1990; 56 FR 67224, Dec. 30, 1991; 58 FR 8702, Feb. 17, 1993; 59 FR 33445, June 29, 1994; 60 FR 11912, Mar. 3, 1995; 61 FR 39090, July 26, 1996; 62 FR 40466, July 29, 1997; 64 FR 42041, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

701.602–1 Authority of contracting officers in resolving audit recommendations.

With the exception of termination settlements subject to part 749, Termination of Contracts, contracting officers shall have the authority to negotiate and enter into settlerments with contractors for costs questioned under audit reports, or to issue a contracting officer's final decision pursuant to the disputes clauses (in the event that questioned costs are not settled by negotiated agreement) in accordance with ADS Chapter 591.5.20. The negotiated settlement or final decision shall be final, subject only to a contractor's appeal, either under the provisions of the Contract Disputes Act of 1978, as amended (41 U.S.C. 601–613), or to the courts. Policies and procedures for resolving audit recommendations are in accordance with ADS Chapters 591 and 592.

[62 FR 40466, July 29, 1997]

701.602–3 Ratification of unauthorized commitments.

(a) [Reserved]

(b) *Policy*. (1) [Reserved]

(2) In order to maintain management oversight and controls on unauthorized commitments, authority to ratify unauthorized commitments within USAID is reserved to the M/OAA Director.

[53 FR 6829, Mar. 3, 1988, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

701.603 Selection, appointment, and termination of appointment.

701.603–70 Designation of contracting officers.

A contracting officer represents the U.S. Government through the exercise of his/her delegated authority to negotiate, sign, and administer contracts on behalf of the U.S. Government. The

contracting officer's duties are sensitive, specialized, and responsible. In order to insure proper accountability, and to preclude possible security, conflict of interest, or jurisdiction problems, it is USAID policy that USAID contracting officers must be U.S. citizen direct-hire employees of the U.S. Government.

[49 FR 13236, Apr. 3, 1984, as amended at 61 FR 39091, July 26, 1996]

Subpart 701.7—Determinations and Findings

701.704 Content.

There is no USAID-prescribed format or form for determinations and findings (D&Fs). D&Fs are to contain the information specified in FAR 1.704 and any information which may be required by the FAR or AIDAR section under which the D&F is issued.

[58 FR 8702, Feb. 17, 1993, as amended at 62 FR 40466, July 29, 1997]

701.707 Signatory authority.

Unless otherwise specified in the FAR or AIDAR section under which the D&F is issued, the Contracting Officer is the signing official.

[58 FR 8702, Feb. 17, 1993]

PART 702—DEFINITIONS OF WORDS AND TERMS

Subpart 702.170—Definitions

Sec.

702.170–1 USAID.
702.170–2 Administrator.
702.170–3 Contracting activities.
702.170–4 Cooperating country.
702.170–5 Cooperating country national (CCN).
702.170–6 Executive agency.
702.170–7 Foreign Assistance Act.
702.170–8 Government, Federal, State, local and political subdivisions.
702.170–9 Head of agency.
702.170–10 Head of the contracting activity.
702.170–11 Mission.
702.170–12 Overseas.
702.170–13 Procurement Executive.
702.170–14 [Reserved]
702.170–15 Third country national (TCN).
702.170–16 U.S. national (USN).
702.170–17 Automated Directives System.

Subpart 702.270—Definitions Clause

702.270–1 Definitions clause.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13238, Apr. 3, 1984, unless otherwise noted.

Subpart 702.170—Definitions

702.170–1 USAID.

USAID means the U.S. Agency for International Development and its predecessor agencies, including the International Cooperation Administration (ICA).

702.170–2 Administrator.

Administrator means the Administrator or Deputy Administrator of the U.S. Agency for International Development.

702.170–3 Contracting activities.

The contracting activities within USAID are:

(a) *The USAID/Washington activities.* The contracting activities located in Washington are the Office of Acquisition and Assistance, Office of Foreign Disaster Assistance, and Center for Human Capacity Development (G/HCD). Subject to the limitations stated in 702.170–10, these contracting activities are responsible for procurement related to programs and activities for their areas. The Office of Acquisition and Assistance is responsible for procurements which do not fall within the responsibility of other contracting activities, or which are otherwise assigned to it.

(b) *The overseas field contracting activities.* Each USAID Mission or post overseas is a contracting activity, responsible for procurement related to its programs and activities, subject to the limitations in 702.170–10(b), which sets forth the contracting authority for Mission Directors and principal USAID officers at posts.

[50 FR 16085, Apr. 24, 1985, as amended at 50 FR 40528, Oct. 4, 1985; 50 FR 50302, Dec. 10, 1985; 51 FR 20651, June 6, 1986; 56 FR 67224, Dec. 30, 1991; 61 FR 39091, July 26, 1996; 62 FR 40466, July 29, 1997; 72 FR 19670, Apr. 19, 2007]

702.170–4 Cooperating country.

Cooperating country means a foreign country in which there is a program or activity administered by USAID.

702.170–5 Cooperating country national (CCN).

Cooperating country national (CCN) means an individual who is a cooperating country citizen or a non-cooperating country citizen lawfully admitted for permanent residence in the cooperating country.

702.170–6 Executive agency.

Executive agency includes the U.S. Agency for International Development (USAID) and its predecessor agencies, including the International Cooperation Administration.

702.170–7 Foreign Assistance Act.

Foreign Assistance Act means the Foreign Assistance Act of 1961, as amended (22 U.S.C., Chapter 32).

702.170–8 Government, Federal, State, local and political subdivisions.

As used in the FAR and AIDAR, these terms do not refer to foreign entities except as otherwise stated.

702.170–9 Head of agency.

Head of agency means, for USAID, the Administrator, and the Deputy Administrator, and in accordance with the responsibilities and limitations set forth in 701.601(a)(1), the M/OAA Director.

[50 FR 52780, Dec. 26, 1985, as amended at 64 FR 42041, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

702.170–10 Head of the contracting activity.

(a) The heads of USAID contracting activities are listed below. The limits of their contracting authority are set forth in 701.601.

(1) USAID/Washington Heads of Contracting Activities:

(i) Director, Office of Acquisition and Assistance;

(ii) Director, Office of U.S. Foreign Disaster Assistance; and

(iii) Director, Center for Human Capacity Development (G/HCD).

(2) Overseas Heads of Contracting Activities: Each Mission Director or principal USAID officer at post (e.g. USAID Representative, USAID Affairs Officer, etc.)

(b) Individuals serving in the positions listed in (a)(1) and (a)(2) of this section in an ''Acting'' capacity may exercise the authority delegated to that position.

[53 FR 4980, Feb. 19, 1988, as amended at 56 FR 67224, Dec. 30, 1991; 61 FR 39091, July 26, 1996; 62 FR 40466, July 29, 1997; 72 FR 19670, Apr. 19, 2007]

702.170–11 Mission.

Mission means the USAID mission or the principal USAID office or representative (including an embassy designated to so act) in a foreign country in which there is a program or activity administered by USAID.

702.170–12 Overseas.

Overseas means outside the United States, its possessions, and Puerto Rico.

702.170–13 Procurement Executive.

''Procurement Executive'' is synonymous with ''Senior Procurement Executive'' as defined in FAR 2.101 and means the USAID official who is responsible for the management direction of USAID's assistance and acquisition (''A&A'') system, as so delegated and more fully described in ADS 103.5.10f.

[64 FR 42041, Aug. 3, 1999]

702.170–14 [Reserved]

702.170–15 Third country national (TCN).

Third country national (TCN) means an individual who is neither a cooperating country national nor a U.S. national, but is a citizen of a country included in Geographic Code 935 (see 22 CFR 228.3).

[49 FR 13238, Apr. 3, 1984. Redesignated at 50 FR 16086, Apr. 24, 1985, as amended at 62 FR 40466, July 29, 1997]

702.170–16 U.S. national (USN).

U.S. national (USN) means an individual who is a U.S. citizen or a non-

U.S. citizen lawfully admitted for permanent residence in the United States.

[49 FR 13238, Apr. 3, 1984. Redesignated at 50 FR 16086, Apr. 24, 1985]

702.170–17 Automated Directives System.

''Automated Directives System'' (''ADS'') sets forth the Agency's policies and essential procedures, as well as supplementary informational references. It contains six functional series, interim policy updates, valid USAID handbook chapters, a resource library, and a glossary. References to ''ADS'' throughout this chapter 7 are references to the Automated Directives System. Procurement-related sections of this system are accessible to the general public at the following internet address: *http://www.info.usaid.gov/pubs/ads*. The entire ADS is available on the ADS Compact Disk (ADS CD), which may be purchased from the Agency at cost by submitting a completed ADS CD order form. To request a fax copy of the ADS CD order form, send an e-mail with your fax number to *ADS@USAID.GOV*.

[64 FR 42041, Aug. 3, 1999]

Subpart 702.270—Definitions Clause

702.270–1 Definitions clause.

Use the appropriate clause in 752.202–1, in addition to the clause in FAR 52.202–1.

PART 703—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 703.1—Safeguards

Sec.

703.104–5 Disclosure, protection, and marking of proprietary and source information.
703.104–10.1 Violations or possible violations.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 703.1—Safeguards

703.104–5 Disclosure, protection, and marking of proprietary and source information.

A Contracting Office may authorize release of proprietary and/or source selection information outside the Government for evaluation purposes pursuant to FAR 15.305(c) and (AIDAR) 48 CFR 715.305(c).

[64 FR 16648, Apr. 6, 1999]

703.104–10.1 Violations or possible violations.

Requests for concurrence under paragraph (a)(1) of FAR 3.104–10 shall be forwarded to one level above the Contracting Officer.

[64 FR 16648, Apr. 6, 1999]

PART 704—ADMINISTRATIVE MATTERS

Subpart 704.4—Safeguarding Classified Information Within Industry

Sec.

704.404 Contract clause.

Subpart 704.8—Contract Files [Reserved]

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 704.4—Safeguarding Classified Information Within Industry

704.404 Contract clause.

If the contract involves access to classified (''Confidential'', ''Secret'', or ''Top Secret''), or administratively controlled (''Sensitive But Unclassified'') information, use the contract clause in 752.204–2.

[49 FR 13239, Apr. 3, 1984. Redesignated at 54 FR 16122, Apr. 21, 1989, as amended at 62 FR 40467, July 29, 1997]

Subpart 704.8—Contract Files [Reserved]

SUBCHAPTER B—ACQUISITION PLANNING

PART 705—PUBLICIZING CONTRACT ACTIONS

Sec.
705.002 Policy.

Subpart 705.2—Synopsis of Proposed Contract Actions

705.202 Exceptions.
705.207 Preparation and transmittal of certain synopses.
705.502 Authority.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp., p. 435; 40 U.S.C. 474.

705.002 Policy.

(a) USAID's Office of Small and Disadvantaged Business Utilization maintains an USAID Consultant Registry Information System (ACRIS), which serves as a reference source and an indication of a prospective contractor's interest in performing USAID contracts. Prospective contractors are invited to file the appropriate form (Standard Forms 254/255, Architect-Engineer and Related Services Questionnaire; or USAID Form 1420–50, USAID Consultant Registry Information System (ACRIS) Organization and Individual Profile) with USAID's Office of Small and Disadvantaged Business Utilization (Department of State, U.S. Agency for International Development, Washington, DC 20523–1414—Attention: Office of Small and Disadvantaged Business Utilization). These forms should be updated annually.

(b) USAID policy is to include all Commerce Business Daily Notices and solicitations on the Internet.

[50 FR 40976, Oct. 8, 1985, and 50 FR 51396, Dec. 17, 1985, as amended at 52 FR 21058, June 4, 1987; 56 FR 2699, Jan. 24, 1991; 62 FR 40467, July 29, 1997]

Subpart 705.2—Synopsis of Proposed Contract Actions

705.202 Exceptions.

(a) [Reserved]

(b) The head of the U.S. Agency for International Development has determined after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that advance notice is not appropriate or reasonable for contract actions described in 706.302–70(b)(1) through (b)(3).

(c) Advance notice is not required for contract actions undertaken in accordance with 706.302–71.

[51 FR 42845, Nov. 26, 1986, as amended at 54 FR 28069, July 5, 1989; 55 FR 8469, Mar. 8, 1990; 55 FR 39154, Sept. 25, 1990; 56 FR 27208, June 13, 1991; 57 FR 5235, Feb. 13, 1992]

705.207 Preparation and transmittal of certain synopses.

The responsible contracting officer shall notify USAID's Office of Small and Disadvantaged Business Utilization (OSDBU) at least seven business days before publicizing a solicitation in the Commerce Business Daily for an acquisition:

(a) Which is to be funded from amounts referred to in section 706.302–71(a); and

(b) Which is expected to exceed $100,000.

For exceptions, see 726.7005.

[56 FR 27208, June 13, 1991, as amended at 62 FR 40467, July 29, 1997]

705.502 Authority.

(a) The M/OAA Director, acting as head of the Agency under the authority of 701.601(a)(1), hereby authorizes USAID contracting officers to place paid advertisements and notices in newspapers and periodicals. Contracting officers shall document the contract file to reflect consideration of the requirements of (48 CFR) FAR 5.101(b)(4).

[64 FR 5006, Feb. 2, 1999, as amended at 64 FR 42042, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 706—COMPETITION REQUIREMENTS

Sec.
706.003 Definitions.

Subparts 706.1–706.2 [Reserved]

Subpart 706.3—Other Than Full and Open Competition

706.302–5 Authorized or required by statute.
706.302–70 Impairment of foreign aid programs.
706.302–71 Small disadvantaged businesses.
706.303–1 Requirements.

Subpart 706.5—Competition Advocates

706.501 Requirement.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp., p. 435; 40 U.S.C. 474.

706.003 Definitions.

Procuring activity means ''contracting activity'', as defined in 702.170–3.

[50 FR 40528, Oct. 4, 1985]

Subparts 706.1–706.2 [Reserved]

Subpart 706.3—Other Than Full and Open Competition

706.302–5 Authorized or required by statute.

Certain annual appropriations acts authorize USAID to contract with certain disadvantaged enterprises using other than full and open competition. The provisions implementing this authority are set forth in 706.302–71 and part 726.

[58 FR 8702, Feb. 17, 1993, as amended at 62 FR 40467, July 29, 1997]

706.302–70 Impairment of foreign aid programs.

(a) *Authority.* (1) Citation: 40 U.S.C. 474.

(2) Full and open competition need not be obtained when it would impair or otherwise have an adverse effect on programs conducted for the purposes of foreign aid, relief, and rehabilitation.

(b) *Application.* This authority may be used for:

(1) An award under section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, involving a personal services contractor serving abroad;

(2) An award of $250,000 or less by an overseas contracting activity;

(3)(i) An award for which the Assistant Administrator responsible for the project or program makes a formal written determination, with supporting findings, that compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of the foreign assistance program; or

(ii) Awards for countries, regions, projects, or programs for which the Administrator of USAID makes a formal written determination, with supporting findings, that compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of the foreign assistance program.

(4) Awards under AIDAR 715.370–1 (Title XII selection procedure—general) or 715.370–2 (Title XII selection procedure—collaborative assistance).

(5) An award for the continued provision of highly specialized services when award to another resource would result in substantial additional costs to the government or would result in unacceptable delays.

(c) *Limitations.* (1) Offers shall be requested from as many potential offerors as is practicable under the circumstances. While the authority at 706.302–70(b)(5) is for use when the contracting officer determines that the incumbent contractor is the only practicable, potential offeror, the requirement to publicize the intended award, as required in FAR 5.201, still applies.

(2) The contract file must include appropriate explanation and support justifying the award without full and open competition, as provided in FAR 6.303, except that determinations made under 706.302–70(b)(3) will not be subject to the requirement for contracting officer certification or to approvals in accord with FAR 6.304.

(3) The authority in 706.302–70(b)(3)(i) shall be used only when no other authority provided in FAR 6.302 or AIDAR 706.302 is suitable. The specific foreign assistance objective which would be impaired must be identified and explained in the written determination and finding. Prior consultation with the Agency Competition Advocate (see 706.501) is required before executing the written determination and finding, and this consultation must

be reflected in the determination and finding.

(4) Use of the authority in 706.302–70(b)(5) for proposed follow-on amendments in excess of one year or over $250,000 is subject to the approval of the Agency Competition Advocate. For all other follow-on amendments using this authority, the contracting officer's certification required in FAR 6.303–2(a)(12) will serve as approval.

[50 FR 40976, Oct. 8, 1985, and 50 FR 51395, Dec. 17, 1985, as amended at 54 FR 28069, July 5, 1989; 54 FR 46389, Nov. 3, 1989; 57 FR 5235, Feb. 13, 1992; 61 FR 39091, July 26, 1996; 62 FR 40467, July 29, 1997; 64 FR 42042, Aug. 3, 1999]

706.302–71 Small disadvantaged businesses.

(a) *Authority.* (1) Citations: Sec. 579, Pub. L. 101–167 (Fiscal Year (FY) 1990), Sec. 567, Pub. L. 101–513 (FY 1991), Sec. 567, Pbu. L. 102–145 (FY 1992), Sec. 562, Pub. L. 102–391 (FY 1993), Sec. 558, Pub. L. 103–87 (FY 1994), and Sec. 555, Pub. L. 103–306 (FY 1995).

(2) Except to the extent otherwise determined by the Administrator, not less than ten percent of the amounts made available through the appropriations cited in paragraph (a)(1) of this section for development assistance and for assistance for famine recovery and development in Africa shall be used only for activities of disadvantaged enterprises (as defined in 726.7002). In order to achieve its goal, USAID is authorized in the cited statutes to use other than full and open competition to award contracts to small business concerns owned and controlled by socially and economically disadvantaged individuals (small disadvantaged businesses as defined in 726.7002), historically black colleges and universities, colleges and universities having a student body of which more than 40 percent of the students are Hispanic Americans, and private voluntary organizations which are controlled by individuals who are socially and economically disadvantaged, as the terms are defined in 726.7002.

(b) *Application.* This authority may be used only if the Agency determines in accordance with 726.7004 that:

(1) The acquisition is to be funded from amounts referred to in paragraph (a) of this section;

(2) Award of the acquisition to an eligible organization is appropriate to meet the requirement in paragraph (a)(2) of this section; and

(3) After considering whether the acquisition can be made under the authority of section 8(a), award under section 8(a) is not practicable.

(c) *Limitations.* (1) Offers shall be requested from as many potential offerors as is practicable under the circumstances.

(2) Use of this authority is not subject to the requirements in FAR 6.303 and FAR 6.304, provided that the contract file includes a certification by the contracting officer stating that the procurement is being awarded pursuant to 706.302–71 and that the application requirements and limitations of 706.302–71 (b) and (c) have been complied with.

[56 FR 27208, June 13, 1991, as amended at 58 FR 8702, Feb. 17, 1993; 61 FR 51235, Oct. 1, 1996; 62 FR 40467, July 29, 1997]

706.303–1 Requirements.

(a)–(c) [Reserved]

(d) USAID project procurements are generally not subject to the Trade Agreements Acts of 1979 (see 725.403 of this chapter). To the extent procurements are made under the authority of FAR 6.302–3(a)(2)(i) or FAR 6.302–7 with Operating Expenses (OE) Funds, the Contracting Officer shall send a copy of the justification to the Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20506, ATTN: Director, International Procurement Policy.

[50 FR 16086, Apr. 24, 1985]

Subpart 706.5—Competition Advocates

706.501 Requirement.

The USAID Administrator delegated the authority to designate the agency competition advocate and a competition advocate for each agency procuring activity (see 706.003 of this part) to the M/OAA Director. The M/OAA Director, under the Administrator's delegation, has designated the M/OAA Deputy Director for Policy, Evaluation and Support as the Agency's competition advocate and the deputy head of each

contracting activity as the competition advocate for each activity. The competition advocate for M/OAA is the Deputy Director for Operations. If there is no deputy, the head of the contracting activity is designated the competition advocate for that activity. The competition advocate's duties may not be redelegated, but can be exercised by persons serving as acting deputy (or acting head) of the contracting activity. For definitions of contracting activity and head of contracting activity, see 702.170–3 and 702.170–10, respectively.

[59 FR 33446, June 29, 1994, as amended at 64 FR 5006, Feb. 2, 1999; 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 707—ACQUISITION PLANNING

Subpart 707.1—Acquisition Plans [Reserved]

PART 709—CONTRACTOR QUALIFICATIONS

Sec.

Subpart 709.4—Debarment, Suspension and Ineligibility

709.403 Definitions.

Subpart 709.5—Organizational Conflicts of Interest

709.503 Waiver.
709.507–2 Contract clause.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 709.4—Debarment, Suspension and Ineligibility

709.403 Definitions.

Debarring official in USAID is the M/OAA Director.

Suspending official in USAID is the M/OAA Director.

[62 FR 40467, July 29, 1997, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

Subpart 709.5—Organizational Conflicts of Interest

709.503 Waiver.

For purposes of approving waivers or further delegating the authority to approve waivers pursuant to FAR 9.503, the M/OAA Director is the Agency head (see AIDAR 701.601(a)(1)). The M/OAA Director hereby delegates the authority to approve waivers pursuant to FAR 9.503 to the heads of USAID contracting activities, as defined in AIDAR 702.170–10.

[64 FR 42042, Aug. 3, 1999, as amended at 72 FR 19670, Apr. 19, 2007]

709.507–2 Contract clause.

(a)–(b) [Reserved]

(c) In order to avoid problems from organizational conflicts of interest that may be discovered after award of a contract, the clause found at 752.209–71 shall be inserted in all contracts whenever the solicitation or resulting contract or both include a provision in accordance with (48 CFR) FAR 9.507–1, or a clause in accordance with (48 CFR) FAR 9.507–2, establishing a restraint on the contractor's eligibility for future contracts.

[58 FR 42255, Aug. 9, 1993, as amended at 64 FR 5006, Feb. 2, 1999]

PART 711—DESCRIBING AGENCY NEEDS

Sec.

711.002–70 Metric system waivers.
711.002–71 Solicitation provisions and contract clauses.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

711.002–70 Metric system waivers.

(a) *Criteria.* The FAR 11.002(b) requirement to use the metric system of measurement for specifications and quantitative data that are incorporated in or required by USAID contracts may be waived when USAID determines in writing that such usage is impractical or is likely to cause U.S. firms to experience significant inefficiencies or the loss of markets.

(b) *Authorization.* (1) The USAID Metric Executive (as designated in ADS chapter 323), the contracting officer, and the USAID official who approves the procurement requirement are authorized to waive the metric requirement for one of the above reasons. The USAID Metric Executive is authorized to overrule a decision to grant a waiver, or to nullify a blanket waiver made by another approving official so long as a contractor's rights under an executed contract are not infringed upon.

(2) A blanket waiver for a class of multiple transactions may be issued for a term not to exceed three years.

(3) When a waiver will be based upon the adverse impact on U.S. firms, clearance from the USAID Metric Executive and the Office of Small and Disadvantaged Business Utilization (SDB) will be obtained prior to authorization.

(c) *Records and reporting.* (1) The basis for each waiver and any plans to adapt similar requirements to metric specifications in future procurements should be documented in the contract file.

(2) Each procurement activity will maintain a log of the waivers from the metric requirements which are authorized for its procurements. The logs shall list the commodity/service being procured, total dollar value of the procured item(s), waiver date, authorizing official, basis for waiver, and USAID actions that can promote metrication and lessen the need for future waivers.

(3) Within 30 days of the closing of each fiscal year, each USAID/W procurement activity and each Mission will submit a copy of the metric waiver log for the year to the USAID Metric Executive. (Mission logs are to be consolidated in a Mission report for the procurement activity and for the non-procurement activities maintaining such logs under the USAID Metric Transition Plan.) Repetitive purchases of commercially produced and marketed items and classes of items may be consolidated in reporting procurements that do not exceed $10,000 cumulatively during the reporting period.

[57 FR 23321, June 3, 1992, as amended at 59 FR 33446, June 29, 1994. Redesignated and amended at 61 FR 39091, July 26, 1996. Redesignated and amended at 62 FR 40467, July 29, 1997]

711.002–71 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 752.211–70 in all USAID-direct solicitations and contracts.

[57 FR 23321, June 3, 1992. Redesignated and amended at 61 FR 39091, July 26, 1996]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 713—SIMPLIFIED ACQUISITION PROCEDURES

Sec.
713.000 Scope of part.

Subpart 713.1—General

713.101 Definitions.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

SOURCE: 61 FR 39091, July 26, 1996, unless otherwise noted.

713.000 Scope of part.

The simplified acquisition threshold applies to the cost of supplies and services, exclusive of the cost of transportation and other accessorial costs if their destination is outside the United States.

Subpart 713.1—General

713.101 Definitions.

Accessorial costs means the cost of getting supplies or services to their destination in the cooperating country (and the travel costs of returning personnel to the U.S. or other point of hire). It does not include costs such as allowances or differentials related to maintaining personnel at post which are to be considered as part of the base costs within the simplified acquisition threshold.

PART 714—SEALED BIDDING

Subpart 714.4—Opening of Bids and Award of Contract

Sec.
714.406–3 Other mistakes disclosed before award.
714.406–4 Disclosure of mistakes after award.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 714.4—Opening of Bids and Award of Contract

714.406–3 Other mistakes disclosed before award.

The M/OAA Director is the designated central authority to make the determinations described in FAR 14.406–3.

[49 FR 13240, Apr. 3, 1984, as amended at 54 FR 46389, Nov. 3, 1989; 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

714.406–4 Disclosure of mistakes after award.

The M/OAA Director is the designated central authority to make the determinations described in FAR 14.406–4.

[49 FR 13240, Apr. 3, 1984, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 715—CONTRACTING BY NEGOTIATION

Subpart 715.3—Source Selection

Sec.
715.303 Responsibilities.
715.303–70 Responsibilities of USAID evaluation committees.
715.305 Proposal evaluation.
715.370 Alternative source selection procedures.
715.370–1 Title XII selection procedure—general.
715.370–2 Title XII selection procedure—collaborative assistance.

Subpart 715.6—Unsolicited Proposals

715.602 Policy.
715.604 Agency points of contact.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13240, Apr. 3, 1984, unless otherwise noted.

Subpart 715.3—Source Selection

715.303 Responsibilities.

715.303–70 Responsibilities of USAID evaluation committees.

(a) *Establishment and composition of USAID evaluation committees.* A technical evaluation committee shall be established for each proposed procurement. In each case, the committee shall be composed of a chair representing the cognizant technical office, a representative of the contracting office (who shall be a non-voting member of the committee), and representatives from other concerned offices as appropriate.

(b) *Technical evaluation procedures.* (1) The contracting officer will receive all proposals and provide to the chair a listing and copies of the technical proposals and instructions for conducting the evaluation.

(2) The chair will promptly call a meeting of the committee to evaluate the proposals received. The evaluation shall be based on the evaluation factors set forth in the solicitation document.

(3) The chair shall prepare and provide to the Contracting Officer written documentation summarizing the results of the evaluation of each proposal, including an assessment of past performance information in accordance with FAR 15.305(a)(2). The documentation shall include narrative justification of the evaluation results.

(4) The contracting officer is responsible for reviewing the documentation justifying the evaluation results to determine that it is adequate and complete. The contracting officer shall return a justification determined to be inadequate to the chair for revision.

(5) No member of the USAID evaluation committee shall hold discussions with any offeror before or during the USAID evaluation committee's proceedings, nor shall any information about the proposals be provided to anyone not on the committee without first obtaining the contracting officer's consent.

[61 FR 39091, July 26, 1996. Redesignated and amended at 64 FR 16648, Apr. 6, 1999]

715.305 Proposal evaluation.

(a)(1) [Reserved]

(2) USAID shall use the information on offerors made available from the NIH Contractor Performance System to evaluate past performance. (Access to the system by USAID contracting office personnel is authorized by the USAID Past Performance Coordinator, E-mail address: *AIDNET: Past Performance@op.spu@aidw/Internet: pastperformance@usaid.gov*.)

(b) A justification is to be written by the Contracting Officer and placed in the official file to support the decision to reject all proposals and to cancel the procurement.

(c) The Contracting Officer may authorize release of proposals outside the Government for evaluation—

(1) When an Evaluation Assistance Contract (EAC) is required to provide technical advisory or other services relating to the evaluation of proposals; or

(2) When an individual other than a government employee, known as a Non-Government Evaluator (NGE), is selected to serve as a member of a USAID technical evaluation committee, the Contracting Officer shall obtain a signed and dated certification and agreement from each NGE and EAC that they will safeguard the proposals and information therein and that they perceive no actual or potential conflict of interests. (An acceptable certification appears under ADS Chapter 302).

[64 FR 16648, Apr. 6, 1999; 64 FR 25405, May 11, 1999, as amended at 65 FR 36642, June 9, 2000]

715.370 Alternative source selection procedures.

The following selection procedures may be used, when appropriate, for activities covered under Title XII of the Foreign Assistance Act of 1961, as amended.

[64 FR 16649, Apr. 6, 1999]

715.370–1 Title XII selection procedure—general.

(a) *General.* The Deputy Administrator has determined, as provided in AIDAR 706.302–70(b)(3)(ii) that use of this Title XII source selection procedure is necessary so as not to impair or affect USAID's ability to administer Title XII of the Foreign Assistance

Act. This determination is reflected in AIDAR 706.302–70(b)(4). This constitutes authority for other than full and open competition when selecting Title XII institutions to perform Title XII projects.

(b) *Scope of subsection.* This subsection prescribes policies and procedures for the selection of institutions eligible under Title XII of the Foreign Assistance Act of 1961, as amended, to perform activities authorized under Title XII.

(c) *Applicability.* The provisions of this subsection are applicable when the project office certifies that the activity is authorized under Title XII, and determines that use of the Title XII selection procedure is appropriate.

(d) *Solicitation, evaluation, and selection procedures.* (1) Competition shall be sought among eligible Title XII institutions to the maximum practicable extent; this requirement shall be deemed satisfied when a contractor is selected under the procedures of this subsection.

(2) The project office shall—

(i) Prepare selection criteria for evaluation of eligible institutions for use in preparing the source list, determining predominantly qualified sources, and selecting the contractor;

(ii) Prepare an initial list of eligible institutions considered qualified to perform the proposed activity;

(iii) Provide a statement describing qualifications and areas of expertise considered essential, a statement of work, estimate of personnel requirements, special requirements (logistic support, government furnished property, and so forth) for the contracting officer's use in preparing the request for technical proposal (RFTP).

(iv) Send a memorandum incorporating the certification and determination required by paragraph (c) of this section, together with the information required by paragraphs (d)(2) (i) through (iii) of this section, with the ''Action'' copy of the PIO/T to the contracting officer, requesting him/her to prepare and distribute the RFTP.

(3) Upon receipt and acceptance of the project officer's request, the contracting officer shall prepare the RFTP. The RFTP shall contain sufficient information to enable an offeror to submit a responsive and complete technical proposal. This includes a definitive statement of work, an estimate of the personnel required, and special provisions (such as logistic support, government furnished equipment, and so forth), a proposed contract format, and evaluation criteria. No cost or pricing data will be requested or required by the RFTP. The RFTP will be distributed to the eligible institutions recommended by the project office. The RFTP will be synopsized, as required by FAR 5.201, and will normally allow a minimum of 60 days for preparation and submission of a proposal.

(4) Upon receipt of responses to the RFTP by the contracting officer, an evaluation committee will be established as provided for in 715.608 of this subpart.

(5) The evaluation committee will evaluate all proposals in accordance with the criteria set forth in the RFTP, and will prepare a selection memorandum which shall:

(i) State the evaluation criteria;

(ii) List all of the eligible institutions whose proposals were reviewed;

(iii) Report on the ranking and rationale therefor for all proposals;

(iv) Indicate the eligible institution or institutions considered best qualified.

(6) The evaluation committee will submit the selection memorandum to the contracting officer for review and approval.

(7) The contracting officer will either approve the selection memorandum, or return it to the evaluation committee for reconsideration for specified reasons.

(8) If the selection memorandum is approved, the contracting officer shall obtain cost, pricing, and other necessary data from the recommended institution or institutions and shall conduct negotiations. If a satisfactory contract cannot be obtained, the contracting officer will so advise the evaluation committee. The evaluation committee may then recommend an alternate institution or institutions.

[52 FR 6158, Mar. 2, 1987, as amended at 54 FR 28069, July 5, 1989; 55 FR 6802, Feb. 27, 1990. Redesignated at 64 FR 16648, Apr. 6, 1999]

715.370–2 Title XII selection procedure—collaborative assistance.

(a) *General.* (48 CFR) AIDAR 706.302–70(b)(4) provides authority for other than full and open competition when selecting Title XII institutions to perform Title XII activities.

(b) *Scope of subsection.* This subsection prescribes policies and procedures for the selection of institutions eligible under Title XII of the Foreign Assistance Act of 1961, as amended, to perform activities authorized under Title XII, where USAID has determined, in accordance with paragraph (c) of this subsection, that use of the collaborative assistance contracting system is appropriate. See AIDR Appendix F (of this chapter)—Use of Collaborative Assistance Method for Title XII Activities for a more complete definition and discussion of the collaborative assistance method.

(c) *Determinations.* The following findings and determinations must be made prior to initiating any contract actions under the collaborative assistance method:

(1) The cognizant technical office makes a preliminary finding that an activity:

(i) Is authorized by Title XII; and

(ii) Should be classed as collaborative assistance because a continuing collaborative relationship between USAID, the host country, and the contractor is required from design through completion of the activity, and USAID, host country, and contractor participation in a continuing review and evaluation of the activity is essential for its proper execution.

(2) Based upon this preliminary finding, the cognizant technical office shall establish an evaluation panel consisting of a representative of the cognizant technical office as chairman, a representative of the contracting officer, and any other representatives considered appropriate by the chairman to review the proposed activity for its appropriateness under the collaborative assistance method.

(3) If supported by the panel's findings, the chairman will make a formal written determination that the collaborative assistance method is the appropriate contracting method for the Title XII activity in question.

(d) *Evaluation and selection.* (1) Competition shall be sought among eligible Title XII institutions to the maximum practicable extent; this requirement shall be deemed satisfied when a contractor is selected under the procedures of this section.

(2) The evaluation panel shall:

(i) Prepare evaluation and selection criteria;

(ii) Prepare an initial source list of eligible institutions considered qualified to perform the proposed project; and

(iii) Evaluate the list, using the evaluation criteria previously determined, for the purpose of making a written determination of the sources considered most capable of performing the project.

(3) The chairman of the evaluation panel will prepare a memorandum requesting the contracting officer to prepare a request for expressions of interest from qualified sources and setting forth:

(i) The formal determinations required by paragraph (c) of this section;

(ii) The evaluation criteria which have been determined; and

(iii) The recommended source list and the rationale therefor.

(4) The contracting officer will prepare a request for an expression of interest (REI), containing sufficient information to permit an offeror to determine its interest in the project, and to discuss the project with USAID representatives, if appropriate. The REI should include a concise statement of the purpose of the activity, any special conditions or qualifications considered important, a brief description of the selection procedure and evaluation criteria which will be used, the proposed contract format, and any other information considered appropriate. The REI will be issued to the sources recommended by the panel, and to others, as appropriate; it will be synopsized, as required by FAR 5.201, and it will normally allow a minimum of 60 days for preparation of an expression of interest. Guidelines for preparation of expressions of interest are contained in attachment 1 to AIDAR appendix F.

(5) The contracting officer will transmit all expressions of interest to the evaluation panel for evaluation and selection recommendation. The panel

may conduct on site evaluations at its discretion, as part of the evaluation process.

(6) The chairman of the evaluation panel will prepare a written selection recommendation with supporting justification, recommending that negotiations be conducted with the prospective contractor(s) selected by the evaluation panel. The selection recommendation shall be transmitted to the contracting officer together with the complete official file on the project which was being maintained by the evaluation panel.

(7) The contracting officer will review the selection recommendation, obtain necessary cost and other data, and proceed to negotiate with the recommended sources.

[52 FR 6159, Mar. 2, 1987, as amended at 54 FR 28069, July 5, 1989; 55 FR 6802, Feb. 27, 1990; 62 FR 40467, July 29, 1997; 62 FR 45334, Aug. 27, 1997; 62 FR 47532, Sept. 9, 1997. Redesignated at 64 FR 16648, Apr. 6, 1999]

Subpart 715.6—Unsolicited Proposals

715.602 Policy.

(a) USAID encourages the submission of unsolicited proposals which contribute new ideas consistent with and contributing to the accomplishment of the Agency's objectives. However, the requirements for contractor resources are normally quite program specific, and thus widely varied, and must be responsive to host country needs. Futher, USAID's projects are usually designed in collaboration with the cooperating country. These factors can limit both the need for, and USAID's ability to use unsolicited proposals. Therefore, prospective offerors are encouraged to contact USAID to determine the Agency's technical and geographical requirements as related to the offeror's interests before preparing and submitting a formal unsolicited proposal.

(b) USAID's basic policies and procedures regarding unsolicited proposals are those established in FAR subpart 15.6 and this subpart.

(c) For detailed information on unsolicited proposals, see 715.604; for initial contact point within USAID, see 715.604(c).

[49 FR 13240, Apr. 3, 1984. Redesignated and amended at 64 FR 16648, 16649, Apr. 6, 1999; 64 FR 25405, May 11, 1999]

715.604 Agency points of contact.

(a) Information concerning USAID's policies for unsolicited proposals is available from the U.S. Agency for International Development, Evaluation Division, Room 7.08–005, 1300 Pennsylvania Avenue, NW., Washington, DC 20523–7803.

(b) The information available concerns:

(1) Contact points within USAID;

(2) Definitions;

(3) Characteristics of a suitable proposal;

(4) Determination of contractor responsibility;

(5) Organizational conflict of interest;

(6) Cost sharing; and

(7) Procedures for submission and evaluation of proposals.

(c) Initial inquiries and subsequent unsolicited proposals should be submitted to the address specified in paragraph (a) of this section.

[49 FR 13240, Apr. 3, 1984, as amended at 50 FR 50302, Dec. 10, 1985; 52 FR 21058, June 4, 1987; 56 FR 2699, Jan. 24, 1991; 56 FR 67224, Dec. 30, 1991; 59 FR 33446, June 29, 1994. Redesignated and amended at 64 FR 16648, 16649, Apr. 6, 1999]

PART 716—TYPES OF CONTRACTS

Subpart 716.3—Cost Reimbursement Contracts

Sec.

716.303 Cost-sharing contracts.
716.306 [Reserved]
709.406 Contract clauses.

Subpart 716.5 [Reserved]

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381) as amended: E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 716.3—Cost Reimbursement Contracts

716.303 Cost-sharing contracts.

(a)–(b) [Reserved]

(c) *Limitations.* In addition to the limitations specified in FAR 16.301–3, prior approval of the M/OAA Director (see 701.601(a)(1)) is required in order to use a cost-sharing contract with an educational institution.

[54 FR 46390, Nov. 3, 1989, as amended at 64 FR 42042, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

716.306 [Reserved]

716.406 Contract clauses.

The Contracting Officer shall include the clause at 752.216–70, Award Fee, in solicitations and contracts when an award-fee contract is contemplated.

[64 FR 5007, Feb. 2, 1999]

Subpart 716.5 [Reserved]

PART 717—SPECIAL CONTRACTING METHODS

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 717.70—Pharmaceutical Products

717.700 General.

Section 606(c) of the Foreign Assistance Act bars procurement by the Government of drug and pharmaceutical products manufactured outside the United States if their manufacture involves the use of or is covered by an unexpired U.S. patent which has not been held invalid by an unappealed or unappealable court decision unless the manufacture is expressly authorized by the patent owner. Applicable policies and procedures are set forth in USAID Automated Directive System Chapter 312.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 719—SMALL BUSINESS PROGRAMS

Subpart 719.2—Policies

Sec.
719.270 Small business policies.
719.271 Agency program direction and operation.
719.271–1 General.
719.271–2 The USAID Office of Small and Disadvantaged Business Utilization (SDB).
719.271–3 USAID contracting officers.
719.271–4 Heads of contracting activities.
719.271–5 Cognizant technical officers.
719.271–6 Small business screening procedure.
719.271–7 Reports on procurement actions that are exempted from screening.
719.272 Small disadvantaged business policies.

Subpart 719.273—The U.S. Agency for International Development (USAID) Mentor-Protégé Program

719.273 The U.S. Agency for International Development Mentor-Protégé Program.
719.273–1 Purpose.
719.273–2 Definitions.
719.273–3 Incentives for prime contractor participation.
719.273–4 Eligibility of Mentor and Protégé firms.
719.273–5 Selection of Protégé firms.
719.273–6 Application process.
719.273–7 OSDBU review of application.
719.273–8 Developmental assistance.
719.273–9 Obligations under the Mentor-Protégé Program.
719.273–10 Internal controls.
719.273–11 Solicitation provision and contract clause.

AUTHORITY: 42 U.S.C. 7254, 40 U.S.C. 486(c), 42 U.S.C. 2201.

SOURCE: 49 FR 13243, Apr. 3, 1984, unless otherwise noted.

Subpart 719.2—Policies

719.270 Small business policies.

(a) In keeping with section 602 of the Foreign Assistance Act of 1961 (22 U.S.C. 2352), as amended, USAID shall, insofar as practicable and to the maximum extent consistent with the accomplishment of the purposes of said Act, assist United States small business to participate equitably in the furnishing of supplies and services for Foreign Assistance activities.

(b) It is the policy of USAID to:

(1) Fully endorse and carry out the Government's small business program for placing a fair proportion of its purchases and contracts for supplies, construction (including maintenance and repair), research and development, and services (including personal, professional, and technical services) with small business, including minority small business concerns; and

(2) Increase their participation in USAID procurement.

(c) In furtherance of this policy:

(1) Cognizant technical officers shall make positive efforts (see 719.271–5) to identify potentially qualified small and minority business firms during precontract development of activities and shall, with the responsible contracting officers, assure that such firms are given full opportunity to participate equitably;

(2) Small business set-asides shall be made for all contracts to be executed in USAID/Washington which qualify for small business set-aside action under Part 19 of the FAR; and

(3) Consideration shall be given in appropriate cases to the award of the contract to the Small Business Administration for subcontracting to small business firms pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(d) This program shall be implemented by all USAID/Washington contracting activities in order to attain these policy objectives. In accordance with 719.271, all USAID/Washington direct-procurement requirements which exceed the simplified acquisition threshold shall be screened for small business opportunities by the Office of Small and Disadvantaged Business Utilization (SDB) except those exempted by 719.271–6(a).

(e) Where practicable and desirable, small business and minority business enterprise award goals will be established for the respective USAID/Washington procuring activities to provide incentive for contracting personnel to increase awards to small firms. The

goals will be set by SDB after consultation with the respective head of the contracting activity (see subsection 702.170–10).

(f) In the event of a disagreement between SDB and the contracting officer concerning: (1) A recommended set-aside, or (2) a request for modification or withdrawal of a class or individual set-aside, complete documentation of the case including the reasons for disagreement shall be transmitted within five working days to the head of the contracting activity (see 719.271–6(e)) for a decision. Procurement action shall be suspended pending a decision.

(g) The above suspension shall not apply where the contracting officer:

(1) Certifies in writing, with supporting information, that in order to protect the public interest award must be made without delay;

(2) Promptly provides a copy of said certification to SDB; and

(3) Includes a copy of the certification in the contract file.

(h) SDB shall be the Small Business Advisor and Minority Business Procurement Policy Manager for all USAID/Washington procuring activities.

(i) The details on the Agency's direction and operation of the small business program are set forth in 719.271.

(j) No decision rendered, or action taken, under the coverage set forth in 719.271 shall preclude the Small Business Administration from appealing directly to the USAID Administrator as provided for in part 19 of the FAR.

[49 FR 13243, Apr. 3, 1984, as amended at 52 FR 21058, June 4, 1987; 56 FR 67224, Dec. 30, 1991; 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997]

719.271 Agency program direction and operation.

719.271–1 General.

The purpose of this section is to prescribe responsibilities and procedures for carrying out the small business program policy set forth in 219.270, and in part 19 of the FAR. Small Business concerns are defined in FAR subpart 19.1; in addition, small business concerns are concerns organized for profit. Nonprofit organizations are not considered small business concerns. Small disadvantaged business enterprises are defined in FAR subpart 19.1. Small disadvantaged business enterprises are included in the term ''small business'' when used in this subpart; specific reference to disadvantaged business enterprises is for added emphasis.

719.271–2 The USAID Office of Small and Disadvantaged Business Utilization (SDB).

(a) SDB is responsible for administering, implementing, and coordinating the Agency's small business (including minority business enterprises) program.

(b) SDB, headed by the Director SDB, who also serves as the Minority Business Procurement Manager, shall be specifically responsible for:

(1) Developing policies, plans, and procedures for a coordinated Agency-wide small business and minority business enterprise procurement program;

(2) Advising and consulting regularly with USAID/Washington procuring activities on all phases of their small business program, including, where practicable and desirable, the establishment of small business and minority business enterprise award goals;

(3) Collaborating with officials of the Small Business Administration (SBA), other Government Agencies, and private organizations on matters affecting the Agency's small business program;

(4) Developing and maintaining an USAID Consultant Registry Information System (ACRIS) of bidders/offerors (annotated to identify small business and minority business enterprise firms) capable of furnishing services for use by the USAID contracting activities;

(5) Cooperating with contracting officers in administering the performance of contractors subject to the Small Business and Minority Business Enterprises Subcontracting Program clauses;

(6) Developing a plan of operation designed to increase the share of contracts awarded to small business concerns, including small minority business enterprises;

(7) Establishing small business class set-aside for types and classes of items of services where appropriate;

(8) Reviewing each procurement requisition to make certain individual or class set-asides are initiated on all suitable USAID/Washington proposed contract actions in excess of the simplified acquisition threshold which are subject to screening (see 719.271–6);

(9) Maintaining a program designed to:

(i) Locate capable small business sources for current and future procurements through GSA and other methods;

(ii) Utilize every source available to determine if an item is obtainable from small business; and

(iii) Develop adequate small business competition on all appropriate procurements;

(10) Taking action to assure that unnecessary qualifications, restrictive specifications, or other features (such as inadequate procurement lead time) of the programming or procurement process, which may prevent small business participation in the competitive process, are modified to permit such participation where an adequate product or service can be obtained;

(11) Recommending that portions of large planned procurements or suitable components of end items or services be purchased separately so small firms may compete;

(12) On proposed non-competitive procurements, recommending to the contracting officer that the procurement be made competitive when, in the opinion of SDB, there are small business or minority business enterprises believed competent to furnish the required goods or services, and supplying the contracting officer a list of such firms;

(13) Assisting small business concerns with individual problems;

(14) Promoting increased awareness by the technical staff of the availability of small business firms;

(15) Making available to GSA copies of solicitations when so requested;

(16) Counseling non-responsive or non-responsible small business bidders/offerors to help them participate more effectively in future solicitations; and

(17) Examining bidders lists to make certain small business firms are appropriately identified and adequately represented for both negotiated and advertised procurements.

[49 FR 13243, Apr. 3, 1984, as amended at 52 FR 21058, June 4, 1987; 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997]

719.271–3 USAID contracting officers.

With respect to procurement activities within their jurisidiction, contracting officers are responsible for:

(a) Being thoroughly familiar with part 19 of the FAR and this section dealing with the small business program;

(b) Screening abstracts of bids and other award data to determine set-aside potential for future procurements;

(c) Assuring that small business concerns and minority business enterprises are appropriately identified on source lists and abstracts of bids or proposals by an ''S'' and ''M'', respectively, or other appropriate symbol;

(d) Reviewing types and classes of items and services to determine where small business set-asides can be applied;

(e) Recommending that portions of large planned procurements of suitable components of end items or services be purchased separately so small firms may compete;

(f) Making a unilateral determination for total or partial small business set-asides in accordance with Subpart 19.5 of the Federal Acquisition Regulations;

(g) Submitting proposed procurement actions for USAID/Washington contracts to SDB for screening (see 719.271–6);

(h) Taking action to assure that unnecessary qualifications, restrictive specifications or other features (such as inadequate procurement lead time) of the programming or procurement process which may prevent small business participation in the competitive process are modified to permit such participation where an adequate product or service can be obtained;

(i) Prior to rendering a final decision on a proposed non-competitive procurement action, and as part of his/her findings and determinations, the contracting officer shall consider the recommendations, if any, of SDB together

with the latter's list of additional sources;

(j) As appropriate, referring small business concerns, including small minority business enterprises, to SDB for information and advice;

(k) Promoting increased awareness by the technical staff of the availability of small business concerns;

(l) Making available to SDB copies of solicitations when requested;

(m) Assisting SDB in counseling nonresponsive or non-responsible small business bidders/offerors to help them to participate more effectively in future solicitations; and

(n) Including the Small Business and Minority Business Enterprises Subcontracting Program clauses in all contracts where required by part 19 of the FAR.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997]

719.271–4 Heads of contracting activities.

In order for the agency small business program to be effective, the active support of top management is required. The heads of the contracting activities shall be responsible for:

(a) Rendering decisions in cases resulting from non-acceptances by their contracting officers of set-aside recommendations made by SDB;

(b) Consulting with SDB in establishing small business and minority business enterprise award goals, where practicable and desirable; and

(c) Advising cognizant technical officers of their responsibilities as set forth in 719.271–5.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996]

719.271–5 Cognizant technical officers.

Since the procurement process starts with the establishment of a requirement, the actions of the cognizant technical officers can affect the opportunity of small business to participate equitably; therefore, each cognizant technical officer shall, during the formulation of activities which will require contractual implementation:

(a) Consult with SDB on the availability and capabilities of small business firms to permit making a tentative set-aside determination where appropriate; and

(b) Provide sufficient procurement lead time in the activity implementation schedule to allow potential small business participation.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996]

719.271–6 Small business screening procedure.

(a) *General.* All USAID/Washington proposed contract actions in excess of the simplified acquisition threshold shall be screened by SDB, with the exception of:

(1) Class set-asides and those unilaterally set-aside by contracting officers (719.271–3(f));

(2) Those where the contracting officer certifies in writing that the public exigency will not permit the delay incident to screening (719.271–7(b));

(3) ''Institution building'' contracts (contracts for development of a counterpart capability in the host country) with educational or nonprofit institutions; or collaborative assistance contracts pursuant to AIDAR 715.370–2.

(4) Those involving the payment of tuition and fees for participant training at academic institutions; and

(5) Personal services contract requirements (see 719.270).

(b) *Preparation of Form USAID 1410–14 (the Small Business/Minority Business Enterprise Procurement Review Form).* (1) The contracting officer shall prepare the subject form in an original and 3 copies and forward the original and 2 copies to SDB within one working day of receipt by the contracting activity of a procurement requisition.

(2) The contracting officer will attach to his/her transmittal a complete copy of the procurement request and a copy of the recommended source list as furnished by the technical office and supplemented by him/her.

(3) The contracting officer shall complete blocks 2, 3, 4, 5, 9, and 10 (when appropriate) prior to submittal to SDB.

(c) *Screening of Form USAID 1410–14 by SDB.* (1) SDB will screen the contracting officer's recommendations on set-aside potential, small business subcontracting opportunities, and section 8(a) subcontracting, and furnish him/her with either a written concurrence

in his/her recommendations or written counter-recommendations on the original and duplicate copy within five working days from receipt of the form from the contracting officer.

(2) SDB will complete Blocks 1, 6, 7, 8, 11, and 12 (when appropriate) prior to returning the screened form to the contracting officer.

(d) *Concurrence or rejection procedure.* (1) The contracting officer shall complete Block 13 upon receipt of the original and duplicate copy of the screened form from SDB.

(2) If the contracting officer rejects the SDB counter-recommendation, he/she shall return the original and duplicate forms with his/her written reasons for rejection to SDB within two working days.

(3) Upon receipt of the contracting officer's rejection, SDB may: (i) accept, or (ii) appeal, the rejection. In the case of acceptance of the contracting officer's rejection, SDB shall annotate Block 14 when it renders a decision and return the original form to the contracting officer within two working days.

(e) *Appeal procedure.* (1) When informal efforts fail to resolve the set-aside disagreement between the contracting officer and SDB, the latter official may appeal the contracting officer's decision to the head of the contracting activity. Such an appeal will be made within five working days after receipt of the contracting officer's rejection.

(2) In the case of an appeal, SDB will send the original and duplicate form, with the appeal noted in Block 14, directly to the head of the contracting activity with its written reasons for appealing. The contracting officer will be notified of SDB's appeal by means of a copy of the written reasons for appealing.

(3) The head of the contracting activity shall render a decision on the appeal (complete Block 15) within three working days after receipt of same and return the original to SDB and the duplicate to the contracting officer.

[49 FR 13243, Apr. 3, 1984, as amended at 52 FR 21058, June 4, 1987; 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997; 64 FR 42042, Aug. 3, 1999]

719.271–7 Reports on procurement actions that are exempted from screening.

(a) *Unilateral and class set-asides.* The contracting officer shall prepare Form USAID 1410–14 as stated in 719.271–6, but forward only the duplicate copy with the documentation required by Block 5 of the form to SDB. The original will be filed in the contract file.

(1) If, upon review of the material submitted under 719.271–7(a) above, SDB concludes that it would be practicable to accomplish all or a portion of the procurement involved under section 8(a) subcontracting, it shall so advise the contracting officer in writing within five days after receipt of such material.

(2) Such advice shall be considered a counter-recommendation and shall be processed in accordance with 719.271–6 (d) and (e).

(b) *Public exigency exemption.* The contracting officer shall prepare Form USAID 1410–14 as stated in 719.271–6, but forward only the duplicate copy with the documentation required by Block 5 of the form to SDB. In addition to the documentation called for in 719.271–6, the contracting officer shall furnish a copy of his/her written determination exempting the procurement from screening. The determination shall cite the pertinent facts which led to his/her decision. This exemption is not intended to be used as substitute for good procurement planning and lead-time; SDB will report abuses of this exemption to the head of the contracting activity for appropriate action in accordance with 719.271–4(c).

(c) *Institution building contract (IBC) exemption.* The contracting officer shall prepare Form USAID 1410–14 as stated in 719.271–6, but forward only the duplicate copy with the documentation required by Block 5 of the form to SDB.

(d) *Personal services contract exemption.* Preparation of Form USAID 1410–14 is not required for personal services contracts.

719.272 Small disadvantaged business policies.

In addition to the requirements in FAR part 19, part 726 provides for contracting and subcontracting with small

disadvantaged businesses and other disadvantaged enterprises based on provisions of the foreign assistance appropriations acts.

[58 FR 8702, Feb. 17, 1993]

Subpart 719.273—The U.S. Agency for International Development (USAID) Mentor-Protégé Program

SOURCE: 72 FR 32543, June 13, 2007, unless otherwise noted.

719.273 The U.S. Agency for International Development (USAID) Mentor-Protégé Program.

719.273–1 Purpose.

The USAID Mentor-Protégé Program is designed to assist small business, including veteran-owned small business, service-disabled veteran-owned small business, HUBZone, small socially and economically disadvantaged business, and women-owned small business in enhancing their capabilities to perform contracts and sub-contracts for USAID and other Federal agencies. The Mentor-Protégé Program is also designed to improve the performance of USAID contractors and subcontractors by providing developmental assistance to Protégé entities, fostering the establishment of long-term business relationships between small business and prime contractors, and increasing the overall number of small business that receive USAID contract and subcontract awards. A firm's status as a Protégé under a USAID contract shall not have an effect on the firm's eligibility to seek other prime contracts or subcontracts.

719.273–2 Definitions.

Throughout, the term ''small business'' includes all categories of small firms as defined by the Small Business Administration (SBA) on whose behalf the Office of Small and Disadvantaged Business Utilization (OSDBU) is chartered to advocate, including small business, small disadvantaged business, women-owned small business, veteran-owned and service-disabled veteran-owned small business and small business located in HUBZones, as those terms are defined in 13 CFR part 124. The determination of affiliation is a function of the SBA.

(a) A ''Mentor'' is a prime contractor that elects to promote and develop small business subcontractors by providing developmental assistance designed to enhance the business success of the Protégé.

(b) ''Program'' refers to the USAID Mentor-Protégé Program as described in this Chapter.

(c) ''Protégé'' means a small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business or service-disabled veteran owned small business that is the recipient of developmental assistance pursuant to a Mentor-Protégé Agreement.

719.273–3 Incentives for prime contractor participation.

(a) Under the Small Business Act, 15 U.S.C. 637(d)(4)(E), USAID is authorized to provide appropriate incentives to encourage subcontracting opportunities for small business consistent with the efficient and economical performance of the contract. This authority is limited to negotiated procurements. FAR 19.202–1 provides additional guidance.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in 719.273–8 to fulfill the terms of their agreement(s) with a Protégé firm(s), are not reimbursable as a direct cost under a USAID contract. If USAID is the mentor's responsible audit agency under FAR 42.703–1, USAID will consider these costs in determining indirect cost rates. If USAID is not the responsible audit agency, mentors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates.

(c) In addition to subparagraph (b) above, contracting officers may give Mentors evaluation credit under FAR 15.101–1 considerations for subcontracts awarded pursuant to their Mentor-Protégé Agreements and their subcontracting plans. Therefore:

(1) Contracting officers may evaluate subcontracting plans containing Mentor-Protégé arrangements more favorably than subcontracting plans without Mentor-Protégé Agreements.

(2) Contracting officers may assess the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance under FAR 15.305(a)(2)(v) and determining contractor responsibility 19.705–5(a)(1).

(d) OSDBU Mentoring Award. A nonmonetary award will be presented annually to the Mentoring firm providing the most effective developmental support of a Protégé. The Mentor-Protégé Program Manager will recommend an award winner to the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU).

(e) OSDBU Mentor-Protégé Annual Conference. At the conclusion of each year in the Mentor-Protégé Program, Mentor firms will be invited to brief contracting officers, program leaders, office directors and other guests on Program progress.

719.273–4 Eligibility of Mentor and Protégé firms.

Eligible business entities approved as Mentors may enter into agreements (hereafter referred to as ''Mentor-Protégé Agreement'' or ''Agreement'' and explained in section 719.273–6) with eligible Protégés. Mentors provide appropriate developmental assistance to enhance the capabilities of Protégés to perform as contractors and/or subcontractors. Eligible small business entities capable of providing developmental assistance may be approved as Mentors. Protégés may participate in the Program in pursuit of a prime contract or as subcontractors under the Mentor's prime contract with the USAID, but are not required to be a subcontractor to a USAID prime contractor or be a USAID prime contractor. Notwithstanding eligibility requirements in this section, USAID reserves the right to limit the number of participants in the Program in order to insure its effective management of the Mentor-Protégé Program.

(a) Eligibility. A Mentor:

(1) May be either a large or small business entity;

(2) Must be eligible for award of Government contracts;

(3) Must be able to provide developmental assistance that will enhance the ability of Protégés to perform as prime contractors or subcontractors; and

(4) Will be encouraged to enter into arrangements with entities with which it has established business relationships.

(b) Eligibility. A Protégé:

(1) Must be a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone, small socially and economically disadvantaged business, and women-owned small business);

(2) Must meet the size standard corresponding to the NAICS code that the Mentor prime contractor believes best describes the product or service being acquired by the subcontract; and

(3) Eligible for award of government contracts.

(c) Protégés may have multiple Mentors. Protégés participating in Mentor-Protégé programs in addition to USAID's Program should maintain a system for preparing separate reports of Mentoring activity so that results of the USAID Program can be reported separately from any other agency program.

(d) A Protégé firm shall self-certify to a Mentor firm that it meets the requirements set forth in paragraph (b) of this section and possess related certifications granted by the Small Business Administration (e.g., HUBZone, 8(a), etc.). Mentors may rely in good faith on written representations by potential Protégés that they meet the specified eligibility requirements. HUBZone and small disadvantaged business status eligibility and documentation requirements are determined according to 13 CFR part 124.

719.273–5 Selection of Protégé firms.

(a) Mentor firms will be solely responsible for selecting Protégé firms. Mentors are encouraged to select from a broad base of small business including small disadvantaged business, women-owned small business, veteran-owned small business, service-disabled veteran-owned small business, and

HUBZone firms whose core competencies support USAID's mission.

(b) Mentors may have multiple Protégés. However, to preserve the integrity of the Program and assure the quality of developmental assistance provided to Protégés, USAID reserves the right to limit the total number of Protégés participating under each Mentor firm for the Mentor-Protégé Program.

(c) The selection of Protégé firms by Mentor firms may not be protested, except that any protest regarding the size or eligibility status of an entity selected by a Mentor shall be handled in accordance with the Federal Acquisition Regulation (FAR) and the Small Business Administration regulations.

719.273–6 Application process.

Entities interested in becoming a Mentor firm must apply in writing to the USAID Office of Small and Disadvantaged Business Utilization (OSDBU) by submitting form AID 321–1 (OMB Control number 0412–0574 approved on 5/22/2007). The application shall contain the Mentor-Protégé Agreement and shall be evaluated for approval. Evaluations will consider the nature and extent of technical and managerial support as well as any proposed financial assistance in the form of equity investment, loans, joint-venture, and traditional subcontracting support. The Mentor-Protégé Agreement must contain:

(a) Names, addresses, phone numbers, and e-mail addresses (if available) of Mentor and Protégé firm(s) and a point of contact for both Mentor and Protégé;

(b) A description of the developmental assistance that will be provided by the Mentor to the Protégé, including a description of the work or product contracted for (if any), a schedule for providing assistance, and criteria for evaluation of the Protégé's developmental success;

(c) A listing of the number and types of subcontracts to be awarded to the Protégé;

(d) Duration of the Agreement, including rights and responsibilities of both parties (Mentor and Protégé);

(e) Termination procedures, including procedures for the parties' voluntary withdrawal from the Program. The Agreement shall require the Mentor or the Protégé to notify the other firm in writing at least 30 days in advance of its intent to voluntarily terminate the Agreement;

(f) Procedures requiring the parties to notify OSDBU immediately upon receipt of termination notice from the other party;

(g) A plan for accomplishing the work or product contracted for should the Agreement be terminated; and

(h) Other terms and conditions, as appropriate.

719.273–7 OSDBU review of application.

(a) OSDBU will review the information to establish the Mentor and Protégé eligibility and to ensure that the information that is in section 719.273–6 is included. If the application relates to a specific contract, then OSDBU will consult with the responsible contracting officer on the adequacy of the proposed Agreement, as appropriate. OSDBU will complete its review no later than 30 calendar days after receipt of the application or after consultation with the contracting officer, whichever is later. Application for and enrollment into the Program are free and open to the public.

(b) After OSDBU completes its review and provides written approval, the Mentor may execute the Agreement and implement the developmental assistance as provided under the Agreement. OSDBU will provide a copy of the Mentor-Protégé Agreement to the USAID contracting officer for any USAID contracts affected by the Agreement.

(c) The Agreement defines the relationship between the Mentor and Protégé firms only. The Agreement itself does not create any privity of contract or contractual relationship between the Mentor and USAID nor the Protégé and USAID.

(d) If the application is disapproved, the Mentor may provide additional information for reconsideration. OSDBU will complete review of any supplemental material no later than 30 days after its receipt. Upon finding deficiencies that USAID considers correctable, OSDBU will notify the Mentor

and Protégé and request correction of deficiencies to be provided within 15 days.

719.273–8 Developmental assistance.

The forms of developmental assistance a Mentor can provide to a Protégé include and are not limited to the following:

(a) Guidance relating to—

(1) Financial management;

(2) Organizational management;

(3) Overall business management/planning;

(4) Business development; and

(5) Technical assistance.

(b) Loans;

(c) Rent-free use of facilities and/or equipment;

(d) Property;

(e) Temporary assignment of personnel to a Protégé for training; and

(f) Any other types of permissible, mutually beneficial assistance.

719.273–9 Obligations under the Mentor-Protégé Program.

(a) A Mentor or Protégé may voluntarily withdraw from the Program. However, in no event shall such withdrawal impact the contractual requirements under any prime contract.

(b) Mentor and Protégé entities shall submit to the USAID Office of Small and Disadvantaged Business Utilization (OSDBU) annual reports on progress under the Mentor-Protégé Agreement. USAID will evaluate annual reports by considering the following:

(1) Specific actions taken by the Mentor during the evaluation period to increase the participation of their Protégé(s) as suppliers to the Federal Government and to commercial entities;

(2) Specific actions taken by the Mentor during the evaluation period to develop technical and administrative expertise of a Protégé as defined in the Agreement;

(3) The extent to which the Protégé has met the developmental objectives in the Agreement;

(4) The extent to which the Mentor's participation in the Mentor-Protégé Program impacted the Protégé's(s) ability to receive contract(s) and subcontract(s) from private firms and Federal agencies other than USAID; and, if deemed necessary;

(5) Input from the Protégé on the nature of the developmental assistance provided by the Mentor.

(c) OSDBU will submit annual reports to the relevant contracting officer regarding participating prime contractor(s)' performance in the Program.

(d) Mentor and Protégé firms shall submit an evaluation to OSDBU at the conclusion of the mutually agreed upon Program period, the conclusion of the contract, or the voluntary withdrawal by either party from the Program, whichever comes first.

719.273–10 Internal controls.

(a) OSDBU will oversee the Program and will work in concert with the Mentor-Protégé Program Manager and relevant contracting officers to achieve Program objectives. OSDBU will establish internal controls as checks and balances applicable to the Program. These controls will include:

(1) Reviewing and evaluating Mentor applications for validity of the provided information;

(2) Reviewing annual progress reports submitted by Mentors and Protégés on Protégé development to measure Protégé progress against the plan submitted in the approved Agreement;

(3) Reviewing and evaluating financial reports and invoices submitted by the Mentor to verify that USAID is not charged by the Mentor for providing developmental assistance to the Protégé; and

(4) Limiting the number of participants in the Mentor-Protégé Program within a reporting period, in order to insure the effective management of the Program.

(b) USAID may rescind approval of an existing Mentor-Protégé Agreement if it determines that such action is in USAID's best interest. The rescission shall be in writing and sent to the Mentor and Protégé after approval by the Director of OSDBU. Rescission of an Agreement does not change the terms of any subcontract between the Mentor and the Protégé.

719.273–11 Solicitation provision and contract clause.

(a) The Contracting Officer shall insert the provision at AIDAR 752.219–70 in all unrestricted solicitations exceeding $550,000 ($1,000,000 for construction) that offer subcontracting opportunities.

(b) The Contracting Officer shall insert the clause at AIDAR 752.219–71 in all contracts where the prime contractor has signed a Mentor-Protégé Agreement with USAID.

PART 722—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

Subpart 722.1—Basic Labor Policies

Sec.
722.103 Overtime.
722.103–1 Definitions.
722.103–2 Policy.
722.103–3 [Reserved]
722.103–4 Approvals.
722.170 Employment of third country nationals (TCN's) and cooperating country nationals (CCN's).

Subpart 722.8—Equal Employment Opportuntity

722.805–70 Procedures.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13246, Apr. 3, 1984, unless otherwise noted.

Subpart 722.1—Basic Labor Policies

722.103 Overtime.

722.103–1 Definitions.

Compensatory time off means leave equal to overtime worked, which, unless otherwise authorized in a contract or approved by a contracting officer, must be taken not later than the end of the calendar month following that in which the overtime is worked.

722.103–2 Policy.

(a) Most contracts covered by this regulation call for the performance of professional or technical services overseas on a cost-reimbursement basis. The compensation for employees performing such services is normally fixed on a monthly or annual basis, and the contracts usually state minimum work week hours. It is not expected that these employees will receive additional pay, overtime or shift premiums, or compensatory time off.

(b) When the contracting officer determines it is in the best interests of the Government, specific provision may be made in contracts to permit such benefits for non-technical and non-professional employees serving overseas, subject to approvals to be required in the contract.

[49 FR 13246, Apr. 3, 1984. Redesignated at 61 FR 39092, July 26, 1996]

722.103–3 [Reserved]

722.103–4 Approvals.

The contracting officer may make the determinations referred to in FAR 22.103–4.

[49 FR 13246, Apr. 3, 1984. Redesignated at 61 FR 39092, July 26, 1996]

722.170 Employment of third country nationals (TCN's) and cooperating country nationals (CCN's).

(a) *General.* It is USAID policy that cooperating country nationals (CCN's) and third country nationals (TCN's), who are hired abroad for work in a cooperating country under USAID-direct contracts, generally be extended the same benefits, and be subject to the same restrictions as TCN's and CCN's employed as direct hires by the USAID Mission. Exceptions to this policy may be granted either by the Mission Director or the Assistant Administrator having program responsibility for the project. (TCN's and CCN's who are hired to work in the United States shall be extended benefits and subject to restrictions on the same basis as U.S. citizens who work in the United States.)

(b) *Compensation.* Compensation, including merit or promotion increases paid to TCN's and CCN's may not, without the approval of the Mission Director or the Assistant Administrator having program responsibility for the project, exceed the prevailing compensation paid to personnel performing comparable work in the cooperating

country as determined by the USAID Mission. Unless otherwise authorized by the Mission Director or the Assistant Administrator having program responsibility for the project, the compensation of such TCN and CCN employees shall be paid in the currency of the cooperating country.

(c) *Allowances and differentials.* TCN's and CCN's, hired abroad for work in a cooperating country, are not eligible for allowances or differentials under USAID-direct contracts, unless authorized by the Mission Director or the Assistant Administrator having program responsibility for the project.

(d) *Country and security clearances.* The contractor shall insure that the necessary clearances, including security clearances, if required, have been obtained for TCN and CCN employees in accordance with any such requirements set forth in the contract or required by the USAID Mission, prior to the TCN or CCN starting work under the contract.

(e) *Physical fitness.* Contractors are required to insure that prospective TCN and CCN employees are examined prior to employment to determine whether the prospective employee meets the minimum physical requirements of the position and is free from any contagious disease.

(f) *Workweek, holidays, and leave.* The workweek, holidays, and leave for TCN and CCN employees shall be the same as for all other employees of the contractor, under the terms of the contract; however, TCN and CCN employees are not eligible for home leave or military leave unless authorized by the Mission Director or the Assistant Administrator having program responsibility for the project.

(g) *Travel and transportation for TCN's and CCN's.* Travel and transportation shall be provided TCN and CCN employees on the same basis as for all other employees of the contractor, under the terms of the contract.

(h) *Household effects and motor vehicles.* USAID will not provide household effects to TCN and CCN employees; such employees may ship their household effects and motor vehicles to their place of employment on the same basis as for all other employees of the contractor, under the terms of the contract unless they are residents of the cooperating country.

Subpart 722.8—Equal Employment Opportunity

722.805–70 Procedures.

(a) The procedures in this section apply, as appropriate, for all contracts excluding construction, which shall be handled in accordance with (48 CFR) FAR 22.804–2. Contracting officers are responsible for ensuring that the requirements of (48 CFR) FAR 22.8 and related clauses are met before awarding any contracts or consenting to subcontracts subject to these requirements.

(b) Representations and Certifications. The first step in ensuring compliance with these requirements is to obtain all necessary representations and certifications (Reps and Certs) required by FAR 22.810. The contracting officer must review the Reps and Certs to determine whether they have been completed and signed as required, and are acceptable.

(1) If any of these Reps and Certs are incomplete or unsigned, the contracting officer must request that the offeror(s) complete and sign them, as necessary, unless the initial evaluation of the offeror's proposal results in the contracting officer's concluding that the offeror would not, in any event, be within a competitive range determined in accordance with (48 CFR) FAR 15.306(c), or would not be selected if award is to be made without discussions. A request as described in this paragraph (b)(1) constitutes either a clarification per (48 CFR) FAR 15.306(a) (''resolving minor or clerical errors'', paragraph (a)(2)), or a communication before establishment of competitive range per (48 CFR) FAR 15.306(b), not a discussion per (48 CFR) FAR 15.306(d).

(2) If completed and signed Reps and Certs raise questions concerning the offeror's compliance with EEO requirements, or if the contracting officer has information from any other source which calls into question the offeror's eligibility for award based on this section and (48 CFR) FAR 22.8, the contracting officer must refer the matter to the cognizant regional Department of Labor Office of Federal Contract

Compliance Programs (OFCCP) regardless of the estimated value of the contract; only OFCCP may make a determination of non-compliance with EEO requirements.

(c) OFCCP's National Preaward Registry. If the Reps and Certs are complete, signed, and deemed acceptable, and the contracting officer has no reason to doubt their accuracy, the contracting officer must then consult the OFCCP's National Preaward Registry at the internet website in 48 CFR 22.805(a)(4) (i) to see if the offeror is listed.

(1) If the conditions stated in FAR 22.805(a) (4) are met (including the contract file documentation requirement in paragraph (a)(4)(iii)), then the Contracting Officer does not need to take any further action in verifying the offeror's compliance with the requirements of this subpart and (48 CFR) FAR 22.8.

(2) If the offeror does not appear in the National Preaward Registry, and the estimated amount of the contract or subcontract is expected to be under $10 million then the contracting officer may rely on the Reps and Certs as sufficient verification of the offeror's compliance.

(3) If the offeror does not appear in the National Preaward Registry and the estimated amount of the contract or subcontract is $10 million or more, then the contracting officer must request a preaward clearance from the appropriate OFCCP regional office, in accordance with 48 CFR 22.805(a). If the initial contact with OFCCP is by telephone, the contracting officer and OFCCP are to mutually determine what information is to be included in the written verification request. The contracting officer may need to provide the following information in addition to the items listed in FAR 22.805(a)(5), if so requested by the OFCCP regional office:

(i) Name, title, address, and telephone number of a contract person for the prospective contractor;

(ii) A description of the type of organization (university, nonprofit, etc.) and its ownership (private, foreign, state, etc.).

(iii) Names and addresses of the organizations in a joint venture (if any).

(iv) Type of procurement (new contract—RFP or IFB, amendment, etc.) and the period of the contract.

(v) Copy of approved Reps and Certs.

(d) In the event that OFCCP reports that the offeror is not in compliance, negotiations with the offeror shall be terminated.

(e) Documentation for the contract file. Every contract file must contain completed and signed Reps and Certs. The file must clearly show that these documents have been reviewed and accepted by the contracting officer. If the Reps and Certs were revised to make them acceptable (see paragraph (b) of this section), the file must also document what changes were required and why, and verify that the changes were made. The contracting officer shall also document the OFCCP National Preaward Registry review (see paragraph (c)(1) of this section), and, if the Registry does not include the offeror:

(1) For contracts or modifications over $10,000 but less than $10 million, the file must contain a statement from the contracting officer that the contractor is considered in compliance with EEO requirements, and giving the basis for this statement (see paragraph (c)(2) of this section). This statement may be in a separate memorandum to the file or in the memorandum of negotiation.

(2) For contracts or modifications of $10 million or more, the file must document all communications with OFCCP regarding the offeror's compliance. Such documentation includes copies of any written correspondence and a record of telephone conversations, specifying the name, address, and telephone number of the person contacted, a summary of the information presented, and any advice given by OFCCP.

(f) Documentation in the event of non-compliance. In the event OFCCP determines that a prospective contractor is not in compliance, a copy of OFCCP's written determination, and a summary of resultant action taken (termination of negotiations, notification of offeror and cognizant technical officer, negotiation with next offeror in competitive range, resolicitation, etc.) will be placed in the contract file for

any contract which may result, together with other records related to unsuccessful offers, and retained for at least six months following award.

[64 FR 5007, Feb. 2, 1999; 64 FR 18481, Apr. 14, 1999]

PART 724—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 724.2—Freedom of Information Act

Sec.
724.202 Policy.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13248, Apr. 3, 1984, unless otherwise noted.

Subpart 724.2—Freedom of Information Act

724.202 Policy.

The U.S. Agency for International Development's policies concerning implementation of the Freedom of Information Act are codified in 22 CFR part 212 (USAID Regulation 12).

PART 725—FOREIGN ACQUISITION

Subpart 725.1—Buy American Act—Supplies

Sec.
725.170 Exceptions for Foreign Assistance Act functions.

Subpart 725.4—Trade Agreements

725.403 Exceptions.

Subpart 725.70—Source, Origin, and Nationality

725.701 General.
725.702 Designation of authorized geographic code.
725.703 Contractor employees.
725.704 Source, origin and nationality requirements—Contract clause.
725.705 Local procurement—contract clause.
725.706 Geographic source waivers.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13248, Apr. 3, 1984, unless otherwise noted.

Subpart 725.1—Buy American Act—Supplies

725.170 Exceptions for Foreign Assistance Act functions.

In addition to the exception stated in FAR 25.102 for purchases for use outside the United States, there is an exception for economic assistance functions performed under authority of the Foreign Assistance Act. This exception is stated in Executive Order 11223, dated May 12, 1965 (30 FR 6635). U.S. procurement restrictions are applied by USAID, however, as shown elsewhere in this part. These restrictions are generally tighter than the Buy American Act. As a general rule, the tighter USAID restrictions will be used. In the case of certain procurements for use within the United States, the Buy American provision may be used instead in the interest of uniformity among Federal Agencies procuring for domestic use.

Subpart 725.4—Trade Agreements

725.403 Exceptions.

FAR 25.4 establishes procedures for purchases under the Trade Agreements Act of 1979 (including GATT's Agreement on Government Procurement) and the North American Free Trade Agreement (NAFTA). Under both such agreements, USAID's contracts for the purpose of providing foreign assistance are not subject to the procedures set forth in FAR 25.4. In contrast, USAID's operating expense-type administrative purchases (i.e., purchases for the direct benefit and use of USAID) are subject to the procedures in FAR 25.4, unless otherwise exempted by one of the exemptions specified in FAR 25.4.

[61 FR 39093, July 26, 1996]

Subpart 725.70—Source, Origin, and Nationality

725.701 General.

USAID's source, origin and nationality requirements for program-funded contracts and subcontracts are established in 22 CFR part 228, Rules on

Source, Origin and nationality for Commodities and Services Financed by USAID. These policies as they apply to subcontracts and purchases under USAID program-funded contracts have been incorporated into the contract clauses referenced in 725.704 and 725.705 of this subpart.

[62 FR 40468, July 29, 1997]

725.702 Designation of authorized geographic code.

(a) The authorized geographic code or codes for an USAID contract shall be specified in the Schedule of each contract and shown on its cover page. If no geographic code is specified, the authorized code will be deemed to be Geographic Code 000, the U.S.

(b) Individual country and geographic codes are defined in the Agency Geographic Code Book.

[49 FR 13248, Apr. 3, 1984, as amended at 61 FR 39093, July 26, 1996]

725.703 Contractor employees.

(a) Except as specifically provided in paragraph (b) of this section, there are no nationality restrictions on employees or consultants of either contractors or subcontractors providing services under an USAID-financed contract, except that they must be citizens of a Geographic Code 935 country, or non-U.S. citizens lawfully admitted for permanent residence in the U.S.

(b) For USAID-financed construction projects where the contract is awarded to a U.S. firm, at least half of the supervisors, and any other specified key personnel, working at the project site must be U.S. citizens or permanent legal residents of the United States. Exceptions may be authorized by the Mission Director in writing if special circumstances make compliance impractical.

[51 FR 34985, Oct. 1, 1986]

725.704 Source, origin and nationality requirements—Contract clause.

The clause in 752.225–70 is required in all USAID program-funded contracts under which the contractor may procure goods or services.

[62 FR 40468, July 29, 1997]

725.705 Local procurement—contract clause.

Local procurement may be undertaken in accordance with the provisions of 22 CFR 228.40. All contracts involving performance overseas shall contain the clause in 752.225–71.

[62 FR 40468, July 29, 1997]

725.706 Geographic source waivers.

(a) Authority to waive source, origin, nationality, and transportation services requirements is set forth in chapters 103 and 310 of the ADS.

(b) The contracting officer shall insert the authorized geographic code based on an approved geographic source waiver in the Schedule of the contract as provided for in 725.702. In addition, the contracting officer shall place a copy of any approved geographic source waiver in the official contract file.

[49 FR 13248, Apr. 3, 1984, as amended at 52 FR 4144, Feb. 10, 1987; 61 FR 39093, July 26, 1996; 62 FR 40468, July 29, 1997]

PART 726—OTHER SOCIOECONOMIC PROGRAMS

Subpart 726.70—Disadvantaged Enterprises Program

Sec.

726.7001 Scope of subpart.
726.7002 Definitions.
726.7003 Policy.
726.7004 Determination to use other than full and open competition.
726.7005 Exceptions.
726.7006 Determination of status as a disadvantaged enterprise.
726.7007 Requirement for subcontracting with disadvantaged enterprises.
726.7008 Limitations on subcontracting.

Subpart 726.71—Relocation of U.S. Businesses, Assistance to Export Processing Zones, Internationally Recognized Workers' Rights

726.7101 Policy.
726.7102 PD 20 provision.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O.12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 55 FR 8470, Mar. 8, 1990, unless otherwise noted.

Subpart 726.70—Disadvantaged Enterprises Program

726.7001 Scope of subpart.

This subpart supplements FAR part 19 and implements the provisions of certain foreign assistance appropriations acts (see section 706.302–71(a)) concerning disadvantaged enterprises which require, in general, that not less than ten percent of the aggregate amount made available for development assistance and for assistance for famine recovery and development in Africa shall be made available to disadvantaged enterprises. See part 705 and part 706 for additional provisions on publicizing contract actions and using other than full and open competition.

[58 FR 8702, Feb. 17, 1993. Redesignated and amended at 61 FR 39093, July 26, 1996; 62 FR 40468, July 29, 1997]

726.7002 Definitions.

(a) *Controlled by socially and economically disadvantaged individuals* means management and daily business are controlled by one or more such individuals.

(b) *Disadvantaged enterprises* means U.S. organizations or individuals that are:

(1) Business concerns (as defined in FAR 19.001) owned and controlled by socially and economically disadvantaged individuals;

(2) Institutions designated by the Secretary of Education, pursuant to 34 CFR 608.2, as historically black colleges and universities;

(3) Colleges or universities having a student body in which more than 40 percent of the students are Hispanic American; or

(4) Private voluntary organizations which are controlled by individuals who are socially and economically disadvantaged.

(c) *Economically disadvantaged individuals* has the same meaning as in FAR 19.001, except that the term includes women.

(d) *Owned by socially and economically disadvantaged individuals* means at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals.

(e) *Small disadvantaged business* means a small business concern (as defined in FAR 19.001) that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged (as defined in this section), or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals (as defined in this section) and that has its management and daily business controlled by one or more such individuals.

(f) *Socially disadvantaged individuals* has the same meaning as in FAR 19.001, except that the term includes women.

[56 FR 27209, June 13, 1991, as amended at 56 FR 52212, Oct. 18, 1991. Redesignated at 61 FR 39093, July 26, 1996]

726.7003 Policy.

USAID promotes participation in its projects by disadvantaged enterprises. In order to achieve the goals in foreign assistance appropriation acts, contracts which are to be funded from amounts made available from the appropriations cited in section 706.302–71(a)(1) are subject to the following policies:

(a) Authority in section 8(a) of the Small Business Act (15 U.S.C. 637(a)) shall be used to the maximum practicable extent;

(b) Other than full and open competition in contracting with certain disadvantaged enterprises shall be authorized in accordance with 706.302–71;

(c) Subcontracting with disadvantaged enterprises shall be carried out in accordance with section 726.7007;

(d) In accordance with 705.207, the Office of Small and Disadvantaged Business Utilization (OSDBU) shall be notified at least seven business days before publicizing a proposed procurement in excess of $100,000.

[56 FR 27209, June 13, 1991. Redesignated at 61 FR 39093, July 26, 1996, as amended at 62 FR 40468, July 29, 1997]

726.7004 Determination to use other than full and open competition.

The determinations required in order to use the authority under 706.302–71 for other than full and open competition shall be made by the contracting officer in consultation with the Director of OSDBU. In the event of a disagreement between the contracting officer and the Director of OSDBU, the head of the contracting activity shall make the final determination.

[55 FR 8470, Mar. 8, 1990. Redesignated at 61 FR 39093, July 26, 1996.]

726.7005 Exceptions.

The notification requirement in 705.207 and the subcontracting requirement in 726.7007 are based on statutory requirement and may not be deviated from under the provisions of subpart 701.4. By statute, the Administrator or designee may determine that these requirements do not apply to a particular contract or category of contracts. The M/OAA Director has been designated to make such determinations. One such determination concerning subcontracting is set out in 726.7007.

[58 FR 8702, Feb. 17, 1993. Redesignated at 61 FR 39093, July 26, 1996, as amended at 62 FR 40468, July 29, 1997; 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

726.7006 Determination of status as a disadvantaged enterprise.

(a) To be eligible for an award under AIDAR 706.302–71 providing for other than full and open competition, the contractor must qualify, as of both the date of submission of its offer and the date of contract award, as a small disadvantaged business (as defined in 726.7002), an historically black college or university, a college or university in which more than 40 percent of the students are Hispanic Americans, or a private voluntary organization controlled by individuals who are socially and economically disadvantaged. The contracting officer shall insert the provision at 752.226–1 in any solicitation or contract to be awarded under the provisions of 706.302–71.

(b) The contracting officer shall accept an offeror's representations and certifications under the provisions referenced above that it is a small disadvantaged business unless he or she determines otherwise based on information contained in a challenge of the offeror's status by the Small Business Administration or another offeror, or otherwise available to the contracting officer.

[55 FR 8470, Mar. 8, 1990, as amended at 56 FR 27209, June 13, 1991. Redesignated at 61 FR 39093, July 26, 1996, as amended at 62 FR 40468, July 29, 1997]

726.7007 Requirement for subcontracting with disadvantaged enterprises.

(a) In addition to the requirements in FAR subpart 19.7, any new contract or modification which constitutes new procurement (except for a contract or modification with a disadvantaged enterprise as defined in 726.7002) with respect to which more than $500,000 is to be funded with amounts made available for development assistance or from the appropriations cited in section 706.302–71(a)(1) shall contain a provision requiring that not less than ten percent of the dollar value of the contract must be subcontracted to disadvantaged enterprises, including disadvantaged enterprises which are not small.

(b) This requirement does not apply when the contracting officer, with the concurrence of the Director of OSDBU, certifies there is no realistic expectation of U.S. subcontracting opportunities and so documents the file. If the contracting officer and the Director of OSDBU do not agree, the determination will be made by the head of the contracting activity. See 726.7005 for guidance on other potential exceptions.

(c) The contracting officer shall insert the clause in 752.226–2 in any solicitation or contract as provided in paragraph (a) of this section, unless exempted in accordance with the provisions of paragraph (b) of this section.

[55 FR 8470, Mar. 8, 1990, as amended at 56 FR 27209, June 13, 1991; 56 FR 52213, Oct. 18, 1991; 58 FR 42255, Aug. 9, 1993. Redesignated at 61 FR 39093, July 26, 1996, as amended at 62 FR 40468, July 29, 1997; 62 FR 47532, Sept. 9, 1997]

726.7008 Limitations on subcontracting.

The contracting officer shall insert the clause at 752.226–3, Limitations on Subcontracting, in any solicitation and

contract for technical assistance services which is to be awarded under the authority of 706.302–71.

[58 FR 42255, Aug. 9, 1993. Redesignated at 61 FR 51235, Oct. 1, 1996]

Subpart 726.71—Relocation of U.S. Businesses, Assistance to Export Processing Zones, Internationally Recognized Workers' Rights

726.7101 Policy.

USAID Policy Determination (PD) 20, ''Guidelines to Assure USAID Programs do not Result in the Loss of Jobs in the U.S.'' implemented statutory prohibitions on expenditure of appropriated funds. The PD contains a standard provision for inclusion in USAID-funded grants and inter-agency agreements and indicates that when the PD applies to a contract, appropriate provisions covering the subject matter are to be included. When the provisions of PD 20 do apply to a contract, the cognizant technical office shall provide to the contracting officer appropriate language tailored to the specific circumstances for the contract statement of work, or if applicable to the circumstances, the provision included in the PD (see 726.7102) may be used as a clause in the contract. The provision is not required in subcontracts.

[61 FR 39093, July 26, 1996]

726.7102 PD 20 provision.

RELOCATION OF U.S. BUSINESSES, ASSISTANCE TO EXPORT PROCESSING ZONES, INTERNATIONALLY RECOGNIZED WORKERS' RIGHTS (JAN 1994)

No funds or other support provided hereunder may be used in an activity reasonably likely to involve the relocation or expansion outside of the United States of an enterprise located in the United States if non-U.S. production in such relocation or expansion replaces some or all of the production of, and reduces the number of employees at, said enterprise in the United States.

No funds or other support provided hereunder may be used in an activity the purpose of which is the establishment or development in a foreign country of any export processing zone or designated area where the labor, environmental, tax, tariff, and safety laws of the country would not apply, without the prior approval of USAID.

No funds or other support provided hereunder may be used in an activity which contributes to the violation of internationally recognized rights of workers in the recipient country, including those in any designated zone or area in that country.

[61 FR 39093, July 26, 1996]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 727—PATENTS, DATA, AND COPYRIGHTS

Subpart 727.4—Rights in Data and Copyrights

Sec.

727.404 Basic rights in data clause.
727.409 Solicitation provisions and contract clauses.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

SOURCE: 72 FR 53163, Sept. 18, 2007, unless otherwise noted.

Subpart 727.4—Rights in Data and Copyrights

727.404 Basic rights in data clause.

(a) through (f) [Reserved]

(g) When the contract includes a requirement for the contractor to assign copyright to the government or another party, the contracting officer shall incorporate (48 CFR) 752.227–14 and/or include an express limitation or restriction in the contract. USAID contracting officers will assert such a right in limited circumstances in accordance with the principles as stated in (48 CFR) 27.402.

727.409 Solicitation provisions and contract clauses.

(a) When the contracting officer incorporates (48 CFR) FAR 52.227–14, and if the release or publication of data first produced in the performance of the contract may be sensitive to U.S. Government relations with the cooperating country, the contracting officer must use the clause at (48 CFR) 752.227–14.

(b) through (m) [Reserved]

(n) The prescriptions for provisions and clauses in (48 CFR) FAR 27.409 apply to all USAID contracts regardless of place of performance.

PART 728—BONDS AND INSURANCE

Subpart 728.1—Bonds

Sec.

728.105–1 Advance payment bonds.

Subpart 728.3—Insurance

728.305–70 Overseas worker's compensation and war-hazard insurance—waivers and USAID insurance coverage.
728.307–2 Liability.
728.307–70 Medical Evacuation (MEDEVAC) Services (MAR 1993).
728.309 Contract clause for worker's compensation insurance.
728.313 Contract clauses for insurance of transportation or transportation-related services.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13249, Apr. 3, 1984, unless otherwise noted.

Subpart 728.1—Bonds

728.105–1 Advance payment bonds.

(a) Generally, advance payment bonds will not be required in connection with USAID contracts containing an advance payment provision. In lieu thereof, contracting officers will follow procedures set forth in FAR 32.409–3.

(b) Whenever a contracting officer considers that an advance payment bond is necessary, the contracting officer will: (1) Establish a bond penalty that will adequately protect interests of the Government, (2) use the USAID Advance Payment Bond format, (3) place bond with a surety currently approved by the U.S. Treasury Department according to the latest Treasury Department Circular 570, (4) stipulate that the cost of the bond shall not exceed a rate of $7.50 per $1,000 per annum based on the penalty of the bond, without the prior written approval of the Office of Acquisition and Assistance, Policy Division (M/OAA/P).

(c) Where the surety's obligation under an advance payment bond covers all advances made to the contractor

during the term of the contract, no release should be issued to the surety until all advances made and to be made under the contract have been fully liquidated in accordance with the provisions of the contract, such as no-pay vouchers, reports of expenditures, or by refund. Where the surety's obligation under the bond is limited to advances made during a specified period of time, no release should be issued to the surety until all advances made and to be made during the specified period have been liquidated as aforesaid.

[49 FR 13249, Apr. 3, 1984, as amended at 50 FR 50302, Dec. 10, 1985; 55 FR 6802, Feb. 27, 1990; 56 FR 67224, Dec. 30, 1991; 59 FR 33446, June 29, 1994; 72 FR 19670, Apr. 19, 2007]

Subpart 728.3—Insurance

728.305–70 Overseas worker's compensation and war-hazard insurance—waivers and USAID insurance coverage.

(a) Upon the recommendation of the USAID Administrator, the Secretary of Labor may waive the applicability of the Defense Base Act (DBA) with respect to any contract, subcontract, or subordinate contract, work location, or classification of employees. Either the contractor or USAID can request a waiver from coverage. Such a waiver can apply to any employees who are not U.S. citizens, not residents of, or not hired in the United States. Waivers requested by the contractor are submitted to the contracting officer for approval and further submission to the Department of Labor, which grants the waiver. Application for a waiver is submitted on Labor Department Form BEC 565. USAID has a number of blanket waivers already in effect for certain countries that are applicable to its direct contracts with contractors performing in such countries. Where such waivers are granted from coverage under the DBA, the waiver is conditioned on providing other worker's compensation coverage to employees to which the waiver applies. Usually this takes the form of securing worker's compensation coverage of the country where work will be performed or of the country of the employee's nationality, whichever offers greater benefits. The Department of Labor has granted partial blanket waivers of DBA coverage applicable to USAID-financed contracts performed in certain countries, subject to two conditions:

(1) Employees hired in the United States by the contractor, and citizens or residents of the United States are to be provided DBA insurance coverage;

(2) Waived employees (i.e., employees who are neither U.S. citizens nor U.S. resident aliens, and who were hired outside the United States) will be provided worker's compensation benefits as required by the laws of the country in which they are working or the laws of their native country, whichever offers greater benefits. Information as to whether a DBA Waiver has been obtained by USAID for a particular country may be obtained from the cognizant USAID contracting officer.

(b) To assist contractors in securing insurance at minimal rates for the workmen's compensation insurance required under the DBA, and to facilitate meeting insurance requirements for such coverage, USAID, after open and competitive negotiation, has entered into a contract with an insurance carrier to provide such coverage at a specified rate. The terms of this contract require the insurance carrier to provide coverage, and the contractor to make payments to and handle its claims with that insurance carrier. Contracting officers are responsible for explaining and advising contractors of the details of securing such insurance.

[49 FR 13249, Apr. 3, 1984, as amended at 52 FR 4144, Feb. 10, 1987. Redesignated at 53 FR 50630, Dec. 16, 1988, and amended at 54 FR 16122, Apr. 21, 1989; 56 FR 67224, Dec. 30, 1991]

728.307–2 Liability.

(a)–(b) [Reserved]

(c) *Automobile liability.* In order to ensure that private automobiles used by contractor employees stationed overseas under an USAID contract are properly insured, USAID has established minimum required coverages as a supplement to the FAR clause at 52.228–7. This supplemental coverage is specified in AIDAR 752.228–7, and is to be used in all USAID-direct contracts involving performance overseas.

[53 FR 50630, Dec. 16, 1988]

728.307–70 Medical Evacuation (MEDEVAC) Services (MAR 1993).

The Contracting Officer shall insert the clause at 752.228–70 in all contracts which require performance by contractor employees overseas.

[59 FR 33446, June 29, 1994]

728.309 Contract clause for worker's compensation insurance.

(a) Because of the volume of projects performed overseas resulting in contracts which require worker's compensation insurance, USAID has contracted with an insurance carrier to provide the required insurance for all USAID contractors. It is therefore necessary to supplement the FAR clause at 52.228–3 with the additional coverage specified in AIDAR 752.228–3. The coverage specified in AIDAR 752.228–3 shall be used in addition to the coverage specified in FAR 52.228–3 in all USAID-direct contracts involving performance overseas.

[53 FR 50630, Dec. 16, 1988]

728.313 Contract clauses for insurance of transportation or transportation-related services.

(a) USAID is required by law to include language in all its direct contracts and subcontracts ensuring that all U.S. marine insurance companies have a fair opportunity to bid for marine insurance when such insurance is necessary or appropriate under the contract. USAID has therefore established a supplementary preface to the clause at FAR 52.228–9. This supplementary preface is set forth in AIDAR 752.228–9, and is required for use in any USAID-direct contract where marine insurance is necessary or appropriate.

[53 FR 50630, Dec. 16, 1988]

PART 731—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 731.1—Applicability

Sec.
731.109 Advance agreements.

Subpart 731.2—Contracts With Commercial Organizations

731.205–6 Compensation for personal services.
731.205–46 Travel costs.
731.205–70 Overseas recruitment incentive.
731.205–71 Salary supplements for Host Government employees.

Subpart 731.3—Contracts With Educational Institutions

731.370 Predetermined fixed rates for indirect costs.
731.371 Compensation for personal services.
731.372 Fringe benefits.
731.373 Overseas recruitment incentive.

Subpart 731.7—Contracts With Nonprofit Organizations

731.770 OMB Circular A–122; cost principles for nonprofit organizations; USAID implementation.
731.771 Bid and proposal costs.
731.772 Compensation for personal services.
731.773 Independent research and development costs.
731.774 Overseas recruitment incentive.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13250, Apr. 3, 1984, unless otherwise noted.

Subpart 731.1—Applicability

731.109 Advance agreements.

Advance agreements on selected costs may be negotiated with USAID contractors by the Overhead and Special Cost and Contract Close-Out Branch, Office of Acquisition and Assistance. Such advance understandings will be applicable to all USAID contracts with that contractor.

[49 FR 13250, Apr. 3, 1984, as amended at 50 FR 50302, Dec. 10, 1985; 51 FR 20651, June 6, 1986; 72 FR 19670, Apr. 19, 2007]

Subpart 731.2—Contracts With Commercial Organizations

731.205–6 Compensation for personal services.

(a) *General.* When establishing the workweek for employees overseas the contractor will take local and USAID Mission practice into account and will insure that the workweek is compatible with that of those USAID Mission and Cooperating Country employees with whom the contractor will be working.

(b) *Salaries and wages.* It is USAID policy that if an employee's base salary plus overseas recruitment incentive, if any (see AIDAR 731.205–70) exceeds the USAID Contractor Salary Threshold (USAID CST), as stated in USAID's Automated Directives System (ADS) Chapter 302 USAID Direct Contracting (available at *http://www.usaid.gov/policy/ads/300/302.pdf*), it will be allowable only if approved in writing by the contracting officer. The contracting officer shall only provide such approval after internal Agency procedures for review/approval of salaries in excess of the USAID CST in ADS 302 have been followed. USAID policies on compensation of third country national or cooperating country national employees are set forth in AIDAR 722.170.

(d)–(l) [Reserved]

(m) *Fringe benefits.* USAID's policies on certain fringe benefits related to overseas service, including but not limited to leave, holidays, differentials and allowances, etc. are set forth in the appropriate contract clauses in AIDAR subpart 752.70.

[57 FR 5235, Feb. 13, 1992, as amended at 60 FR 11913, Mar. 3, 1995; 62 FR 40468, July 29, 1997; 64 FR 5008, Feb. 2, 1999; 72 FR 19669, Apr. 19, 2007]

731.205–46 Travel costs.

It is USAID policy to require prior written approval of international travel by the Contacting Officer. See AIDAR 752.7032 for specific requirements and procedures.

[57 FR 5236, Feb. 13, 1992]

731.205–70 Overseas recruitment incentive.

NOTE: the term *employee* as used in this section means an employee who is a U.S. citizen or a U.S. resident alien.)

(a) If a contractor employee serving overseas under a contract does not qualify for the exemption for overseas income provided under section 911 of the U.S. Internal Revenue Code (26 U.S.C. 911), such employee is eligible to receive an overseas recruitment incentive (ORI), to the extent the ORI: Is authorized by the contractor's normal policy and practice; is deemed necessary by the contractor to recruit and retain qualified employees for overseas services; and does not exceed 10% of the base salary of the employee from date of arrival at overseas post to begin assignment to date of departure from post at the end of assignment. ORI is to be paid as a single payment at the end of the employee tour of duty overseas. The contractor shall take all reasonable and prudent steps to ensure that ORI is not paid to any employee who has received the IRS section 911 exemption.

(b) In the event that an employee subsequently receives a section 911 exclusion for any part of the base salary upon which this supplement has been paid, such supplement or appropriate portion thereof shall be reimbursed by the contractor to USAID with interest. The interest shall be calculated at the average U.S. Treasury rate in effect for the period that the contractor or his employee had the funds. Neither the contractor's nor the subcontractor's inability to collect refunds from eligible employees shall be used as a basis to excuse subsequent refunds by the contractor to USAID.

[57 FR 5236, Feb. 13, 1992]

731.205–71 Salary supplements for Host Government employees.

(a) *Definitions.* (1) A Host Government (HG) employee is a person paid by the HG, occupying an established position, either temporary or permanent, part-time or full-time, within a HG institution.

(2) An HG institution is an organization in which the government owns at least a fifty percent share or receives at least fifty percent of its financial support from the government.

(b) *General.* Salary supplement occurs when payments are made that augment an HG employee's base salary or premiums, overtime, extra payments, incentive payment and allowances for which the HG employee would qualify under HG rules or practices for the performance of his/hers regular duties or work performed during his/hers regular office hours. Per diem, invitational travel, honoraria and payment for work carried out outside of normal working hours are not considered to be salary supplements subject to the provisions in USAID policy referenced in paragraph (c) of this section.

(c) Salary supplements are eligible for USAID financing only when authorized in accordance with USAID policy established in the cable State 119780 dated April 15, 1988 (on ADS-CD under USAID Handbooks, Handbook 1). If salary supplements have been authorized in a particular case, the Contracting Officer shall provide written approval to the contractor in order for such costs to be eligible. Any specific requirements or limitations shall be specified in the approval.

(d) Contracting Officers shall insert the Clause at 752.231–71 in all contracts in which there is a possibility of the need of HG employees. It should also be inserted in all subsequent subcontracts.

[64 FR 16649, Apr. 6, 1999]

Subpart 731.3—Contracts With Educational Institutions

731.370 Predetermined fixed rates for indirect costs.

Section 635(k) of the Foreign Assistance Act of 1961, as amended, authorizes USAID to use predetermined fixed rates in determining the indirect costs applicable under contracts with educational institutions.

731.371 Compensation for personal services.

(a) *General.* When establishing the workweek for employees overseas the contractor will take local and USAID Mission practice into account and will ensure that the workweek is compatible with that of those USAID Mission and Cooperating Country employees with whom the contractor will be working.

(b) *Salaries and wages.* (1) The policies set forth in AIDAR 731.205–6(b) are also applicable to contracts with a nonprofit organization.

(2) In considering consulting income as a factor when determining allowable salary for service under a contract:

(i) For faculty members working under annual appointments, salary for service under the contract may include the employee's on-campus salary plus ''consulting income'' (that is, income from employment other than the employee's regular on-campus appointment, excluding business or other activities not connected with the employee's profession) earned during the year preceding employment under the contract.

(ii) For faculty members working under academic year appointments, salary for service under the contract may include the employee's on-campus academic year salary plus ''consulting income'' as defined above earned during the year proceeding employment under the contract, or salary for service under the contract may be derived by annualizing the academic year salary (in which case ''consulting income'' may not be included).

(3) USAID policies and compensation of third country national or cooperating country national employees are set forth in AIDAR 722.170.

[57 FR 5236, Feb. 13, 1992, as amended at 60 FR 11913, Mar. 3, 1995; 62 FR 40469, July 29, 1997; 64 FR 5008, Feb. 2, 1999; 72 FR 19669, Apr. 19, 2007]

731.372 Fringe benefits.

USAID's policies on certain fringe benefits related to overseas service, including but not limited to leave, holidays, differentials and allowances, etc. are set forth in the appropriate contract clauses in AIDAR 752.70.

[57 FR 5236, Feb. 13, 1992]

731.373 Overseas recruitment incentive.

USAID's policies regarding overseas recruitment incentives are set forth in AIDAR 731.205–70. These policies are also applicable to contracts with an educational institution.

[57 FR 5236, Feb. 13, 1992]

Subpart 731.7—Contracts With Nonprofit Organizations

731.770 OMB Circular A–122, cost principles for nonprofit organizations; USAID implementation.

(a) Paragraph 6 of the transmittal letter for OMB Circular A–122 specifies that ''Agencies shall designate a liaison official to serve as the agency representative on matters relating to the implementation of this Circular.'' The Director, Office of Acquisition and Assistance, has been so designated. The

Overhead and Special Cost and Contract Close-Out Branch, Office of Acquisition and Assistance (OCC) provides staff assistance to the Director concerning OMB Circular A–122. OCC is also responsible for obtaining cognizance under the criteria in the transmittal letter for OMB Circular A–122; for liaison with other cognizant agencies; for authorizing exclusion of OMB Circular A–122 coverage for a particular nonprofit organization pursuant to paragraph 5 of the OMB Circular A–122 transmittal letter; and for advice and assistance in applying OMB Circular A–122 cost principles.

(b) Paragraph 4b of the OMB Circular A–122 transmittal letter contains a definition of *prior approval* as follows:

> Prior approval means securing the awarding agency's permission in advance to incur costs for those items that are designated as requiring prior approval by OMB Circular A–122. Generally, this permission will be in writing. Where an item of cost requiring prior approval is specified in the budget of an award, approval of the budget constitute approval of that cost.

Consequently, an award containing a budget constitutes prior approval of the direct cost item in the budget, unless otherwise annotated. Accordingly, award budgets should be appropriately annotated substantially as follows:

> Inclusion of any cost in the line item budget of this award does not obviate the requirement for prior approval of cost items designated as requiring prior approval by OMB Circular A–122 ; or
>
> In accordance with the requirements to OMB Circular No. A–122, approval is granted to incur costs for (name specific item or items) which are included in the budget of this award.

[49 FR 13250, Apr. 3, 1984, as amended at 50 FR 50302, Dec. 10, 1985; 51 FR 20651, June 6, 1986; 56 FR 67225, Dec. 30, 1991; 72 FR 19670, Apr. 19, 2007]

731.771 Bid and proposal costs.

Pending the establishment of Government-wide principles in Attachment B of OMB Circular A–122, USAID will treat bid and proposal costs as follows:

(a) Bid and proposal costs are the costs of preparing bids, proposals, and applications for potential activities such as Government and non-Government grants, contracts and other agreements, including the development of scientific, cost, and other data needed to support such bids, proposals, and applications. Except as provided in (b) below, bid and proposal costs of the current accounting period of both successful and unsuccessful bids and proposals normally should be treated as indirect costs for allocation to all current activities, and no bid and proposal costs of past accounting periods will be allocable to the current period. However, if the organization's established practice is to treat bid and proposal costs by some other method, the results obtained may be accepted only if found to be reasonable and equitable.

(b) Bid and proposal costs incurred by the organization to obtain unrestricted funds are to be treated as fund raising and allocated an appropriate share of indirect costs under the conditions described in paragraph B.3 of Attachment A to OMB Circular A–122.

731.772 Compensation for personal services.

The policies set for in AIDAR 731.205–6 are also applicable to contracts with a nonprofit organization.

[57 FR 5236, Feb. 13, 1992]

731.773 Independent research and development costs.

Pending establishment of Government-wide principles in Attachment B of OMB Circular A–122, USAID will apply the cost principles at FAR 31.205–18 for independent research and development costs.

731.774 Overseas recruitment incentive.

USAID's policies regarding overseas recruitment incentives are set forth in AIDAR 731.205–70. These policies are also applicable to contracts with a nonprofit organization.

[57 FR 5236, Feb. 13, 1992]

PART 732—CONTRACT FINANCING

Subpart 732.1—General

Sec.
732.111 Contract clauses.

Subpart 732.4—Advance Payments

732.401 Statutory authority.

732.402 General.
732.403 Applicability.
732.406–70 Agency-issued letters of credit.
732.406–71 Circumstances for use of an LOC.
732.406–72 Establishing an LOC.
732.406–73 LOC contract clause.
732.406–74 Revocation of the LOC.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 732.1—General

732.111 Contract clauses.

(a) [Reserved]

(b) USAID may obtain short term and (less frequently) long-term indefinite quantity professional services through Agency-specific indefinite quantity contracts that are a combination of contract types. Rather than using the fixed-price payment clauses for indefinite quantity contracts, when these IQCs provide for fixed daily rates (which may include wages, overhead, general and administrative expenses, fringe benefits, and profit) for services and reimbursement of other direct costs (such as travel and transportation) at cost, then the payment clause at 752.232–7 shall be used in the contract.

[61 FR 39094, July 26, 1996]

Subpart 732.4—Advance Payments

SOURCE: 56 FR 67225, Dec. 30, 1991, unless otherwise noted.

732.401 Statutory authority.

(a) Sections 635 (b) of the Foreign Assistance Act and Executive Order 11223, May 12, 1965, 30 FR 6635, permit the making of advance payments with respect to functions authorized by the Foreign Assistance Act. Advance payments may also be made under section 305 of the Federal Property and Administrative Services Act of 1949, which provides authority, not otherwise available to USAID, to take a paramount lien.

(b) The Act of August 28, 1968, Public Law 85–804 does not apply to USAID.

[56 FR 67225, Dec. 30, 1991, as amended at 62 FR 40469, July 29, 1997]

732.402 General.

(a)–(d) [Reserved]

(e)(1) U.S. Dollar advances to for-profit organizations, including advances for disbursement to grantees, shall be processed and approved in accordance with ADS 583.5.6b.

(2) All local currency advances to for-profit organizations require the approval of the Head of the Contracting Activity, after consultation with the Mission Controller.

[56 FR 67225, Dec. 30, 1991, as amended at 61 FR 39093, July 26, 1996; 64 FR 5008, Feb. 2, 1999; 64 FR 42042, Aug. 3, 1999]

732.403 Applicability.

References to nonprofit contracts with nonprofit educational or research institutions for experimental, research and development work include nonprofit contracts with nonprofit institutions for: (a) technical assistance services provided to or for another country or countries, and (b) projects which concern studies, demonstrations and similar activities related to economic growth or the solution of social problems of developing countries.

732.406–70 Agency-issued letters of credit.

This subsection provides guidance on use of USAID issued letters of credit (LOC) for advance payments.

732.406–71 Circumstances for use of an LOC.

An LOC shall be used under the following circumstances:

(a) The contracting officer has determined that an advance payment is necessary and appropriate in accordance with this subpart and the guidance provided in FAR 32.4;

(b) USAID has, or expects to have, a continuing relationship of at least one year with the organization, and the annual amount required for advance financing will be at least $50,000; and

(c) The Office of Financial Management, Cash Management and Payment Division (FM/CMP) agrees that the LOC payment method is appropriate.

[56 FR 67225, Dec. 30, 1991, as amended at 61 FR 39093, July 26, 1996]

732.406–72 Establishing an LOC.

(a) While the contract will provide for the use of an LOC when it is justified under subsection 732.406–71, the LOC is a separate agreement between the contractor and FM/CMP, acting on behalf of the USAID Controller. The terms and conditions of the LOC are established by FM/CMP/GIB.

(b) In order to establish or amend an LOC, the contracting officer shall provide FM/CMP with the following information:

(1) The name of the Contractor;

(2) The official USAID contract number;

(3) The obligated amount of the contract;

(4) The budget plan code for the obligated funds;

(5) The effective date and estimated completion date.

(6) The contractor Federal Tax Identification Number.

This information should be provided in writing to FM/CMP together with a request to establish or amend an LOC as early in the negotiation cycle as possible.

(c) FM/CMP will prepare the LOC in accordance with USAID's LOC procedures; issue or amend and maintain the LOC in accordance with its terms and USAID procedures and regulations; and provide the contracting officer(s) a copy of each LOC and any other material governing its use at the time the LOC is issued or when it is amended or modified.

[56 FR 67225, Dec. 30, 1991, as amended at 61 FR 39093, July 26, 1996; 64 FR 42042, Aug. 3, 1999]

732.406–73 LOC contract clause.

(a) If payment is to be provided by LOC, the contract shall contain the clause in subsection 752.232–70.

(b) Contracting offices shall ensure that an appropriate (48 CFR) FAR payment clause is also included in the contract, in the event that the LOC is revoked pursuant to 732.406–74.

[56 FR 67225, Dec. 30, 1991, as amended at 64 FR 5008, Feb. 2, 1999]

732.406–74 Revocation of the LOC.

If during the term of the contract FM/CMP believes that the LOC should be revoked, FM/CMP may, after consultation with the cognizant contracting officer(s) and GC, revoke the LOC by written notification to the contractor. A copy of any such revocation notice will immediately be provided to the cognizant contracting officer(s).

PART 733—PROTESTS, DISPUTES, AND APPEALS

Subpart 733.1—Protests

Sec.

733.101 Definitions.
733.103–70 Protests to the agency.
733.103–71 Filing of protest.
733.103–72 Responsibilities.
733.103–73 Protests excluded from consideration.

Subpart 733.27—USAID Procedures for Disputes and Appeals

733.270–1 Designation of Armed Services Board of Contract Appeals (ASBCA) to hear and determine appeals under USAID contracts.
733.270–2 Special procedures regarding contract disputes appeals promulgated pursuant to paragraph 2 of the Administrator's designation.

AUTHORITY: Sec. 621. Pub. L. 87–195, 73 Stat. 445 (22 U.S.C. 2381), as amended: E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp. p. 435.

Subpart 733.1—Protests

SOURCE: 61 FR 39094, July 26, 1996, unless otherwise noted.

733.101 Definitions.

(a) All ''days'' referred to in this subpart are deemed to be ''calendar days'', in accordance with FAR 33.101. In the case of USAID overseas offices with non-Saturday/Sunday weekend schedules, the official post weekend applies in lieu of Saturday and Sunday.

(b) All other terms defined in FAR 33.101 are used herein with the same meaning.

[61 FR 39094, July 26, 1996, as amended at 64 FR 42042, Aug. 3, 1999]

733.103–70 Protests to the agency.

USAID follows the agency protest procedures in FAR 33.103, as supplemented by this section.

733.103–71 Filing of protest.

(a) Protests must be in writing and addressed to the Contracting Officer for consideration by the M/OAA Director.

(b) A protest shall include, in addition to the information required in FAR 33.103(d)(2), the name of the issuing Mission or office.

(c) Material submitted by a protester will not be withheld from any interested party outside the government or from any government agency if the M/OAA Director decides to release such material, except to the extent that the withholding of such information is permitted or required by law or regulation.

[61 FR 39094, July 26, 1996; 61 FR 51235, Oct. 1, 1996, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

733.103–72 Responsibilities.

(a) *M/OAA Director.* The decision regarding an agency protest shall be made by the M/OAA Director within 30 days from the date a proper protest is filed unless the M/OAA Director determines that a longer period is necessary to resolve the protest, and so notifies the protester in writing. The M/OAA Director shall make his or her decision after personally reviewing and considering all aspects of the case as presented in the protest itself and in any documentation provided by the contracting officer, and after obtaining input and clearance from the Assistant General Counsel for Litigation and Enforcement (GC/LE). The decision shall be in writing and constitutes the final decision of the Agency.

(b) *Contracting Officer.* The Contracting Officer is responsible for requesting an extension of the time for acceptance of offers as described in FAR 33.103(f)(2).

[61 FR 39094, July 26, 1996; 61 FR 51235, Oct. 1, 1996, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

733.103–73 Protests excluded from consideration.

(a) *Contract administration.* Disputes between a contractor and USAID are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978.

(b) *Small business size standards and standard industrial classification.* Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification are for review solely by the Small Business Administration.

(c) *Procurement under Section 8(a) of the Small Business Act.* Contracts are let under Section 8(a) of the Small Business Act to the Small Business Administration solely at the discretion of the Contracting Officer, and are not subject to review.

(d) *Protests filed in the General Accounting Office (GAO).* Protests filed with the GAO will not be reviewed.

(e) *Procurements funded by USAID to which USAID is not a party.* No protest of a procurement funded by USAID shall be reviewed unless USAID is a party to the acquisition agreement.

(f) *Subcontractor protests.* Subcontractor protests will not be considered.

(g) *Judicial proceedings.* Protests will not be considered when the matter involved is the subject of litigation before a court of competent jurisdiction or when the matter involved has been decided on the merits by a court of competent jurisdiction.

(h) *Determinations of responsibility by the contracting officer.* A determination by the contracting officer that a bidder or offeror is or is not capable of performing a contract will not be reviewed by the M/OAA Director.

(i) *Small Business Certificate of Competency Program.* Any referral made to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act, or any issuance of, or refusal to issue, a certificate of competency under that section will not be reviewed by the M/OAA Director.

[61 FR 39094, July 26, 1996, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

Subpart 733.27—USAID Procedures for Disputes and Appeals

733.270–1 Designation of Armed Services Board of Contract Appeals (ASBCA) to hear and determine appeals under USAID contracts.

(a) The ASBCA is hereby designated the authorized representative of the

Administrator of the U.S. Agency for International Development (USAID) in hearing, considering, and determining as fully and finally as might the Administrator, appeals by contractors from decisions on disputed questions taken pursuant to the provisions of contracts requiring the determination of such appeals by the Administrator or his/her duly authorized representative or Board.

(b) In acting under this designation, the ASBCA will follow such rules and procedures as are or may be prescribed for the conduct of Defense Department contract appeal cases, except for the rules entitled ''Forwarding of Appeals'' (Rule 3) and ''Duties of the Contracting Officer'' (Rule 4), which subjects will be governed by procedures to be promulgated by the General Counsel of USAID with approval of the Chairman of the ASBCA.

(c) The General Counsel of USAID will assure representation of the interests of the Government in proceedings before the ASBCA.

(d) All officers and employees of USAID will cooperate with the ASBCA and Government counsel in the processing of appeals so as to assure their speedy and just determination.

[53 FR 4980, Feb. 19, 1988. Redesignated at 61 FR 39095, July 26, 1996; 61 FR 51235, Oct. 1, 1996]

733.270–2 Special procedures regarding contract disputes appeals promulgated pursuant to paragraph 2 of the Administrator's designation.

(a) The following rules will apply, in lieu of Rules 3 and 4(a) of the ASBCA, to contract dispute appeals to the Administrator of the USAID or his/her authorized representative which are docketed with that Board.

(b) Rule 3 (USAID)—Forwarding of Appeals. When a notice of appeal in any form has been received by the contracting officer, he/she shall endorse thereon the date of mailing (or date of receipt, if otherwise conveyed) and within 10 days shall forward said notice of appeal to the Board with a copy to the USAID General Counsel in Washington, DC. Following receipt by the Board of the original notice of an appeal (whether through the contracting officer or otherwise), the contractor, the contracting officer, and the USAID General Counsel will be promptly advised of its receipt, and the contractor will be furnished a copy of these rules.

(c) Rule 4 (USAID). Preparation, Contents, Organization, Forwarding, and Status of Appeal File (Supersedes Rule 4, ''Duties of Contracting Officer'' of the ASBCA rules in effect on April 1, 1980).

(d) Duties of Contracting Officer. Within 30 days of receipt of an appeal or advice that an appeal has been filed, the contracting officer shall assemble and transmit to the USAID General Counsel in Washington, DC, two copies of all documents pertinent to the appeal, including:

(1) The decision and findings of fact from which appeal is taken;

(2) The contract, including specifications and pertinent amendments, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) All transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

(e) The General Counsel will compile the appeal file from such documents, which file must contain the items enumerated in paragraphs (d) (1) through (5) of this section and will promptly, and in any event within 65 days after the appeal is docketed by the Board, transmit the appeal file to the Board. The General Counsel will notify the appellant when he/she has compiled the appeal file, will provide him/her with a list of its contents, and will afford him/her an opportunity to examine the complete file at the office of the Board and, if the General Counsel deems it appropriate, at any overseas location, for the purpose of satisfying himself/herself as to the contents, and furnishing or suggesting any additional documentation deemed pertinent to the appeal. After receipt of the foregoing file, as it may be augmented at

the time of receipt, the Board will promptly advise the parties.

[53 FR 4980, Feb. 19, 1988. Redesignated at 61 FR 39095, July 26, 1996; 61 FR 51235, Oct. 1, 1996; 62 FR 40469, July 29, 1997]

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 734—MAJOR SYSTEM ACQUISITION

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp., p. 435.

734.002–70 USAID policy.

In order for an USAID acquisition to be considered a major system acquisition it must meet the criteria of OMB Circular A–109 and FAR part 34, and must have an estimated value of $15 million or more during the first year of the contract. All major systems acquisition must be approved in advance by the M/OAA Director.

[55 FR 39976, Oct. 1, 1990, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 736—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 736.6—Architect-Engineer Services

Sec.

736.602–2 Evaluation boards.
736.602–3 Evaluation board functions.
736.602–4 Selection authority.
736.602–5 Short selection process for procurements not to exceed the simplified acquisition threshold.
736.603 Collecting data on and appraising firms' qualifications.
736.605 Government cost estimate for architect-engineer work.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13254, Apr. 3, 1984, unless otherwise noted.

Subpart 736.6—Architect-Engineer Services

736.602–2 Evaluation boards.

(a)–(b) [Reserved]

(c) Each evaluation board will include a representative of the Contracting Officer and, as appropriate, the cognizant bureau.

[54 FR 46391, Nov. 3, 1989]

736.602–3 Evaluation board functions.

Agency architect-engineer evaluation boards shall perform the following functions:

(a) Prepare a selection memorandum recommending no less than three firms which are considered most highly qualified to perform the required services for submission to the head of the contracting activity for his/her approval. This selection memorandum shall include the information specified in 736.602–3(c).

(b) In evaluating architect-engineer firms, the architect-engineer evaluation board shall apply the following criteria, other criteria established by Agency regulations, and any criteria set forth in the public notice on a particular contract:

(1) Specialized experience of the firm (including each member of joint venture or association) with the type of service required;

(2) Capacity of the firm to perform the work (including any specialized services) within the time limitations;

(3) Past record of performance on contracts with USAID or other Government agencies and private industry with respect to such factors as control of costs, quality of work, and ability to meet schedules, to the extent such information is available;

(4) Ability to assign an adequate number of qualified key personnel from the organization, including a competent supervising representative having considerable experience in responsible positions on work of a similar nature;

(5) The portions of the work the architect-engineer is able to perform with its own forces when required;

(6) Ability of the architect-engineer to furnish or to obtain required materials and equipment;

(7) If the geographical or topographical aspects of the project are deemed vital, familiarity with the locality where the project is situated;

(8) Financial capacity;

(9) Responsibility of the architect-engineer under standards provided in FAR subpart 9.1. No contract may be

awarded to a contractor that does not meet these standards;

(10) Volume of work previously awarded to the firm by the Agency, with the object of effecting an equitable distribution of architect-engineer contracts among qualified firms. Each architect-engineer evaluation board shall give favorable consideration, to the fullest extent practicable to the most highly qualified firms that have not had prior experience on Government projects (including small business firms and firms owned by the socially and/or economically deprived).

(c) The evaluation board shall prepare a selection memorandum for the approval of the head of the contracting activity. The selection memorandum will be signed by the board chairman and cleared by each board member. The selection memorandum shall include the following information:

(1) A listing by name of all firms reviewed by the board;

(2) A listing of the evaluation criteria applied;

(3) An analysis of the selection showing the rationale for the board's recommendation;

(4) The board's recommendation of the three most highly qualified firms, in order of preference;

(5) An independent Government cost estimate. The evaluation board shall require the project engineer to develop an independent Government estimate of the cost of the required architect-engineer services. Consideration shall be given to the estimated value of the services to be rendered, the scope, complexity, and the nature of the project and the estimated costs expected to be generated by the work. The independent Government estimate shall be revised as required during negotiations to correct noted deficiencies and reflect changes in or clarification of, the scope of the work to be performed by the architect-engineer. A cost estimate based on the application of percentage factors to cost estimates of the various segments of the work involved, e.g., construction project, may be developed for comparison purposes, but such a cost estimate shall not be used as a substitute for the independent Government estimate.

736.602–4 Selection authority.

(a) The head of the contracting activity or his/her authorized designee shall review the selection memorandum and shall either approve it or return it to the board for reconsideration for specified reasons.

(b) Approval of the selection memorandum by the head of the contracting activity or his/her authorized designee shall serve as authorization for the contracting office to commence negotiation.

736.602–5 Short selection process for procurements not to exceed the simplified acquisition threshold.

References to FAR 36.602–3 and 36.602–4 contained in FAR 36.602–5 shall be construed as references to 736.602–3 and 736.602–4 of this subpart.

[49 FR 13254, Apr. 3, 1984, as amended at 61 FR 39095, July 26, 1996]

736.603 Collecting data on and appraising firms' qualifications.

An USAID Consultant Registry Information System (ACRIS) is maintained in Washington by the USAID Office of Small and Disadvantaged Business Utilization. Architect-engineers wishing to perform contracts for USAID should file the appropriate form with that office, as provided in section 705.002. Procurements are publicized in the *Commerce Business Daily*, as provided in FAR part 5.

[49 FR 13254, Apr. 3, 1984, as amended at 52 FR 21059, June 4, 1987; 53 FR 50631, Dec. 16, 1988]

736.605 Government cost estimate for architect-engineer work.

See 736.602–3(c)(5).

PART 737 [RESERVED]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 742—CONTRACT ADMINISTRATION

Subpart 742.7—Indirect Cost Rates

Sec.
742.770 Negotiated indirect cost rate agreement.

Subpart 742.11—Production, Surveillance, and Reporting

742.1170 Performance monitoring and progress reporting.
742.1170–1 General.
742.1170–2 Applicability.
742.1170–3 Policy.
742.1170–4 Progress reporting requirements and contract clause.

Subpart 742.15—Contractor Performance Information

742.1501 [Reserved]
742.1502 Policy.
742.1503 Procedures.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 742.7—Indirect Cost Rates

742.770 Negotiated indirect cost rate agreement.

Except for educational institutions having a cognizant agency (as defined in OMB Circular A–88, 44 FR 70094, 12/5/79) other than USAID, USAID may establish negotiated overhead rates in a Negotiated Indirect Cost Rate Agreement, executed by both parties. The Negotiated Indirect Cost Rate Agreement is automatically incorporated in each contract between the parties and shall specify: (a) The final rate(s), (b) the base(s) to which the rate(s) apply, (c) the period(s) for which the rate(s) apply, (d) the items treated as direct costs, and (e) the contract(s) to which the rate(s) apply. The Negotiated Indirect Cost Rate Agreement shall not change any monetary ceiling, obligation, or specific cost allowance or disallowance provided for in each contract between the parties.

[49 FR 13256, Apr. 3, 1984; 53 FR 50631, Dec. 16, 1988]

Subpart 742.11—Production, Surveillance, and Reporting

SOURCE: 72 FR 53163, Sept. 18, 2007, unless otherwise noted.

742.1170 Performance monitoring and progress reporting.

742.1170–1 General.

Performance monitoring is a function of contract administration used to determine contractor progress towards achieving the goals and objectives of the contract and to identify any factors that may delay or prevent the accomplishment of those goals and objectives. Performance monitoring requires USAID personnel, particularly the cognizant technical officer, to maintain adequate knowledge of the contractor's activities and progress in order to ensure that USAID's objectives, as stated in the contract's Statement of Work, will be achieved.

742.1170–2 Applicability.

(a) This section applies to USAID non-personal, professional/technical services contracts exceeding the simplified acquisition threshold, but may be applied to other USAID contracts, if the contracting officer and requiring office determine that doing so is in the best interests of the Agency. The contracting officer must ensure that this determination is documented in the contract file. This section does not apply to personal services contracts.

(b) The underlying principles of FAR 48 CFR subpart 42.11 apply to USAID contracts and are inherent to this section. However, not all of the specific requirements and terminology in FAR 48 CFR subpart 42.11 are compatible with the types of technical assistance contracts usually awarded by USAID. Therefore, this section 742.1170 applies when the requirements of FAR 48 CFR subpart 42.11 do not meet USAID requirements or are otherwise not appropriate.

(c) The progress reports discussed in this section are separate from the performance evaluation reports prepared

in accordance with FAR 48 CFR subpart 42.15 and internal Agency procedures, although they may be used by USAID personnel or their authorized representatives when evaluating the contractor's performance. Furthermore, the policies, procedures, and limitations of this section do not apply to technical reports, studies, papers, etc., the acquisition of which may be part of or even the sole purpose of the contract.

742.1170–3 Policy.

(a) The contractor is responsible for timely contract performance. Performance monitoring by USAID does not obviate this responsibility.

(b) The requiring office, particularly the cognizant technical officer and the contracting officer, will determine how to monitor the contractor's performance to protect the Government's interests, by considering:

(1) The contract requirements for reporting progress;

(2) The contract performance schedule;

(3) The contractor's implementation plan or workplan;

(4) The contractor's history of contract performance;

(5) The contractor's experience with the services or supplies being provided under the contract;

(6) The contractor's financial capability;

(7) Any other factors the requiring office, particularly the cognizant technical officer and the contracting officer, considers appropriate and necessary to adequately monitor contractor performance (for example, the day-to-day working proximity of the cognizant technical officer or contracting officer to the contractor's place of performance).

(c) In monitoring contractor performance, the requiring office (particularly the cognizant technical officer and contracting officer) must utilize any of the contractor's existing systems or processes for monitoring progress, provided that doing so is not contrary to the terms of the contract. The requiring officer or cognizant technical officer must not require anything from the contractor that is outside the scope or terms of the contract or may result in claims of waivers, of changes, or of other contract modifications. Further, progress reports shall not require information already available from other sources.

742.1170–4 Progress reporting requirements and contract clause.

(a) When the requiring office needs information on contract performance status on a regular basis, the contracting officer may require the contractor to submit periodic progress reports, tailored to address specific contract requirements but limited to only that information essential to USAID's needs in monitoring the contractor's progress.

(b) Because the cognizant technical officer is the individual most familiar with the contractor's performance, the contractor must submit the progress reports directly to the cognizant technical officer. The cognizant technical officer must review the reports and advise the contracting officer, in writing, of any recommended action, including any action needed to address potential or actual delays in performance. The cognizant technical officer must so advise the contracting officer in sufficient time, typically thirty days, for him or her to take any action that the contracting officer determines is appropriate. The requirements of this paragraph do not relieve the contractor of notification requirements identified elsewhere in the contract.

(c) The contracting officer must insert the clause at 752.242–70, Periodic Progress Reports, in solicitations and contracts that require progress reporting, as specified in this section. The contracting officer must include specific reporting instructions in the Schedule.

Subpart 742.15—Contractor Performance Information

SOURCE: 65 FR 36642, June 9, 2000, unless otherwise noted.

742.1501 [Reserved]

742.1502 Policy.

(a) USAID contracting officers shall report contractor performance information at least annually, employing

the procedures prescribed by the NIH Contractor Performance System. (Access to the system by USAID contracting office personnel is authorized by the USAID Past Performance Coordinator, E-mail address: *AIDNET: Past Performance@op.spu@aidw/Internet: pastperformance@usaid.gov*.)

(b) Performance for personal services contracts awarded under AIDAR Appendices D and J shall not be evaluated under the contractor performance reporting procedures prescribed in FAR subpart 42.15.

[65 FR 36642, June 9, 2000; 65 FR 39470, June 26, 2000]

742.1503 Procedures.

(a) [Reserved]

(b) Personal services contractors shall be recognized as Government personnel for the purposes of the restriction on access to contractor performance information in FAR 42.1503(b).

PART 745—GOVERNMENT PROPERTY

AUTHORITY: Sec. 621, Pub. L. 787–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

Subpart 745.1—General

745.106 Contract clauses.

(a) The contracting officer shall insert the clause at 752.245–71 in all contracts under which the contractor will acquire property for use overseas and the contract funds were obligated under a Strategic Objective agreement (or similar agreement) with the cooperating country.

(b) The contracting officer shall insert the applicable clause as required in (48 CFR) FAR 45.106 in all contracts under which the contractor will acquire property with funds not already obligated under a Strategic Objective agreement (or similar agreement) with the cooperating country.

[64 FR 5008, Feb. 2, 1999]

PART 747—TRANSPORTATION

AUTHORITY: Sec. 621, Pub. L. 98–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

Subpart 747.5—Ocean Transportation by U.S.-Flag Vessels

747.507 Contract clauses.

Contracting officers shall insert the clause at 752.247–70 in solicitations and contracts solely for ocean transportation services, and in solicitations and contracts for goods and ocean transportation services when the ocean transportation will be fixed at the time the contract is awarded. Contracting Officers shall use (48 CFR) FAR 52.247–64 as prescribed in (48 CFR) FAR 27.507(a) in other situations.

[64 FR 5008, Feb. 2, 1999]

PART 749—TERMINATION OF CONTRACTS

Subpart 749.1—General Principles

Sec.

749.100 Scope of subpart.
749.111 Review of proposed settlements.
749.111–70 Termination settlement review boards.
749.111–71 Required review and approval.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13256, Apr. 3, 1984, unless otherwise noted.

Subpart 749.1—General Principles

749.100 Scope of subpart.

The Foreign Aid and Related Agencies Appropriation Act, 1963, and subsequent appropriation Acts, have imposed the following requirement:

None of the funds appropriated or made available pursuant to this Act for carrying out the Foreign Assistance Act of 1961, as amended, may be used for making payments on any contract for procurement to which the United States is a party entered into after the date of enactment of this Act which

does not contain a provision authorizing the termination of such contract for the convenience of the United States.

See, for example, section 110 of the Foreign Assistance and Related Agencies Appropriation Act, 1965.

749.111 Review of proposed settlements.

749.111–70 Termination settlement review boards.

(a) The USAID Settlement Review Board shall be composed of the following members or their delegates (except as provided under 749.111–71(b)):

(1) M/OAA Director;

(2) Controller;

(3) General Counsel.

(b) The M/OAA Director or his/her delegate shall be designated as chairman of the board. Delegate members of the board shall have broad business and contracting experience and shall be senior USAID officials. Each member or his/her delegate must be in attendance in order to conduct business, and the board shall act by majority vote. No individual shall serve as a member of a board for the review of a proposed settlement if he/she has theretofore reviewed, approved or disapproved or recommended approval, disapproval or other action with respect to any substantive element of such settlement proposal.

(c) The chairman shall appoint a nonvoting recorder who shall be responsible for receiving cases, scheduling and recording the proceedings at meetings, maintaining a log of all cases received by him/her for the board, and other duties as assigned by the board.

[49 FR 13256, Apr. 3, 1984, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

749.111–71 Required review and approval.

(a) *When required.* The USAID Settlement Review Board shall receive and approve all USAID/W and Mission proposed settlements or determinations if:

(1) The amount of settlement, by agreement or determination, involves $100,000 or more;

(2) The settlement or determination is limited to adjustment of the fee of a cost-reimbursement contract or subcontract and: (i) In the case of complete termination, the fee, as adjusted, with respect to the terminated portion of the contract or subcontract is $100,000 or more; or (ii) in the case of a partial termination, the fee, as adjusted, with respect to the terminated portion of the contract or subcontract is $100,000 or more;

(3) The head of the contracting activity concerned determines that a review of a specific case or class of cases is desirable; or

(4) The contracting officer, in his/her discretion, desires review by the board.

(b) *Level of review.* Proposed settlements in excess of $5 million shall be reviewed and approved by a board consisting of the M/OAA Director, the General Counsel, and the Controller, without power of redelegation.

(c) *Submission of information.* The contracting officer shall submit to the board a statement of the proposed settlement agreement or determination, supported by such detailed information as is required for an adequate review. This information should normally include copies of: (1) The contractor's or subcontractor's settlement proposal, (2) the audit report, (3) the property disposal report and any required approvals in connection therewith, and (4) the contracting officer's memorandum explaining the settlement. The board may, in its discretion, require the submission of additional information.

[49 FR 13256, Apr. 3, 1984, as amended at 57 FR 5236, Feb. 13, 1992; 59 FR 33446, June 29, 1994; 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 750—EXTRAORDINARY CONTRACTUAL ACTIONS

Sec.

750.000 Scope of part.

Subpart 750.70 [Reserved]

Subpart 750.71—Extraordinary Contractual Actions To Protect Foreign Policy Interests of the United States

750.7100 Scope of subpart.
750.7101 Authority.
750.7102 General policy.
750.7103 Definitions.

750.7104 Types of actions.
750.7105 Approving authorities.
750.7106 Standards for deciding cases.
750.7106–1 General.
750.7106–2 Amendments without consideration.
750.7106–3 Mistakes.
750.7106–4 Informal commitments.
750.7107 Limitations upon exercise of authority.
750.7108 Contractual requirements.
750.7109 Submission of requests by contractors.
750.7109–1 Filing requests.
750.7109–2 Form of requests by contractors.
750.7109–3 Facts and evidence.
750.7110 Processing cases.
750.7110–1 Investigation.
750.7110–2 Office of General Counsel coordination.
750.7110–3 Submission of cases to the M/OP Director.
750.7110–4 Processing by M/OAA Director.
750.7110–5 Contract files.
750.7110–6 Inter-agency coordination.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13257, Apr. 3, 1984, unless otherwise noted.

750.000 Scope of part.

USAID is not among the agencies named in the Act or authorized by the President to take actions under it; however, see Subpart 750.71—Extraordinary Contractual Actions to Protect Foreign Policy Interests of the United States.

Subpart 750.70 [Reserved]

Subpart 750.71—Extraordinary Contractual Actions To Protect Foreign Policy Interests of the United States

750.7100 Scope of subpart.

This subpart sets forth the standards and the procedures for disposition of requests for extraordinary contractual actions under Executive Order 11223.

750.7101 Authority.

Under section 633 of the Foreign Assistance Act of 1961, 75 Stat. 454 (22 U.S.C. 2933), as amended; Executive Order 11223, dated May 12, 1965 (30 FR 6635), as amended; and Executive Order 12163, dated September 29, 1979 (44 FR 56673), as amended, the Administrator of the U.S. Agency for International Development has been granted authority to provide extraordinary contractual relief. The Authority is set forth in sections 3 and 4 of Executive Order 11223, as follows:

Section 3. With respect to cost-type contracts heretofore or hereafter made with non-profit institutions under which no fee is charged or paid, amendments or modifications of such contracts may be made with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished, irrespective of the time or circumstances of the making, or of the form of the contract amended or modified, or of the amending or modifying contract and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

Section 4. With respect to contracts heretofore or hereafter made, other than those described in section 3 of this order, amendments and modifications of such contracts may be made with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished, irrespective of the time or circumstances of the making, or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof, if the Secretary of State or the Director of the United States International Development Cooperation Agency (with respect to functions vested in or delegated to Director) determines in each case that such action is necessary to protect the foreign policy interests of the United States.

[49 FR 49472, Dec. 20, 1984, as amended at 62 FR 40469, July 29, 1997; 64 FR 42042, Aug. 3, 1999]

750.7102 General policy.

Extra-contractual claims arising from foreign assistance contracts will be processed in accordance with this subpart, which is similar to that utilized to process claims for extraordinary relief under FAR Part 50, as modified to meet the circumstances involved under the Foreign Assistance Act and the different authority involved.

750.7103 Definitions.

(a) The term *approving authority* as used in this subpart means an officer or

official having been delegated authority to approve actions under the Executive Order. This authority is distinguished from authority to take appropriate contractual action pursuant to such approval.

(b) The term *the Executive Order* shall mean Executive Order 11223 (30 FR 6635) as amended, unless otherwise stated.

(c) The term *the Act* shall mean the Foreign Assistance Act of 1961, as amended.

[49 FR 13257, Apr. 3, 1984, as amended at 49 FR 49472, Dec. 20, 1984]

750.7104 Types of actions.

Three types of actions may be taken by or pursuant to the direction of an approving authority under the Executive Order. These are contractual adjustments such as amendments without consideration, correction of mistakes, and formalization of informal commitments.

750.7105 Approving authorities.

All authority to approve actions under this subpart has been delegated to the M/OAA Director.

[50 FR 16086, Apr. 24, 1985, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

750.7106 Standards for deciding cases.

750.7106–1 General.

The mere fact that losses occur under a Government contract is not, by itself, a sufficient basis for the exercise of the authority conferred by the Executive Order. Whether, in a particular case, appropriate action such as amendment without consideration, correction of a mistake or ambiguity in a contract, or formalization of an informal commitment, will protect the foreign policy interests of the United States is a matter of sound judgment to be made on the basis of all of the facts of such case. Although it is obviously impossible to predict or enumerate all the types of cases with respect to which action may be appropriate, examples of certain cases or types of cases where action may be proper are set forth in sections 750.7106–2 through 750.7106–4. Even if all of the factors contained in any of the examples are present, other factors or considerations in a particular case may warrant denial of the request. These examples are not intended to exclude other cases where the approving authority determines that the circumstances warrant action.

750.7106–2 Amendments without consideration.

(a) Where an actual or threatened loss under a foreign assistance contract, however caused, will impair the productive ability of a contractor whose continued performance of any foreign assistance contract or whose continued operation as a source of supply is found to be essential to protect the foreign policy interests of the United States, the contract may be adjusted but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(b) Where a contractor suffers a loss (not merely a diminution of anticipated profits) on a foreign assistance contract as a result of Government action, the character of the Government action will generally determine whether any adjustment in the contract will be made and its extent. Where the Government action is directed primarily at the contractor and is taken by the Government in its capacity as the other contracting party, the contract may be adjusted if fairness so requires; thus where such Government action, although not creating any liability on its part, increases the cost of performance, considerations of fairness may make appropriate some adjustment in the contract.

750.7106–3 Mistakes.

A contract may be amended or modified to corrrect or mitigate the effect of a mistake, including the following examples:

(a) A mistake or ambiguity which consists of the failure to express or to express clearly in the written contract the agreements as both parties understood them;

(b) A mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer; and

(c) A mutual mistake as to a material fact.

Amending contracts to correct mistakes with the least possible delay normally will protect the foreign policy interests of the United States by expediting the procurement program and by giving contractors proper assurance that such mistakes will be corrected expeditiously and fairly.

750.7106–4 Informal commitments.

Informal commitments may be formalized under certain circumstances to permit payment to persons who have taken action without a formal contract; for example, where any person, pursuant to written or oral instructions from an officer or official of the Agency and relying in good faith upon the apparent authority of the officer or official to issue such instructions, has arranged to furnish or has furnished property or services to the agency and/or to a foreign assistance contractor or subcontractor without formal contractual coverage for such property or services. Formalization of commitments under such circumstances normally will protect the foreign policy interests of the United States by assuring persons that they will be treated fairly and paid expeditiously.

750.7107 Limitations upon exercise of authority.

(a) The Executive Order is not authority for:

(1) The use of the cost-plus-a-percentage-of-cost system of contracting;

(2) The making of any contract in violation of existing law relating to limitation on profit or fees;

(3) The waiver of any bid, payment performance or other bond required by law.

(b) No amendments, or modifications shall be entered into under the authority of the Executive Order:

(1) Unless, with respect to cases falling within Section 4 of the Executive Order, a finding is made that the action is necessary to protect the foreign policy interests of the United States;

(2) Unless other legal authority in the Agency is deemed to be lacking or inadequate;

(3) Except within the limits of the amounts appropriated and the statutory contract authorization.

(c) No contract shall be amended or modified unless the request therefor has been filed before all obligations (including final payment) under the contract have been discharged.

(d) No informal commitment shall be formalized unless:

(1) A request for payment has been filed within six months after arranging to furnish or furnishing property or services in reliance upon the commitment;

(2) USAID has received the services satisfactorily performed, or has accepted property furnished in reliance on the commitment;

(3) The USAID employees alleged to have made the informal commitment have accepted responsibility for making the informal commitment in question; and

(4) USAID has taken appropriate action to prevent recurrence.

[49 FR 13257, Apr. 3, 1984, as amended at 50 FR 16088, Apr. 24, 1985; 53 FR 4982, Feb. 19, 1988]

750.7108 Contractual requirements.

Every contract amended or modified pursuant to this subpart shall contain:

(a) A citation of the Act and Executive Order.

(b) A brief statement of the circumstances justifying the action;

(c) A recital of the finding, with respect to cases falling within Section 4 of the Executive Order, that the action is necessary to protect the foreign policy interests of the United States.

750.7109 Submission of requests by contractors.

750.7109–1 Filing requests.

Any person (hereinafter called the ''contractor'') seeking an adjustment under standards set forth in 750.7106 may file a request in duplicate with the cognizant contracting officer or his/her duly authorized representative. If such filing is impracticable, requests will be deemed to be properly filed if filed with the Chief of the Office of Acquisition and Assistance, Evaluation Division

(M/OAA/E) for forwarding to the cognizant contracting officer.

[49 FR 13257, Apr. 3, 1984, as amended at 50 FR 50303, Dec. 10, 1985; 55 FR 6802, Feb. 27, 1990; 56 FR 67225, Dec. 30, 1991; 59 FR 33446, June 29, 1994; 72 FR 19670, Apr. 19, 2007]

750.7109–2 Form of requests by contractors.

The contractor's request shall normally consist of a letter to the contracting officer providing the information specified in FAR 50.303.

750.7109–3 Facts and evidence.

The contracting officer or the approving authority may, where considered appropriate, request the contractor to furnish the facts and evidence as described in FAR 50.304.

[49 FR 13257, Apr. 3, 1984, as amended at 62 FR 40469, July 29, 1997]

750.7110 Processing cases.

750.7110–1 Investigation.

The Evaluation Division of the Office of Acquisition and Assistance (M/OAA/E) shall be responsible for assuring that the case prepared by the cognizant contracting officer makes a thorough investigation of all facts and issues relevant to each situation. Facts and evidence shall be obtained from contractor and Government personnel and shall include signed statements of material facts within the knowledge of the individuals where documentary evidence is lacking and audits where considered necessary to establish financial or cost related facts. The investigation shall establish the facts essential to meet the standards for deciding the particular case and shall address the limitations upon exercise of the authority of the M/OAA Director to approve the request.

[62 FR 40469, July 29, 1997, as amended at 64 FR 42042, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

750.7110–2 Office of General Counsel coordination.

Prior to the submission of a case to the M/OAA Director recommending extraordinary contractual relief, the claim shall be fully developed by the cognizant contracting officer and concurrences or comments shall be obtained from the Office of General Counsel for the proposed relief to be granted. Such concurrences or comments shall be incorporated in or accompany the action memorandum submitted for consideration to the M/OAA Director in accordance with 750.7110–3.

[62 FR 40469, July 29, 1997, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

750.7110–3 Submission of cases to the M/OP Director.

Cases to be submitted for consideration by the M/OAA Director shall be prepared and forwarded by the cognizant contracting officer through M/OAA/E to the M/OAA Director by means of an action memorandum. M/OAA/E will review the action memorandum for accuracy and completeness. The action memorandum shall provide for approval or disapproval by the M/OAA Director of the disposition recommended by the contracting officer. The action memorandum shall address:

(a) The nature of the case;

(b) The basis for authority to act under section 750.7101;

(c) The findings of fact essential to the case (see 750.7109–3) arranged chronologically with cross references to supporting enclosures;

(d) The conclusions drawn from applying the standards for deciding cases, as set forth in 750.7106, to the findings of fact;

(e) Compliance with the limitations upon exercise of authority, as set forth in section 750.7107 (for informal commitments, include statements addressing each of the limitations in paragraph (d) of 750.7107):

(f) Concurrences or comments obtained from the Office of General Counsel;

(g) Verification of funds availability and the contracting officer's determination of cost/price reasonableness when the disposition recommended requires payment to a contractor;

(h) The disposition recommended and, if contractual action is recommended with respect to cases falling within Section 4 of the Executive Order, the opinion of the contracting officer that such action is necessary to protect the foreign policy interest of the United States; and

(i) The action memorandum shall enclose all evidentiary materials, including the reports and comments of all cognizant Government or other officials, and a copy of the contractor's request. The action memorandum should provide the following information related to the contractor's request, as applicable:

(1) Date of request;

(2) Date request received by USAID:

(3) Contract number;

(4) Contractor's name and address;

(5) Name, address, and phone number of contractor's representative;

(6) Name, office symbol, and phone number of cognizant contracting officer;

(7) Amount of request.

[62 FR 40469, July 29, 1997, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

750.7110–4 Processing by M/OAA Director.

When the action memorandum has been determined to be as accurate and complete as possible and has been prepared in accordance with this subpart, M/OAA/E will forward the action memorandum to the M/OAA Director. The M/OAA Director will sign and date the action memorandum indicating approval or disapproval of the disposition recommended by the contracting officer.

[62 FR 40469, July 29, 1997, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

750.7110–5 Contract files.

The fully executed action memorandum indicating approval/disapproval and a copy of the contractual document implementing any approved contractual action shall be placed in the contract file.

[62 FR 40469, July 29, 1997; 62 FR 47532, Sept. 9, 1997]

750.7110–6 Inter-agency coordination.

(a) *General.* Where a case involves matters of interest to more than one department or agency, USAID should maintain liaison with other departments and agencies of the Government and take such joint action as may be proper under the circumstances, including holding joint meetings.

(b) *Cases involving funds of other departments or agencies.* Requests for adjustment within any category, involving the funds of another department or agency, shall not be approved by USAID until advice is requested and received from the department or agency whose funds are involved.

SUBCHAPTER H—CLAUSES AND FORMS

PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 752.2—Texts of Provisions and Clauses

Sec.
752.200 Scope of subpart.
752.202–1 Definitions.
752.204–2 Security requirements.
752.209–71 Organizational conflicts of interest discovered after award.
752.211–70 Language and measurement.
752.216–70 Award fee.
752.219–8 Utilization of small business concerns and small disadvantaged business concerns.
752.219–70 USAID Mentor-Protégé Program.
752.219–71 Mentor requirements and evaluation.
752.225–9 Buy American Act—Trade Agreements Act—Balance of Payments Program.
725.225–70 Source, origin and nationality requirements.
725.225–71 Local procurement.
752.226–1 Determination of status as disadvantaged enterprise.
752.226–2 Subcontracting with disadvantaged enterprises.
752.226–3 Limitation on subcontracting.
752.227–14 Rights in Data—general.
752.228–3 Worker's compensation insurance (Defense Base Act).
752.228–7 Insurance—liability to third persons
752.228–9 Cargo insurance.
752.228–70 Medical Evacuation (MEDEVAC) Services.
752.229–70 Federal, state and local taxes.
752.231–71 Salary supplements for HG employees.
752.232–7 Payments under time-and-materials and labor-hour contracts.
752.232–70 Letter of credit advance payment.
752.242–70 Periodic progress reports.
752.245–70 Government property—USAID reporting requirements.
752.245–71 Title to and care of property.
752.247–70 Preference for privately owned U.S.-flag commercial vessels.

Subpart 752.70—Texts of USAID Contract Clauses

752.7000 Scope of subpart.
752.7001 Biographical data.
752.7002 Travel and transportation.
752.7003 Documentation for payment.
752.7004 Emergency locator information.
752.7005 Submission requirements for development experience documents.
752.7006 Notices.
752.7007 Personnel compensation.
752.7008 Use of Government facilities or personnel.
752.7009 Marking.
752.7010 Conversion of U.S. dollars to local currency.
752.7011 Orientation and language training.
752.7012 Protection of the individual as a research subject.
752.7013 Contractor-mission relationships.
752.7014 Notice of changes in travel regulations.
752.7015 Use of pouch facilities.
752.7016—752.7017 [Reserved]
752.7018 Health and accident coverage for USAID participant trainees.
752.7019 Participant training.
752.7020 [Reserved]
752.7021 Changes in tuition and fees.
752.7022 Conflicts between contract and catalog.
752.7023 Required visa form for USAID participants.
752.7024 Withdrawal of students.
752.7025 Approvals.
752.7026 [Reserved]
752.7027 Personnel.
752.7028 Differential and allowances.
752.7029 Post privileges.
752.7030 Inspection trips by contractor's officers and executives.
752.7031 Leave and holidays.
752.7032 International travel approval and notification requirements.
752.7033 Physical fitness.
752.7034 Acknowledgement and disclaimer.
752.7035 Public notices.

Subpart 752.3–70—USAID Clause Matrices [Reserved]

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13259, Apr. 3, 1984, unless otherwise noted.

Subpart 752.2—Texts of Provisions and Clauses

752.200 Scope of subpart.

None of the clauses specified in this subpart are for use in USAID personal services contracts. For personal services contract clauses, see AIDAR Appendix D—Direct USAID Contracts

with U.S. Citizens or U.S. Residents for Personal Services Abroad and AIDAR Appendix J—Direct USAID Contracts with Cooperating Country Nationals and with Third Country Nationals for Personal Services Abroad.

[49 FR 13259, Apr. 3, 1984, as amended at 51 FR 11450, Apr. 3, 1986; 51 FR 12706, Apr. 15, 1986; 57 FR 5236, Feb. 13, 1992; 62 FR 40469, July 29, 1997]

752.202–1 Definitions.

(a) As prescribed in 702.270 and in FAR Subpart 2.2, USAID contracts use the Definitions clause in FAR 52.202–1 and its Alternate I, as appropriate, and the following additional definitions.

(b) *Alternate 70.* For use in all USAID contracts. Use in addition to the clause in FAR 52.202–1.

USAID DEFINITIONS CLAUSE—GENERAL SUPPLEMENT FOR USE IN ALL USAID CONTRACTS (JAN 1990)

(a) *USAID* shall mean the U.S. Agency for International Development.

(b) *Administrator* shall mean the Administrator or the Deputy Administrator of USAID.

(c) When this contract is with an educational institution *Campus Coordinator* shall mean the representative of the Contractor at the Contractor's home institution, who shall be responsible for coordinating the activities carried out under the contract.

(d) When this contract is with an educational institution *Campus Personnel* shall mean representatives of the Contractor performing services under the contract at the Contractor's home institution and shall include the Campus Coordinator.

(e) *Consultant* shall mean any especially well qualified person who is engaged, on a temporary or intermittent basis to advise the Contractor and who is not an officer or employee of the Contractor who performs other duties for the Contractor.

(f) *Contractor employee* shall mean an employee of the Contractor assigned to work under this contract.

(g) *Cooperating Country or Countries* shall mean the foreign country or countries in or for which services are to be rendered hereunder.

(h) *Cooperating Government* shall mean the government of the Cooperating Country.

(i) *Federal Acquisition Regulations (FAR),* when referred to herein shall include U.S. Agency for International Development Acquisition Regulations (AIDAR).

(j) *Government* shall mean the United States Government.

(k) *Mission* shall mean the United States AID Mission to, or principal USAID office in, the Cooperating Country.

(l) *Mission Director* shall mean the principal officer in the Mission in the Cooperating Country, or his/her designated representative.

(c) *Alternate 71.* For use in USAID contracts with an educational institution for participant training. Use in addition to the clauses in FAR 52.202–1 and in 752.202–1(b) of this chapter.

USAID DEFINITIONS CLAUSE—SUPPLEMENT FOR CONTRACTS WITH AN EDUCATIONAL INSTITUTION FOR PARTICIPANT TRAINING (APR 1984)

(a) *Catalog* shall mean any medium by which the Institution publicly announces terms and conditions for enrollment in the Institution, including tuition and fees to be charged. This includes ''bulletins,'' ''announcements,'' or any other similar word the Institution may use.

(b) *Director* shall mean the individual who fills the USAID position of Director, Center for Human Capacity Development (G/HCD), or his/her authorized representative acting within the limits of his/her authority.

(c) *Fees* shall mean those applicable charges directly related to enrollment in the Institution. This shall not include any permit charge (e.g., parking, vehicle registration), or charges for services of a personal nature (e.g., food, housing, laundry) unless specifically called for in this contract.

(d) *Institution* shall mean the educational institution providing services hereunder. The terms ''Institution'' and ''Contractor'' are synonymous.

(e) *Tuition* shall mean the amount of money charged by an institution for instruction, not including fees as described in this section.

(d) *Alternate 72.* For use in all USAID contracts which involve any performance overseas. Use in addition to the clauses in FAR 52.202–1 and in 752.202–1(b) of this chapter.

USAID DEFINITIONS CLAUSE—SUPPLEMENT FOR USAID CONTRACTS INVOLVING PERFORMANCE OVERSEAS (DEC 1986)

(a) *Contractor's Chief of Party* shall mean the representative of the Contractor in the Cooperating Country who shall be responsible for supervision of the performance of all duties undertaken by the Contractor in the Cooperating Country.

(b) *Cooperating Country National (CCN) employee* means an individual who meets the citizenship requirements of 48 CFR 702.170–5 and is hired while residing outside the

United States for work in a cooperating country.

(c) *Dependents* shall mean:

(1) Spouse;

(2) Children (including step and adopted children) who are unmarried and under 21 years of age or, regardless of age, are incapable of self support.

(3) Parents (including step and legally adoptive parents), of the employee or of the spouse, when such parents are at least 51 percent dependent on the employee for support; and

(4) Sisters and brothers (including step or adoptive sisters or brothers) of the employee, or of the spouse, when such sisters and brothers are at least 51 percent dependent on the employee for support, unmarried and under 21 years of age, or regardless of age, are incapable of self support.

(d) *Local currency* shall mean the currency of the Cooperating Country.

(e) *Regular employee* shall mean a Contractor employee appointed to serve one year or more in the Cooperating Country.

(f)*Short-term employee* shall mean a Contractor employee appointed to serve less than one year in the Cooperating Country.

(g) *Third Country National (TCN) employee* means an individual who meets the citizenship requirements of 48 CFR 702.170–15 and is hired while residing outside the United States for work in a Cooperating Country.

[49 FR 13259, Apr. 3, 1984, as amended at 52 FR 4145, Feb. 10, 1987; 52 FR 38098, Oct. 14, 1987; 55 FR 6802, Feb. 27, 1990; 64 FR 42042, Aug. 3, 1999]

752.204–2 Security requirements.

Pursuant to the Uniform State/USAID/USIA Regulations (Volume 12, Foreign Affairs Manual, Chapter 540), USAID applies the safeguards applicable to ''Confidential'' information to administratively controlled information designated as ''Sensitive But Unclassified''. Therefore, when the clause in FAR 52.204–2 is used in USAID contracts, pursuant to 704.404, paragraph (a) of the clause is revised as follows:

(a) This clause applies to the extent that this contract involves access to classified ('Confidential', 'Secret', or 'Top Secret'), or administratively controlled ('Sensitive But Unclassified') information.

[49 FR 13259, Apr. 3, 1984, as amended at 49 FR 33668, Aug. 24, 1984; 62 FR 40469, July 29, 1997; 64 FR 5008, Feb. 2, 1999]

752.209–71 Organizational conflicts of interest discovered after award.

As prescribed in 709.507–2, include the following clause in any solicitation containing a provision in accordance with (48 CFR) FAR 9.507–1, or a clause in accordance with (48 CFR) FAR 9.507–2, establishing a restraint on the contractor's eligibility for future contracts.

ORGANIZATIONAL CONFLICTS OF INTEREST DISCOVERED AFTER AWARD (JUN 1993)

(a) The Contractor agrees that, if after award it discovers either an actual or potential organizational conflict of interest with respect to this contract, it shall make an immediate and full disclosure in writing to the Contracting Officer which shall include a description of the action(s) which the Contractor has taken or proposes to take to avoid, eliminate or neutralize the conflict.

(b) The Contracting Officer shall provide the contractor with written instructions concerning the conflict. USAID reserves the right to terminate the contract if such action is determined to be in the best interest of the Government.

(End of clause)

[58 FR 42255, Aug. 9, 1993, as amended at 64 FR 5008, Feb. 2, 1999]

752.211–70 Language and measurement.

The following clause shall be used in all USAID-direct contracts.

LANGUAGE AND MEASUREMENT (JUN 1992)

(a) The English language shall be used in all written communications between the parties under this contract with respect to services to be rendered and with respect to all documents prepared by the contractor except as otherwise provided in the contract or as authorized by the contracting officer.

(b) Wherever measurements are required or authorized, they shall be made, computed, and recorded in metric system units of measurement, unless otherwise authorized by USAID in writing when it has found that such usage is impractical or is likely to cause U.S. firms to experience significant inefficiencies or the loss of markets. Where the metric system is not the predominant standard for a particular application, measurements may be expressed in both the metric and the traditional equivalent units, provided the metric units are listed first.

(End of clause)

[57 FR 23321, June 3, 1992. Redesignated at 61 FR 39095, July 26, 1996]

752.216–70 Award fee.

As prescribed in 716.406, insert the following clause in solicitations and contracts in which an award-fee contract is contemplated.

AWARD FEE (MAY 1997)

(a) The Government shall pay the Contractor for performing this contract such base fee and such additional fee as may be awarded, as provided in the Schedule.

(b) Payment of the base fee and award fee shall be made as specified in the Schedule; provided, that after payment of 85 percent of the base fee and potential award fee, the Contracting Officer may withhold further payment of the base fee and award fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total base fee and potential award fee or $100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(c) Award fee determinations made by the Government under this contract are not subject to the Disputes clause.

(End of clause)

[64 FR 5008, Feb. 2, 1999]

752.219–8 Utilization of small business concerns and small disadvantaged business concerns.

The Foreign Assistance Act calls for USAID to give small businesses an opportunity to provide supplies and services for foreign assistance projects. To help USAID meet this obligation, the following paragraph is to be added to the clause prescribed in FAR 19.708(a):

USAID small business provision. To permit USAID, in accordance with the small business provisions of the Foreign Assistance Act, to give small business firms an opportunity to participate in supplying equipment supplies and services financed under this contract, the Contractor shall, to the maximum extent possible, provide the following information to the Office of Small and Disadvantaged Business Utilization (OSDBU), USAID, Washington, DC 20523–1414, at least 45 days prior to placing any order in excess of the simplified acquisition threshold except where a shorter time is requested of, and granted by OSDBU:

(1) Brief general description and quantity of commodities or services;

(2) Closing date for receiving quotations or bids; and

(3) Address where invitations or specifications may be obtained.

[49 FR 13259, Apr. 3, 1984, as amended at 52 FR 21059, June 4, 1987; 56 FR 2699, Jan. 24, 1991; 61 FR 39095, July 26, 1996; 62 FR 40469, July 29, 1997]

752.219–70 USAID Mentor-Protégé Program.

As prescribed in 719.273–11(a), insert the following provision:

USAID MENTOR-PROTÉGÉ PROGRAM (JULY 13, 2007)

(a) Large and small business are encouraged to participate in the USAID Mentor-Protégé Program (the ''Program''). Mentor firms provide eligible small business Protégés with developmental assistance to enhance their business capabilities and ability to obtain Federal contracts.

(b) Mentor firms are large prime contractors or eligible small business capable of providing developmental assistance. Protégé firms are small business as defined in 13 CFR parts 121, 124, and 126.

(c) Developmental assistance is technical, managerial, financial, and other mutually beneficial assistance that aids Protégés. The costs for developmental assistance are not chargeable to the contract.

(d) Firms interested in participating in the Program are encouraged to contact the USAID Mentor-Protégé Program Manager (202–712–1500) for more information.

(End of provision)

[72 FR 32546, June 13, 2007]

752.219–71 Mentor requirements and evaluation.

As prescribed in AIDAR 719.273–11(b), insert the following clause:

MENTOR REQUIREMENTS AND EVALUATION (JULY 13, 2007)

(a) Mentor and Protégé firms shall submit an evaluation of the overall experience in the Program to OSDBU at the conclusion of the mutually agreed upon Program period,

the conclusion of the contract, or the voluntary withdrawal by either party from the Program, whichever occurs first. At the conclusion of each year in the Mentor-Protégé Program, the Mentor and Protégé will formally brief the USAID Mentor-Protégé Program Manager regarding Program accomplishments under their Mentor-Protégé Agreement.

(b) Mentor or Protégé shall notify OSDBU in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the Program.

(End of clause)

[72 FR 32546, June 13, 2007]

752.225–9 Buy American Act—Trade Agreements Act—Balance of Payments Program.

The clause prescribed by FAR 25.408(a)(2) is not generally included in USAID contracts when more stringent source requirements are stated in the contract or when inclusion is not appropriate under FAR 25.403, or 725.403 of this chapter. (See Executive Order 11223, dated May 12, 1965, 30 FR 6635.) The clause setting forth USAID's source restrictions is shown in section 752.225–70.

[49 FR 13259, Apr. 3, 1984, as amended at 54 FR 16122, Apr. 21, 1989; 59 FR 33447, June 29, 1994; 62 FR 40470, July 29, 1997]

752.225–70 Source, origin and nationality requirements.

The following clause is required as prescribed in 725.704.

SOURCE, ORIGIN AND NATIONALITY REQUIREMENTS (FEB 1997)

(a) Except as may be specifically approved by the Contracting Officer, all commodities (e.g., equipment, materials, vehicles, supplies) and services (including commodity transportation services) which will be financed under this contract with U.S. dollars shall be procured in accordance with the requirements in 22 CFR part 228, ''Rules on Source, Origin and Nationality for Commodities and Services Financed by USAID.'' The authorized source for procurement is Geographic Code 000 unless otherwise specified in the schedule of this contract. Guidance on eligibility of specific goods or services may be obtained from the Contracting Officer.

(b) Ineligible goods and services. The Contractor shall not procure any of the following goods or services under this contract:

(1) Military equipment,

(2) Surveillance equipment,

(3) Commodities and services for support of police and other law enforcement activities,

(4) Abortion equipment and services,

(5) Luxury goods and gambling equipment, or

(6) Weather modification equipment.

(c) Restricted goods. The Contractor shall not procure any of the following goods or services without the prior written approval of the Contracting Officer:

(1) Agricultural commodities,

(2) Motor vehicles,

(3) Pharmaceuticals and contraceptive items,

(4) Pesticides,

(5) Fertilizer,

(6) Used equipment, or

(7) U.S. government-owned excess property.

If USAID determines that the Contractor has procured any of these specific restricted goods under this contract without the prior written authorization of the Contracting Officer, and has received payment for such purposes, the Contracting Officer may require the contractor to refund the entire amount of the purchase.

[62 FR 40470, July 29, 1997; 62 FR 45334, Aug. 27, 1997]

752.225–71 Local procurement.

For use in any USAID contract involving performance overseas.

LOCAL PROCUREMENT (FEB 1997)

(a) Local procurement involves the use of appropriated funds to finance the procurement of goods and services supplied by local businesses, dealers, or producers, with payment normally being in the currency of the cooperating country.

(b) All locally-financed procurements must be covered by source/origin and nationality waivers as set forth in subpart F of 22 CFR part 228 except as provided for in 22 CFR 228.40, Local procurement.

[62 FR 40470, July 29, 1997; 62 FR 45334, Aug. 27, 1997; 62 FR 47532, Sept. 9, 1997]

752.226–1 Determination of status as disadvantaged enterprise.

As prescribed in 726.7006(a), insert the following provision:

DISADVANTAGED ENTERPRISE REPRESENTATION (APR 1991)

The offeror/contractor shall submit a representation in the following form to the contracting officer:

(a) *Representation.* The offeror represents that:

(1) It □ is, □ is not a small disadvantaged business.

(2) It □ is, □ is not an historically black college or university, as designated by the Secretary of Education pursuant to 34 CFR 608.2.

(3) It □ is, □ is not a college or university having a student body in which more than 40 percent of the students are Hispanic American.

(4) It □ is, □ is not a private voluntary organization which is controlled by individuals who are socially and economically disadvantaged.

(b) *Definitions.* (1) *Asian Pacific Americans,* as used in this provision means United States citizens whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands (Republic of Palau), the Northern Mariana Islands, Laos, Kampuchea (Cambodia), Taiwan, Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, or the Federated States of Micronesia.

(2) *Controlled by socially and economically disadvantaged individuals* means management and daily business are controlled by one or more such individuals.

(3) *Native Americans,* as used in this provision means American Indians, Eskimos, Aleuts, and native Hawaiians.

(4) *Owned by socially and economically disadvantaged individuals* means at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals.

(5) *Small business concern,* as used in this provision, means a U.S. concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualifies as a small business under the criteria and size standards in 13 CFR part 121.

(6) *Small disadvantaged business,* as used in this provision, means a small business concern that:

(i) Is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals; and

(ii) Has its management and daily business controlled by one or more such individuals.

(7) *Subcontinent Asian Americans,* as used in this provision, means United States citizens whose origins are in India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal.

(c) *Qualified groups.* The offeror shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women.

(End of provision)

[56 FR 27209, June 13, 1991, as amended at 62 FR 40470, July 29, 1997]

752.226–2 Subcontracting with disadvantaged enterprises.

As prescribed in 726.7007, insert the following clause:

SUBCONTRACTING WITH DISADVANTAGED ENTERPRISES (APR 1997)

NOTE: This clause does not apply to prime contractors that qualify as disadvantaged enterprises as described below.

(a) Not less than ten (10) percent of the dollar value of this contract shall be subcontracted to disadvantaged enterprises as described in paragraph (b) of this clause.

(b) Disadvantaged enterprises are U.S. organizations or individuals that are:

(1) Business concerns (as defined in FAR 19.001) owned and controlled by socially and economically disadvantaged individuals;

(2) Institutions designated by the Secretary of Education, pursuant to 34 CFR 608.2, as historically black colleges and universities:

(3) Colleges and universities having a student body in which more than 40 percent of the students are Hispanic American; or

(4) Private voluntary organizations which are controlled by individuals who are socially and economically disadvantaged.

(c) *Definitions.* (1) *Controlled by socially and economically disadvantaged individuals* means management and daily business are controlled by one or more such individuals.

(2) *Owned by socially and economically disadvantaged individuals* means at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals.

(3) *Socially and economically disadvantaged individuals* has the same meaning as in FAR 19.001, except that the term also includes women.

(d) Contractors should require representations from their subcontractors regarding their status as a disadvantaged enterprise. Contractors acting in good faith may rely on such representations by their subcontractors.

(End of clause)

[56 FR 27210, June 13, 1991, as amended at 62 FR 40470, July 29, 1997]

752.226–3 Limitation on subcontracting.

As prescribed in 726.7008, insert the following clause:

LIMITATIONS ON SUBCONTRACTING (JUN 1993)

By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract, at least 51 percent of the cost of contract performance incurred for personnel shall be expended for employees of the contractor or employees of other disadvantaged enterprises eligible under the terms of 706.302–71. For the purposes of this clause, independent contractors hired by the contractor shall be considered employees of the contractor.

(End of clause)

[58 FR 42255, Aug. 9, 1993, as amended at 62 FR 40470, July 29, 1997]

752.227–14 Rights in Data—general.

As prescribed in 727.409(b), insert the following clause:

RIGHTS IN DATA—GENERAL (OCT 2007)

The following paragraph (d) replaces paragraph (d) of (48 CFR) FAR 52.227–14 Rights in Data—General.

(d) Release, publication and use of data.

(1) For all data first produced or specifically used by the Contractor in the performance of this contract in the United States, its territories, or Puerto Rico, the Contractor shall have the right to use, release to others, reproduce, distribute, or publish such data, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this contract [see paragraph (d)(3) for limitations on contracts performed outside of the US].

(2) The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(3) For all data first produced or specifically used by the Contractor in the overseas performance of this contract, the Contractor shall not release, reproduce, distribute, or publish such data without the written permission of the Contracting Officer. The government also may require the contractor to assign copyright to the government or another party as circumstances warrant or as specifically stated elsewhere in the contract.

[72 FR 53164, Sept. 18, 2007]

752.228–3 Worker's compensation insurance (Defense Base Act).

As prescribed in 728.309, the following supplemental coverage is to be added to the clause specified in FAR 52.228–3 by the USAID contracting officer.

(a) The Contractor agrees to procure Defense Base Act (DBA) insurance pursuant to the terms of the contract between USAID and USAID's DBA insurance carrier unless the Contractor has a DBA self insurance program approved by the Department of Labor or has an approved retrospective rating agreement for DBA.

(b) If USAID or the contractor has secured a waiver of DBA coverage (see AIDAR 728.305–70(a)) for contractor's employees who are not citizens of, residents of, or hired in the United States, the contractor agrees to provide such employees with worker's compensation benefits as required by the laws of the country in which the employees are working, or by the laws of the employee's native country, whichever offers greater benefits.

(c) The Contractor further agrees to insert in all subcontracts hereunder to which the DBA is applicable, a clause similar to this clause, including this sentence, imposing on all subcontractors a like requirement to provide overseas workmen's compensation insurance coverage and obtain DBA coverage under the USAID requirements contract.

[53 FR 50631, Dec. 16, 1988, as amended at 54 FR 16122, Apr. 21, 1989; 56 FR 67226, Dec. 30, 1991]

752.228–7 Insurance—liability to third persons.

As prescribed in 728.307–2(c), the following paragraph is to be added to the clause specified in FAR 52.228–7 as either paragraph (h) (if FAR 52.228–7 *Alternate I* is not used) or (i) (if FAR 52.228–7 Alternate I is used):

( ) *Insurance on private automobiles.* If the Contractor or any of its employees or their dependents transport or cause to be transported (whether or not at contract expense) privately owned automobiles to the Cooperating Country, or they or any of them purchase an automobile within the Cooperating Country, the Contractor agrees to make certain that all such automobiles during such ownership within the Cooperating Country will be covered by a paid-up insurance policy issued by a reliable company providing the following minimum coverages or such other minimum coverages as may be set by the Mission Director, payable in United States dollars or its equivalent in the currency of the Cooperating Country: injury to persons, $10,000/$20,000; property damage, $5,000. The

premium costs for such insurance shall not be a reimbursable cost under this contract. Copies of such insurance policies shall be preserved and made available as part of the Contractor's records which are required to be preserved and made available by the ''Audit and Records—Negotiation'' clause of this contract.

[53 FR 50632, Dec. 16, 1988, as amended at 54 FR 16122, Apr. 21, 1989; 62 FR 40470, July 29, 1997]

752.228–9 Cargo insurance.

As prescribed in 728.313(a), the following preface is to be used preceding the text of the clause at FAR 52.228–9:

PREFACE: To the extent that marine insurance is necessary or appropriate under this contract, the contractor shall ensure that U.S. marine insurance companies are offered a fair opportunity to bid for such insurance. This requirement shall be included in all subcontracts under this contract.

[53 FR 50632, Dec. 16, 1988]

752.228–70 Medical Evacuation (MEDEVAC) Services.

As prescribed in 728.307–70, for use in all contracts requiring performance overseas:

MEDICAL EVACUATION (MEDEVAC) SERVICES (JUL 2007)

(a) Contractor must provide MEDEVAC service coverage to all U.S. citizen, U.S. resident alien, and Third Country National employees and their authorized dependents (hereinafter ''individual'') while overseas under a USAID-financed direct contract. USAID will reimburse reasonable, allowable, and allocable costs for MEDEVAC service coverage incurred under the contract. The Contracting Officer will determine the reasonableness, allowability, and allocability of the costs based on the applicable cost principles and in accordance with cost accounting standards.

(b) *Exceptions.* (i) The Contractor is not required to provide MEDEVAC insurance to eligible employees and their dependents with a health program that includes sufficient MEDEVAC coverage as approved by the Contracting Officer.

(ii) The Mission Director may make a written determination to waive the requirement for such coverage. The determination must be based on findings that the quality of local medical services or other circumstances obviate the need for such coverage for eligible employees and their dependents located at post.

(c) Contractor must insert a clause similar to this clause in all subcontracts that require performance by contractor employees overseas.

[59 FR 33447, June 29, 1994, as amended at 72 FR 19669, Apr. 19, 2007]

752.229–70 Federal, state and local taxes.

For contracts involving performance overseas the clauses prescribed in FAR 29.401–3 or 29.401–4 may be modified to specify that the taxes referred to are United States taxes.

752.231–71 Salary supplements for HG employees.

As prescribed in 731.205–71, for use in all contracts with a possible need or services of a HG employee. The clause should also be inserted in all subsequent sub-contracts.

SALARY SUPPLEMENTS FOR HG EMPLOYEES (OCT 1998)

(a) Salary supplements are payments made that augment an employee's base salary or premiums, overtime, extra payments, incentive payment and allowances for which the HG employee would qualify under HG rules or practice for the performance of his/hers regular duties or work performed during his/hers regular office hours. Per diem, invitational travel, honoraria and payment for work carried out outside of normal working hours are not considered to be salary supplements.

(b) Salary supplements to HG Employees are not allowable without the written approval of the Contracting Officer.

[64 FR 16649, Apr. 6, 1999]

752.232–70 Letter of credit advance payment.

As required by 732.406–73 insert the following clause in contracts being paid by Letter of Credit.

LETTER OF CREDIT ADVANCE PAYMENT (OCT 1989)

(a) Payment under this contract shall be by means of a Letter of Credit (LOC) in accordance with the terms and conditions of the LOC and any instructions issued by the USAID Office of Financial Management, Cash Management and Payment Division (FM/CMP).

(b) As long as the LOC is in effect, the terms and conditions of the LOC and any instructions issued by FM/CMP constitute the payment conditions of this contract, superseding and taking precedence over any other clause of this contract concerning payment.

(c) If the LOC is revoked, payment may be made on a cost-reimbursement basis, in accordance with the other clauses of this contract concerning payment.

(d) Revocation of the LOC is at the discretion of FM/CMP after consultation with the contracting officer. Notification to the contractor of revocation must be in writing and must specify the reasons for such action. The contractor may appeal any such revocation to the contracting officer, in accordance with the Disputes clause of this contract. Pending final decision, payments under the contact will be in accordance with paragraph (c) of this clause.

[49 FR 13259, Apr. 3, 1984, as amended at 49 FR 33668, Aug. 24, 1984; 54 FR 46391, Nov. 3, 1989; 56 FR 67226, Dec. 30, 1991; 59 FR 33447, June 29, 1994]

752.242–70 Periodic progress reports.

As prescribed in 742.1170–3(c), insert the following clause in contracts for which periodic progress reports are required from the contractor. The term ''contract'' shall be interpreted as ''task order'' or ''delivery order'' when this clause is used in an indefinite-delivery contract.

PERIODIC PROGRESS REPORTS (OCT 2007)

(a) The contractor shall prepare and submit progress reports as specified in the contract schedule. These reports are separate from the interim and final performance evaluation reports prepared by USAID in accordance with FAR 42.15 and internal Agency procedures, but they may be used by USAID personnel or their authorized representatives when evaluating the contractor's performance.

(b) During any delay in furnishing a progress report required under this contract, the contracting officer may withhold from payment an amount not to exceed US$25,000 (or local currency equivalent) or 5 percent of the amount of this contract, whichever is less, until such time as the contractor submits the report or the contracting officer determines that the delay no longer has a detrimental effect on the Government's ability to monitor the contractor's progress.

[72 FR 53164, Sept. 18, 2007]

752.245–70 Government property—USAID reporting requirements.

In response to a GAO audit recommendation, USAID contracts, except for those for commercial items, must contain the following preface and reporting requirement as additions to the appropriate Government Property clause prescribed by FAR 45.106.

Preface: to be inserted preceding the text of the FAR clause.

The term *Government furnished property* wherever it may appear in the following clause, shall mean (1) non-expendable personal property owned by or leased to the U.S. Government and furnished to the contractor *and* (2) personal property furnished either prior to or during the performance of this contract by any U.S. Government accountable officer to the contractor for use in connection with performance of this contract and identified by such officer as accountable. The term *government property*, wherever it may appear in the following clause, shall mean government-furnished property and non-expendable personal property title to which vests in the U.S. Government under this contract. Non-expendable property, for purposes of this contract, is defined as property which is complete in itself, does not lose its identity or become a component part of another article when put into use; is durable, with an expected service life of two years or more; and which has a unit cost of more than $500.

Reporting Requirement: to be inserted following the text of the FAR clause.

Reporting Requirements: The contractor will submit an annual report on all non-expendable property in a form and manner acceptable to USAID substantially as follows:

ANNUAL REPORT OF GOVERNMENT PROPERTY IN CONTRACTOR'S CUSTODY

[(Name of contractor) as of (end of contract year), 19xx]

Motor vehicles	Furniture and furnishings—		Other nonexpendable property
	Office	Living quarters	
A. Value of property as of last report	.....	.....	.....
B. Transactions during this reporting period	.....	.....	.....
1. Acquisitions (add):			
a. Purchased by contractor[1]	.....	.....	.....
b. Transferred from USAID[2]	.....	.....	.....
c. Transferred from others, without reimbursement[3]	.....	.....	.....
2. Disposals (deduct):			
a. Returned to USAID	.....	.....	.....
b. Transferred to USAID—contractor purchased	.....	.....	.....
c. Transferred to other Government agencies[3]	.....	.....	.....
d. Other disposals[3]	.....	.....	.....
C. Value of property as of reporting date	.....	.....	.....
D. Estimated average age of contractor held property	.....	.....	.....
	Years	Years	Years

[1] Property which is complete in itself, does not lose its identity or become a component part of another article when put into use; is durable, with an expected service life of two years or more; and which has a unit cost of more than $500.

[2] Government furnished property listed in this Contract as nonexpendable.
[3] Explain if transactions were not processed through or otherwise authorized by USAID.

PROPERTY INVENTORY VERIFICATIONS

I attest that (1) physical inventories of Government property are taken not less frequently than annually; (2) the accountability records maintained for Government property in our possession are in agreement with such inventories; and (3) the total of the detailed accountability records maintained agrees with the property value shown opposite line C above, and the estimated average age of each category of property is as cited opposite line D above.

_____

Authorized Signature

[49 FR 13259, Apr. 3, 1984, as amended at 62 FR 40470, July 29, 1997]

752.245–71 Title to and care of property.

As prescribed in 745.106(a), the following clause shall be included in all contracts when the contractor will acquire property under the contract for use overseas and the contract funds were obligated under a Strategic Objective agreement (or similar agreement) with the cooperating country.

TITLE TO AND CARE OF PROPERTY (APR 1984)

(a) Title to all non-expendable property purchased with contract funds under this contract and used in the Cooperating Country, shall at all times be in the name of the Cooperating Government, or such public or private agency as the Cooperating Government may designate, unless title to specified types or classes of non-expendable property is reserved to USAID under provisions set forth in the schedule of this contract; but all such property shall be under the custody and control of Contractor until the owner of title directs otherwise, or completion of work under this contract or its termination, at which time custody and control shall be turned over to the owner of title or disposed of in accordance with its instructions. All performance guaranties and warranties obtained from suppliers shall be taken in the name of the title owner. (Non-expendable property is property which is complete in itself, does not lose its identity or become a component part of another article when put into use; is durable, with an expected service life of two years or more; and which has a unit cost of $500 of more.)

(b) Contractor shall prepare and establish a program, to be approved by the Mission, for the receipt, use, maintenance, protection, custody, and care of non-expendable property for which it has custodial responsibility, including the establishment of reasonable controls to enforce such program.

(c)(1) For non-expendable property to which title is reserved to the U.S. Government under provisions set forth in the schedule of this contract, Contractor shall submit an annual report on all non-expendable property under its custody as required in the clause of this contract entitled ''Government Property''.

(2) For non-expendable property titled to the Cooperating Government, the Contractor shall, within 90 days after completion of this contract, or at such other date as may be fixed by the Contracting Officer, submit an inventory schedule covering all items of non-expendable property under its custody, which have not been consumed in the performance of this contract. The Contractor shall also indicate what disposition has been made of such property.

[49 FR 13259, Apr. 3, 1984, as amended at 62 FR 40470, July 29, 1997; 64 FR 5009, Feb. 2, 1999]

752.247–70 Preference for privately owned U.S.-flag commercial vessels.

As prescribed in 747.507, insert the following clause:

PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS (OCT 1996)

(a) Under the provisions of the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)) at least 50 percent of the gross tonnage of equipment, materials, or commodities financed by USAID, or furnished without provision for reimbursement, or at least 75 percent of the gross tonnage of cargo moving under P.L. 480 financed by the U.S. Department of Agriculture, that may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo liners, and tankers) shall be transported in privately owned U.S.-flag commercial vessels.

(b) In accordance with USAID regulations and consistent with the regulations of the Maritime Administration, USAID applies Cargo Preference requirements on the basis of programs or activities that generally include more than one contract. Thus, the amount of cargo fixed on privately owned U.S.-flag vessels under this contract may be more or less than the required 50 or 75 percent, depending on current compliance with Cargo Preference requirements. If freight under the contract is fixed on a U.S. flag vessel, Alternate I of this clause shall apply.

(c)(1) The contractor shall submit one legible copy of a rated on-board ocean bill of lading for each shipment to both the Division of National Cargo, Office of Cargo Preference, Maritime Administration, U.S. Department of Transportation, Washington, DC

20590, and the Transportation Division, Office of Acquisition and Assistance, USAID, Washington, DC 20523–7900.

(2) The contractor shall furnish these bill of lading copies within 20 working days of the date of loading for shipments originating in the United States, or within 30 working days for shipments originating outside the United States. Each bill of lading copy shall contain the following information:

(i) Sponsoring U.S. Government agency.

(ii) Name of vessel.

(iii) Vessel flag registry.

(iv) Date of loading.

(v) Port of loading.

(vi) Port of final discharge.

(vii) Description of commodity.

(viii) Gross weight in pounds and cubic feet if available.

(ix) Total ocean freight revenue in U.S. dollars.

Alternate I

(d) If freight is fixed on a U.S. flag vessel, except as provided in paragraph (e) of this clause, the contractor shall use privately owned U.S. flag commercial vessels, and no others, in the ocean transportation of any supplies to be furnished under this contract.

(e) If such vessels are not available, or not available at rates that are fair and reasonable for privately owned U.S. flag commercial vessels, the Contractor shall notify the contracting officer and request either authorization to ship in foreign-flag vessels or designation of available U.S.-flag vessels. If the Contractor is authorized in writing by the Contracting Officer to ship the supplies in foreign-flag vessels, the contract price shall be equitably adjusted to reflect the difference in costs of shipping the suppliers in privately owned U.S.-flag commercial vessels and foreign-flag vessels.

[64 FR 5009, Feb. 2, 1999, as amended at 72 FR 19670, Apr. 19, 2007]

Subpart 752.70—Texts of USAID Contract Clauses

752.7000 Scope of subpart.

Subpart 752.70 contains the text of USAID-specific contract clauses for which there is no FAR equivalent. The clauses in this subpart do not apply to contracts for personal services. For personal service contract clauses see AIDAR Appendix D—Direct USAID Contracts with U.S. Citizens or U.S. Residents for Personal Services Abroad and AIDAR Appendix J—Direct USAID Contracts with Cooperating Country Nationals and with Third Country Nationals for Personal Services Abroad.

[49 FR 13259, Apr. 3, 1984, as amended at 57 FR 5237, Feb. 13, 1992]

752.7001 Biographical data.

The following clause is to be included in all USAID cost reimbursement contracts.

BIOGRAPHICAL DATA (JUL 1997)

The Contractor agrees to furnish to the Contracting Officer on USAID Form 1420–17, ''Contractor Employee Biographical Data Sheet'', biographical information on the following individuals to be employed in the performance of the contract: (1) All individuals to be sent outside the United States, or (2) any employees designated as ''key personnel''. Biographical data in the form usually maintained by the Contractor on the other individuals employed under the contract shall be available for review by USAID at the Contractor's headquarters. A supply of USAID Form 1420–17 will be provided with this contract. The Contractor may reproduce additional copies as necessary.

[62 FR 40470, July 29, 1997; 62 FR 45334, Aug. 27, 1997; 62 FR 47532, Sept. 9, 1997]

752.7002 Travel and transportation.

For use in cost reimbursement contracts performed in whole or in part overseas.

TRAVEL AND TRANSPORTATION (JAN 1990)

(a) *General.* The Contractor will be reimbursed for reasonable, allocable and allowable travel and transportation expenses incurred under and for the performance of this contract. Determination of reasonableness, allocability and allowability will be made by the Contracting Officer based on the applicable cost principles, the Contractor's established policies and procedures, USAID's established policies and procedures for USAID direct-hire employees, and the particular needs of the project being implemented by this contract. The following paragraphs provide specific guidance and limitations on particular items of cost.

(b) *International travel.* For travel to and from post of assignment the Contractor shall be reimbursed for travel costs and travel allowances of travelers from place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of the travel from the employee's residence in the United States) to the post of duty in the Cooperating Country and return to place of residence in the United States (or other location provided that the cost of such travel does not exceed

the cost of travel from the post of duty in the Cooperating Country to the employee's residence) upon completion of services by the individual. Reimbursement for travel will be in accordance with the applicable cost principles and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. If a regular employee does not complete one full year at post of duty (except for reasons beyond his/her control), the costs of going to and from the post of duty for that employee and his/her dependents are not reimbursable hereunder. If the employee serves more than one year but less than the required service in the Cooperating Country (except for reasons beyond his/her control) the costs of going to the post of duty are reimbursable hereunder but the costs of going from post of duty to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location as approved by the Contracting Officer are not reimbursable under this contract for the employee and his/her dependents. When travel is by economy class accommodations, the Contractor will be reimbursed for the cost of transporting up to 22 pounds of accompanied personal baggage per traveler in addition to that regularly allowed with the economy ticket provided that the total number of pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers shall not be in excess of the rates authorized in the Standardized Regulations (Government Civilians, Foreign Areas)—hereinafter referred to as the Standardized Regulations—as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover en route for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the established practice of the Contractor but not to exceed the amounts stated in the Standardized Regulations.

(c) *Local travel.* Reimbursement for local travel in connection with duties directly referable to the contract shall not be in excess of the rates established by the Mission Director for the travel costs of travelers in the Cooperating Country. In the absence of such established rates the Contractor shall be reimbursed for actual travel costs of travelers in the Cooperating Country, if not provided by the Cooperating Government or the Mission, including travel allowances at rates not in excess of those prescribed by the Standardized Regulations.

(d) *Travel for consultation.* The Contractor shall be reimbursed for the round trip of the Contractor's Chief of Party in the Cooperating Country or other designated Contractor employee or consultant in the Cooperating Country performing services required under this Contract, for travel from the Cooperating Country to the Contractor's office in the United States or to USAID/Washington for consultation and return on occasions deemed necessary by the Contractor and approved in advance, in writing, by the Contracting Officer or the Mission Director.

(e) *Special international travel and third country travel.* For special travel which advances the purpose of the contract, which is not otherwise provided by the Cooperating Government, and with the prior written approval of the Contracting Officer or the Mission Director, the Contractor shall be reimbursed for (i) the travel cost of travelers other than between the United States and the Cooperating Country and for local travel within other countries and (ii) travel allowance for travelers while in travel status and while performing services hereunder in such other countries at rates not in excess of those prescribed by the Standardized Regulations.

(f) *Indirect travel for personal convenience.* When travel is performed by an indirect route for the personal convenience of the traveler, the allowable costs of such travel will be computed on the basis of the cost of allowable air fare via the direct usually traveled route. If such costs include fares for air or ocean travel by foreign flag carriers, approval for indirect travel by such foreign flag carriers must be obtained from the Contracting Officer or the Mission Director before such travel is undertaken, otherwise only that portion of travel accomplished by United States-flag carriers will be reimbursable within the above limitation of allowable costs.

(g) *Limitation on travel by dependents.* Travel costs and allowances will be allowed only for dependents of regular employees and such costs shall be reimbursed for travel from place of abode to assigned station in the Cooperating Country and return, only if dependent remains in the country for at least 9 months or one-half of the required tour of duty of the regular employee responsible for such dependent, whichever is greater. If the dependent is eligible for educational travel pursuant to the ''Differential and Allowances'' clause of this contract, time spent away from post resulting from educational travel will be counted as time at post.

(h) *Delays en route.* The Contractor may grant to travelers under this contract reasonable delays en route while in travel status when such delays are caused by events beyond the control of such traveler or Contractor. It is understood that if delay is

caused by physical incapacitation, personnel shall be eligible for such sick leave as provided under the ''Leave and Holidays'' clause of this contract.

(i) *Travel by privately owned automobile.* The Contractor shall be reimbursed for the cost of travel performed by a regular employee in his/her privately owned automobile at a rate not to exceed that authorized in the Federal Travel Regulations plus authorized per diem for the employee and for each of the authorized dependents traveling in the automobile, if the automobile is being driven to or from the Cooperating Country as authorized under the contract, provided that the total cost of the mileage and the per diem paid to all authorized travelers shall not exceed the total constructive cost of fare and normal per diem by all authorized travelers by surface common carrier or authorized air fare, whichever is less.

(j) *Emergency and irregular travel and transportation.* Emergency transportation costs and travel allowances while en route, as provided in this section will also be reimbursed not to exceed amounts authorized by the Foreign Service Travel Regulations for USAID-direct hire employees in like circumstances under the following conditions:

(1) The costs of going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location for Contractor employees and dependents and returning to the post of duty, when the Contractor's Chief of Party, with the concurrence of the Contracting Officer or Mission Director makes a written determination that such travel is necessary for one of the reasons specified in subparagraphs (j)(1) (i) and (ii) of this section. A copy of the written determination shall be furnished to the Contracting Officer.

(i) Need for medical care beyond that available within the area to which the employee is assigned, or serious effect on physical or mental health if residence is continued at assigned post of duty, subject in either case, to the limitations stated in the clause of this contract entitled ''Personnel—Physical Fitness of Employee and Dependents.'' The Mission Director may authorize a medical attendant to accompany the employee at contract expense if, based on medical opinion, such an attendant is necessary.

(ii) Death, or serious illness or injury of a member of the immediate family of the employee or the immediate family of the employee's spouse.

(2) When, for any reason, the Mission Director determines it is necessary to evacuate the Contractor's entire team (employees and dependents) or Contractor dependents only, the Contractor will be reimbursed for travel and transportation expenses and travel allowance while en route, for the cost of the individuals going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other approved location. The return of such employees and dependents may also be authorized by the Mission Director when, in his/her discretion, he/she determines it is prudent to do so.

(3) The Mission Director may also authorize emergency or irregular travel and transportation in other situations, when in his/her opinion, the circumstances warrant such action. The authorization shall include the kind of leave to be used and appropriate restrictions as to time away from post, transportation of personal and/or household effects, etc. Requests for such emergency travel shall be submitted through the Contractor's Chief of Party.

(k) *Home leave travel.* To the extent that home leave has been authorized as provided in the ''Leave and Holidays'' clause of this contract, the cost of travel for home leave is reimbursable for travel costs and travel allowances of travelers from the post of duty in the Cooperating Country to place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of travel to the employee's residence in the United States) and return to the post of duty in the Cooperating Country. Reimbursement for travel will be in accordance with the applicable cost principles and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. When travel is by economy class accommodations, the Contractor will be reimbursed for the cost of transporting up to 22 pounds of accompanied personal baggage per traveler in addition to that regularly allowed with the economy ticket provided that the total number of pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers shall not be in excess of the rates authorized in the Standardized Regulations as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover en route for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the established practice of the Contractor but not to exceed the amounts stated in the Standardized Regulations.

(l) *Rest and recuperation travel.* The Contractor shall be reimbursed for the cost of travel performed by regular employees and dependents for purposes of rest and recuperation provided that such reimbursement does

not exceed that authorized for USAID direct hire employees, and provided further that no reimbursement will be made unless approval is given by the Contractor's Chief of party.

(m) *Transportation of motor vehicles, personal effects and household goods.* (1) Transportation, including packing and crating costs, will be paid for shipping from the point of origin in the United States (or other location as approved by the Contracting Officer) to post of duty in the Cooperating Country and return to point of origin in the United States (or other location as approved by the Contracting Officer) of one privately-owned vehicle for each regular employee, personal effects of travelers and household goods of each regular employee not to exceed the limitations in effect for such shipments for USAID direct hire employees in accordance with the Foreign Service Travel Regulations as in effect when shipment is made.

(2) If a regular employee does not complete one full year at post of duty (except for reasons beyond his/her control), the costs for transportation of vehicles, effects and goods to and from the post of duty are not reimbursable hereunder. If the employee serves more than one year but less than the required service in the Cooperating Country (except for reasons beyond his/her control) the costs for transportation of vehicles, effects and goods to the post of duty are reimbursable hereunder but the costs for transportation of vehicles, effects and goods from post of duty to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location as approved by the Contracting Officer are not reimbursable under this contract.

(3) The cost of transporting motor vehicles and household goods shall not exceed the cost of packing, crating and transportation by surface. In the event that the carrier does not require boxing or crating of motor vehicles for shipment to the Cooperating Country, the cost of boxing or crating is not reimbursable. The transportation of a privately-owned motor vehicle for a regular employee may be authorized by the Contractor as replacement of the last such motor vehicle shipped under this contract for the employee when the Mission Director or his/her designee determines in advance and so notifies the Contractor in writing that the replacement is necessary for reasons not due to the negligence or malfeasance of the regular employee. The determination shall be made under the same rules and regulations that apply to Mission employees.

(n) *Unaccompanied baggage.* Unaccompanied baggage is considered to be those personal belongings needed by the traveler immediately upon arrival at destination. To permit the arrival of effects to coincide with the arrival of regular employees and dependents, consideration should be given to advance shipments of unaccompanied baggage. The Contractor will be reimbursed for costs of shipment of unaccompanied baggage (in addition to the weight allowance for household effects) not to exceed the limitations in effect for USAID direct hire employees in accordance with the Foreign Service Travel Regulations as in effect when shipment is made.

This unaccompanied baggage may be shipped as air freight by the most direct route between authorized points of origin and destination regardless of the modes of travel used. This provision is applicable to home leave travel and to short-term employees when these are authorized by the terms of this contract.

(o) *Storage of household effects.* The cost of storage charges (including packing, crating, and drayage costs) in the U.S. of household goods of regular employees will be permitted in lieu of transportation of all or any part of such goods to the Cooperating Country under paragraph (m) above provided that the total amount of effects shipped to the Cooperating Country or stored in the U.S. shall not exceed the amount authorized for USAID direct hire employees under the Uniform Foreign Service Travel Regulations.

(p) *International ocean transportation.* (1) Flag eligibility requirements for ocean carriage are covered by the ''Source and Nationality Requirements'' clause of this contract.

(i) Transportation of things. Where U.S. flag vessels are not available, or their use would result in a significant delay, the Contractor may obtain a release from this requirement from the Transportation Division, Office of Acquisition and Assistance, U.S. Agency for International Development, Washington, DC. 20523–1419, or the Mission Director, as appropriate, giving the basis for the request.

(ii) Transportation of persons. Where U.S. flag vessels are not available, or their use would result in a significant delay, the Contractor may obtain a release from this requirement from the Contracting Officer or the Mission Director, as appropriate.

(2) Transportation of foreign-made vehicles. Reimbursement of the costs of transporting a foreign-made motor vehicle will be made in accordance with the provisions of the Foreign Service Travel Regulations.

(3) Reduced rates on U.S. flag carriers. Reduced rates on United States flag carriers are in effect for shipments of household goods and personal effects of USAID contract personnel. These reduced rates are available provided the shipper states on the bill of lading that the cargo is ''Personal property-not for resale-payment of freight charges is at U.S. Government (USAID) expense and any special or diplomatic discounts accorded this type cargo are applicable.'' The Contractor will not be reimbursed for shipments of household goods or personal effects in an

amount in excess of the reduced rates available in accordance with the foregoing.

(End of clause)

[55 FR 6803, Feb. 27, 1990, as amended at 56 FR 2699, Jan. 24, 1991; 72 FR 19670, Apr. 19, 2007]

752.7003 Documentation for payment.

The following clause is required in all USAID direct contracts, excluding fixed price contracts:

DOCUMENTATION FOR PAYMENT (NOV 1998)

(a) Claims for reimbursement or payment under this contract must be submitted to the Paying Office indicated in the schedule of this contract. The cognizant technical officer (CTO) is the authorized representative of the Government to approve vouchers under this contract. The Contractor must submit either paper or fax versions of the SF–1034—Public Voucher for Purchases and Services Other Than Personal. Each voucher shall be identified by the appropriate USAID contract number, in the amount of dollar expenditures made during the period covered.

(1) The SF 1034 provides space to report by line item for products or services provided. The form provides for the information to be reported with the following elements:

TOTAL EXPENDITURES

[Document Number: XXX–X–XX–XXXX–XX]

Line item No.	Description	Amt. vouchered to date	Amt. vouchered this period
001	Product/Service Desc. for Line Item 001	$XXXX.XX	$ XXXX.XX
002	Product/Service Desc. for Line Item 002	XXXX.XX	XXXX.XX
Total		XXXX.XX	XXXX.XX

(2) The fiscal report shall include the following certification signed by an authorized representative of the Contractor:

The undersigned hereby certifies to the best of my knowledge and belief that the fiscal report and any attachments have been prepared from the books and records of the Contractor in accordance with the terms of this contract and are correct: the sum claimed under this contract is proper and due, and all the costs of contract performance (except as herewith reported in writing) have been paid, or to the extent allowed under the applicable payment clause, will be paid currently by the Contractor when due in the ordinary course of business; the work reflected by these costs has been performed, and the quantities and amounts involved are consistent with the requirements of this Contract; all required Contracting Officer approvals have been obtained; and appropriate refund to USAID will be made promptly upon request in the event of disallowance of costs not reimbursable under the terms of this contract.

BY: _____

TITLE: _____

DATE: _____

(b) *Local currency payment.* The Contractor is fully responsible for the proper expenditure and control of local currency, if any, provided under this contract. Local currency will be provided to the Contractor in accordance with written instructions provided by the Mission Director. The written instructions will also include accounting, vouchering, and reporting procedures. A copy of the instructions shall be provided to the Contractor's Chief of Party and to the Contracting Officer. The costs of bonding personnel responsible for local currency are reimbursable under this contract.

(c) Upon compliance by the Contractor with all the provisions of this contract, acceptance by the Government of the work and final report, and a satisfactory accounting by the Contractor of all Government-owned property for which the Contractor had custodial responsiblity, the Government shall promptly pay to the Contractor any moneys (dollars or local currency) due under the completion voucher. The Government will make suitable reduction for any disallowance or indebtedness by the Contractor by applying the proceeds of the voucher first to such deductions and next to any unliquidated balance of advance remaining under this contract.

(d) The Contractor agrees that all approvals of the Mission Director and the Contracting Officer which are required by the provisions of this contract shall be preserved and made available as part of the Contractor's records which are required to be presented and made available by the clause of this contract entitled ''Audit and Records—Negotiation''.

[53 FR 6829, Mar. 3, 1988, as amended at 64 FR 5009, Feb. 2, 1999]

752.7004 Emergency locator information.

The following clause is to be included in all contracts requiring travel overseas.

EMERGENCY LOCATOR INFORMATION (JUL 1997)

The Contractor agrees to provide the following information to the Mission Administrative Officer on or before the arrival in the host country of every contract employee or dependent:

(1) The individual's full name, home address, and telephone number.

(2) The name and number of the contract, and whether the individual is an employee or dependent.

(3) The contractor's name, home office address, and telephone number, including any after-hours emergency number(s), and the name of the contractor's home office staff member having administrative responsibility for the contract.

(4) The name, address, and telephone number(s) of each individual's next of kin.

(5) Any special instructions pertaining to emergency situations such as power of attorney designees or alternate contact persons.

[62 FR 40470, July 29, 1997; 62 FR 45334, Aug. 27, 1997]

752.7005 Submission requirements for development experience documents.

The following clause shall be included in all USAID professional/technical contracts in which development experience documents are likely to be produced.

SUBMISSION REQUIREMENTS FOR DEVELOPMENT EXPERIENCE DOCUMENTS (OCT 1997)

(a) Contract Reports and Information/Intellectual Products. (1) The Contractor shall submit to the Development Experience Information Division of the Center for Development Information and Evaluation (PPC/DCIE/DI) in the Bureau for Policy and Program Coordination, copies of reports and information products which describe, communicate or organize program/project development assistance activities, methods, technologies, management, research, results and experience as outlined in the Agency's ADS Chapter 540, section E540.5.2b(3). Information may be obtained from the Cognizant Technical Officer (CTO). These reports include: assessments, evaluations, studies, development experience documents, technical reports and annual reports. The Contractor shall also submit to PPC/CDIE/DI copies of information products including training materials, publications, databases, computer software programs, videos and other intellectual deliverable materials required under the Contract Schedule. Time-sensitive materials such as newsletters, brochures, bulletins or periodic reports covering periods of less than a year are not to be submitted.

(2) Upon contract completion, the contractor shall submit to PPC/CDIE/DI an index of all reports and information/intellectual products referenced in paragraph (a)(1) of this clause.

(b) *Submission requirements*—(1) *Distribution.* (i) The contractor shall submit contract reports and information/intellectual products (referenced in paragraph (a)(1) of this clause) in electronic format and hard copy (one copy) to U.S. Agency for International Development PPC/CDIE/DI, Attn: ACQUISITIONS, Washington D.C. 20523 at the same time submission is made to the CTO.

(ii) The contractor shall submit the reports index referenced in paragraph (a)(2) of this clause and any reports referenced in paragraph (a)(1) of this clause that have not been previously submitted to PPC/CDIE/DI, within 30 days after completion of the contract to the address cited in paragraph (b)(1)(i) of this clause.

(2) *Format.* (i) Descriptive information is required for all Contractor products submitted. The title page of all reports and information products shall include the contract number(s), contractor name(s), name of the USAID cognizant technical office, the publication or issuance date of the document, document title, author name(s), and strategic objective or activity title and associated number. In addition, all materials submitted in accordance with this clause shall have attached on a separate cover sheet the name, organization, address, telephone number, fax number, and Internet address of the submitting party.

(ii) The hard copy report shall be prepared using non-glossy paper (preferably recycled and white or off-white) using black ink. Elaborate art work, multicolor printing and expensive bindings are not to be used. Whenever possible, pages shall be printed on both sides.

(iii) The electronic document submitted shall consist of only one electronic file which comprises the complete and final equivalent of the hard copy submitted.

(iv) Acceptable software formats for electronic documents include WordPerfect, Microsoft Word, ASCII, and Portable Document Format (PDF). Submission in Portable Document format is encouraged.

(v) The electronic document submission shall include the following descriptive information:

(A) Name and version of the application software used to create the file, e.g., WordPerfect Version 6.1 or ASCII or PDF.

(B) The format for any graphic and/or image file submitted, e.g., TIFF-compatible.

(C) Any other necessary information, e.g. special backup or data compression routines, software used for storing/retrieving submitted data, or program installation instructions.

[64 FR 5010, Feb. 2, 1999]

752.7006 Notices.

The following clause shall be used in all USAID contracts.

NOTICES (APR 1984)

Any notice given by any of the parties hereunder shall be sufficient only if in writing and delivered in person or sent by telegraph, cable, or registered or regular mail as follows:

To USAID: Administrator, U.S. Agency for International Development, Washington, DC 20523–0061. Attention: Contracting Officer (the name of the cognizant Contracting Officer with a copy to the appropriate Mission Director).

To Contractor: At Contractor's address shown on the cover page of this contract, or to such other address as either of such parties shall designate by notice given as herein required. Notices hereunder shall be effective when delivered in accordance with this clause or on the effective date of the notice, whichever is later.

[49 FR 13259, Apr. 3, 1984, as amended at 56 FR 2699, Jan. 24, 1991; 61 FR 39095, July 26, 1996]

752.7007 Personnel compensation.

The following clause shall be used in all USAID cost-reimbursement contracts.

PERSONNEL COMPENSATION (JUL 2007)

(a) Direct compensation of the Contractor's personnel will be in accordance with the Contractor's established policies, procedures, and practices, and the cost principles applicable to this contract.

(b) Reimbursement of the employee's base annual salary plus overseas recruitment incentive, if any, which exceed the USAID Contractor Salary Threshold (USAID CST) stated in USAID Automated Directives System (ADS) Chapter 302 USAID Direct Contracting, must be approved in writing by the Contracting Officer, as prescribed in 731.205–6(b) or 731.371(b), as applicable.

[49 FR 13259, Apr. 3, 1984, as amended at 49 FR 33669, Aug. 24, 1984; 61 FR 39095, July 26, 1996; 62 FR 40470, July 29, 1997; 72 FR 19669, Apr. 19, 2007]

752.7008 Use of Government facilities or personnel.

The following clause is for use in all USAID non-commercial contracts.

USE OF GOVERNMENT FACILITIES OR PERSONNEL (APR 1984)

(a) The Contractor and any employee or consultant of the Contractor is prohibited from using U.S. Government facilities (such as office space or equipment) or U.S. Government clerical or technical personnel in the performance of the services specified in the contract, unless the use of Government facilities or personnel is specifically authorized in the contract, or is authorized in advance, in writing, by the Contracting Officer.

(b) If at any time it is determined that the Contractor, or any of its employees or consultants have used U.S. Government facilities or personnel without authorization either in the contract itself, or in advance, in writing, by the Contracting Officer, then the amount payable under the contract shall be reduced by an amount equal to the value of the U.S. Government facilities or personnel used by the Contractor, as determined by the Contracting Officer.

(c) If the parties fail to agree on an adjustment made pursuant to this clause, it shall be considered a dispute, and shall be dealt with under the terms of the clause of this contract entitled ''Disputes''.

[49 FR 13259, Apr. 3, 1984, as amended at 62 FR 40470, July 29, 1997]

752.7009 Marking.

The following clause is for use in all USAID contracts performed in whole or in part overseas.

MARKING (JAN 1993)

(a) It is USAID policy that USAID-financed commodities and shipping containers, and project construction sites and other project locations be suitably marked with the USAID emblem. Shipping containers are also to be marked with the last five digits of the USAID financing document number. As a general rule, marking is not required for raw materials shipped in bulk (such as coal, grain, etc.), or for semifinished products which are not packaged.

(b) Specific guidance on marking requirements should be obtained prior to procurement of commodities to be shipped, and as early as possible for project construction sites and other project locations. This guidance will be provided through the cognizant technical office indicated on the cover page of this contract, or by the Mission Director in the Cooperating Country to which commodities are being shipped, or in which the project site is located.

(c) Authority to waive marking requirements is vested with the Regional Assistant Administrators, and with Mission Directors.

(d) A copy of any specific marking instructions or waivers from marking requirements is to be sent to the Contracting Officer; the original should be retained by the Contractor.

[49 FR 13259, Apr. 3, 1984, as amended at 58 FR 8703, Feb. 17, 1993]

752.7010 Conversion of U.S. dollars to local currency.

For use in all USAID non-commercial contracts involving performance overseas.

CONVERSION OF U.S. DOLLARS TO LOCAL CURRENCY (APR 1984)

Upon arrival in the Cooperation Country, and from time to time as appropriate, the Contractor's Chief of Party shall consult with the Mission Director who shall provide, in writing, the procedure the Contractor and its employees shall follow in the conversion of United States dollars to local currency. This may include, but is not limited to, the conversion of said currency through the cognizant U.S. Disbursing Officer or Mission Controller, as appropriate.

[49 FR 13259, Apr. 3, 1984, as amended at 62 FR 40470, July 29, 1997]

752.7011 Orientation and language training.

For use in all USAID cost-reimbursement contracts involving performance overseas.

ORIENTATION AND LANGUAGE TRAINING (APR 1984)

(a) Regular employees shall receive a maximum of 2 weeks USAID sponsored orientation before travel overseas. The dates of orientation shall be selected by the Contractor from the orientation schedule provided by USAID.

(b) Participation in USAID sponsored orientation in no way relieves the Contractor of its responsibility for assuring that all employees, regular and short-term, are properly oriented. As an addition to or substitution for USAID's sponsored orientation for regular employees, the following types of orientation may be authorized taking into consideration specific job requirements, the employee's prior overseas experience, or unusual circumstances.

(1) Modified orientation.

(2) Language training, particularly when significant for operating capabilities.

(3) Orientation and language training for regular employee's dependents.

(4) Contractor-sponsored orientation.

(5) Orientation in all matters related to the administrative, logistical, and technical aspects of the employee's movement to, and tour of duty in, the Cooperating Country.

(c) Authorization for an additional or alternate orientation program, if any, shall be either set forth in the schedule or provided in writing by the Contracting Officer.

(d) Travel expenses not to exceed one round trip from regular employee's residence to place of orientation and return will be reimbursed, pursuant to the cost principles applicable to this contract. Allowable salary costs during the period of orientation are also reimbursable.

752.7012 Protection of the individual as a research subject.

This clause is for use in any USAID contract which involves research using human subjects.

PROTECTION OF THE INDIVIDUAL AS A RESEARCH SUBJECT (AUG 1995)

(a) Safeguarding the rights and welfare of human subjects in research conducted under a USAID contract is the responsibility of the contractor. USAID has adopted the Common Federal Policy for the Protection of Human Subjects. USAID's Policy is found in Part 225 of Title 22 of the Code of Federal Regulations (the ''Policy''). Additional interpretation, procedures, and implementation guidance of the Policy are found in USAID General Notice entitled ''Procedures for the Protection of Human Subjects in Research Supported by USAID'', issued April 19, 1995, as from time to time amended (a copy of which is attached to this contract). USAID's Cognizant Human Subjects Officer (CHSO) and USAID/W has oversight, guidance, and interpretation responsibility for the Policy.

(b) Contractors must comply with the Policy when humans are the subject of research, as defined in 22 CFR 225.102(d), performed as part of the contract, and contractors must provide ''assurance'', as required by 22 CFR 225.103, that they follow and abide by the procedures in the Policy. See also Section 5 of the April 19, 1995, USAID General Notice which sets forth activities to which the Policy is applicable. The existence of a bona fide, applicable assurance approved by the Department of Health and Human Services (HHS) such as the ''multiple project assurance'' (MPA) will satisfy this requirement. Alternatively, contractors can provide an acceptable written assurance to USAID as described in 22 CFR 225.103. Such assurances must be determined by the CHSO to be acceptable prior to any applicable research being initiated or conducted under the contract. In some limited instances outside the U.S., alternative systems for the protection of human subjects may be used provided they are deemed ''at least equivalent'' to those

outlined in Part 225 (see 22 CFR 225.101(h)). Criteria and procedures for making this determination are described in the General Notice cited in the preceding paragraph.

(c) Since the welfare of the research subject is a matter of concern to USAID as well as to the contractor, USAID staff, consultants and advisory groups may independently review and inspect research, and research processes and procedures involving human subjects, and based on such findings, the CHSO may prohibit research which presents unacceptable hazards or otherwise fails to comply with USAID procedures. Informed consent documents must include the stipulation that the subject's records may be subject to such review.

[61 FR 39095, July 26, 1996]

752.7013 Contractor-mission relationships.

For use in all USAID contracts involving performance overseas. Note that paragraph (f) of this clause is applicable only in contracts with an educational institution.

CONTRACTOR-MISSION RELATIONSHIPS (OCT 1989)

(a) The Contractor acknowledges that this contract is an important part of the United States Foreign Assistance Program and agrees that its operations and those of its employees in the Cooperating Country will be carried out in such a manner as to be fully commensurate with the responsibility which this entails.

(b) The Mission Director is the chief representative of USAID in the Cooperating Country. In this capacity, he/she is responsible for both the total USAID program in the cooperating country including certain administrative responsibilities set forth in this contract, and for advising USAID regarding the performance of the work under the contract and its effect on the United States Foreign Assistance Program. Although the Contractor will be responsible for all professional, technical, and administrative details of the work called for by the contract, it shall be under the guidance of the Mission Director in matters relating to foreign policy. The Chief of Party shall keep the Mission Director currently informed of the progress of the work under the contract.

(c) In the event the conduct of any Contractor employee is not in accordance with the preceding paragraphs, the Contractor's Chief of Party shall consult with the Mission Director and the employee involved and shall recommend to the Contractor a course of action with regard to such employee.

(d) The parties recognize the right of the U.S. Ambassador to direct the removal from a country of any U.S. citizen or the discharge from this contract of any third-country national or cooperating-country national when, at the discretion of the Ambassador, the interests of the United States so require. Under these circumstances termination of an employee and replacement by an acceptable substitute shall be at no cost to USAID.

(e) If it is determined that the services of such employee shall be terminated, the Contractor shall use its best efforts to cause the return of such employee to the United States or point of origin as appropriate.

[The following paragraph (f) is applicable if the contract is with an educational institution:]

(f) It is understood by the parties that the Contractor's responsibilities shall not be restrictive of academic freedom. Notwithstanding these academic freedoms, the Contractor's employees, while in the Cooperating Country, are expected to show respect for its conventions, customs, and institutions, to abide by applicable laws and regulations, and not to interfere in its internal political affairs.

(End of clause)

[54 FR 46391, Nov. 3, 1989]

752.7014 Notice of changes in travel regulations.

The following clause is for use in cost-reimbursement contracts involving work overseas.

NOTICE OF CHANGES IN TRAVEL REGULATIONS (JAN 1990)

(a) Changes in travel, differential, and allowance regulations shall be effective on the beginning of the Contractor's next pay period following the effective date of the change as published in the applicable travel regulations (the Standardized Regulations (Government Civilians, Foreign Areas), the Uniform State/USAID/USIA Foreign Service Travel Regulations, and the Federal Travel Regulations).

(b) The Standardized Regulations (Government Civilians Foreign Areas), and the Federal Travel Regulations are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(c) Information regarding the Uniform State/USAID/USIA Foreign Service Travel Regulations as referenced in the ''Travel and Transportation'' clause of this contract may be obtained from the Contracting Officer.

(End of clause)

[55 FR 6805, Feb. 27, 1990]

752.7015 Use of pouch facilities.

For use in all USAID non-commercial contracts exceeding the simplified acquisition threshold and involving performance overseas.

USE OF POUCH FACILITIES (JUL 1997)

(a) Use of diplomatic pouch is controlled by the Department of State. The Department of State has authorized the use of pouch facilities for USAID contractors and their employees as a general policy, as detailed in paragraphs (a)(1) through (a)(7) of this clause; however, the final decision regarding use of pouch facilities rests with the Embassy or USAID Mission. In consideration of the use of pouch facilities as hereinafter stated, the Contractor and its employees agree to indemnify and hold harmless the Department of State and USAID against loss or damage occurring in pouch transmission.

(1) Contractors and their employees are authorized use of the pouch for transmission and receipt of up to a maximum of 2 pounds per shipment of correspondence and documents needed in the administration of foreign assistance programs.

(2) U.S. citizen employeed of U.S. contractors are authorized use of the pouch for personal mail up to a maximum of one pound per shipment (but see paragraph (a)(3) of this clause).

(3) Merchandise, parcels, magazines, or newspapers are not considered to be personal mail for purposes of this clause, and are not authorized to be sent or received by pouch.

(4) Official mail as authorized by paragraph (a)(1) of this clause should be addressed as follows: Individual or Organization name, followed by the symbol ''C'', city Name of Post, U.S. Agency for International Development, Washington, DC 20523–0001.

(5) Personal mail pursuant to paragraph (a)(2) of this clause should be sent to the address specified in paragraph (a)(4) of this clause, but without the name of the organization.

(6) Mail sent via the diplomatic pouch may not be in violation of U.S. Postal laws and may not contain material ineligible for pouch transmission.

(7) USAID contractor personnel are not authorized use of military postal facilities (APO/FPO). This is an Adjutant General's decision based on existing laws and regulations governing military postal facilities and is being enforced worldwide. Posts having access to APO/FPO facilities and using such for diplomatic pouch dispatch, may, however, accept official mail from Contractors and letter mail from their employees for the pouch, provided of course, adequate postage is affixed.

(b) The Contractor shall be responsible for advising its employees of this authorization and these guidelines and limitations on use of pouch facilities.

(c) Specific additional guidance on use of pouch facilities in accordance with this clause is available from the Post Communication Center at the Embassy or USAID Mission.

[49 FR 13259, Apr. 3, 1984, as amended at 56 FR 2699, Jan. 24, 1991; 57 FR 5237, Feb. 13, 1992; 62 FR 40471, July 29, 1997; 62 FR 45334, Aug. 27, 1997]

752.7016—752.7017 [Reserved]

752.7018 Health and accident coverage for USAID participant trainees.

For use in any USAID contract under which USAID participants are trained.

HEALTH AND ACCIDENT COVERAGE FOR USAID PARTICIPANT TRAINEES (JAN 1999)

(a) In accordance with the requirements of USAID Automated Directive System (ADS) 253.5.6b, the Contractor shall enroll all non-U.S. trainees (hereinafter referred to as ''participants''), whose training in the U.S. is financed by USAID under this contract, in USAID's Health and Accident Coverage (HAC) program. Sponsored trainees enrolled in third-country or in-country training events are not eligible for USAID's HAC program, but the Contractor may obtain alternative local medical and accident insurance at contract expense, provided the cost is consistent with the cost principles in FAR 31.2.

(b) When enrollment in the HAC program is required per paragraph (a) of this clause, the Contractor must enroll each participant in the HAC program through one of two designated contractors prior to the initiation of travel by the participant. USAID has developed an Agency-wide database training management system, the Training Results and Information Network (''TraiNet''), which is the preferred system for managing USAID's participant training program, including enrollment in the HAC program. However, until such time as the USAID sponsoring unit (as defined in ADS 253) has given the Contractor access to USAID's ''TraiNet'' software for trainee tracking and HAC enrollment, the Contractor must fill out and mail the Participant Data Form (PDF) (Form USAID 1381–4) to USAID. The Contractor can obtain information regarding each HAC program contractor, including contact information, and a supply of the PDF forms and instructions for completing and submitting them, by contacting the data base contractor serving the Global Center for Human Capacity Development (G/HCD).

(c) The Contractor must ensure that HAC enrollment begins immediately upon the participant's departure for the United States for the purpose of participating in a training

program financed by USAID, and that enrollment continues in full force and effect until the participant returns to his/her country of origin, or is released from USAID's responsibility, whichever is the sooner.

(1) The HAC insurance provider, not the Contractor, shall be responsible for paying all reasonable and necessary medical reimbursement charges not otherwise covered by student health service or other insurance programs, subject to the availability of funds for such purposes, in accordance with the standards of coverage established by USAID under its HAC program and by the HAC providers' contracts.

(2) After HAC enrollment, upon receipt of HAC services invoice from the selected HAC provider, the Contractor shall submit payment directly to the HAC provider.

(3) The Contractor is responsible for ensuring that participants and any stakeholders (as defined in ADS 253) are advised that USAID is not responsible for any medical claims in excess of the coverages provided by the HAC program, or for medical claims not eligible for coverage under the HAC program, or not otherwise covered in this section.

(d) The Contractor, to the extent that it is an educational institution with a mandatory student health service program, shall also enroll participants in that institution's student health service program. Medical costs which are covered under the institution's student health service shall not be eligible for payment under USAID's HAC program.

(e) If the Contractor has a mandatory, non-waivable health and accident insurance program for students, the costs of such insurance will be allowable under this contract. Any claims eligible under such insurance will not be payable under USAID's HAC plan or under this contract. Even though the participant is covered by the Contractor's mandatory, non-waivable health and accident insurance program, the participant MUST be enrolled in USAID's more comprehensive HAC program.

(f) Medical conditions pre-existing to the participant's sponsorship for training by USAID, discovered during the required predeparture medical examination, are grounds for ineligibility for sponsorship unless specifically waived by the sponsoring unit, and covered through a separate insurance policy maintained by the participant or his employer, or a letter of guarantee from the participant or the employer (which thereby assumes liability for any related charges that might materialize. See ADS 253).

[64 FR 5010, Feb. 2, 1999]

752.7019 Participant training.

For use in any USAID direct contract involving training of USAID participants.

PARTICIPANT TRAINING (JAN 1999)

(a) *Definitions.* (1) Participant training is the training of any foreign national outside of his or her home country, using USAID funds.

(2) A Participant is any foreign national being trained under this contract outside of his or her country.

(b) *Applicable regulations.* Participant training conducted under this contract shall comply with the policies and essential procedures pertaining to training-related services contained in USAID Automated Directive System (ADS) Ch. 253 ''Training for Development Impact''. Any exceptions to ADS 253 requirements are specified as such within this contract. The current version of Chapter 253 may be obtained directly from the USAID website at *http://www.info.usaid.gov/pubs/ads/200.*

(c) The contractor shall be reimbursed for the reasonable and allocable costs incurred in providing training to participants in the United States or other approved location provided such costs do not exceed the limitations in, or have been waived in accordance with, ADS 253.5.5.

NOTE: Academic rates are available through a special website monitored by the United States Information Agency. The website for academic programs is: *http://www.iie.org/fulbright/posts/restrict.* U.S.-based participants receive the standardized U.S. travel per diem rates maintained by GSA for short-term training (website: *http://policyworks.gov*).

[64 FR 5011, Feb. 2, 1999]

752.7020 [Reserved]

752.7021 Changes in tuition and fees.

For use in contracts for participant training with an educational institution.

CHANGES IN TUITION AND FEES (APR 1984)

While educational programs for participants will be established utilizing the Contractor's currently applicable tuition and fee schedule, the parties understand that such standard tuition and fees may be subject to change during the course of the program. If such event results in an increase in the cost of the program, USAID agrees to pay such increased standard tuition and fees in the next applicable academic term as a condition for the continuation of the program. If such change results in a decrease in the cost of the program, the Contractor agrees to charge to USAID only the amount of such revised standard tuition and fees in the next applicable academic term. The Contractor shall undertake to keep USAID currently advised as to changes in its standard tuition and fees. At such time as increases in the

amounts of tuition and fees results in there being inadequate funds remaining in this contract to meet the costs of the next academic term, the Contractor will so advise USAID. USAID may then provide such additional funds as required to complete the program.

752.7022 Conflicts between contract and catalog.

For use in contracts for participant training with an educational institution.

CONFLICTS BETWEEN CONTRACT AND CATALOG (APR 1984)

In the event of any inconsistency between the provisions of this contract and any catalog, or other document incorporated in this contract by reference or otherwise or any of the Contractor's rules and regulations, the provisions of this contract shall govern.

752.7023 Required visa form for USAID participants.

For use in any USAID direct contract which involves training of USAID participants.

REQUIRED VISA FORM FOR USAID PARTICIPANTS (APR 1984)

The Contractor shall insure that any foreign student brought to the United States for training under this contract uses visa form IAP 66A ''Certificate for Exchange Visitor (J–1) Status''.

752.7024 Withdrawal of students.

For use in contracts for participant training with an educational institution.

WITHDRAWAL OF STUDENTS (APR 1984)

(a) The Government may, at its option and at any time, withdraw any student.

(b) The Contractor may request withdrawal by the Government of any student for academic or disciplinary reasons.

(c) If such withdrawal occurs prior to the end of a term, the Government shall pay any tuition and fees due for the current term in which the student may be enrolled, and the Contractor shall credit the Government with any charges eligible for refund under the Contractor's standard procedures for civilian students in effect on the effective date of such withdrawal.

(d) Withdrawal of students by the Government shall not be the basis for any special charge or claim by the Contractor other than as provided by the Contractor's standard procedures.

752.7025 Approvals.

For use in all USAID contracts.

APPROVALS (APR 1984)

All approvals required to be given under the contract by the Contracting Officer or the Mission Director shall be in writing and, except when extraordinary circumstances make it impracticable, shall be requested by the Contractor sufficiently in advance of the contemplated action to permit approval, disapproval or other disposition prior to that action. If, because of existing conditions, it is impossible to obtain prior written approval, the approving official may, at his discretion, ratify the action after the fact.

752.7026 [Reserved]

752.7027 Personnel.

For use in all USAID services contracts involving performance overseas. Note that paragraphs (f) and (g) of this clause are for use only in cost reimbursement contracts.

PERSONNEL (DEC 1990)

(a) *Clearance.*

(1) *Individuals Engaged or Assigned Within the United States.* The contractor will obtain written notification from the Contracting Officer of Cooperating Country clearance of any employee sent outside the United States to perform duties under this contract.

(2) *Individuals Engaged or Assigned When Outside the United States.* No individual shall be engaged or assigned when outside the United States under this contract unless authorized in the schedule or otherwise approved by the Contracting Officer or Mission Director. However, when services are performed in the Cooperating Country on a casual or irregular basis or in an emergency, exception to this provision can be made in accordance with instructions or regulations established by the Mission Director.

(b) *Physical fitness of employees and dependents.* See the clause of this contract entitled Physical Fitness.

(c) *Conformity to laws and regulations of Cooperating Country.* Contractor agrees to use its best efforts to assure that its employees and their dependents, while in the Cooperating Country, abide by all applicable laws and regulations of the Cooperating Country and political subdivisions thereof.

(d) *Importation or sale of personal property or automobiles.* To the extent permitted by Cooperating Country laws, the importation and sale of personal property or automobiles by contractor employees and their dependents in the Cooperating Country shall be subject to the same limitations and prohibitions which apply to U.S. nationals employed by

the Mission. This provision does not apply to employees or consultants who are citizens or legal residents of the Cooperating Country.

(e) *Economic and Financial Activities.* Other than work to be performed under this contract for which an employee or consultant is assigned by the contractor, no such employee or consultant of the contractor shall engage, directly or indirectly, either in his/her own name or in the name or through the agency of another person, in any business, profession or occupation in the Cooperating Country or other foreign countries to which he/she is assigned, nor shall he make loans or investments to or in any business, profession or occupation in the Cooperating Country or other foreign countries in which he/she is assigned. This provision does not apply to employees or consultants who are citizens or legal residents of the Cooperating Country.

[The following paragraphs (f) and (g) are applicable only to cost reimbursement contracts.]

(f) *Duration of Appointments.* (1) Regular employees will normally be appointed for a minimum of 2 years which period includes orientation (less language training) in the United States and authorized international travel under the contract except:

(i) An appointment may be made for less than 2 years if the contract has less than 2 years but more than 1 year to run provided that if the contract is extended the appointment shall also be extended to the full 2 years. This provision shall be reflected in the employment agreement prior to employment under this contract.

(ii) When a 2-year appointment is not required, appointment may be made for less than 2 years but in no event less than 1 year.

(iii) When the normal tour of duty established for USAID personnel at a particular post is less than 2 years, then a normal appointment under this contract may be of the same duration.

(iv) When the contractor is unable to make appointments of regular employees for a full 2 years, the contractor may make appointments of less than 2 but not less than 1 year, provided that such appointment is approved by the Contracting Officer.

(2) Services required for less than 1 year will be considered short-term appointments and the employee will be considered a short-term employee.

(g) *Employment of Dependents.* If any person who is employed for services in the Cooperating Country under this contract is either (1) a dependent of an employee of the U.S. Government working in the Cooperating Country, or (2) a dependent of a contractor employee working under a contract with the U.S. Government in the Cooperating Country, such person shall continue to hold the status of a dependent. He or she shall be entitled to salary for the time services are actually performed in the Cooperating Country, and differential and allowances as established by the Standardized Regulations (Government Civilians, Foreign Areas).

(End of clause)

[56 FR 7587, Feb. 25, 1991, as amended at 62 FR 40471, July 29, 1997]

752.7028 Differential and allowances.

The following clause is for use in all USAID cost reimbursement contracts performed in whole or in part overseas.

DIFFERENTIALS AND ALLOWANCES (JUL 1996)

(This clause does not apply to TCN or CCN employees. TCN and CCN employees are not eligible for differentials and allowances, unless specifically authorized by the cognizant Assistant Administrator or Mission Director. A copy of such authorization shall be retained and made available as part of the contractor's records which are required to be preserved and made available by the ''Examination of Records by the Comptroller General'' and ''Audit'' clauses of this contract).

(a) *Post differential.* Post differential is an additional compensation for service at places in foreign areas where conditions of environment differ substantially from conditions of environment in the continental United States and warrant additional compensation as a recruitment and retention incentive. In areas where post differential is paid to USAID direct-hire employees, post differential not to exceed the percentage of salary as is provided such USAID employees in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 500 (except the limitation contained in Section 552, ''Ceiling on Payment'') Tables-Chapter 900, as from time to time amended, will be reimbursable hereunder for employees in respect to amounts earned during the time such employees actually spend overseas on work under this contract. When such post differential is provided to regular employees of the Contractor, it shall be payable beginning on the date of arrival at the post of assignment and continue, including periods away from post on official business, until the close of business on the day of departure from post of assignment en route to the United States. Sick or vacation leave taken at or away from the post of assignment will not interrupt the continuity of the assignment or require a discontinuance of such post differential payments, provided such leave is not taken within the United States or the territories of the United States. Post differential will not be payable while the employee is away from his/her post of assignment for purposes of home leave. Short-term employees shall be entitled to

post differential beginning with the forty-third (43rd) day at post.

(b) *Living quarters allowance.* Living quarters allowance is an allowance granted to reimburse an employee for substantially all of his/her cost for either temporary or residence quarters whenever Government-owned or Government-rented quarters are not provided to him/her at his/her post without charge. Such costs are those incurred for temporary lodging (temporary lodging allowance) or one unit of residence quarters (living quarters allowance) and include rent, plus any costs not included therein for heat, light, fuel, gas, electricity and water. The temporary lodging allowance and the living quarters allowance are never both payable to an employee for the same period of time. The Contractor will be reimbursed for payments made to employees for a living quarters allowance for rent and utilities if such facilities are not supplied. Such allowance shall not exceed the amount paid USAID employees of equivalent rank in the Cooperating Country, in accordance with either the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 130, as from time to time amended, or other rates approved by the Mission Director. Subject to the written approval of the Mission Director, short-term employees may be paid per diem (in lieu of living quarters allowance) at rates prescribed by the Federal Travel Regulations, as from time to time amended, during the time such short-term employees spend at posts of duty in the Cooperating Country under this contract. In authorizing such per diem rates, the Mission Director shall consider the particular circumstances involved with respect to each such short-term employee including the extent to which meals and/or lodging may be made available without charge or at nominal cost by an agency of the United States Government or of the Cooperating Government, and similar factors.

(c) *Temporary quarters subsistence allowance.* Temporary quarters subsistence allowance is a quarters allowance granted to an employee for the reasonable cost of temporary quarters incurred by the employee and his family for a period not in excess of (i) 90 days after first arrival at a new post in a foreign area or a period ending with the occupation of residence (permanent) quarters, if earlier, and (ii) 30 days immediately preceding final departure from the post subsequent to the necessary vacating of residence quarters, unless an extension is authorized in writing by the Mission Director. The Contractor will be reimbursed for payments made to employees and authorized dependents for temporary quarters subsistence allowance, in lieu of living quarters allowance, not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 120, as from time to time amended.

(d) *Post allowance.* Post allowance is a cost-of-living allowance granted to an employee officially stationed at a post where the cost of living, exclusive of quarters cost, is substantially higher than in Washington, DC. The Contractor will be reimbursed for payments made to employees for post allowance not to exceed those paid USAID employees in the Cooperating Country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 220, as from time to time amended.

(e) *Supplemental post allowance.* Supplemental post allownce is a form of post allowance granted to an employee at his/her post when it is determined that assistance is necessary to defray extraordinary subsistence costs. The Contractor will be reimbursed for payments made to employees for supplemental post allowance not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 230, as from time to time amended.

(f) Educational allowance. Educational allowance is an allowance to assist an employee in meeting the extraordinary and necessary expenses, not otherwise compensated for, incurred by reason of his/her service in a foreign area in providing adequate elementary and secondary education for his/her children. The Contractor will be reimbursed for payments made to regular employees for educational allowances for their dependent children in amounts not to exceed those set forth in the Standardized (Regulations Government Civilians, Foreign Areas), Chapter 270, as from time to time amended.

(g) *Educational travel.* Educational travel is travel to and from a school in the United States for secondary education (in lieu of an educational allowance) and for college education. The Contractor will be reimbursed for payments made to regular employees for educational travel for their dependent children provided such payment does not exceed that which would be payable in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 280, as from time to time amended. Educational travel shall not be authorized for regular employees whose assignment is less than two years.

(h) *Separate maintenance allowance.* Separate maintenance allowance is an allowance to assist an employee who is compelled, by reason of dangerous, notably unhealthful, or excessively adverse living conditions at his/her post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining his/her dependents elsewhere than at such post. The Contractor will be reimbursed for payments made to regular employees for a

separate maintenance allowance not to exceed that made to Aid employees in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 260, as from time to time amended.

(i) *Payments during evacuation.* The Standardized Regulations (Government Civilians, Foreign Areas) provide the authority for efficient, orderly, and equitable procedure for the payment of compensation, post differential and allowances in the event of an emergency evacuation of employees or their dependents, or both, from duty stations for military or other reasons or because of imminent danger to their lives. If evacuation has been authorized by the Mission Director the Contractor will be reimbursed for payments made to employees and authorized dependents evacuated from their post of assignment in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 600, and the Federal Travel Regulations, as from time to time amended.

(j) *Danger pay allowance.* (1) The contractor will be reimbursed for payments made to its employees for danger pay not to exceed that paid USAID employees in the cooperating country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 650, as from time to time amended.

(2) Danger pay is an allowance that provides additional compensation above basic compensation to an employee in a foreign area where civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well-being of the employee. The danger pay allowance is in lieu of that part of the post differential which is attributable to political violence. Consequently, the post differential may be reduced while danger pay is in effect to avoid dual crediting for political violence.

[49 FR 13259, Apr. 3, 1984, as amended at 51 FR 11450, Apr. 3, 1986; 53 FR 50632, Dec. 16, 1988; 61 FR 39096, July 26, 1996; 61 FR 51235, Oct. 1, 1996]

752.7029 Post privileges.

For use in all USAID non-commercial contracts involving performance overseas.

POST PRIVILEGES (JUL 1993)

(a) Routine health room services may be available, subject to post policy, to U.S. citizen contractors and their authorized dependents (regardless of citizenship) at the post of duty. These services do not include hospitalization, or predeparture or end of tour medical examinations. The services normally include such medications as may be available, immunizations and preventive health measures, diagnostic examinations and advice, and home visits as medically indicated. Emergency medical treatment is provided to U.S. citizen employees and dependents, whether or not they may have been granted access to routine health room services, on the same basis as it would be to any U.S. citizen in an emergency medical situation in the country.

(b) Privileges such as the use of APO, PX's, commissaries, and officer's clubs are established at posts abroad pursuant to agreements between the U.S. and Cooperating Governments. These facilities are intended for and usually limited to members of the official U.S. establishment including the Embassy, USAID Mission, U.S. Information Service, and the Military. Normally, the agreements do not permit these facilities to be made available to nonofficial Americans.

[49 FR 13259, Apr. 3, 1984, as amended at 56 FR 7587, Feb. 25, 1991; 58 FR 58596, Nov. 2, 1993; 62 FR 40471, July 29, 1997]

752.7030 Inspection trips by contractor's officers and executives.

For use in cost reimbursement contracts with an educational institution involving performance overseas.

INSPECTION TRIPS BY CONTRACTOR'S OFFICERS AND EXECUTIVES (APR 1984)

Provided it is approved by the Mission Director, the Contractor may send the Campus Coordinator, a professional member of its staff as an alternate to the Campus Coordinator, or such of its senior officials (e.g., president, vice presidents, deans, or department heads) to the Cooperating Country as may be required to review the progress of the work under this contract. Except for the Campus Coordinator or his/her alternate, no direct salary charges will be paid hereunder with respect to any such officials.

752.7031 Leave and holidays.

For use in all USAID cost-reimbursement contracts for technical or professional services.

LEAVE AND HOLIDAYS (OCT 1989)

(a) *Vacation leave.* (1) The Contractor may grant to its employees working under this contract vacations of reasonable duration in accordance with the Contractor's practice for its employees, but in no event shall such vacation leave be earned at a rate exceeding 26 work days per annum. Reimbursement for vacation leave is limited to the amount earned by employees while serving under this contract.

For regular employees during their tour of duty in the Cooperating Country, vacation

leave is provided under this contract primarily for purposes of affording necessary rest and recreation. The Contractor's Chief of Party, the employee and the Cooperating Country institution associated with this project shall develop vacation leave schedules early in the employee's tour of duty taking into consideration project requirements, employee preference and other factors.

(2) Leave taken during the concluding weeks of an employee's tour shall be included in the established leave schedule and be limited to that amount of leave which can be earned during a twelve-month period unless approved in accordance with paragraph (a)(3) of this clause.

(3) Vacation leave earned but not taken by the end of the employee's tour pursuant to paragraphs (a) (1) and (2) of this clause will be forfeited unless the requirements of the project precluded the employee from taking such leave, and the Contracting Officer (with the endorsement of the Mission) approves one of the following as an alternative:

(i) Taking, during the concluding weeks of the employee's tour, leave not permitted under (a)(2) of this section, or

(ii) Lump-sum payment for leave not taken provided such leave does not exceed the number of days which can be earned by the employee during a twelve-month period.

(b) *Sick Leave.* Sick leave is earned by employees in accordance with the Contractor's usual practice but not to exceed 13 work days per annum or 4 hours every 2 weeks. Additional sick leave after use of accrued vacation leave may be advanced in accordance with Contractor's usual practice, if in the judgment of the Contractor's Chief of Party it is determined that such additional leave is in the best interest of the project. In no event shall such additional leave exceed 30 days. The Contractor agrees to reimburse USAID for leave used in excess of the amount earned during the employee's assignment under this contract. Sick leave earned and unused at the end of a regular tour of duty may be carried over to an immediately-succeeding tour of duty under this contract. The use of home leave authorized under this clause shall not constitute a break in service for the purpose of sick leave carry-over. Contractor employees will not be compensated for unused sick leave at the completion of their duties under this contract.

(c) *Home leave.* (1) Home leave is leave earned for service abroad for use only in the United States, in the Commonwealth of Puerto Rico, or in the possessions of the United States.

(2) A regular employee who is a U.S. citizen or resident and has served at least 2 years overseas, as defined in paragraph (c)(4) of this clause, under this contract and has not taken more than 30 workdays leave (vacation, sick, or leave without pay) in the United States, may be granted home leave of not more than 15 workdays for each such year of service overseas, provided that such regular employee agrees to return overseas upon completion of home leave under an additional 2 year appointment, or for a shorter period of not less than 1 year of overseas service under the contract if the Mission Director has approved in advance. Home leave must be taken in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States; any days spent elsewhere will be charged to vacation leave or leave without pay.

(3) Notwithstanding the requirement in paragraph (c)(2), of this clause, that the Contractor's regular employee must have served 2 years overseas under this contract to be eligible for home leave, Contractor may grant advance home leave to such regular employee subject to all of the following conditions:

(i) Granting of advance home leave would in each case serve to advance the attainment of the objectives of this contract;

(ii) The regular employee shall have served a minimum of 18 months in the Cooperating Country on his/her current tour of duty under this contract; and

(iii) The regular employee shall have agreed to return to the Cooperating Country to serve out the remainder of his/her current tour of duty and an additional 2 year appointment under this contract, or such other additional appointment of not less than 1 year of overseas service as the Mission Director may approve.

(4) The period of service overseas required under paragraph (c)(2) or paragraph (c)(3) of this clause shall include the actual days spent in orientation in the United States (less language training) and the actual days overseas beginning on the date of departure from the United States port of embarkation on international travel and continuing, inclusive of authorized delays en route, to the date of arrival at the United States port of debarkation from international travel. Allowable vacation and sick leave taken while overseas, but not leave without pay, shall be included in the required period of service overseas. An amount equal to the number of days vacation and sick leave taken in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States will be added to the required period of service overseas.

(5) Salary during travel to and from the United States for home leave will be limited to the time required for travel by the most expeditious air route. The Contractor will be responsible for reimbursing USAID for salary payments made during home leave if in spite of the undertaking of the new appointment the regular employee, except for reasons beyond his/her control as determined by the Contracting Officer, does not return overseas

and complete the additional required service. Unused home leave is not reimbursable under this contract.

(6) To the extent deemed necessary by the Contractor, regular employees in the United States on home leave may be authorized to spend not more than 5 days in work status for consultation at home office/campus or at USAID/Washington before returning to their post of duty. Consultation at locations other than USAID/Washington or home office/campus, as well as any time in excess of 5 days spent for consultation, must be approved by the Mission Director or the Contracting Officer.

(7) Except as provided in the schedule or approved by the Mission Director or the Contracting Officer, home leave is not authorized for TCN or CCN employees.

(d) *Holidays.* Holidays for Contractor employees serving in the United States shall be in accordance with the Contractor's established policy and practice. Holidays for Contractor employees serving overseas should take into consideration local practices and shall be established in collaboration with the Mission Director.

(e) *Military leave.* Military leave of not more than 15 calendar days in any calendar year may be granted in accordance with the Contractor's usual practice to each regular employee whose appointment is not limited to 1 year or less and who is a reservist of the United States Armed Forces, provided that such military leave has been approved in advance by the cognizant Mission Director or Assistant Administrator. A copy of any such approval shall be provided to the Contracting Officer.

(f) *Leave Records.* The Contractor's leave records shall be preserved and made available as part of the contractor's records which are required to be preserved and made available by the Examination of Records by the Comptroller General and Audit clauses of this contract.

(End of clause)

[54 FR 46392, Nov. 3, 1989, as amended at 56 FR 2699, Jan. 24, 1991]

752.7032 International travel approval and notification requirements.

For use in any USAID contract requiring international travel.

INTERNATIONAL TRAVEL APPROVAL AND NOTIFICATION REQUIREMENTS (JAN 1990)

Prior written approval by the Contracting Officer is required for all interrnational travel directly and identifiably funded by USAID under this contract. The Contractor shall therefore present to the Contracting Officer an itinerary for each planned international trip, showing the name of the traveler, purpose of the trip, origin/destination (and intervening stops), and dates of travel, as far in advanced of the proposed travel as possible, but in no event less than three weeks before travel is planned to commence. The Contracting Officer's prior written approval may be in the form of a letter or telegram or similar device or may be specifically incorporated into the schedule of the contract. At least one week prior to commencement of approved international travel, the Contractor shall notify the cognizant Mission, with a copy to the Contracting Officer, of planned travel, identifying the travellers and the dates and times of arrival.

(End of clause)

[55 FR 6805, Feb. 27, 1990]

752.7033 Physical fitness.

For use in all USAID contracts involving performance overseas.

PHYSICAL FITNESS (JUL 1997)

(The requirements of this provision do not apply to employees hired in the Cooperating Country or to authorized dependents who were already in the Cooperating Country when their sponsoring employee was hired.)

(a) *Assignments of less than 60 days in the Cooperating Country.* The contractor shall require employees being assigned to the Cooperating Country for less than 60 days to be examined by a licensed doctor of medicine. The contractor shall require the doctor to provide to the contractor a written statement that in his/her medical opinion the employee is physically qualified to engage in the type of activity for which he/she is employed and the employee is physically able to reside in the country to which he/she is assigned. Under a cost reimbursement contract, if the contractor has no written statement of medical opinion on file prior to the departure for the Cooperating Country of any employee and such employee is unable to perform the type of activity for which he/she is employed or cannot complete his/her tour of duty because of any physical disability (other than physical disability arising from an accident while employed under this contract), the contractor shall be responsible for returning the disabled employee to his/her point of hire and providing a replacement at no additional cost to the Government. In addition, in the case of a cost reimbursement contract, the contractor shall not be entitled to reimbursement for any additional costs attributable to delays or other circumstances caused by the employee's inability to complete his/her tour of duty.

(b) *Assignments of 60 days or more in the Cooperating Country.* (1) The Contracting Officer shall provide the contractor with a reproducible copy of the ''USAID Contractor Employee Physical Examination Form''. This form is for collection of information; it has been reviewed and approved by OMB (see 701.105(a)). Information required by the Paperwork Reduction Act for reporting the burden estimate, the points of contact regarding burden estimate, and the OMB approval expiration date, are printed on the form. The contractor shall reproduce the form as required, and provide a copy to each employee and authorized dependent proposed for assignments of 60 days or more in the Cooperating Country. The contractor shall have the employee and all authorized dependents obtain a physical examination from a licensed physician, who will complete the form for each individual. The employee will deliver the physical examination form(s) to the embassy health unit in the Cooperating Country.

(2) (The following information is provided for two purposes: To assist fixed price offerors to develop their price proposal, and to provide cost reimbursement contractors with guidance in determining reasonable and allowable costs.) As a contribution to the cost of medical examinations, USAID shall reimburse the contractor for the physical examination authorized in paragraph (a) of this section in an amount not to exceed $100 for the physical examination, plus reimbursement of charges for immunizations to the extent not covered by the contractor's health insurance policy. For physical examinations authorized in paragraph (b)(1) above, the USAID contribution to the cost of the examination shall be as follows:

(i) For the employee and authorized dependents 12 years of age and over, one half of the cost of each examination up to a maximum USAID share of $300 per individual, plus reimbursement of charges for immunizations to the extent not covered by the contractor's health insurance policy.

(ii) For authorized dependents under 12 years of age, one half of the cost of each examination up to a maximum USAID share of $120 per individual, plus reimbursement of charges for immunizations to the extent not covered by the contractor's health insurance policy.

(iii) The contractor must obtain the prior written approval of the Contracting Officer to receive any USAID contributions higher than these limits.

(End of clause)

[56 FR 7588, Feb. 25, 1991, as amended at 58 FR 58596, Nov. 2, 1993; 62 FR 40471, July 29, 1997; 62 FR 45334, Aug. 27, 1997]

752.7034 Acknowledgement and disclaimer.

For use in any USAID contract which funds or partially funds publications, videos, or other information/media products.

ACKNOWLEDGEMENT AND DISCLAIMER (DEC 1991)

(a) USAID shall be prominently acknowledged in all publications, videos or other information/media products funded or partially funded through this contract, and the product shall state that the views expressed by the author(s) do not necessarily reflect those of USAID. Acknowledgements should identify the sponsoring USAID Office and Bureau or Mission as well as the U.S. Agency for International Development substantially as follows:

''This (publication, video or other information/media product (specify)) was made possible through support provided by the Office of _____, Bureau for _____, U.S. Agency for International Development, under the terms of Contract No. _____. The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of the U.S. Agency for International Development.''

(b) Unless the contractor is instructed otherwise by the cognizant technical office, publications, videos or other information/media products funded under this contract and intended for general readership or other general use will be marked with the USAID logo and/or U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT appearing either at the top or at the bottom of the front cover or, if more suitable, on the first inside title page for printed products, and in equivalent/appropriate location in videos or other information/media products. Logos and markings of co-sponsors or authorizing institutions should be similarly located and of similar size and appearance.

(End of clause)

[57 FR 5237, Feb. 13, 1992]

752.7035 Public notices.

The following clause is for use when the cognizant technical office determines that the contract is of public interest, and that both the public and the Government would benefit from public notices concerning the contract, and requests that the Contracting Officer include the clause in the contract.

PUBLIC NOTICES (DEC 1991)

It is USAID's policy to inform the public as fully as possible of its programs and activities. The contractor is encouraged to give public notice of the receipt of this contract and, from time to time, to announce progress and accomplishments. Press releases or other public notices should include a statement substantially as follows: ''The U.S. Agency for International Development administers the U.S. foreign assistance program providing economic and humanitarian assistance in more than 80 countries worldwide.'' The contractor may call on USAID's Legislative and Public Affairs (LPA) for advice regarding public Notices. The contractor is requested to provide copies of notices or announcements to the cognizant technical officer and to USAID's Legislative and Public Affairs (LPA) as far in advance of release as possible.

(End of clause)

[57 FR 5237, Feb. 13, 1992, as amended at 60 FR 11913, Mar. 3, 1995]

Subpart 752.3–70—USAID Clause Matrices [Reserved]

PART 753—FORMS

Subpart 753.1—General

Sec.
753.107 Obtaining forms.

Subpart 753.2—Prescription of Forms

753.270 Prescription of USAID Forms.

Subpart 753.3—Illustration of Forms

753.300 Scope of subpart.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979 44 FR 56673, 3 CFR, 1979 Comp., p. 435.

SOURCE: 53 FR 50632, Dec. 16, 1988, unless otherwise noted.

Subpart 753.1—General

753.107 Obtaining forms.

Copies of any USAID Form referenced in the AIDAIR may be obtained from the U.S. Agency for International Development, Washington, DC 20523–0001, Attention: M/AS/ISS, Distribution, Room B–929 N.S., or from the congnizant Contracting Officer.

[53 FR 50632, Dec. 16, 1988, as amended at 56 FR 2699, Jan. 24, 1991; 56 FR 67226, Dec. 30, 1991; 59 FR 33447, June 29, 1994; 62 FR 40471, July 29, 1997]

Subpart 753.2—Prescription of Forms

753.270 Prescription of USAID forms.

The requirements for use of USAID forms are contained in parts 701 through 752 where the subject matter applicable to the form is addressed.

Subpart 753.3—Illustration of Forms

753.300 Scope of subpart.

USAID forms are not illustrated in the AIDAR. Copies of any USAID form prescribed in the AIDAR may be obtained as provided in 753.107.

APPENDIXES A–C TO CHAPTER 7 [RESERVED]

APPENDIX D TO CHAPTER 7—DIRECT USAID CONTRACTS WITH A U.S. CITIZEN OR A U.S. RESIDENT ALIEN FOR PERSONAL SERVICES ABROAD

1. *General.* (a) *Purpose.* This appendix sets forth the authority, policy, and procedures under which USAID contracts with a U.S. citizen or U.S. resident alien for personal services abroad.

(b) *Definitions.* (1) *Personal services contract (PSC)* means a contract that, by its express terms or as administered, make the contractor personnel appear, in effect, Government employees (see FAR 37.104).

(2) *Employer-employee relationship* means an employment relationship under a service contract with an individual which occurs when, as a result of the contract's terms or the manner of its administration during performance, the contractor is subject to the relatively continuous supervision and control of a Government officer or employee.

(3) *Non-person services contract* means a contract under which the personnel rendering the services are not subject either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

(4) *Independent contractor relationship* means a contract relationship in which the contractor is not subject to the supervision

and control prevailing in relationships between the Government and its employees. Under this relationship, the Government does not normally supervise the performance of the work, control the days of the week or hours of the day in which it is to be performed, or the location of performance.

(5) *Resident hire* means a U.S. citizen who, at the time of hire as a PSC, resides in the cooperating country as a spouse or dependent of a U.S. citizen employed by a U.S. government agency or under any U.S. government-financed contract or agreement, or for reasons other than for employment with a U.S. government agency or under any U.S. government-financed contract or agreement. A U.S. citizen for purposes of this definition also includes persons who at the time of contracting are lawfully admitted permanent residents of the United States.

(6) *U.S. resident alien* means a non-U.S. citizen lawfully admitted for permanent residence in the United States.

(7) *Abroad* means outside the United States and its territories and possessions.

(8) *USAID direct-hire employees* means civilian employees appointed under USAID Handbook 25 procedures or superseding Automated Directive System (ADS) Chapters.

2. *Legal Basis.* (a) Section 635(b) of the Foreign Assistance Act of 1961, as amended (hereinafter referred to as the ''FAA'') provides the Agency's contracting authority.

(b) Section 636(a)(3) of the FAA (22 U.S.C. 2396(a)(3)) authorizes the Agency to enter into personal services contracts with individuals for personal services abroad and provides further that such individuals ''* * * shall not be regarded as employees of the U.S. Government for the purpose of any law administered by the Civil Service Commission.'' [1]

3. *Applicability.* (a) This appendix applies to all personal services contracts with U.S. citizens or U.S. resident aliens to provide assistance abroad under Section 636(a)(3) of the FAA.

(b) This appendix does not apply to:

(1) Nonpersonal services contracts with U.S. citizens or U.S. resident aliens; such contracts are covered by the basic text of the FAR (48 CFR Chapter 1) and the AIDAR (48 CFR Chapter 7).

(2) Personal services contracts with individual Cooperating Country Nationals (CCNs) or Third Country Nationals (TCNs). Such contracts are covered by Appendix J of this chapter.

(3) Other personal services arrangements covered by USAID Handbook 25—Employment and Promotion or superseding ADS Chapters.

(4) Interagency agreements (e.g., PASAs and RSSAs covered by ADS 306—Interagency Agreements.

4. *Policy.* (a) *General.* USAID may finance, with either program or operating expense (OE) funds, the cost of personal services contracts as part of the Agency's program of foreign assistance by entering into a direct contract with an individual U.S. citizen or U.S. resident alien for personal services abroad.

(1) *Program funds.* Under the authority of Section 635(h) of the FAA, program funds may be obligated for periods up to five years where necessary and appropriate to the accomplishment of the tasks involved.

(2) *Operating Expense Funds.* Pursuant to USAID budget policy, OE funded salaries and other recurrent cost items may be forward funded for a period of up to three (3) months beyond the fiscal year in which these funds were obligated. Non-recurring cost items may be forward funded for periods not to exceed twenty-four (24) months where necessary and appropriate to accomplishment of the work.[2]

(b) *Limitations on Personal Services Contracts.* (1) Personal services contracts may only be used when adequate supervision is available.

(2) Personal services contracts may be used for commercial activities. Commercial activities provide a product or service which could be obtained from a commercial source. See Attachment A of OMB Circular A–76 for a representative list of such activities.

(3) Notwithstanding any other provision of USAID directives, regulations or delegations, U.S. citizen personal services contractors (USPSCs) may be delegated or assigned any authority, duty or responsibility delegable to U.S. citizen direct-hire employees (USDH employees) except that:

a. They may not supervise U.S. direct-hire employees of USAID or other U.S. Government agencies. They may supervise USPSCs and non-U.S. citizen employees.

b. They may not be designated as Contracting Officers or delegated authority to sign obligating or subobligating documents.

c. They may represent the agency, except that communications that reflect a final policy, planning or budget decision of the agency must be cleared by a USDH employee.

d. They may participate in personnel selection matters, but may not be delegated authority to make a final decision on personnel selection.

e. Exceptions to the limitations in this paragraph (b)(3) must be approved by the Assistant Administrator for Management (AA/M).

[1] The Civil Service Commission is now the Federal Office of Personnel Management.

[2] If there is a need, these contracts may be written for 5 years also but funded only as outlined in paragraph 4(a) of this Appendix.

(c) *Withholdings and Fringe Benefits.* (1) Personal services contractors (PSCs) are Government employees for purposes of the Internal Revenue Code (Title 26 of the United States Code) and are, therefore, subject to social security (FICA) and Federal income tax (FIT) withholdings. As employees, they are ineligible for the ''foreign earned income'' exclusion under the Internal Revenue Service (IRS) regulations (see 26 CFR 1.911–3(c)(3)).

(2) Personal services contractors are treated on par with other Government employees, except for programs based on any law administered by the Federal Office of Personnel Management (e.g., incentive awards, life insurance, health insurance, and retirement programs covered by 5 CFR Parts 530, 531, 831, 870, 871, and 890). While PSCs are ineligible to participate in any of these programs, the following fringe benefits are provided as a matter of policy:

(i) The employer's FICA contribution for retirement purposes.

(ii) A contribution against the actual cost of the PSC's annual health and life insurance costs. Proof of health and life insurance coverage and its actual cost to the PSC shall be submitted to the Contracting Officer before any contribution is made. (See also paragraph 4(c)(3) of this Appendix.)

(A) The contribution for health insurance shall not exceed 50% of the actual cost to the PSC for his/her annual health insurance, or the maximum U.S. Government contribution for a direct-hire employee, as announced annually by the Office of Personnel Management, whichever is less. If the PSC is covered under a spouse's health insurance plan, where the spouse's employer pays some or all of the health insurance costs, the cost to the PSC for annual health insurance shall be considered to be zero.

(B) The contribution for life insurance shall be up to 50% of the actual annual costs to the PSC for life insurance, not to exceed $500.00 per year.

(iii) PSCs shall receive the same percentage pay comparability adjustment as U.S. Government employees subject to the availability of funds.

(iv) PSCs shall receive a 3% annual salary increase subject to satisfactory performance documented in their annual written evaluation. Such increase may not exceed 3% without a deviation. This 3% limitation also applies to extensions of the same service or negotiations for a new contract for the same or similar services unless a deviation has been approved.

(v) PSCs shall receive the following allowances and differentials provided in the State Department's Standardized Regulations (Government Civilians Foreign Areas) on the same basis as U.S. Government employees (except for U.S. resident hires, see paragraph 4(d) and Section 12, General Provisions, Clause 22, ''U.S. Resident Hire Personal Services Contractors''):

(A) Temporary lodging allowance (Section 120),[3]

(B) Living quarters allowance (Section 130),[3]

(C) Post allowance (Section 220),[3]

(D) Supplemental post allowance (Section 230),[3]

(E) Separate maintenance allowance (Section 260),[4]

(F) Education allowance (Section 270),[4]

(G) Educational travel (Section 280),[4]

(H) Post differential (Section 500),

(I) Payments during evacuation/authorized departure (Section 600), and

(J) Danger pay (Section 650).

(vi) Any allowance or differential that is not expressly stated in paragraph 4(c)(2)(v) is not authorized for any PSC unless a deviation is approved. The only exception is a consumables allowance if authorized for the post under Handbook 22 or superseding ADS Chapter.

(vii) Health room services may be provided in accordance with the clause of this contract entitled ''Physical Fitness and Health Room Privileges.''

(viii) PSCs are eligible to receive benefits for injury, disability, or death under the Federal Employees' Compensation Act since the law is administered by the Department of Labor not the Office of Personnel Management.

(ix) PSCs are eligible to earn four hours of annual leave and four hours of sick leave for each two week period. However, PSCs with previous PSC service (not previous U.S. Government civilian or military service) earn either six hours of annual leave for each two week period if their previous PSC service exceeds 3 years (including 10 hours annual leave for the final pay period of a calendar year), or eight hours of annual leave for each two week period if their previous PSC service exceeds 15 years.

(3) A PSC who is a spouse of a current or retired Civil Service, Foreign Service, or Military Service member and who is covered by their spouse's Government health or life insurance policy is ineligible for the contribution under paragraph 4(c)(2)(ii) of this appendix.

(4) Retired U.S. Government employees shall not be paid additional contributions for health or life insurance under their contract (since the Government will normally have already paid its contribution for the retiree) unless the employee can prove to the satisfaction of the Contracting Officer that his/

[3] Mission Directors may authorize per diem in lieu of these allowances.

[4] These allowances are not authorized for short tours (i.e., less than a year).

her health and life insurance does not provide or specifically excludes coverage overseas. If coverage overseas is excluded, then eligibility as cited in paragraph 4(c)(3) applies.

(5) Retired U.S. Government employees may be awarded Personal Services Contracts without any reduction in or offset against their Government annuity.

(d) *U.S. Resident Hire Personal Services Contractors.* U.S. resident-hire PSCs are not eligible for any fringe benefits (except contributions for FICA, health insurance, and life insurance), including differentials and allowances unless such individuals can demonstrate to the satisfaction of the Contracting Officer that they have received similar benefits and allowances from their immediately previous employer in the cooperating country, or the Mission Director may determine that payment of such benefits would be consistent with the Mission's policy and practice and would be in the best interests of the U.S. Government.

(e) *Determining Salary for Personal Services Contractors.* (1) There are two separate and distinct methods of establishing a salary for personal services contractors. Use of method number 1 is required unless justified and approved as provided for in paragraph (e)(1)(ii).

(i) *Method 1:* Salaries for Personal Services Contractors shall be established based on the market value in the United States of the position being recruited for. This requires the Contracting Officer in coordination with the Technical Officer to determine the correct market value (a salary range) of the position to be filled. This method is required in establishing salary for all PSCs unless method 2 is authorized as provided for in paragraph (e)(1)(ii). Contract Information Bulletin (CIB) 96–8 dated February 23, 1996 provides a guide which contains information concerning Preparation of Scopes of Work, Determination of Salary Class Grade, Salary Class Bench Marks and Salary Class Review. The market value of the position then becomes the basis along with the applicants' certified salary history on the SF 171, ''Personal Qualifications Statement'' for salary negotiations by the Contracting Officer. The SF 171 must be retained in the permanent contract file. Any position which is determined to be above the GS–13 equivalent and exceeds six months in duration must be classified by M/HR/POD. The crucial point is the establishment of a realistic and reasonable market value for a job. The final determination regarding the reasonableness of a salary level rests with the Contracting Officer. Paying salaries using this method avoids ''rank in person'' salaries which are in excess of the value of the job being contracted for.

(ii) *Method 2:* If approved in writing by the Mission Director or the cognizant Assistant Administrator, based on written justification, salary may be negotiated based on the applicant's current earnings adjusted in accordance with the factors set out in paragraphs (e)(1)(ii) (A) through (C). This approval requirement cannot be redelegated. Current earnings must be certified by the contractor on the SF 171, (see paragraph 6(b)(3) of this appendix). This is guidance for establishing initial salaries, not subsequent increases, for the same contractor performing the same function.

(A) As a rule, up to a 3 percent increase above current earnings may be given. However, a 3 percent increase is awarded only to a PSC whose earnings are based on a period of twelve months or more; 2 percent for established earnings of less than twelve months but not less than four months; or 1 percent for established earnings during the past four months.

(B) Additional percentages may be given for the following factors. If a PSC has worked in a developing country for more than two years, an additional 1 percent may be awarded. Education related to the area of specialization and above the minimum qualification required may warrant an additional 1 percent, and those specialties for which there is keen competition in the employment market or a serious shortage category nationwide may be awarded an additional 2 percent. In addition, related technical experience over 5 years may increase the percentage by 1 and over ten years by 3.

(C) All requests for an initial rate of pay above 10 percent over current earnings must be approved in writing by the appropriate Assistant Administrator or Mission Director. Current earnings are actual earnings for work reasonably related to the position for which the applicant is being considered. Paragraphs 4(e)(1)(ii) (A) through (C) apply only to salary setting method number 2 in paragraph 4 (e)(1)(ii).

(2) When an applicant has no current earnings history (e.g., a person returning to the workforce after an absence of a number of years) or when an applicant's current earnings history doesn't accurately reflect the applicant's job market worth (e.g., a Peace Corps volunteer), every effort should be made to establish a market value for the position as a basis for negotiation, notwithstanding the lack of a current earnings history, provided that the applicant has the full qualifications for the job and could command a similar salary in the open job market.

(3) This Appendix applies the ''USAID Contractor Salary Threshold (USAID CST)'' policy in Automated Directives System (ADS) Chapter 302.3.6.8 to salaries for U.S. PSCs. Salaries in excess of the USAID CST, which is equivalent to the maximum rate for Federal agencies without a certified SES performance appraisal system, must be approved by the M/OAA Director in accordance with the approval procedures in ADS

302.3.6.8(e). This approval cannot be re-delegated.

(f) *Incentive Awards.* U.S. PSCs are not eligible to receive monetary awards. They are eligible for non-monetary awards such as certificates.

(g) *Annual Salary Increase.* PSC contracts written for more than one year should provide for a 3% annual increase based on satisfactory performance documented in their annual written evaluations.

(h) *Pay Comparability Adjustment.* PSCs shall receive the same percentage pay comparability adjustment as that received by U.S. Government employees subject to the availability of funds.

(i) *Subcontracting.* PSCs are U.S. Government employees and may not be called upon (or permitted) to subcontract out any part of their work. Funds for subcontracting have no place in the budget of a personal services contract. Support services, equipment, and supplies (e.g., typing and report preparation, paper, pens, computers, and furniture) should be furnished to PSCs just as they would be to direct-hire employees. To the extent that direct-hire personnel may be authorized to purchase supporting services or supplies under a travel authorization, so may PSCs; otherwise, contracts for personal services should not contain any funds for procurement.

5. *Soliciting for Personal Services Contracts.* (a) *Technical Officer's Responsibilities.* The Technical Officer will prepare a written detailed statement of duties and a statement of minimum qualifications to cover the position being recruited for. The statement shall be included in the procurement request (the Acquisition & Assistance Request Document) e.g., the request shall also include the following additional information as a minimum:

(1) The specific foreign location(s) where the work is to be performed, including any travel requirements (with an estimate of frequency);

(2) The length of the contract, with beginning and ending dates, plus any options for renewal or extension;

(3) The basic education, training, experience, and skills required for the position;

(4) An estimate of what a comparable GS/FS equivalent position should cost, including basic salary, allowances, and differentials, if appropriate; and

(5) A list of Government or host country furnished items (e.g., housing).

(b) *Contracting Officer's Responsibilities.* (1) The Contracting Officer will prepare the solicitation for personal services which shall contain:

(i) Three sets of SF 171s and SF 171As. (Upon receipt, one copy of each SF 171 and SF 171A shall be forwarded to the Project Officer.)

(ii) A detailed statement of duties or a completed position description for the position being recruited for.

(iii) A copy of the prescribed contract Cover Page, Contract Schedule, General Provisions as appropriate, as well as the FAR Clauses to be incorporated in full text and by reference.

(iv) A copy of the USAID General Notice entitled ''Employee Review of the New Standards of Conduct''.

(2) The Contracting Officer shall comply with the requirements of (48 CFR) AIDAR 706.302–70(c) as detailed in paragraph 5(c) except those recruited from the U.S.

(c) *Competition.* (1) Under (48 CFR) AIDAR 706.302–70(b)(1), Personal Services Contracts (except those recruited from the U.S.) are exempt from the requirements for full and open competition with two limitations that must be observed by Contracting Officers:

(i) Offers are to be requested from as many potential offerors as is practicable under the circumstances, and

(ii) A justification supporting less than full and open competition must be prepared in accordance with FAR 6.303.

(2) *PSCs With Untied States Citizens or Resident Aliens Recruited from Outside the Cooperating Country.* Solicitations for PSCs recruited outside the cooperating country must be publicized via the Agency's External Home Page on the Internet under the caption ''Business & Procurement, USAID Procurements.'' Instructions regarding how to access the External Internet and the information to be provided have been approved and included in a CIB. A justification under FAR 6.303 is not required when this procedure is followed.

(3) A class justification was approved by the USAID Procurement Executive to satisfy the requirements of (48 CFR) AIDAR 706.302–70(c)(2) for a justification in accordance with FAR 6.303. This class justification for Personal Services Contracts with U.S. Citizens may only be used for those who are recruited locally subject to the following conditions:

(i) The position was publicized locally in accordance with established Mission policy or procedure, or the procedures in paragraph 5(c)(ii) was followed;

(ii) As an alternative to the procedures in paragraphs 5(c) (i) and (ii), at least 3 individuals were considered by consulting source lists (e.g., applications or resumes on hand) or conducting other informal solicitation.

(iii) Extensions or renewals with the same individual for continuing services do not need to be publicized.

(iv) A copy of the class justification (which was distributed to all USAID Contracting Officers via Contract Information Bulletin) must be included in the contract file, together with a written statement, signed by the Contracting Officer, that the contract is being awarded pursuant to (48 CFR) AIDAR

706.302–70(b)(1); that the conditions for use of this class justification have been met; and that the cost of the contract is fair and reasonable.

(4) If the appropriate competitive procedure in paragraph 5(3) is not followed, the Contracting Officer must prepare a separate justification as required under (48 CFR) AIDAR 706.302–70(c)(2).

(5) Since the award of a Personal Services Contract is based on technical qualifications, not price, and since the SF 171, ''Personal Qualifications Statement'', and SF 171A, ''Continuation Sheet for Standard Form 171'', are used to solicit for such contracts, FAR subparts 15.4 and 15.5 and FAR parts 52 and 53 are inappropriate and shall not be used. Instead, the solicitation and selection procedures outlined in this Appendix shall govern.

6. *Negotiating a Personal Services Contract.* Negotiating a Personal Services Contract is significantly different from negotiating a nonpersonal services contract because it establishes an employer-employee relationship; therefore, the selection procedures are more akin to the personnel selection procedures.

(a) *Technical Officer's Responsibilities.* The Technical Officer shall be responsible for reviewing and evaluating the applications (i.e., SF 171s) received in response to the solicitation issued by the Contracting Officer. If deemed appropriate, interviews may be conducted with the applicants before the final selection is submitted to the Contracting Officer.

(b) *Contracting Officer's Responsibilities.* (1) The Contracting Officer shall forward a copy of each SF 171 received under the solicitation to the Project Officer for evaluation.

(2) On receipt of the Technical Officer's recommendation, the Contracting Officer shall conduct negotiations with the recommended applicant. Normally, the Contracting Officer shall negotiate only the salary (see the salary setting coverage in paragraph 4(e) of this Appendix). The terms and conditions of the contract, including differentials and allowances, are not negotiable or waivable without a properly approved deviation (see (48 CFR) AIDAR 701.470). If the Contracting Officer can negotiate a salary that is fair and reasonable, then the award shall be made.

(3) The Contracting Officer shall use the certified salary history on the SF 171 as the basis for salary negotiations, along with the market value of the position being recruited for (unless approval not to use market value has been granted under paragraph 4(e)(1)(ii)), and the Technical Officer's cost estimate.

(4) The Contracting Officer will obtain two copies of IRS Form W–4, ''Employee's Withholding Allowance Certificate'', from the successful applicant. (Upon receipt, the Contracting Officer will forward one copy of the W–4 to the Office of the Controller.)

(5) Security clearance is required for all U.S. citizens entering into USAID PSCs. The Contracting Officer will obtain four sets of SF 86, ''Security Investigation Data for Sensitive Position'', from the successful applicant and forward them to the Office of Security. PSCs may receive a preliminary clearance and be placed under contract prior to receipt of clearance provided the appropriate paper work has been completed, reviewed by IG/SEC/PSI and acknowledged as a ''no objection'' to the appropriate Mission. See General Provision 24 in section 12 of this Appendix.

7. *Executing a Personal Services Contract.* Contracting Officers or Heads of Contracting Activities, whether USAID/W or Mission, may execute Personal Services Contracts, provided that the amount of the contract does not exceed the contracting authority that has been redelegated to them. In executing a Personal Services Contract, the Contracting Officer is responsible for insuring that:

(a) The proposed contract is within his/her delegated authority;

(b) A Request Number covering the proposed contract has been received;

(c) The position has been classified by either the Mission or M/HR/POD (see CIB 96–8) and the classification is in the contract file;

(d) The proposed Statement of Duties is contractible, contains a statement of minimum qualifications from the technical office requesting the services, and is suitable to the use of a Personal Services Contract in that:

(1) Performance of the proposed work requires or is best suited for an employer-employee relationship, and is thus not suited to the use of a non-personal services contract;

(2) The Statement of Duties does not require performance of any function normally reserved for Federal employees (see paragraph 4(b) of this Appendix); and

(3) There is no apparent conflict of interest involved (if the Contracting Officer believes that a conflict of interest may exist, the question should be referred to the cognizant legal counsel);

(e) Selection of the contractor is documented and justified. (48 CFR) AIDAR 706.302–70(b)(1) provides an exception to the requirement for full and open competition for Personal Services Contracts abroad (see paragraph 5(c) of this Appendix);

(f) The standard contract format prescribed for Personal Services Contracts (Sections 10, 11, 12 and 13 to this Appendix) is used; or that any necessary deviations are processed as required by (48 CFR) AIDAR 701.470.

(NOTE: The prescribed contract format is designed for use with contractors who are residing in the U.S. when hired. If the contract is with a U.S. citizen residing in the cooperating country when hired, contract provisions governing physical fitness and travel/transportation expenses, and home leave, allowances, and orientation should be suitably modified (see paragraph 4(d) of this Appendix)).

These modifications are not considered deviations subject to (48 CFR) AIDAR 701.470. (Justification and explanation of these modifications is to be included in the contract file);

(g) Orientation is arranged in accordance with General Provision 23 in section 12 of this Appendix;

(h) The contractor has submitted the names, addresses, and telephone numbers of at least two persons who may be notified in the event of an emergency (this information is to be retained in the contract file);

(i) The contract is complete and correct and all information required on the contract Cover Page (USAID Form 1420–36A) has been entered;

(j) The contract has been signed by the Contracting Office and the contractor, and fully executed copies are properly distributed;

(k) The following clearances, approvals and forms have been obtained, properly completed, and placed in the contract file before the contract is signed by both parties;

(1) Evidence of job classification in the file by the Mission except for grade equivalents above GS–13. For those positions with grade equivalent above GS–13, evidence of job classification done by M/HR/POD;

(2) Security clearance, including the completed SF 86, to the extent required by USAID Handbook 6, Security or superseding ADS Chapter, (see General Provisions 14 and 24 in section 12 of this Appendix);

(3) Mission, host country, Human Resources Office, and technical office clearance, as appropriate;

(4) Medical examinations and certifications as required by the contract general provision entitled ''Physical Fitness and Health Room Privileges'';

(5) One original executed IRS Form W–4 entitled ''Employee's Withholding Allowance Certificate'', and one copy, shall be obtained. The original shall be sent to the Controller of the paying office and one shall be placed in the contract file;

(6) Evidence of DAA/HR clearance that the position may be filled by PSC.

(7) The approval for any salary in excess of the ''USAID Contractor Salary Threshold (USAID CST)'', which is equivalent to the maximum rate for Federal agencies without a certified SES performance appraisal system, in accordance with approval procedures in ADS 302.3.6.8(e) as required in Section 4.(e)(3);

(8) A copy of the class justification or other appropriate explanation and support required by (48 CFR) AIDAR 706.302–70, if applicable;

(9) Any deviation to the policy or procedures of this appendix, processed and approved under (48 CFR) AIDAR 701.470;

(10) A fully executed SF 171, and a copy of the position classification, and approved deviation, if appropriate;

(11) The Memorandum of Negotiation; and

(12) The Contracting Officer's signed certification that competition requirements have been satisfied as described in paragraph 5(c) of the policy text of this Appendix. The certification shall be a part of the Memorandum of Negotiations.

(l) Funds for the contract are properly obligated to preclude violation of the Anti-Deficiency Act, 31 U.S.C. 1341 (the Contracting Officer ensures that the contract has been properly recorded by the appropriate accounting office prior to its release for the signature of the selected contractor);

(m) The contractor receives and understands the USAID General Notice entitled ''Employee Review of the New Standards of Conduct'' and a copy is attached to each contract as provided for in paragraph (c) of General Provision 1, section 12;

(n) Agency conflict of interest requirements as set out in the General Notice ''Employee Review of the New Standards of Conduct'' are met by the contractor prior to his/her reporting for duty;

(o) A copy of a Checklist for Personal Services contractors which may be in the format set out in this section or another format convenient for the Contracting Officer, provided that a memorandum containing all of the information described in this section 7 shall be prepared for each PSC and placed in the contract file;

(p) The contractor understands that he/she is an employee of the United States for purposes of the Foreign Assistance Act of 1961, as amended, and the Internal Revenue Code (Title 26 of the United States Code). This subjects the employee to withholding for both FICA and Federal Income Tax and precludes the employee from receiving the Federal Earned Income Tax exclusion of 26 U.S.C. Section 911. See Special Note on the Cover Page of USAID Form 1420–36.

(q) The contractor also understands that he/she may commence work prior to the completion of the security clearance. However, until such time as clearance is received, the contractor may not have access to classified or administratively controlled materials. Failure to obtain clearances will constitute cause for termination.

8. *Post Audit.* The Inspector General, or his/her designee, audits the Personal Services Contracts of all contracting activities for

the purpose of ensuring conformance to applicable policy and regulations.

9. *Contracting Format.* The prescribed Contract Cover Page, Contract Schedule, General Provisions, and appropriate Federal Acquisition Regulations (FAR) clauses for Personal Services Contracts covered by this appendix are included as follows:

10. *Form USAID 1420–36, ''Cover Page'' and ''Schedule''.*

11. *Optional Schedule With a U.S. Citizen or U.S. Resident Alien.*

12. *General Provisions.*

13. *FAR Clauses to be Incorporated in Full Text in Personal Services Contracts.*

14. *FAR Clauses to be incorporated by reference in Personal Services Contracts.*

10. *Form USAID 1420–36, ''Cover Page'' and ''Schedule''.*

Contract With a U.S. Citizen or U.S. Resident Alien for Personal Services Abroad—Form AID 1420–36A (11/96) (Cover Page)

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

CONTRACT WITH A U.S. CITIZEN OR U.S. RESIDENT ALIEN FOR PERSONAL SERVICES ABROAD

Ethics Code *("X" Appropriate Box)* ☐ N ☐ C ☐ P

Negotiated Pursuant to Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, and Executive Order 11223	Contract Number
Country of Performance	Amount Obligated This Action / Total Estimated Contract Cost $
Contract For Technical Services	Request Document Number
For	Contractor *(Name, Street, City, State, Postal Zone)*
Contracting Office *(Name and Address)*	
Administered By *(If other than Contracting Office)*	Effective Date / Estimated Completion Date
Cognizant Scientific/Technical Office *(Name, Office Symbol, Address)*	Accounting and Appropriation Data Resource Category Organization Request ID Activity Fund Fund Account Allotment Symbol Nationality Social Security Number
Supervising Officer	Green Card Holder ☐ Yes ☐ No
Payment Will be Made By	Type of Advance *("X" Appropriate Box)* ☐ INITIAL ☐ NONE AUTHORIZED

The United States of America, hereinafter called the Government, represented by the Contracting Office executing this contract, and the Contractor agree that the Contractor shall perform all the services set forth in the attached Schedule, for the consideration stated therein. The rights and obligations of the parties to this contract shall be subject to and governed by the Schedule and the General Provisions. To the extent of any inconsistency between the Schedule or the General Provisions and any specifications or other provisions which are made a part of this contract, by reference or otherwise, the Schedule and the General Provisions shall control. To the extent of any inconsistency between the Schedule and the General Provisions, the Schedule shall control.

SPECIAL NOTE: As an employee for purposes of Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, *(22 USC 2396(a)(3))*, the Contractor is generally an employee of the United States for purposes of laws other than those administered by the Office of Personnel Management *(i.e., Title 5, United States Code)*. This includes being an employee of the United States for purposes of Title 26, United States Code, which subjects the Contractor to withholding for both FICA and Federal Income Tax, and precludes the Contractor from receiving the federal earned income tax exclusion of 26 USC Section 911.

(Fill In Appropriate Spaces)

This Contract consists of this Cover Pager, the Schedule of _____pages, including the Table of Contents,

The General Provisions Section 11 and Section 12 FAR Clauses by reference.

	UNITED STATES OF AMERICA AGENCY FOR INTERNATIONAL DEVELOPMENT
Signature of Contractor	By *(Signature of Contracting Officer)*
Typed or Printed Name	Typed or Printed Name
Date	Date

AID 1420-36A (11/96)

-32-

PRIVACY ACT STATEMENT

This information is provided pursuant to Public Law 93–579 (Privacy Act of 1974), December 31, 1974, for individuals who complete this form.

The Executive Office of the President, Office of Management and Budget has required

that all departments and agencies comply with the reporting requirements of Section 6041 of the Internal Revenue Code, Section 6041 states that all departments and agencies making payments totalling $600 or more in one year to a recipient for services provided must be reported to the Internal Revenue Service (IRS). The SSN and all financial numbers will be disclosed to U.S. Agency for International Development (USAID) payroll office personnel and personnel in the Department of the Treasury, Division of Disbursements. USAID will use this SSN to complete Form W-2 of the Code on employee compensation. Disclosure by the personal services contractor of the SSN is necessary to obtain the services, benefits or processes provided by this contract. Disclosure of the SSN may be made outside USAID (a) pursuant to any applicable routine use listed in USAID's Notice for implementing the Privacy Act as published in the Federal Register or (b) when disclosure by virtue of a contract being a public document after signatures is authorized under the Freedom of Information Act.

Schedule

(The Illustrated Schedule consists of this Table of Contents—Articles I–VI, and the General Provisions.)

TABLE OF CONTENTS

Article I—Statement of Duties
Article II—Period of Service Overseas
Article III—Contractor's Compensation and Reimbursement in U.S. Dollars
Article IV—Costs Reimbursable and Logistic Support
Article V—Precontract Expenses
Article VI—Additional Clauses

General Provisions:

The following provisions numbered as shown below omitting number(s) _____, are the General Provisions (GPs) of this Contract:

1. Definitions
2. Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security, Federal Income Tax and Foreign Earned Income
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment
12. Conversion of U.S. Dollars to Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination
17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. Resident Hire PSC
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation Services
26. Governing Law

For each tour of duty, attach the applicable General Provisions.

Schedule: (NOTE: Use of the following Schedule Articles are not mandatory. They are intended to serve as guidelines for contracting offices in drafting contract schedules. Article language may be changed to suit the needs of the particular contract).

Article I—Statement of Duties

(The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Any USAID consultation or orientation.)

Article II—Period of Service Overseas

Within _____ days after written notice from the Contracting Officer that all clearances, including the doctor's statement of medical opinion required under General Provision Clause 4, have been received or unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to _____ where he/she shall promptly commence performance of the duties specified above. The contractor's period of service overseas shall be approximately _____ in _____. (Specify time of duties in each location as well as authorized stopovers with purpose of each.)

Article III—Contractor's Compensation and Reimbursement in U.S. Dollars

A. Except to the extent reimbursement is payable in the currency of the Cooperating Country pursuant to Article IV, USAID shall pay the contractor compensation after it has accrued and reimburse him/her in U.S. dollars for necessary and reasonable costs actually incurred by him/her in the performance of this contract within the categories listed in paragraph C, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GP).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) which is to include:

(1) vacation, sick, and home leave which may be earned during the contractor's tour of duty (GP Clause 5);

(2) _____ days for authorized travel (GP Clause 10); and

(3) _____ days for orientation and consultation in the United States (GP Clause 23).

C. Allowable Costs: 1. Compensation at the rate of $_____ per (year) (month) (week) (day). Adjustments in compensation (pay) for periods when the contractor is not in compensable pay status shall be calculated as follows:

Rate of $_____ per (day) (hour).

Contingency for Compensation (Pay Comparability) Adjustments. $_____.

Annual Salary increase (3%) $_____.

2. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.) $_____.

*3. Overseas Differential (Ref. GP Clause No. 6.) Rate $_____ and Contingency $_____=Total $_____.

**4. Allowances in Cooperating Country (Ref. GP Clause 6.) $_____.

**5. Travel and Transportation (Ref. GP Clause 10.) (Includes the value of GTRs furnished by the Government, not payable to contractor). $_____.

a. United States $_____

b. International $_____

c. Cooperating and Third Country $_____

Subtotal Item 5 $_____

**6. Subsistence or Per Diem (Ref. GP Clause 10.)

a. Untied States $_____

b. International $_____

c. Cooperating and Third Country $_____.

Subtotal Item 6 $_____

7. Other Direct Costs.

a. Health and Life Insturance $_____

b. Precontract Costs, passport, visa, inoculations, etc. (Ref. GP Clause 8.) $_____

c. Physical Examination (Ref. GP Clause 3.) $_____

d. Communications, Miscellaneous. $_____

Subtotal Item 7 $_____

8. F.I.C.A.–U.S.G. Contribution (not payable to contractor). $_____

D. Maximum U.S.-Dollar Obligation:

In no event shall the maximum U.S.-dollar obligation under this contract exceed $_____. Contractor shall keep a close account of all obligations he/she incurs and accrues hereunder and promptly notify the Contracting Officer whenever in his/her opinion the said maximum is not sufficient to cover all compensation and costs reimbursable in U.S. dollars which he/she anticipates under the contract.

*If post differential is applicable to the assigned post, a contingency for the adjusted amount of differential resulting from compensation (pay comparability) adjustment should be included.

**Do not include the value of any costs to be paid or reimbursed in local currency.

Article IV—Costs Reimbursable and Logistic Support

A. General: The contractor shall be provided with or reimbursed in local currency (_____) for the following:

[Complete]

B. Method of Payment of Local Currency Costs: Those contract costs which are specified as local currency costs in paragraph A above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with General Provision Clause 11. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

[Complete]

Article V—Precontract Expenses

No expense incurred before execution of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

Article VI—Additional Clauses

(Additional Schedule Clauses may be added such as the implementation of General Provisions or Additional Clauses.)

11.*Optional Schedule With a U.S. Citizen or U.S. Resident Alien*

A U.S. Citizen or a U.S. Resident Alien PSC
Contract No. _____

TABLE OF CONTENTS

(Optional Schedule)

(Use of the Optional Schedule is not mandatory. It is intended to serve as an alternate procedure for OE funded U.S. PSCs or U.S. Resident Alien PSCs. The Schedule is for use when the Contracting Officer anticipates incremental recurring cost funded contracts.

Use of the Optional Schedule eliminates the need to amend the contract each time funds are obligated. However, the Contracting Officer is required to amend each contract not less than twice during a 12 month period to ensure that the contract record of obligations is up to date and agrees with the figures in the master funding document.)

The Schedule on pages _____ thru _____ consists of this Table of Contents and the following Articles:

Article I—Statement of Duties

Article II—Period of Service Overseas
Article III—Contractor's Compensation and Reimbursement in U.S. Dollars
Article IV—Costs Reimbursable and Logistic Support
Article V—Precontract Expenses
Article VI—Additional Clauses

General Provisions:

The following provisions, numbered as shown below, omitting number(s) _____, are the General Provisions (GP) of this Contract:

1. Definitions
2. Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security and Federal Income Tax
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment
12. Conversion of U.S. Dollars of Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination
17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. Resident Hire PSC
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation Services
26. Governing Law

For each tour of duty, attach the applicable General Provisions.

Article I—Statement of Duties.

(The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Any USAID consultation or orientation.)

Article II—Period of Service Overseas.

Within _____ days after written notice form the Contracting Officer that all clearances, including the doctor's statement of medical opinion required under General Provision Clause 3, have been received or unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to _____ where he/she shall promptly commence performance of the duties specified above. The contractor's period of service overseas shall be approximately _____ in _____. (Specify time of duties in each location as well as authorized stopovers with purpose of each.)

Article III—Contractor's Compensation and Reimbursement in U.S. Dollars.

A. Except to the extent reimbursement is payable in the currency of the Cooperating Country pursuant to Article IV, USAID shall pay the contractor compensation after it has accrued and reimburse him/her in U.S. dollars for necessary and reasonable costs actually incurred by him/her in the performance of this contract within the categories listed in paragraph C, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GP).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) which is to include:

1. Vacation, sick, and home leave which may be earned during the contractor's tour of duty (GP Clause 5);

2. _____ days for authorized travel (GP Clause 10); and

3. _____ days for orientation and consultation in the United States (GP Clause 23).

C. Allowable Costs: 1. The following illustrative budget details allowable costs under this contract and provides estimated incremental recurrent cost funding in the total amount shown. Additional funds for the full term of this contract will be provided by the preparation of a master PSC funding document issued by the Mission Controller for the purpose of providing additional funding for a specific period. The master PSC funding document will be attached to this contract and will form a part of the executed contract while also serving to amend the budget.

2. Compensation at the rate of $_____ per (year) (month) (week) (day). Adjustments in compensation (pay) for periods when the contractor is not in compensable pay status shall be calculated as follows:

Rate of $_____ per (day) (hour).

Contingency for Compensation (Pay Comparability Adjustments.) $_____

Annual Salary increase (3%) $_____

3. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.) $_____

*4. Overseas Differential (Ref. GP Clause No. 6.) Rate $_____ and Contingency $_____ = Total $_____.

**5. Allowances in Cooperating Country (Ref. GP Clause 6.) $_____

*If post differential is applicable to the assigned post, a contingency for the adjusted amount of differential resulting from compensation (pay comparability) adjustment should be included.

**6. Travel and Transportation (Ref. GP Clause 10.) (Includes the value of GTRs furnished by the Government, not payable to contractor). $_____.

a. United States $_____

b. International $_____

c. Cooperating and Third Country $_____

Subtotal Item 6 $_____

**7. Subsistence or Per Diem (Ref. GP Clause 10.)

a. United States $_____

b. International $_____

c. Cooperating and Third Country $_____

Subtotal Item 7 $_____

**8. Other Direct Costs

a. Health and Life Insurance (Ref. GP Clause 9.) $_____

b. Precontract Costs, passport, visa, inoculations, etc. (Ref. GP Clause 8.) $_____

c. Physical Examination (Ref. GP Clause 3.) $_____

d. Communications, Miscellaneous Subtotal Item 8 $_____

9. F.I.C.A.—U.S.G. contribution (not payable to contractor). $_____

D. Maximum U.S.-Dollar Obligation: In no event shall the maximum U.S.-dollar obligation under this contract exceed $_____.

E. Salary changes and personnel-related contract actions will be made by processing the same forms as used in making such changes and actions for direct-hire employees. When issued by the Contracting Officer, the forms utilized will be attached to the contract and will form a part of the contract terms and conditions.

F. Any adjustment or increase in the compensation granted to direct-hire employees will be allowed for in PSCs subject to the availability of funds. Such an adjustment will be effected by a mass pay adjustment notice from the Contracting Officer, which will be attached to the contract and form a part of the executed contract.

G. At the end of each year of satisfactory service, PSC contractors will be eligible to receive an increase equal to 3% pending availability of funds provided their services have been satisfactory. Such increase will be effected by the execution of an SF–1126, payroll change slip which is to be attached to each contract and each action forms a part of the official contract file.

H. The master PSC funding document may not exceed the term or estimated total cost of this contract. Notwithstanding that additional funds are obligated under this contract through the issuance and attachment of the master PSC funding document, all other contract terms and conditions remain in full effect.

** Do not include the value of any costs to be paid or reimbursed in local currency.

Article IV—Costs Reimbursable and Logistic Support

A. General: The contractor shall be provided with or reimbursed in local currency (_____) for the following:

[Complete]

B. Method of Payment of Local Currency Costs: Those contract costs which are specified as local currency costs in paragraph A above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with General Provision Clause 12. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

Article V—Precontract Expenses

No expense incurred before execution of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

Article VI—Additional Clauses

(Additional Schedule Clauses may be added such as the implementation of General Provisions or Additional Clauses.)

12. *General Provisions*

Contract With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

The following clauses are to be used (when applicable), for both tours of duty of less than 1 year as well as 1 year or more.

INDEX OF CLAUSES

1. Definitions
2. Compliance with Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security, Federal Income Tax, and Foreign Earned Income
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment
12. Conversion of U.S. Dollars to Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination

17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. U.S. Resident Hire Personal Services Contractor
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation (MEDEVAC) Services
26. Governing Law

1. Definitions (June 1990)

(a) *USAID* shall mean the U.S. Agency for International Development.

(b) *Administrator* shall mean the Administrator or the Deputy Administrator of USAID.

(c) *Contracting Officer* shall mean a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(d) *Contractor* shall mean the individual engaged to serve under this contract.

(e) *Cooperating Country* shall mean the foreign country in or for which services are to be rendered hereunder.

(f) *Cooperating Government* shall mean the government of the Cooperating Country.

(g) *Government* shall mean the United States Government.

(h) *Local currency* shall mean the currency of the Cooperating Country.

(i) *Mission* shall mean the United States USAID Mission, or principal USAID office, in the Cooperating Country, or USAID/Washington (USAID/W).

(j) *Mission Director* shall mean the principal officer in the Mission in the Cooperating Country, or his/her designated representative.

(k) *Technical Officer* shall mean the USAID official to whom the contractor reports, and who is responsible for monitoring the contractor's performance.

(l) *Tour of duty* shall mean the contractor's period of service under this contract and shall include orientation in the United States (less language training), authorized leave, and international travel.

(m) *Traveler* shall mean—

(1) The contractor in authorized travel status or

(2) Dependents of the contractor who are in authorized travel status.

(n) *Dependents* means:

(1)Spouse.

(2) Children (including step and adopted children) who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support.

(3) Parents (including step and legally adoptive parents) of the employee or of the spouse, when such parents are at least 51 percent dependent on the contractor for support.

(4) Sisters and brothers (including step or adoptive sisters or brothers) of the contractor, or of the spouse, when such sisters and brothers are at least 51 percent dependent on the contractor for support, unmarried and under 21 years of age, or regardless of age, are incapable of self-support.

(o) *U.S. Resident Alien,* as used in this contract, shall mean an alien immigrant, legally resident in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States, and having a valid ''Alien Registration and Receipt Card'' (Immigration and Naturalization Service forms I–151 or I–551).

(p) *U.S. Resident Hire Personal Services Contractor (PSC)* means a U.S. citizen who, at the time of hiring as a PSC, resides in the Cooperating Country:

(1) As a spouse or dependent of a U.S. citizen employed by a U.S. Government Agency or under any U.S. Government-financed contract or agreement, or

(2) For reasons other than for employment with a U.S. Government Agency or under any U.S. Government-financed contract or agreement. A U.S. citizen for purposes of this definition also includes a person who at the time of contracting, is a lawfully admitted permanent resident of the United States.

2. Compliance With Laws and Regulations Applicable Abroad (July 1993)

(a) *Conformity to Laws and Regulations of the Cooperating Country.* Contractor agrees that, while in the cooperating country, he/she as well as authorized dependents will abide by all applicable laws and regulations of the cooperating country and political subdivisions thereof.

(b) *Purchase or Sale of Personal Property or Automobiles.* To the extent permitted by the cooperating country, the purchase, sale, import, or export of personal property or automobiles in the cooperating country by the contractor shall be subject to the same limitations and prohibitions which apply to Mission U.S.-citizen direct-hire employees.

(c) *Code of Conduct.* The contractor shall, during his/her tour of duty under this contract, be considered an ''employee'' (or if his/her tour of duty is for less than 130 days, a ''special Government employee'') for the purposes of, and shall be subject to, the provisions of 18 U.S.C. 202(a) and the USAID General Notice entitled ''Employee Review of the New Standards of Conduct'' pursuant to 5 CFR part 2635. The contractor acknowledges receipt of a copy of these documents by his/her acceptance of this contract.

3. Physical Fitness and Health Room Privileges (APR 7)

(a) *Physical Fitness.* (1) For all assignments outside of the United States the contractor and any authorized dependents shall be required to be examined by a licensed doctor of medicine, and the contractor shall obtain from the doctor a statement of medical opinion that, in the doctor's opinion, the contractor is physically able to engage in the type of activity for which he/she is to be employed under the contract, and the contractor and any dependents are physically able to reside in the Cooperating Country. A copy of the statement(s) shall be provided to the Contracting Officer prior to the contractor's departure for the Cooperating Country, or for a U.S. resident hire, before he/she starts work under the contract.

(2) For assignments of 60 days or more in the Cooperating Country, the Contracting Officer shall provide the contractor and all authorized dependents copies of the ''USAID Contractor Employee Physical Examination Form''. This form is for collection of information; it has been reviewed and approved by OMB, and assigned Control No. 0412–0536. Information required by the Paperwork Reduction Act (burden estimate, points of contract, and OMB approval expiration date) is printed on the form. The contractor and all authorized dependents shall obtain a physical examination from a licensed physician, who will complete the form for each individual. The contractor will deliver the physical examination form(s) to the Embassy health unit in the Cooperating Country. A copy of the doctor's statement of medical opinion at the end of the form which identifies the contractor or dependent by name may be used to meet the requirement in (a)(1) above.

(3) For end-of-tour the contractor and his/her authorized dependents are authorized physical examinations within 60 days after completion of the contractor's tour-of-duty.

(b) *Reimbursement.* (1) As a contribution to the cost of medical examinations required by paragraph (a)(1) of this clause, USAID shall reimburse the contractor not to exceed $100 for each physical examination, plus reimbursement of charges for immunizations.

(2) As a contribution to the cost of medical examinations required by paragraph (a)(2) of this clause the contractor shall be reimbursed in an amount not to exceed half of the cost of the examination up to a maximum USAID share of $300 per examination plus reimbursement of charges for immunizations for himself/herself and each authorized dependent 12 years of age or over. The USAID contribution for authorized dependents under 12 years of age shall not exceed half of the cost of the examination up to a maximum share of $120 per individual plus reimbursement of charges for immunizations. The contractor must obtain the prior written approval of the Contracting Officer to receive any USAID obligations higher than these limits.

(c) *Health Room Privileges.* Routine health room services may be available, subject to post policy and in accordance with the requirements of paragraph (a) of this clause, to U.S. citizen contractors and their authorized dependents (regardless of citizenship) at the post of duty. These services do not include hospitalization or predeparture examinations. The services normally include such medications as may be available, immunizations and preventive health measures, diagnostic examinations and advice, and home visits as medically indicated. Emergency medical treatment is provided to U.S. citizen contractor employees and dependents, whether or not they may have been granted access to routine health room services, on the same basis as it would be to any U.S. citizen in an emergency medical situation in the country.

4. Workweek and Compensation (Pay Comparability Adjustments) (JUL 2007)

(a) *Workweek.* The contractor's workweek shall not be less than 40 hours, unless otherwise provided in the Contract Schedule, and shall coincide with the workweek for those employee of the Mission or the Cooperating Country agency most closely associated with the work of this contract. If the contract is for less than full time (40 hours weekly), the annual and sick leave earned shall be prorated (see the General Provision of this contract entitled Leave and Holidays).

(b) *Compensation (Pay Comparability) Adjustments.* The PSC's compensation shall be adjusted to reflect the pay comparability adjustments, which are granted from time to time to U.S. direct-hire employees by Executive Order for the statutory pay systems (usually in January). Any adjustments authorized are subject to the availability of funds and shall not exceed that percentage stated in the Executive Order granting the adjustment. Further, the adjusted compensation may not exceed the annual ''USAID Contractor Salary Threshold (USAID CST)'', which is equivalent to the maximum rate for agencies without a certified SES performance appraisal system (or the equivalent hourly rate).

5. Leave and Holidays (APR 1997)

(a) *Vacation Leave.* (1) The contractor shall earn vacation leave at the rate of 13 workdays per annum or 4 hours every 2 weeks. However, no vacation shall be earned if the tour of duty is less than 90 days.

(2) Notwithstanding paragraph (a)(1) above, if the contractor has had previous PSC service (i.e., has served under other personal services contracts (PSCs) covered by Sec.

636(a)(3) of the FAA), he/she shall earn vacation leave at the rate of either 6 hours every two weeks (10 hours for the final pay period of a calendar year) cumulative PSC service exceeding 3 years, or 8 hours every two weeks for cumulative PSC service exceeding 15 years. Former Civil Service, Foreign Service, or a Military Service experience is not creditable towards PSC service for annual leave purposes.

(3) It is understood that vacation leave is provided under this contract primarily for the purposes of affording necessary rest and recreation during the tour of duty in the Cooperating Country. The Contractor in consultation with the USAID Mission shall develop a vacation leave schedule early in his/her tour of duty taking into consideration project requirements, employee preference and other factors. All vacation leave earned by the contractor must be used during his/her tour of duty. All vacation leave earned by the contractor but not taken by the end of his/her tour of duty will be forfeited unless the requirements of the activity precluded the employee from taking such leave and the Contracting Officer, with the endorsement of the Mission Director, approves one of the following as an alternative:

(i) Taking leave during the concluding weeks of the employee's tour, or

(ii) Lump-sum payment for leave not taken provided such leave does not exceed the number of days which can be earned by the employee during a twelve month period.

(4) With the approval of the Mission Director, and if the circumstances warrant, a contractor may be granted advance vacation leave in excess in that earned, but in no case shall a contractor be granted advance vacation leave in excess of that which he/she will earn over the life of the contract. The contractor agrees to reimburse USAID for leave used in excess of the amount earned during the contractor's assignment under the contract.

(b) *Sick Leave.* Sick leave is earned at a rate not to exceed 13 work-days per annum or 4 hours every 2 weeks. Unused sick leave may be carried over under an extension of this contract for the same or similar services *at the same Mission,* but the contractor will not be compensated for unused sick leave at the completion of this contract. No leave my be carried over from one post to another.

(c) *Home Leave.* (1) Home leave is leave earned for service abroad for use only in the United States, in the Commonwealth of Puerto Rico, or in the possessions of the United States.

(2) A contractor who is a U.S. citizen or U.S. resident alien and has served as least 2 years overseas, as defined in paragraph (c)(4) below, under personal services contract in this Mission, and has not taken more than 30 workdays leave (vacation, sick, or leave without pay) in the United States, may be granted home leave of not more than 15 work days for each such year of service overseas; provided, that the contractor agrees to return overseas upon completion of home leave under an additional 2 year appointment, or for such shorter period of not less than 1 year of overseas service under the contract as the Mission Director may approve in advance. Home leave must be taken in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States, and any days spent elsewhere will be charged to vacation leave or leave without pay.

(3) Notwithstanding the requirement in paragraph (c)(2) above that the contractor must have served 2 years overseas under personal services contract with this Mission to be eligible for home leave, the contractor may be granted advance home leave subject to all of the following conditions:

(i) Granting of leave home leave would in each case serve to advance the attainment of the objectives of this contract;

(ii) The contractor has served a minimum of 18 months in the Cooperating Country on his/her current tour of duty under this contract; and

(iii) The contractor agrees to return to the Cooperating Country to serve out the remainder of his/her current tour of duty and an additional 2 year appointment under this or subsequent contract, or such other additional appointment of not less than 1 year of overseas service as the Mission Director may approve.

(4) The period of service overseas required under paragraph (c)(2), or paragraph (c)(3) above, shall include the actual days in orientation in the United States (less language training) and the actual days overseas beginning on the date of departure from the U.S. port of embarkation on international travel and continuing, inclusive of authorized delays enroute, to the date of arrival at the U.S. port of debarkation from international travel. Allowable vacation and sick leave taken while overseas, but not leave without pay, shall be included in the required period of service overseas. An amount equal to the number of days of vacation and sick leave taken in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States will be added to the required period of service overseas.

(5) Salary during the travel to and from the United States for home leave will be limited to the time required for travel by the most expeditious air route. The contractor will be responsible for reimbursing USAID for payments made during home leave, if, in spite of the undertaking of the new appointment, the contractor, except for reasons beyond his/her control as determined by the Contracting Officer, does not return overseas and complete the additional required service. Unused home leave is not reimbursable under this contract.

(6) To the extent deemed necessary by the Contracting Officer, a contractor in the United States on home leave may be authorized to spend not more than 5 days in work status for consultation at USAID/Washington before returning to post duty. Consultation at locations other than USAID/Washington as well as any time in excess of 5 days spent for consultation, must be approved by the Mission Director or the Contracting Officer.

(d) *Holidays.* The contractor, while serving abroad, shall be entitled to all holidays granted by the Mission to U.S.-citizen direct-hire employees.

(e) *Military Leave.* Military leave of not more than 15 calendar days in any calendar year may be granted to a contractor who is a reservist of the Armed Forces, provided that military leave has been approved in advance by the Contracting Officer or the Mission Director. A copy of any such approval shall be part of the contract file.

(f) *Leave Without Pay.* Leave without pay may be granted only with the written approval of the Contracting Officer or Mission Director.

(g) *Compensatory Time.* Compensatory leave may be granted only with the written approval of the Contracting Officer or Mission Director in rare instances when it has been determined absolutely essential and used under those guidelines which apply to direct-hire employees.

(h) *Leave Records.* The contractor shall maintain current leave records for himself/herself and make them available, as requested by the Mission Director or the Contracting Officer.

6. Differential and Allowances (June 1990)

(a) The following differential and allowances will be granted to the contractor and his/her authorized dependents to the same extent and on the same basis as they are granted to U.S. citizen direct-hire employees at the Mission by the Standardized Regulations (Government Civilians, Foreign Areas), as from time to time amended, except as noted to the contrary below:

APPLICABLE REFERENCE TO STANDARDIZED REGULATIONS

(1) Post Differential	Chapter 500 and Tables in Chapter 900.
(2) Living Quarters Allowance	Section 130.
(3) Temporary Lodging Allowance	Section 120.
(4) Post Allowance	Section 220.
(5) Supplemental Post Allowance	Section 230.
(6) Payments During Evacuation	Section 600.
(7) Education Allowance	Section 270.
(8) Separate Maintenance Allowance	Section 260.
(9) Danger Pay Allowance	Section 650.
(10) Education Travel	Section 280.

(1) *Post Differential.* Post differential is an additional compensation for service at places in foreign areas where conditions of environment differ substantially from conditions of environment in the continental United States and warrant additional compensation as a recruitment and retention incentive. In areas where post differential is paid to USAID direct-hire employees, post differential not to exceed the percentage of salary as is provided such USAID employees in accordance with the Standardized Regulations (Government Civilians, Foreign Areas) Chapter 500 (except the limitation contained in Section 552, ''Ceiling on Payment'') Tables—Chapter 900, as from time to time amended, will be reimbursable hereunder for employees in respect to amounts earned during the time such employees actually spend overseas on work under this contract. When such post differential is provided to the contractor, it shall be payable beginning on the date of arrival at the post of assignment and continue, including periods away from post on official business, until the close of business on the day of departure from post of assignment enroute to the United States. Sick or vacation leave taken at or away from the post of assignment will not interrupt the continuity of the assignment or require a discontinuance of such post differential payments, provided such leave is not taken within the United States or the territories of the United States. Post differential will not be payable while the employee is away from his/her post of assignment for purposes of home leave. Short-term employees shall be entitled to pose differential beginning with the forty-third (43rd) day at post.

(2) *Living Quarters Allowance.* Living quarters allowance is an allowance granted to reimburse an employee for substantially all of his/her cost for either temporary or residence quarters whenever Government-owned or Government-rented quarters are not provided to him/her at his/her post without

charge. Such costs are those incurred for temporary lodging (temporary lodging allowance) or one unit of residence quarters (living quarters allowance) and include rent, plus any costs not included therein for heat, light, fuel, gas, electricity and water. The temporary lodging allowance and the living quarters allowance are never both payable to an employee for the same period of time. The contractor will receive living quarters allowance for payment of rent and utilities if such facilities are not supplied. Such allowance shall not exceed the amount paid USAID employees of equivalent rank in the Cooperating Country, in accordance with either the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 130, as from time to time amended, or other rates approved by the Mission Director. Subject to the written approval of the Mission Director, short-term employees may be paid per diem (in lieu of living quarters allowance) at rates prescribed by the Federal Travel Regulations, as from time to time amended, during the time such short-term employees spend at posts of duty in the Cooperating Country under this contract. In authorizing such per diem rates, the Mission Director shall consider the particular circumstances involved with respect to each such short-term employee including the extent to which meals and/or lodging may be made available without charge or at nominal cost by an agency of the United States Government or of the Cooperating Government, and similar factors.

(3) *Temporary Lodging Allowance.* Temporary lodging allowance is a quarters allowance granted to an employee for the reasonable cost of temporary quarters incurred by the employee and his/her family for a period not in excess of (i) three months after first arrival at a new post in a foreign area or a period ending with the occupation of residence (permanent) quarters, if earlier, and (ii) one month immediately preceding final departure from the post subsequent to the necessary vacating of residence quarters. The contractor will receive temporary lodging allowance for himself/herself and authorized dependents, in lieu of living quarters allowance, not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 120, as from time to time amended.

(4) *Post Allowance.* Post allowance is a cost-of-living allowance granted to an employee officially stationed at a post where the cost of living, exclusive of quarters cost, is substantially higher than in Washington, D.C. The contractor will receive post allowance payments not to exceed those paid USAID employees in the Cooperating Country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 220, as from time to time amended.

(5) *Supplemental Post Allowance.* Supplemental post allowance is a form of post allowance granted to an employee at his/her post when it is determined that assistance is necessary to defray extraordinary subsistence costs. The contractor will receive supplemental post allowance payments not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 230, as from time to time amended.

(6) *Payments During Evacuation.* The Standardized Regulations (Government Civilians, Foreign Areas) provide the authority for efficient, orderly, and equitable procedure for the payment of compensation, post differential and allowances in the event of an emergency evacuation of employees or their dependents, or both, from duty stations for military or other reasons or because of imminent danger to their lives. If evacuation has been authorized by the Mission Director, the contractor will receive payments during evacuation for himself/herself and authorized dependents evacuated from their post of assignment in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 600, and the Federal Travel Regulations, as from time to time amended.

(7) *Educational Allowance.* Educational allowance is an allowance to assist the contractor in meeting the extraordinary and necessary expenses, not otherwise compensated for, incurred by reason of his/her service in a foreign area in providing adequate elementary and secondary education for his/her children. The contractor will receive educational allowance payments for his/her dependent children in amounts not to exceed those set forth in Standardized Regulations (Government Civilians, Foreign Areas), Chapter 270, as from time to time amended.

(8) *Separate Maintenance Allowance.* Separate maintenance allowance is an allowance to assist an employee who is compelled by reason of dangerous, notably unhealthful, or excessively adverse living conditions at his/her post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining his/her dependents elsewhere than at such post. The contractor will receive separate maintenance allowance payments not to exceed that made to USAID employees in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 260, as from time to time amended.

(9) *Danger Pay Allowance.* Danger pay allowance is an allowance to provide additional compensation above basic compensation to employees in foreign areas where civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well-

being of the employee. The danger pay allowance is in lieu of that part of the post differential which is attributable to political violence. Consequently, the post differential may be reduced while danger pay is in effect to avoid dual crediting for political violence. The contractor shall be allowed danger pay allowance not to exceed that paid USAID employees in the Cooperating Country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 650, as from time to time amended.

(10) *Educational Travel.* Educational travel is travel to and from a school in the United States for secondary education (in lieu of an educational allowance) and for college education. The contractor will receive educational travel payments for his/her dependent children provided such payment does not exceed that which would be payable in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 280, as from time to time amended. Educational travel shall not be authorized for contractors whose assignment is less than two years.

(b) The allowances provided in paragraphs (a) (1) through (10) of this provision shall be paid to the contractor in dollars or in the currency of the Cooperating Country in accordance with practice prevailing at the Mission, or the Mission Director may direct that the contractor be paid a per diem in lieu thereof as prescribed by the Standardized Regulations (Government Civilians, Foreign Areas), as from time to time amended.

7. Social Security, Federal Income Tax, and Foreign Earned Income (June 1990)

(a) Since the contractor is an employee, F.I.C.A. contributions and U.S. Federal Income Tax withholding shall be deducted in accordance with regulations and rulings of the Social Security Administration and the U.S. Internal Revenue Service, respectively.

(b) As an employee, the contractor is not eligible for the ''foreign earned income'' exclusion under the IRS Regulations (see 26 CFR 1.911–3(c)(3)).

8. Advance of Dollar Funds (APR 1997)

If requested by the contractor and authorized in writing by the Contracting Officer, USAID will arrange for an advance of funds to defray the initial cost of travel, travel allowances, authorized precontract expenses, and shipment of personal property. The advance shall be granted on the same basis as to a USAID U.S.-citizen direct-hire employee in accordance with USAID Handbook 22, Chapter 4 or superseding ADS Chapter.

9. Insurance (APR 1997)

(a) *Worker's Compensation Benefits.* The contractor shall be provided worker's compensation benefits in accordance with the Federal Employees' Compensation Act.

(b) *Health and Life Insurance.* (1) The contractor shall be provided a maximum contribution of up to 50% against the actual costs of the contractor's annual health insurance costs, provided that such costs may not exceed the maximum U.S. Government contribution for direct-hire personnel as announced annually by the Office of Personnel Management.

(2) The contractor shall be provided a contribution of up to 50% against the actual costs of annual life insurance not to exceed $500.00 per year.

(3) Retired U.S. Government employees shall not be paid additional contributions for health or life insurance under their contracts. The Government will normally have already paid its contribution for the retiree unless the employee can prove to the satisfaction of the Contracting Officer that his/her health and life insurance does not provide or specifically excludes coverage overseas. In such case, the contractor would be eligible for contributions under paragraphs (b) (1) or (2) as appropriate.

(4) Proof of health and life insurance coverage shall be submitted to the Contracting Officer before any contribution is paid. On assignments of less than one year, costs for health and life insurance shall be prorated and paid accordingly.

(5) A contractor who is a spouse of a current or retired Civil Service, Foreign Service, or Military Service member and who is covered by their spouse's Government health or life insurance policy is ineligible for the contribution under paragraphs (b)(1) or (b)(2) of this provision.

(c) *Insurance on Private Automobiles.* If the contractor or his/her dependents transport, or cause to be transported, privately owned automobile(s) to the Cooperating Country, or any of them purchase an automobile within the Cooperating Country, the contractor agrees to ensure that all such automobile(s) during such ownership within the Cooperating Country will be covered by a current, i.e., not in arrears, insurance policy issued by a reliable company providing the following minimum coverage, or such other minimum coverage as may be set by the Mission Director, payable in U.S. dollars or its equivalent in the currency of the Cooperating Country: injury to persons, $10,000/$20,000; property damage, $5,000. The contractor further agrees to deliver, or cause to be delivered to the Mission Director, the insurance policies required by this clause or satisfactory proof of the existence thereof, before such automobile(s) operated within the Cooperating Country. The premium costs for such insurance shall not be a reimbursable cost under this contract.

10. Travel and Transportation Expenses (July 1993)

(a) *General.* (1) USAID/Washington Office of Administrative Services, or such other office as may be designated by that office, may furnish Transportation Requests (TR's) to the contractor for transportation authorized by this contract originating in the United States, and the executive or administrative officer at the Mission may furnish TR's for such authorized transportation which is payable in local currency or is to originate overseas. When transportation is not provided by the Government-issued TR, the contractor shall procure his/her own transportation, the costs of which will be reimbursed in accordance with the terms of this contract.

(2) The contractor will be reimbursed for reasonable, allocable and allowable travel and transportation expenses incurred under and for the performance of this contract. Determination of reasonableness, allocability and allowability will be made by the Contracting Officer in accordance with USAID's established policies and procedures for USAID direct-hire employees, and the particular needs of the activity being implemented by this contract. The following paragraphs provide specific guidance and limitations on particular items of cost.

(b) *U.S. Travel and Transportation.* The contractor shall be reimbursed for actual transportation costs and travel allowances in the United States as authorized in the Contract Schedule or approved in advance by the Contracting Officer or the Mission Director. Transportation costs and travel allowances shall not be reimbursed in any amount greater than the cost of, and time required for, economy-class commercially scheduled air travel by the most expeditious route except as otherwise provided in paragraph (g) of this provision unless economy air travel is not available and the contractor certifies to this in his/her voucher or other documents submitted for reimbursement.

(c) *International Travel.* For travel to and from post of assignment, the contractor shall be reimbursed for travel costs and travel allowances from place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of the travel from the contractor's residence in the United States) to the post of duty in the Cooperating Country and return to place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of travel from the post of duty in the Cooperating Country to the contractor's residence) upon completion of services by the individual. Reimbursement for travel will be in accordance with USAID's established policies and procedures for its direct-hire employees and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. If the contract is for longer than one year and the contractor does not complete one full year at post of duty (except for reasons beyond his/her control), the costs of going to and from the post of duty for the contractor and his/her dependents are not reimbursable hereunder. If the contractor serves more than one year but less than the required service in the Cooperating Country (except for reasons beyond his/her control) the costs of going to the post of duty are reimbursable hereunder but the costs of going from post of duty to the contractor's permanent, legal place of residence at the time he or she was employed for work under this contract, or other location as approved by the Contracting Officer, are not reimbursable under this contract for the contractor and his/her dependents. When travel is by economy class accommodations, the contractor will be reimbursed for the cost of transporting up to 10 kilograms/22 pounds of accompanied personal baggage per traveler in addition to that regularly allowed with the economy ticket provided that the total number of pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers shall not be in excess of the rates authorized in the Standardized Regulations (Government Civilians, Foreign Areas)-hereinafter referred to as the Standardized Regulations—as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover enroute for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the Federal Travel Regulations as from time to time amended.

(d) *Local Travel.* Reimbursement for local travel in connection with duties directly referable to the contract shall not be in excess of the rates established by the Mission Director for the travel costs of travelers in the Cooperating Country. In the absence of such established rates the contractor shall be reimbursed for actual travel costs in the Cooperating Country or the Mission, including travel allowances at rates not in excess of those prescribed by the Standardized Regulations.

(e) *Indirect Travel for Personal Convenience.* When travel is performed by an indirect route for the personal convenience of the traveler, the allowable costs of such travel will be computed on the basis of the cost of allowable air fare via the direct usually traveled route. If such costs include fares for air or ocean travel by foreign flag carriers, approval for indirect travel by such foreign flag

carriers must be obtained from the Contracting Officer or the Mission Director before such travel is undertaken, otherwise only that portion of travel accomplished by the United States-flag carriers will be reimbursable within the above limitation of allowable costs.

(f) *Limitation on Travel by Dependents.* Travel costs and allowances will be allowed for authorized dependents of the contractor and such costs shall be reimbursed for travel from place of abode to assigned station in the Cooperating Country and returned, only if the dependent remains in the Cooperating Country for at least 9 months or one-half of the required tour of duty of the contractor, whichever is greater, except as otherwise authorized hereunder for education, medical or emergency visitation travel. If the dependent is eligible for educational travel pursuant to the ''Differential and Allowances'' clause of this contract, time spent away from post resulting from educational travel will be counted as time at post.

(g) *Delays Enroute.* The contractor may be granted reasonable delays enroute while in travel status when such delays are caused by events beyond the control of the contractor and are not due to circuitous routine. It is understood that if delay is caused by physical incapacitation, he/she shall be eligible for such sick leave as provided under the ''Leave and Holidays'' clause of this contract.

(h) *Travel by Privately Owned Automobile (POV).* If travel by POV is authorized in the contract schedule or approved by the Contracting Officer, the contractor shall be reimbursed for the cost of travel performed in his/her POV at a rate not to exceed that authorized in the Federal Travel Regulations plus authorized per diem for the employee and for each of the authorized dependents traveling in the POV, if the POV is being driven to or from the Cooperating Country as authorized under the contract, provided that the total cost of the mileage and the per diem paid to all authorized travelers shall not exceed the total constructive cost of fare and normal per diem by all authorized travelers by surface common carrier or authorized air fare, whichever is less.

(i) *Emergency and Irregular Travel and Transportation.* Emergency transportation costs and travel allowances while enroute, as provided in this section, will be reimbursed not to exceed amounts authorized by the Foreign Service Travel Regulations for USAID-direct hire employees in like circumstances under the following conditions:

(1) The costs of going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location for contractor employees and dependents and returning to the post of duty, subject to the prior written approval of the Mission Director that such travel is necessary for one of the following reasons.

(i) Need for medical care beyond that available within the area to which the employee is assigned, or serious effect on physical or mental health if residence is continued at assigned post of duty. The Mission Director may authorize a medical attendant to accompany the employee at contract expense if, based on medical opinion, such an attendant is necessary.

(ii) Death, or serious illness or injury of a member of the immediate family of the employee or the immediate family of the employee's spouse.

(2) When, for any reason, the Mission Director determines it is necessary to evacuate the contractor or contractor's dependents, the contractor will be reimbursed for travel and transportation expenses and travel allowance while enroute, for the cost of the individuals going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other approved location. The return of such employees and dependents may also be authorized by the Mission Director when, in his/her discretion, he/she determines it is prudent to do so.

(3) The Mission Director may also authorize emergency or irregular travel and transportation in other situations, when in his/her opinion, the circumstances warrant such action. The authorization shall include the kind of leave to be used and appropriate restrictions as to time away from post, transportation of personal and household effects, etc.

(j) *Home Leave Travel.* To the extend that home leave has been authorized as provided in the ''Leave and Holidays'' clause of this contract, the cost of travel for home leave is reimbursable for travel costs and travel allowances of travelers from the post of duty in the Cooperating Country to place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of travel to the contractor's residence in the United States) and return to the post of duty in the Cooperating Country. Reimbursement for travel will be in accordance with the Uniform State/USAID/USIA Foreign Service Travel Regulations, as from time to time amended, and will be limited to the cost of travel by the most direct and expeditious route. Travel allowances for travelers shall be in accordance with the rates authorized in the Standardized Regulations as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route using economy class. One stopover enroute for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a

trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler or the traveler uses other than economy class. Per diem during such stopover shall be paid in accordance with the Standardized Regulations.

(k) *Rest and Recuperations Travel.* If approved in writing by the Mission Director, the contractor and his/her dependents shall be allowed rest and recuperation travel on the same basis as authorized USAID direct-hire Mission employees and their dependents.

(l) *Transportation of Motor Vehicles, Personal Effects and Household Goods.* (1) Transportation costs will be paid on the same basis as for USAID direct-hire employees serving the same length tour of duty, as authorized in the schedule. Transportation, including packing and crating costs, will be paid for shipping from the point of origin in the United States (or other location as approved by the Contracting Officer) to post of duty in the Cooperating Country and return to point of origin in the United States (or other location as approved by the Contracting Officer) of one privately-owned vehicle for the contractor, personal effects of the contractor and authorized dependents, and household goods of the contractor not to exceed the limitations in effect for such shipments for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations in effect at the time shipment is made. These limitations may be obtained from the Contracting Officer.

(2) The cost of transporting motor vehicles and household goods shall not exceed the cost of packing, crating, and transportation by surface common carrier. In the event that the carrier does not require boxing or crating of motor vehicles for shipment to the Cooperating Country, the cost of boxing or crating is not reimbursable. The transportation of a privately owned motor vehicle for a contractor may be authorized as a replacement of the last such motor vehicle shipped under this contract for such contractor when the Mission Director determines, in advance, and so notifies the contractor in writing, that the replacement is necessary for reasons not due to the negligence or malfeasance of the contractor. The determination shall be made under the same rules and regulations that apply to authorized Mission U.S. citizen direct-hire employees.

(m) *Unaccompanied Baggage.* Unaccompanied baggage is considered to be those personal belongings needed by the traveler immediately upon arrival of the contractor and dependents, and consideration should be given to advance shipments of unaccompanied baggage. The contractor will be reimbursed for costs of shipment of unaccompanied baggage (in addition to the weight allowance for household effects) not to exceed the limitations in effect for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations as in effect when shipment is made. These limitations are available from the Contracting Officer. This unaccompanied baggage may be shipped as air freight by the most direct route between authorized points of origin and destination regardless of the modes of travel used. This provision is applicable to home leave travel when authorized by the terms of this contract.

(n) *International Ocean Transportation*—(1)(i) *Transportation of things.* Where U.S. flag vessels are not available, or their use would result in a significant delay, the contractor may obtain a release from the requirement to use U.S. flag vessels from the Transportation Division, Office of Acquisition and Assistance, U.S. Agency for International Development, Washington, D.C. 20523–1419, or the Mission Director, as appropriate, giving the basis for the request.

(ii) *Transportation of persons.* Where U.S. flag vessels are not available, or their use would result in a significant delay, the contractor may obtain a release from the requirement to use U.S. flag vessels from the Contracting Officer or the Mission Director, as appropriate.

(2) *Transportation of foreign-made vehicles.* Reimbursement of the costs of transporting a foreign-made motor vehicle will be made in accordance with the provisions of the Foreign Service Travel Regulations.

(3) Reduced rates on U.S.-flag carriers are in effect for shipments of household goods and personal effects of USAID contractors between certain locations. These reduced rates are available provided the shipper furnishes to the carrier at the time of the issuance of the Bill of Lading documentary evidence that the shipment is for the account of USAID. The Contracting Officer will, on request, furnish to the contractor current information concerning the availability of a reduced rate with respect to any proposed shipment. The contractor will not be reimbursed for shipments of household goods or personal effects in amounts in excess of the reduced rates which are available in accordance with the foregoing.

(o) *Storage of household effects.* The cost of storage charges (including packing, crating, and drayage costs) in the U.S. of household goods of the contractor will be permitted in lieu of transportation of all or any part of such goods to the Cooperating Country under paragraph (l) above provided that the total amount of effects shipped to the Cooperating Country or stored in the U.S. shall not exceed the amount authorized for USAID direct-hire employees under the Uniform Foreign Service Travel Regulations. These amounts are available from the Contracting Officer.

11. Payment (AUG 1996)

(a) Once each month, or at more frequent intervals, if approved by the paying office indicated on the Cover Page, the contractor may submit to such office form SF 1034 ''Public Voucher for Purchases and Services Other Than Personal'' (original) and SF 1034–A (three copies), or whatever other form is locally required or accepted. Each voucher shall be identified by the USAID contract number and properly executed in the amount of dollars claimed during the period covered. The voucher forms shall be supported by:

(1) The contractor's detailed invoice, in original and two copies, indicating for each amount claimed the paragraph of the contract under which payment is to be made, supported when applicable as follows:

(i) For compensation—a statement showing period covered, days worked, and days when contractor was in authorized travel, leave, or stopover status for which compensation is claimed. All claims for compensation will be accompanied by, or will incorporate, a certification signed by the Project Officer covering days or hours worked, or authorized travel or leave time for which compensation is claimed.

(ii) For travel and transportation—a statement of itinerary with attached carrier's receipt and/or passenger's coupons, as appropriate.

(iii) For reimbursable expenses—an itemized statement supported by original receipts.

(2) The first voucher submitted shall account for, and liquidate the unexpended balance of any funds advanced to the contractor.

(b) A final voucher shall be submitted by the contractor promptly following completion of the duties under this contract but in no event later than 120 days (or such longer period as the Contracting Officer may in his/her discretion approve in writing) from the date of such completion. The contractor's claim, which includes his/her final settlement of compensation, shall not be paid until after the performance of the duties required under the terms of this contract has been approved by USAID. On receipt and approval of the voucher designated by the contractor as the ''final voucher'' submitted on Form SF 1034 (original) and SF 1034–A (three copies), together with a refund check for the balance remaining on hand of any funds which may have been advanced to the contractor, the Government shall pay any amounts due and owing the contractor.

(c) If approved by the paying office time and attendance may be submitted for PSCs in the same manner as is approved for direct-hire personnel.

12. Conversion of U.S. Dollars to Local Currency (DEC 1985)

Upon arrival in the Cooperating Country, and from time to time as appropriate, the contractor shall consult with the Mission Director or his/her authorized representative who shall provide, in writing, the policy the contractor shall follow in the conversion of U.S. dollars to local currency. This may include, but not be limited to the conversion of said currency through the cognizant U.S. Disbursing Officer, or Mission Controller, as appropriate.

13. Post of Assignment Privileges (JUL 1993)

Privileges such as the use of APO, PX's, commissaries and officers clubs are established at posts abroad under agreements between the U.S. and host governments. These facilities are intended for and usually limited to members of the official U.S. establishment including the Embassy, USAID Mission, U.S. Information Service and the Military. Normally, the agreements do not permit these facilities to be made available to non-official Americans. However, in those cases where facilities are open to non-official Americans, they may be used.

14. Security Requirements (June 1990)

(a) This entire provision shall apply to the extent that this contract involves access to classified information (''Confidential'', ''Secret'', or ''Top Secret'') or access to administratively controlled information (''Limited Official Use''). Contractors that are not U.S. citizens shall not have access to classified or administratively controlled information.

(b) The contractor (1) shall be responsible for safeguarding all classified or administratively controlled information in accordance with appropriate instructions furnished by the USAID Office of Security (IG/SEC), as referenced in paragraph (d) of this provision and shall not supply, disclose, or otherwise permit access to classified information or administratively controlled information to any unauthorized person; (2) shall not make or permit to be made any reproductions of classified information or administratively controlled information except with the prior written authorization of the Contracting Officer or Mission Director; (3) shall submit to the Contracting Officer, at such times as the Contracting Officer may direct, an accounting of all reproductions of classified or administratively controlled information; and (4) shall not incorporate in any other project any matter which will disclose classified and/or administratively controlled information except with the prior written authorization of the Contracting Officer.

(c) The contractor shall follow the procedures for classifying, marking, handling, transmitting, disseminating, storing, and destroying official material in accordance with

the regulations in the Foreign Affairs Manual, Chapter 5 (5 FAM 900), a copy of which will be furnished by the Contracting Officer or Mission Director.

(d) The contractor agrees to submit immediately to the Mission Director or Contracting Officer a complete detailed report, appropriately classified, of any information which the contractor may have concerning existing or threatened espionage, sabotage, or subversive activity.

(e) The Government agrees that, when necessary, it shall indicate by security classification or administratively controlled designation, the degree of importance to the national defense of information to be furnished by the contractor to the Government or by the Government to the contractor, and the Government shall give written notice of such security classification or administratively controlled designation to the contractor and of any subsequent changes thereof. The contractor is authorized to rely on any letter or other written instrument signed by the Contracting Officer changing a security classification or administratively controlled designation of information.

(f) The contractor agrees to certify after completion of his/her assignment under this contract that he/she has surrendered or disposed of all classified and/or administratively controlled information in his/her custody in accordance with applicable security instructions.

15. Contractor-Mission Relationships (DEC 1985)

(a) The contractor acknowledges that this contract is an important part of the U.S. Foreign Assistance Program and agrees that his/her duties will be carried out in such a manner as to be fully commensurate with the responsibilities which this entails.

(b) While in the Cooperating Country, the contractor is expected to show respect for the conventions, customs, and institutions of the Cooperating Country and not interfere in its political affairs.

(c) If the contractor's conduct is not in accordance with paragraph (b) of this provision, the contract may be terminated under General Provision 16 of this contract. The Contractor recognizes the right of the U.S. Ambassador to direct his/her immediate removal from any country when, in the discretion of the Ambassador, the interests of the United States so require.

(d) The Mission Director is the chief representative of USAID in the Cooperating Country. In this capacity, he/she is responsible for the total USAID Program in the Cooperating Country including certain administrative responsibilities set forth in this contract and for advising USAID regarding the performance of the work under the contract and its effect on the U.S. Foreign Assistance Program. The contractor will be responsible for performing his/her duties in accordance with the statement of duties called for by the contract. However, he/she shall be under the general policy guidance of the Mission Director, and shall keep the Mission Director or his/her designated representative currently informed of the progress of the work under this contract.

16. Termination (NOV 1989)

(This is an approved deviation to be used in place of the clause specified in FAR 52.249–12.)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part:

(1) For cause, which may be effected immediately after establishing the facts warranting the termination, by giving written notice and a statement of reasons to the contractor in the event (i) the Contractor commits a breach or violation of any obligations herein contained, (ii) a fraud was committed in obtaining this contract, or (iii) the contractor is guilty (as determined by USAID) of misconduct in the Cooperating Country. Upon such a termination, the contractor's right to compensation shall cease when the period specified in such notice expires or the last day on which the contractor performs services hereunder, whichever is earlier. No costs of any kind incurred by the contractor after the date such notice is delivered shall be reimbursed hereunder except the cost of return transportation (not including travel allowances), if approved by the Contracting Officer. If any costs relating to the period subsequent to such date have been paid by USAID, the contractor shall promptly refund to USAID any such prepayment as directed by the Contracting Officer.

(2) For the convenience of USAID, by giving not less than 15 calendar days advance written notice to the contractor. Upon such a termination, contractor's right to compensation shall cease when the period specified in such notice expires except that the contractor shall be entitled to any unused vacation leave, return transportation costs and travel allowances and transportation of unaccompanied baggage costs at the rate specified in the contract and subject to the limitations which apply to authorized travel status.

(3) For the convenience of USAID, when the contractor is unable to complete performance of his/her services under the contract by reason of sickness or physical or emotional incapacity based upon a certification of such circumstances by a duly qualified doctor of medicine approved by the Mission. The contract shall be deemed terminated upon delivery to the Contractor of a termination notice. Upon such a termination, the contractor shall not be entitled to compensation except to the extent of any unused vacation or sick leave but shall be

entitled to return transportation, travel allowances, and unaccompanied baggage costs at rates specified in the contract and subject to the limitations which apply to authorized travel status.

(b) The contractor, with the written consent of the Contracting Officer, may terminate this contract upon at least 15 days' written notice to the Contracting Officer.

17. Release of Information (DEC 1985)

All rights in data and reports shall become the property of the U.S. Government. All information gathered under this contract by the Contractor and all reports and recommendations hereunder shall be treated as confidential by the Contractor and shall not, without the prior written approval of the Contracting Officer, be made available to any person, party, or government, other than USAID, except as otherwise expressly provided in this contract.

18. Notices (DEC 1985)

Any notice, given by any of the parties hereunder, shall be sufficient only if in writing and delivered in person or sent by telegraph, telegram, registered, or regular mail as follows:

To USAID: Administrator, U.S. Agency for International Development, Washington, D.C. 20523–0001, Attention: Contracting Officer.

(name of the cognizant Contracting Officer with a copy to the appropriate Mission Director).

To Contractor:

At his/her post of duty while in the Cooperating Country and at the Contractor's address shown on the Cover Page of this contract or to such other address as either of such parties shall designate by notice given as herein required. Notices hereunder shall be effective in accordance with this clause or on the effective date of the notice, whichever is later.

19. Reports (June 1987)

(a) The Contractor shall prepare and submit 2 copies of each technical report required by the schedule of this contract to the Bureau for Program and Policy Coordination, Center for Development Information and Evaluation, Development Information Division (PPC/CDIE/DI). All documents should be mailed to:

PPC/CDIE/DI, Acquisitions, Room 209, SA–18, U.S. Agency for International Development, Washington, D.C. 20523–1802.

The title page of all reports forwarded to PPC/CDIE/DI pursuant to this paragraph shall include a descriptive title, the author's name(s), contract number, project number and title, contractor's name, name of the USAID project office, and the publication or insurance date of the report.

(b) When preparing reports, the contractor shall refrain from using elaborate art work, multicolor printing and expensive paper/binding, unless it is specifically authorized in the Contract Schedule. Wherever possible, pages should be printed on both sides using single spaced type.

20. Use of Pouch Facilities (July 1993)

(a) Use of diplomatic pouch is controlled by the Department of State. The Department of State has authorized the use of pouch facilities for USAID contractors and their employees as a general policy, as detailed in paragraphs (a)(1) through (a)(6) of this provision. However, the final decision regarding use of pouch facilities rests with the Embassy or USAID Mission. In consideration of the use of pouch facilities as hereinafter stated, the Contractor agrees to indemnify and hold harmless the Department of State and USAID for loss or damage occurring in pouch transmission.

(1) Contractors are authorized use of the pouch for transmission and receipt of up to a maximum of 0.90 kilogram/2 pounds per shipment of correspondence and documents needed in the administration of foreign assistance programs.

(2) U.S. citizen contractors are authorized use of the pouch for personal mail up to a maximum of 0.45 kilogram/one pound per shipment (but see (a)(3) below). Non-U.S. citizen Contractors are not permitted use of the pouch for personal mail except to the extent that such use may be authorized by the Chief of Mission.

(3) Merchandise, parcels, magazines, or newspapers are not considered to be personal mail for purpose of this clause, and are not authorized to be sent or received by pouch.

(4) Official and personal mail under paragraphs (a) (1) and (2) of this provision, sent by pouch, should be addressed as follows:

Individual's Name (C), U.S. Agency for International Development, Washington, D.C. 20523–0001.

(5) Mail sent via the diplomatic pouch may not be in violation of U.S. Postal laws and may not contain material ineligible for pouch transmission.

(6) Use of military postal facilities (APO/FPO) is authorized to U.S. contractors on the same basis as approved for direct-hire employees at the USAID Mission. Posts having access to APO/FPO facilities and using such for diplomatic pouch dispatch, may, however, accept official and personal mail for the pouch provided, of course, adequate postage is affixed when onward transmission (mail to other than USAID/W) through U.S. postal channels is required.

(b) The contractor shall be responsible for compliance with these guidelines and limitations on use of pouch facilities.

(c) Specific additional guidance on use of pouch facilities in accordance with this

clause is available from the Post Communication Center at the Embassy or USAID Mission.

21. Biographical Data (June 1990)

(a) The contractor agrees to furnish biographical information to the Contracting Officer on forms (SF 171 and 171As) provided for that purpose.

(b) Emergency locator information. The contractor agrees to provide the following information to the Mission Administrative Officer on arrival in the host country regarding himself/herself and dependents:

(1) Contractor's full name, home address, and telephone number including any after-hours emergency number(s).

(2) The name and number of the contract, and whether the individual is the contractor or the contractor's dependent.

(3) The name, address, and home and office telephone number(s) of each individual's next of kin.

(4) Any special instructions pertaining to emergency situations such as power of attorney designees or alternate contact persons.

22. U.S. Resident Hire Personal Services Contractor (June 1990)

A contractor meeting the definition of a U.S. Resident Hire PSC contained in Section 12, General Provisions, Clause 1, Definitions, shall be subject to U.S. Federal Income Tax, but shall not be eligible for any fringe benefits (except contributions for FICA, health insurance and life insurance), allowances, or differentials, including but not limited to travel and transportation, medical, orientation, home leave, etc., unless such individual can demonstrate to the satisfaction of the Contracting Officer that he/she has received similar benefits/allowances from their immediately previous employer in the Cooperating Country, or the Mission Director determines that payment of such benefits would be consistent with the Mission's policy and practice and would be in the best interest of the U.S. Government.

23. Orientation and Language Training (July 1993)

(a) Except as set forth in paragraph (b)(4) below, the Contractor shall receive a maximum of 2 weeks USAID orientation before travel overseas. The dates of orientation shall be selected by the Contractor and approved by the Contracting Officer from the orientation schedule provided by USAID.

(b) As either set forth in the Contract Schedule, or provided in writing by the Contracting Officer, the following may be authorized taking into consideration specific job requirements, contractor's prior overseas experience, or unusual circumstances, in connection with orientation of individual Contractors:

(1) Modified orientation,

(2) Language training,

(3) Orientation for Contractor's dependents at contract expense.

(4) Waiver of orientation for individual contractor.

(c) Transportation costs and travel allowances not to exceed one round trip from the Contractor's residence to place of orientation and return will be reimbursed, pursuant to Clause 10 of the General Provisions, entitled ''Travel and Transportation Expenses,'' if the orientation is more than 80 kilometers/50 miles from the contractor's residence.

Allowable salary costs during the period of orientation are also reimbursable.

24. Conditions for Contracting Prior to Receipt of Security Clearance (July 1993)

(a) U.S. Resident Hire PSC. The contractor may commence work prior to the completion of the security clearance. However, until such time as clearance is received, the contractor shall have no access to classified or administratively controlled materials. Further, failure to obtain clearance will constitute cause for contract termination in accordance with paragraph (a)(2) of General Provision 16 of this contract.

(b) U.S. PSC—Non-Resident Hire. The contractor may elect to commence travel to post immediately to begin work prior to completion of the security clearance. However, until such time as security clearance is received, the contractor shall:

(1) Have no access to classified or administratively controlled materials;

(2) Be authorized to travel to post himself/herself only; and

(3) Be authorized no entitlements other than those normally authorized for short term (less than a year) employees at post. Even if the contract is for one year or more, dependents may not accompany contractor unless at his/her expense, and transportation/storage of household/personal effects and motor vehicle will not be financed by USAID prior to the receipt of the security clearance. Upon receipt of clearance, the Contracting Officer will authorize reimbursement of any such costs borne at contractor's expense prior to clearance provided they are reasonable, allocable and allowable. If appropriate given the length of time remaining, the Contracting Officer will authorize dependent travel and shipment/storage of motor vehicle and effects. Allowances which would not be provided to short term employees will be authorized after clearance is received provided that the contractor is otherwise entitled to such benefits. Failure to obtain the security clearance will constitute cause for contract termination in accordance with paragraph (a)(2) of General Provision 16 of this contract.

25. Medical Evacuation (MEDEVAC) Services (JUL 2007)

(a) The PSC must obtain MEDEVAC service coverage including coverage for authorized dependents while performing personal services abroad.

USAID will reimburse the total cost of MEDEVAC insurance to the PSC. The PSC must provide proof of coverage to the CO in order to receive reimbursement.

(b) *Exceptions.* (1) A PSC and authorized dependents with a health insurance program that includes sufficient MEDEVAC coverage as approved by the Contracting Officer are not required to obtain MEDEVAC service coverage.

(2) The Mission Director at the post of assignment may make a written determination to waive the requirement for such coverage. The determination must be based on findings that the quality of local medical services or other circumstances obviate the need for such coverage for PSCs and their dependents located at post.

26. Governing Law (NOV 1996)

This contract is established under the procurement authorities of the United States Government and shall be interpreted in accordance with the body of Federal Procurement Law in the United States. This contract is a complete statement of the duties, compensation, benefits, leave, notice, termination, and the like; therefore, the laws of the country of performance with respect to labor and contract matters shall not apply to either the carrying out of the obligations of the parties or to the interpretation of this agreement.

13. *FAR Clauses to be Incorporated in Full Text in Personal Services Contracts.*

The following FAR Clauses are always to be used along with the General Provisions. They are required in full text.

1. Covenant Against Contingent Fees 52.203–5
2. Electronic Funds Transfer Payment Methods 52.232–28
3. Disputes 52.233–1 (Alternate 1)
4. Preference for U.S. Flag Air Carriers 52.247–63

14. *FAR Clauses to be Incorporated by Reference in Personal Services Contracts*

The following FAR Clauses are to be used along with the General Provisions, and when appropriate, be incorporated in each personal services contract by reference:

1. Anti-Kickback Procedures 52.203–7
2. Limitation on Payments to Influence Certain Federal Transactions 52.203–12
3. Audit and Records—Negotiation 52.215–2
4. Privacy Act Notification 52.224–1
5. Privacy Act 52.224–2
6. Taxes—Foreign Cost Reimbursement Contracts 52.229–8
7. Interest 52.232–17
8. Limitation of Cost 52.232–20
9. Limitation of Funds 52.232–22
10. Assignment of Claims 52.232–23
11. Protection of Government Buildings, Equipment, and Vegetation 52.237–2
12. Notice of Intent to Disallow Costs 52.242–1
13. Inspection 52.246–5
14. Limitation of Liability—Services 52.246–25

[62 FR 39453, July 23, 1997, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

APPENDIX E TO CHAPTER 7 [RESERVED]

APPENDIX F TO CHAPTER 7—USE OF COLLABORATIVE ASSISTANCE METHOD FOR TITLE XII ACTIVITIES

1. Introduction

This appendix provides a detailed description of the collaborative assistance method of contracting. This is a specialized contracting system which may be used for contracting with educational institutions eligible under, and for activities authorized under, Title XII of the Foreign Assistance Act of 1961, as amended, under the circumstances described in AIDAR 715.613–71.

2. Purpose

The collaborative assistance system is designed to:

(a) Increase the joint implementation authority and responsibility of the contractor and the LDC;

(b) Encourage more effective collaboration between all participating parties (USAID, host country, and contractor) at important stages, including the design stage of a technical assistance project.

3. Policy

The collaborative assistance approach represents an alternative method for long-term technical assistance which involves professional collaboration with eligible Title XII institutions and LDC counterparts for a problem-solving type activity to develop new institutional forms and capabilities, to devise operating systems and policies, and to conduct joint research and development—including training. In such an activity, the difficulty in defining, in advance, precise and objectively verifiable contractor inputs and long-term project content as a basis for payment usually requires a flexible approach to project design, contracting, and project implementation. Such flexibility is also essential to the collaborative style which is responsive to LDC desires in problem areas of great complexity and varying uncertainty. Other types of technical assistance, which are usually shorter in term are amenable to

more precise definition in advance, or involve closely defined and relatively standardized services, or are otherwise more analogous to commodity resource transfers, may be suitable for other contracting methods, e.g., certain forms of institution building, on-the-job training, resource surveys, etc. The collaborative assistance method is an approved method for providing technical assistance when used in accordance with the circumstances outlined above, and with the guidelines set forth in paragraph 4, below.

4. Implementation Procedures

(a) *Introduction.* This paragraph 4, provides background information, guidelines and procedures to effect the implementation of the policy set forth in paragraph 3 of this appendix.

(b) *Conditions and practices.* In order for this policy to work effectively even when the proposed activity fits the criteria described under Policy, there must also be:

(1) Acceptance of the notion that the host country, in consultation with the contractor, is in the best position to make tactical, day-to-day decisions on project inputs within agreed-upon limitations and output expectations;

(2) Sufficient trust and respect between the Agency and the contractor to allow this flexible implementation authority;

(3) A direct-hire project monitor with appropriate background to be knowledgeable of progress and to assist in an advisory and facilitative capacity, both during and between periodic reviews. In addition, the following important conditions must be met:

(i) Adequate preproject communication between, and identification of assistance required by, the host government and USAID;

(ii) Full joint planning and improved project design (''Joint'' as used herein refers to the primary parties, i.e., the collaborating institutions, as well as the host government and USAID. In some instances, it can also include other donors.);

(iii) Careful contractor selection, i.e., matching of the contractor's technical and managerial capabilities to the anticipated requirements of the overseas activity;

(iv) Establishment of relationships between host country, USAID and contractor staff to include host country leadership, flexible implementation authority, and effective management by the contractor;

(v) Improved joint project evaluation, feedback, and replanning; and

(vi) Simplified administrative procedures and greater reliance on in-country logistical support.

(c) *Project Stages and Contractor Involvement.* In the long-term technical assistance projects as described above, there are four discrete but sometimes overlapping decision stages which take place—with the principal contractor usually involved in the last three.

(1) *Problem analysis and project identification.* After the host government has indicated a desire for U.S. collaboration on a particular problem and the USAID field mission has determined that the proposed activity is consistent with its program goals and priorities, considerable effort is usually necessary to refine further the project purpose and type of assistance required and provide a basis for contractor selection. This is a crucial step and is focused on results sought—on what the prospective contractor is expected to produce in relation to resources to be used and to project purpose. It should result in a clear understanding of what the LDC wants, and an overall plan which includes agreement on specific objectives or outputs, acceptable types of activities and inputs and an initial budget—resulting in project documentation. At this step, USAID makes decisions it cannot delegate on what it will support and at what cost. If needed to supplement its direct-hire expertise, USAID can use outside consultants for analysis and advice but retains the ultimate decision for itself in collaboration with, but independent of, the requesting host government. (Normally, the proposed contractor for project definition and subsequent implementation should not have been involved in the problem analysis and project identification stage as a consultant to either the host country government, host institution, or USAID. If a potential contractor has been so involved, particular care must be taken to prevent actual or apparent organizational conflicts of interest in the procurement that follows. This could require at a minimum, a careful assessment and complete documentation of reasons for selection.)

Normally, there will need to be some mutual interaction between the overall planning stage outlined here and the detailed planning and design work which follows in the next phase. There will usually be some overlap, with preliminary decisions in this stage providing a basis for selection of implementing agents for stage (2) which in turn proceeds through some preliminary planning to guide completion of stage (1) as a basis for long-term contracting.

(2) *Project definition.* At this stage, having selected the implementing agent, the U.S. and LDC organizations which will be collaborating in carrying out the project are encouraged to work out, to their mutual ⅜satisfaction, the particulars of what to do and how to do it (i.e., detailed project design) within the context of LDC leadership and responsibility and the general agreements and budget reached in stage (1). The emphasis here is on the technical approach to be utilized and the scheduling and management of project inputs. This may involve a short-term reconnaissance and/or an extensive period of detailed joint planning and feeling out of what is feasible during a preliminary

operating phase of the project, possibly lasting as much as a year or more. This stage recognizes the importance, for the problem-solving or ground breaking types of technical assistance, of involving the U.S. and LDC implementing organizations together as soon as the detailed design work begins. USAID's role here is to facilitate, not direct, the joint planning, assure consistency with prior agreements or concur in changes, affirm that the implementing parties have agreed on a reasonable project design, and prepare or cause to be prepared the documentation required for stage (3), including any amendments that might be required to the project documentation. If and when a decision is made by the host government and USAID to proceed into the operating phase with the same contractor, the U.S. intermediary should be treated as a cooperating partner in the negotiation of the subsequent long-term operating agreement(s) with the host government, host institution and USAID.

(3) *Implementation.* The results of the approach outlined in the stage above should include, in addition to a better understanding and more meaningful commitment by all parties, the following specific products:

(i) A jointly developed life-of-project design which reflects the commitment of all parties and includes clear statements of purpose, principal outputs, eligible types of activity and expenditure limits, critical assumptions, and major progress indicators;

(ii) A workplan and input schedule for the first two years or at least as long as the expenditure period for the next obligation of project funds;

(iii) Provisions for any administrative support, special services or other inputs by the host country, contractor, and/or USAID; and

(iv) A plan for periodic joint evaluation and review or progress and subsequent workplans, normally annually, with the participation of all parties.

Appropriate elements of these agreements and understandings are now embodied in a contract for project implementation, as described in paragraph (d)(3)(i) of the section on Contracting Implications. This contract allows the U.S. intermediary to apply its judgment, reflecting close collaboration with its LDC colleagues, in adjusting the flow of USAID-financed inputs and in making other operational decisions with a minimum of requirements for prior USAID approvals or contract amendments as long as the contractor stays within the bounds of the approved overall plan and budget. In this phase, USAID will give technical assistance contractors the authority and responsibility for using their specialized expertise to the fullest extent in the scheduling and managing of project inputs.

(4) *Monitoring, joint evaluation and replanning.* With increased flexibility and responsibility for implementation placed with the technical assistance contractor, the host government, and/or institutional collaborator, improved and timely progress reporting and periodic, joint, and structured reviews of results and evolving plans are imperative as a basis for monitoring and evaluating contractor performance, revalidating or adjusting project design, and for determining future funding levels and commitments.

Both the contractor's annual report and the joint review should be structured within the framework of purpose, outputs, performance indicators, etc., originally established in the project indentification phase—as modified by detailed project design—and reflected in the Project Agreement and other pertinent documentation. The field review will normally serve as the occasion for discussing changes in or additions to previously agreed-to workplans as well as proposing changes in purpose, types of activities authorized and budgets which require contract amendment. Obviously, the appropriate host government, host institution, and senior contractor officials should be thoroughly involved in the process, which will have to be adapted to the conditions within specific projects and countries. An important USAID responsibility is to assure that there is appropriate host country participation in developing and improving project plans prior to new obligations of funds. The special requirements and responsibilities of the various parties shall also be reflected in the project agreement and contract terms and in guidelines on the content of annual reports, evaluation procedures, etc.

Standard checking on services actually delivered as a basis for reimbursement will be continued including appropriate audit of expenditures.

(d) *Contracting implications.* The principal elements of change in present contracting practices, as detailed below, are earlier selection and involvement of the prime contractor, contracting by major stages of project design and operations, minimizing the need for precontract negotiations and contract amendments and USAID approvals, and providing technical assistance contractors with the authority and responsibility needed to manage implementation within the approved program bounds.

(1) *Selection.* The early involvement of the contractor in the definition stage of a long-term technical assistance project, after USAID decides what it wants to undertake in stage (1), does not alter the Agency's responsibility to select its contractors carefully and in full compliance with appropriate contracting regulations and selection procedures. What is required here is that contractor selection be carried out at an earlier stage than has sometimes been the Agency practice in the past or with other types of

contracts and in anticipation that the contractor, assuming adequate performance, will participate in all subsequent phases until final completion.

(2) *Contracting stages.* In contracting, the initial design stage should be separated from the longer term implementation stage without any USAID commitment to undertake the second until it has exercised its independent judgment based on the product of the first plus any outside expert appraisal it and the host country want to use.

The long-term implementation stage itself may be further subdivided into contract periods which permit time between predetermined events for analysis, determination of new project requirements, and evaluation of performance prior to initiating the next phase by contract amendment/extension. If, for any reason, such an examination does not appear to warrant project continuation, then termination of the project and/or contract would be the next step.

(3) *Flexible implementation authority.* While good project design will eliminate or diminish many operational problems, the very nature of long-term technical assistance requires flexible implementation within agreed purposes, ultimate outputs, types of activity and available financing. With these key variables for USAID management control established, contracts should be written so as to minimize the need for amendments and USAID approval of changes in input particulars. This can be facilitated, both for the USAID, host country, institution, and the contractor by:

(i) *Retention of operational plan in contract and removal of workplan.* The contract narrative will contain the life-of-the-project Operational Plan, consistent with the project design as developed in stage (2) and reflected in the project documentation (and subsequent amendments thereto). The Operational Plan includes a statement of the purpose to be achieved, the outputs to be produced by the contractor and the types of activities to be undertaken, the more significant indicators of progress, a general description of the type of inputs that are authorized and intended to be provided during the life of the project, and the overall budget.

In order to allow adjustments at the implementation level without going through the contract amendment process, the detailed but short-term workplan containing specific descriptions and scheduling of all inputs such as numbers and types of staff, participants, commodities, etc., and specific activities, will not be a part of the contract. It is a working document to be modified in the field when the situation demands. The latest version will be available as a supporting document to justify proposed new obligation levels. Normally, the workplan and derived budget will cover a rolling two year period, i.e., each year another yearly increment is added after review and approval.

(ii) *Budget flexibility.* To support this implementation flexibility, contract budget or fiscal controls will be shifted from fixed line items for each input category to program categories, permitting the technical assistance contractor to adjust amounts and timing to achieve previously approved types of activity. This same type of flexibility should apply to any local currency supplied for project operations and/or contractor staff support. While an essential corollary to eliminating the workplan from the contract, this is not a unique procedure under cost reimbursement type contracts when the contractor has demonstrated adequate management capability.

(iii) *Negotiation of advance understandings.* To permit university and international research center contractors to manage their activities in accordance with their own policies and procedures and thereby sharpen their management responsibility while achieving substantial savings in time and reduced documentation, USAID may negotiate advance understandings with its technical assistance contractors on dollar costs and administrative procedures that would be included by reference in its subsequent contracts. Upon receipt of a request from the contractor that their policies be reviewed and approved for usage in their contract in lieu of the standard terms and conditions, OP/PS/OCC, USAID/W will initiate negotiations of such policies in an expeditious manner. The approved policies will be used in all relevant relations involving the Agency and respective contractors in lieu of traditional contract standard provisions, whenever this may be appropriate. This does not apply to local currency costs and host government procedures which must be negotiated in each case.

The purpose of the practices listed above is not only to give a qualified contractor the authority to adjust the composition and timing of inputs but to assign to it clear responsibility for managing such resources, as the evolving circumstances require, to achieve the agreed-upon outputs on a cost efficient basis. It should also reduce the delay and paperwork involved in frequent but minor contract amendments, and approvals. For the agency as a whole, both in the Mission and in USAID/W, these have involved a large workload and cost.

(e) *Role of USAID.* Nothing in this appendix is intended to delegate, diminish or otherwise modify USAID's final responsibility for the prudent management of public funds and its own programs. Rather in withdrawing from the day-to-day involvement in and responsibility for the management of adjustment of the flow of inputs during the implementation, the best use of limited agency staff and time can be devoted to protecting

the public interest in gaining maximum results from the funds appropriated for technical assistance by:

(1) Seeking optimum identification in terms of LDC priorities and U.S. capabilities;

(2) Mobilizing and selecting the best U.S. professional talent to design and carry out the project;

(3) Monitoring what is happening to assure adequacy of processes, get a feel of results, assure actual delivery of inputs being financed;

(4) Assuring that the attention of USAID's implementation agents and LDC colleagues stay well focused on project purpose and results to be achieved (outputs) and the relation to these of what is being done and actual results;

(5) Providing intermediaries adequate authority and responsibility to adjust inputs promptly and sensitively to the evolving project situations.

Attention to these considerations, and to achievements of the preimplementation conditions prescribed above, should greatly increase the chances for successful project completion and impact on a cost effective basis, which is the final measurement of prudent management.

ATTACHMENT TO APPENDIX F—GUIDELINES FOR REQUESTS FOR EXPRESSIONS OF INTEREST

A. Length and Level of Detail

A Request for Expression of Interest (REI) should include more than just a short letter expressing interest, but should not be in the detail of a technical proposal (RFTP). The REI is not the only source of information that can or should be used for selection, but at least a minimum level of information should be contained in each document. A ten page paper that responds to the selection criteria included in every REI should be sufficient for evaluation purposes. The selection criteria should specify the technical inputs required for successful execution of the project and normally require a response in three general areas:

1. A description of the institution's capability to address the problem described in the REI.

2. Any related experience, whether in the country or region or in the problem area.

3. A demonstrable commitment of the institution to support the project.

The responses should address the capability, experience, and commitment to the particular project.

B. Specific Personnel Information

The response should specify within the areas set out in the selection criteria the following planning and personnel factors.

1. The design team plan and the scope of work for each member.

2. A list of candidates for the design team and their credentials.

3. A list of possible candidates for long-term assignment to the project. (Since there has been no project design, the specific technical assistance slots and technical responsibilities are vague. But it is expected that at least half of the personnel needs can be estimated early in the project. The institution should make its best guess for the team and present to the Agency the persons or types of persons with whom they are likely to contract.)

C. Multiple Institution Submissions

Joint effort on the part of several institutions is encouraged when appropriate. A single institution may submit an expression of interest for part of the project without knowledge of other collaborators or it may submit information in response to A and B of this attachment as part of a suggested collection of institutions. In either case, a proposed plan for cooperation is necessary.

However, such joint efforts must specify the division of responsibilities for the planning and personnel factors indicated in B of this attachment. Often USAID will identify the need for cooperation and suggest such an effort in the REI. Even if USAID does not suggest collaboration, joint efforts with a description of the cooperation would be an appropriate way to respond to an REI.

(Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435)

[49 FR 13301, Apr. 3, 1984, as amended at 49 FR 33669, Aug. 24, 1984; 50 FR 16089, Apr. 24, 1985; 51 FR 20652, June 6, 1986; 52 FR 6160, Mar. 2, 1987]

APPENDIXES G–H TO CHAPTER 7 [RESERVED]

APPENDIX I TO CHAPTER 7—USAID'S ACADEMIC PUBLICATION POLICY

1. Statement of Policy

This is a statement of USAID policy on publication, or release to parties other than those specifically authorized, of unclassified materials gathered or developed under contracts with academic institutions.

2. Underlying Principles

USAID favors and encourages the publication of scholarly research as well as the maximum availability, distribution, and use of knowledge developed in its program.

This policy statement does not deal with material that is classified for security reasons. It does deal with considerations of national interest, not of sufficient gravity to warrant security classification, but serious enough to affect adversely the conduct of

U.S. assistance programs. Consequently, in addition to the requirements of courtesy, propriety, and confidence which normally guide scholars in their work, there should also be consideration of the potential repercussions of publication on the successful execution of development and other cooperative programs in which the United States and foreign countries are involved.

3. Operational Definitions

The Agency draws a distinction between two kinds of manuscripts which a scholar may wish to publish:

(a) A report which is prepared and delivered to the Agency under the terms of the contract (a ''contract manuscript''); and

(b) An article or book based upon experience and information gained under an USAID contract but not prepared or delivered under the contract (a ''non-contract manuscript'').

There are two kinds of actions, to be specified in the contract, which the Agency can take upon notification of a contractor's desire to publish:

(a) Comment only, under which USAID and the foreign government involved may review the manuscript, and have their comments considered seriously by the contractor prior to publication; and

(b) Authorization for release, which USAID may withhold if reconciliation between the national interest and the author's interest is impossible.

4. Policy Statements

(a) USAID, as a general rule, will not require an academic institution to obtain permission to publish the written work produced under a contract. It will ask for the opportunity to review the manuscript for comment only, prior to publication.

In the case of a contract manuscript, USAID reserves the right to disclaim endorsement of the opinions expressed; if it is a noncontract manuscript, USAID reserves the right to disassociate itself from sponsorship or publication.

(b) On the other hand, USAID may reserve the right of authorization for release in those exceptional cases where conditions exist making it reasonably foreseeable, in light of the contract's scope of work and the manner and place of performance, that the written work to be prepared and delivered under the contract may have adverse repercussions on the relations and programs of the United States. Where this right is reserved, it must be so specified in the contract. In determining where to reserve such right, USAID will consider all relevant factors, including:

(1) The extent to which prompt and full performance of the contract will require access, facilitated by reason of the contract, to information not generally available to scholars;

(2) The extent to which the work involves matters of political concern to foreign countries, particularly where any substantial part of the work is to be performed therein;

(3) The extent to which, by reason of USAID's close involvement and cooperation in the performance of the contract, the work product may be so identified with USAID itself as to prevent effective disclaimer of USAID endorsement thereof;

(4) The extent to which the objective of the contract is to provide advice to USAID or to a foreign government of immediate operational significance in the conduct of the USAID program or the implementation of governmental programs in the host country;

(5) The desires of the host country.

5. Implementation

The successful implementation of this policy on publication rests on a thorough understanding and acceptance of these principles by USAID and the prospective contractor. The actual publications provision for a particular contract, then, would be so worded as to reflect the agreement reached in the contract negotations.

USAID's concern with noncontract manuscripts is related to the identification of a manuscript with the U.S. Government. This concern will be modified by the passage of time following termination of the contract.

In the normal case of prepublication review for USAID comment, the institution will submit a copy of the manuscript not later than the date of submission to the publisher. This gives the Agency time to comment if it is deemed appropriate. However, in the case of review for authorization, timely notification of USAID's response will be given, consistent with the size of the manuscript and the number and location of the parties involved.

The Agency will make every effort to expedite this review procedure in accordance with the underlying principle described at the beginning of this policy statement.

(Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435)

[49 FR 13304, Apr. 3, 1984]

APPENDIX J TO CHAPTER 7—DIRECT USAID CONTRACTS WITH A COOPERATING COUNTRY NATIONAL AND WITH A THIRD COUNTRY NATIONAL FOR PERSONAL SERVICES ABROAD

1. General

(a) *Purpose.* This appendix sets forth the authority, policy, and procedures under which USAID contracts with cooperating

country nationals or third country nationals for personal services abroad.

(b) *Definitions.* For the purpose of this appendix:

(1) *Personal services contract* (PSC) means a contract that, by its express terms or as administered, make the contractor personnel appear, in effect, Government employees (see FAR 37.104).

(2) *Employer-employee relationship* means an employment relationship under a service contract with an individual which occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, the contractor is subject to the relatively continuous supervision and control of a Government officer or employee.

(3) *Non-personal services contract* means a contract under which the personnel rendering the services are not subject either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

(4) *Independent contractor relationship* means a contract relationship in which the contractor is not subject to the supervision and control prevailing in relationships between the Government and its employees. Under these relationships, the Government does not normally supervise the performance of the work, or the manner in which it is to be performed, control the days of the week or hours of the day in which it is to be performed, or the location of performance.

(5) *Contractor* means a cooperating country national or a third country national who has entered into a contract pursuant to this appendix.

(6) *Cooperating country* means the country in which the employing USAID Mission is located.

(7) *Cooperating country national (CCN)* means an individual who is a cooperating country citizen or a non-cooperating country citizen lawfully admitted for permanent residence in the cooperating country.

(8) *Third Country National (TCN)* means an individual

(i) Who is neither a citizen nor a permanent legal resident alien of the United States nor of the country to which assigned for duty, and

(ii) Who is eligible for return to his/her home country or country of recruitment at U.S. Government expense [see Section 12, General Provision 9 paragraph (n)].

2. Legal Basis

(a) Section 635(b) of the Foreign Assistance Act of 1961, as amended, hereinafter referred to as the ''FAA'', provides the Agency's contracting authority.

(b) Section 636(a)(3) of the FAA authorizes the Agency to enter into personal services contracts with individuals for personal services abroad and provides further that such individuals ''* * * shall not be regarded as employees of the U.S. Government for the purpose of any law administered by the Civil Service Commission.''[1]

3. Applicability

(a) This appendix applies to all personal services contracts with CCNs or TCNs to provide assistance abroad under Section 636(a)(3) of the FAA.

(b) This appendix does not apply to:

(1) Contracts for non-personal services with TCNs or CCNs; such contracts are covered by the basic text of the FAR and AIDAR.

(2) Personal services contracts with U.S. citizens or U.S. resident aliens for personal services abroad; such contracts are covered by Appendix D of this chapter.

(3) Appointments of experts and consultants as USAID direct-hire employees; such appointments are covered by USAID Handbook 25, Employment and Promotion or superseding Chapters of the Automated Directive System (ADS).

4. Policy

(a) *General.* USAID may finance, with either program or operating expense (OE) funds, the cost of personal services as part of the Agency's program of foreign assistance by entering into a direct contract with a CCN or a TCN for personal services abroad.

(1) *Program funds.* Under the authority of Section 636(h) of the FAA, program funds may be obligated for periods up to five years where necessary and appropriate to the accomplishment of the tasks involved.

(2) *Operating expense funds.* Pursuant to USAID budget policy, OE funded salaries and other recurrent cost items may be forward funded for a period of up to three (3) months beyond the fiscal year in which these funds were obligated. Non-recurring cost items may be forward funded for periods not to exceed twenty-four (24) months where necessary and appropriate to accomplishment of the work.[2]

(b) *Limitations on Personal Services Contracts.*

(1) Personal services contracts may only be used when adequate supervision is available.

(2) Personal services contracts may be used for commercial activities. Commercial activities provide a product or service which could be obtained from a commercial source. See Attachment A of OMB Circular A–76 for a representative list of such activities.

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[1]The Civil Service Commission is now the Federal Office of Personnel Management.

[2]If there is a need, these contracts may be written for 5 years but only funded as outlined above.

(3) Notwithstanding any other provision of USAID directives, regulations or delegations, Cooperating Country or Third Country Nationals may be delegated or assigned any authority, duty or responsibility, delegated or assigned U.S. citizen direct-hire employees (USDH employees) except that:

a. They may not supervise USDH employees of USAID or other U.S. Government agencies. They may supervise USPSCs and non-U.S. citizen employees.

b. They may not be designated a Contracting Officer or delegated authority to sign obligating or subobligating documents.

c. They may represent the agency, except that communications that reflect a final policy, planning or budget decision of the agency must be cleared by a USDH employee.

d. They may participate in personnel selection matters but may not be delegated authority to make a final decision on personnel selection.

e. Services which involve security classified material.

(4) Exceptions. Exceptions to the limitations in (b)(3) must be approved by the Assistant Administrator for Management (AA/M).

(c) *Conditions of Employment.*

(1) *General.* For the purpose of any law administered by the U.S. Office of Personnel Management, USAID PSC contractors are not to be regarded as employees of the U.S. Government, are not included under any retirement or pension program of the U.S. Government, and are not eligible for the Incentive Awards Program covered by Uniform State/USAID/USIA regulations. Each USAID Mission is expected to participate in the Joint Special Embassy Incentive Awards Program. The program is administered by a joint committee which establishes procedures for submission, review and approval of proposed awards. Other than these exceptions, CCNs and TCNs who are hired for work in a cooperating country under PSCs generally will be extended the same benefits and be subject to the same restrictions as Foreign Service Nationals (FSNs) employed as direct-hires by the USAID Mission.

(2) *Compensation.* (i) It is USAID's general policy (see AIDAR 722.170) that PSC compensation may not, without the approval of the Mission Director or Assistant Administrator, exceed the prevailing compensation paid to personnel performing comparable work in the cooperating country. Compensation for TCN or CCN personal services contractors set in accordance with the provisions of 4c(2)(ii) below satisfies this requirement.

(ii) In accordance with Section 408(a)(1) of the Foreign Service Act of 1980, a local compensation plan forms the basis for all compensation payments to FSNs which includes CCNs and TCNs. The plan is each post's official system of position classification and pay, consisting of the local salary schedule which includes salary rates, statements authorizing fringe benefit payments, and other pertinent facets of compensation for TCNs and CCNs, and the local position classification system as reflected in the Local Employee Position Classification Handbook (LEPCH) or equivalent in effect at the Mission. Compensation for PSCs will be in accordance with the local compensation plan, to the extent that it covers employees of the type or category being employed, unless the Mission Director determines otherwise. If the Mission Director determines that compensation in accordance with the local plan would be inappropriate in a particular instance, then compensation will be set in accordance with (in order of preference):

(A) Any other Mission policies on foreign national employee compensation; or

(B) Paragraphs 4(c) (d), (e), (g), (h), and (i) of Appendix D. When compensation is set in accordance with this exception, the record shall be documented in writing with a justification prepared by the requesting office and approved by the Mission Director.

(iii) The earning of leave (annual and sick), allowances and differential (if applicable), salaries and all other related benefits cannot be enumerated in this Appendix as they vary from Mission to Mission and are based upon the compensation plan for each.

(iv) Unless otherwise authorized, the currency in which compensation is paid to contractors shall be in accordance with the prevailing local compensation practice of the post.

(v) CCN and TCN contractors are eligible for allowances and differential on the same basis as direct-hire FSN employees under the post compensation plan.

(vi) A USAID PSC who is a spouse of a current or retired U.S. Civil Service, U.S. Foreign Service, or U.S. military service member, and who is covered by their spouse's government health or life insurance policy, is ineligible for a contribution towards the costs of annual health and life insurance.

(vii) Retired CCNs and TCNs may be awarded personal services contracts without any reduction in or offset against their Government annuity.

(3) *Incentives Awards.* (i) All Cooperating Country Nationals direct-hire and Personal Services Contractors (PSCs) and Third Country Nationals (PSCs) of the Foreign Affairs Community are eligible for the Joint Special Embassy Incentive Awards Program.

(ii) Meritorious Step Increases for USAID FSN PSCs may be authorized provided the granting of such increases is the general practice locally.

(iii) The Joint Country Awards Committee administers each post's (Embassy) award program, including establishment of procedures for submission, review and approval of proposed awards.

(4) *Training.* CCN and TCN PSCs are eligible for most of the training courses offered in the Training Course Schedule. However, applications will be processed on a case-by-case basis and are required to be approved by the Contracting Officer.

5. Soliciting for Personal Services Contracts

(a) *Technical Officer's Responsibilities.* The Technical Officer will prepare a written detailed statement of duties and a statement of minimum qualifications to cover the position being recruited for; the statement shall be included in the procurement request. The procurement request shall also include the following additional information as a minimum:

(1) The specific foreign location(s) where the work is to be performed, including any travel requirements (with an estimate of frequency);

(2) The length of the contract, with beginning and ending dates, plus any options for renewal or extension;

(3) The basic education, training, experience, and skills required for the position;

(4) A certification from the officer in the Mission responsible for the LEPCH or equivalent that the position has been reviewed and is properly classified as to a title, series and grade in accordance with the LEPCH. If the position does not fall within the LEPCH or equivalent system, and estimate of compensation based on subparagraphs 4(c)(2)(ii)(A) or (B) of this Appendix after consultations or in coordination with the contract officer or executive officer;

(5) A list of Government or host country furnished items (e.g., housing).

(b) *Contracting Officer's Responsibilities.* (1) The Contracting Officer will prepare the solicitation for personal services which shall contain:

(i) Three sets of certified biographical data and salary history. (Upon receipt, one copy of the above information shall be forwarded to the Project Officer);

(ii) A detailed statement of duties or a completed position description for the position being recruited for;

(iii) A copy of the prescribed contract Cover Page, Contract Schedule, and General Provisions as well as the FAR Clause to be included in full text and a list of those to be incorporated by reference; and

(iv) A copy of General Notice entitled ''Employee Review of the New Standards of Conduct'' dated October 30, 1992.

(2) The Contracting Officer shall comply with the limitations of AIDAR 706.302–70(c) as detailed in paragraph 5(c) below.

(c) *Competition.* (1) Under AIDAR 706.302–70(b)(1), Personal Services Contracts are exempt from the requirements for full and open competition with two limitations that must be observed by Contracting Officers:

(i) Offers are to be requested from as many potential offerors as is practicable under the circumstances, and

(ii) a justification supporting less than full and open competition must be prepared in accordance with FAR 6.303.

(2) A class justification was approved by the USAID Procurement Executive to satisfy the requirements of AIDAR 706.302–70(c)(2) for a justification in accordance with FAR 6.303. Use of this class justification for Personal Services Contracts with Cooperating Country Nationals and Third Country Nationals is subject to the following conditions:

(i) New contracts are publicized consistent with Mission/Embassy practice on announcement of direct hire FSN positions. Renewals or extensions with the same individual for continuing service do not need to be publicized.

(ii) A copy of the class justification (which was distributed to all USAID Contracting Officers via Contract Information Bulletin) must be included in the contract file, together with a written statement, signed by the Contracting Officer, that the contract is being awarded pursuant to AIDAR 706.302–70(b)(1); that the conditions for use of this class justification have been met; and that the cost of the contract is fair and reasonable. If the conditions in paragraphs (2)(i) and (ii) are not followed, the Contracting Officer must prepare a separate justification as required under AIDAR 706.302–70(c)(2).

(3) Since the award of a personal services contract is based on technical qualifications, not price, and since the biographical data and salary history are used to solicit for such contracts, FAR Subparts 15.4 and 15.5 are inappropriate and shall not be used. Instead, the solicitation and selection procedures outlined in this Appendix shall govern.

6. Negotiating a Personal Services Contract

Negotiating a Personal Services Contract is significantly different from negotiating a nonpersonal services contract because it establishes an employer-employee relationship; therefore, the selection and negotiations procedures are more akin to the personal selection procedures.

(a) *Technical Officer's Responsibilities.* The Technical Officer shall be responsible for reviewing and evaluating the applications received in response to the solicitation issued by the Contracting Officer. If deemed appropriate, interviews may be conducted with the applicants before the final selection is submitted to the Contracting Officer.

(b) *Contracting Officer's Responsibilities.*

(1) The Contracting Officer shall forward a copy of biographical data and salary history received under the solicitation to the Technical Officer for evaluation.

(2) On receipt of the Technical Officer's recommendation, the Contracting Officer

shall conduct negotiations with the recommended applicant. The terms and conditions of the contract will normally be in accordance with the local compensation plan which forms the basis for all compensation on payments paid to FSNs which includes CCNs and TCNs.

(3) The Contracting Officer shall use the certified salary history on the certified statement of biographical data and salary history as the basis for salary negotiations, along with the Technical Officer's cost estimate.

(4) The Contracting Officer will obtain necessary data for a security and suitability clearance to the extent required by USAID Handbook 6, Security or superseding ADS Chapters.

7. Executing a Personal Services Contract

Contracting activities, whether USAID/W or Mission, may execute Personal Services Contracts, provided that the amount of the contract does not exceed the contracting authority that has been redelegated to them. See AIDAR 701.601. In executing a personal service contract, the Contracting Officer is responsible for insuring that:

(a) The proposed contract is within his/her delegated authority;

(b) A written detailed statement of duties covering the proposed contract has been received;

(c) The proposed scope of work is contractible, contains a statement of minimum qualifications from the technical office requesting the services, and is suitable for a personal services contract in that:

(1) Performance of the proposed work requires or is best suited for an employer-employee relationship, and is thus not suited to the use of a non-personal services contract;

(2) The scope of work does not require performance of any function normally reserved for direct-hire Federal employees (under paragraph 4(b) of this Appendix); and

(3) There is no apparent conflict of interest involved (if the Contracting Officer believes that a conflict of interest may exist, the question should be referred to the cognizant legal counsel);

(d) Selection of the contractor is documented and justified (AIDAR 706.302–70(b)(1) provides an exception to the requirement for full and open competition for Personal Services Contracts abroad; see paragraph 5(c) of this Appendix);

(e) The standard contract format prescribed for a Cooperating Country National and a Third Country National personal services contract (Sections 9, 10, 11, 12, and 13 of this Appendix as appropriate) is used, or that any necessary deviations are processed as required by AIDAR 701.470;

(f) The contractor has submitted the names, addresses, and telephone numbers of at least two persons who may be notified in the event of an emergency (this information is to be retained in the contract file);

(g) The contract is complete and correct and all information required on the contract Cover Page (USAID form 1420–36B) has been entered;

(h) The contract has been signed by the Contracting Officer and the contractor, and fully executed copies are properly distributed;

(i) The following clearances, approvals and forms have been obtained, properly completed, and placed in the contract file before the contract is signed by both parties:

(1) Security clearance to the extent required by USAID Handbook 6, *Security* or other superseding Chapters of the Automated Directives System;

(2) Mission, host country, and technical office clearance, as appropriate;

(3) Medical clearance(s) based on a full medical examination(s) and statement of medical opinion by a licensed physician. The physician's medical opinion must be in the possession of the Contracting Officer prior to signature of contract. If a TCN is recruited, medical clearance requirements apply to the contractor and each dependent who is authorized to accompany the contractor;

(4) The approval for any salary in excess of ES–6, in accordance with Appendix G of this chapter;

(5) A copy of the class justification or other appropriate explanation and support required by AIDAR 706.302–70, if applicable;

(6) Any deviation to the policy or procedures of this Appendix, processed and approved under AIDAR 701.470;

(7) The memorandum of negotiation;

(j) The position description is classified in accordance with the LEPCH, and the proposed salary is consistent with the local compensation plan or the alternate procedures established in 4(c)(2)(ii) above;

(k) Funds for the contract are properly obligated to preclude violation of the Anti-Deficiency Act, 31 U.S.C. 134 (the Contracting Officer ensures that the contract has been properly recorded by the appropriate accounting office prior to its release for the signature of the selected contractor);

(l) The contractor receives and understands USAID General Notice entitled ''Employee Review of the New Standards of Conduct'' dated October 30, 1992 and a copy is attached to each contract, as provided for in paragraph (c) of General Provision 2, Section 12;

(m) Agency conflict of interest requirements, as set out in the above notice are also met by the contractor prior to his/her reporting for duty;

(n) A copy of a Checklist for Personal Services Contractors which may be in the form set out above or another form convenient for the contracting officer, provided that a form containing all of the information described

in this paragraph 7 shall be prepared for each PSC and placed in the contract file;

(o) In consultation with the regional legal advisor and/or the regional contracting officer, the contract is modified by deleting from the General Provisions (Sections 12 and 13 of this Appendix) the inapplicable clause(s) by a listing in the Schedule; and

(p) The block entitled, ''Acquisition and Assistance Request Document'' on the Cover Page of the contract format is completed by inserting the four-segment technical number as prescribed in USAID Handbook 18, the USAID Code Book Appendix D or superseding ADS Chapter if the PSC is project-funded.

8. Contracting Format

The prescribed Contract Cover Page, Contract Schedules, General Provisions and FAR Clauses for personal service contracts for TCNs and CCNs covered by this Appendix are included as follows:

9. *''Cover Page'' for a Contract with a Cooperating Country National or with a Third Country National for Personal Services.*

10. *''Schedule'' for a Contract with a Cooperating Country National or Third Country National Personal Services Contracts.*

11. *''Optional Schedule'' for a Contract with a Cooperating Country National or Third Country National Personal Services Contracts.*

[Use of the Optional Schedule is intended to serve as an alternate procedure for OE funded Foreign Service National PSCs. The schedule was developed for use when the Contracting Officer anticipates incremental recurring cost funded contracts. It should be noted that the Optional Schedule eliminates the need to amend the contract each time funds are obligated. However, the Contracting Officer is required to amend each contract not less than twice during a 12 month period to ensure that the contract record of obligations is up to date and agrees with the figures in the master funding document.]

12. *''General Provisions'' for a Contract With a Cooperating Country National or With a Third Country National for Personal Services.*

13. *FAR Clauses to be incorporated in full text as well as by reference in Personal Services Contracts.*

9. ''Cover page'' for a Contract With a Cooperating Country National or With a Third Country National for Personal Services.

—AID Form 1420–36B (11/96)

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT

WASHINGTON, D.C. 20523

CONTRACT WITH A COOPERATING COUNTRY NATIONAL FOR PERSONAL SERVICES ABROAD [ ]
CONTRACT WITH A THIRD COUNTRY NATIONAL FOR PERSONAL SERVICES ABROAD [ ]

Ethics Code *("X" Appropriate Box)* ☐ N ☐ C ☐ P

Negotiated Pursuant to Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, and Executive Order 11223	Contract Number	
Country of Performance	Amount Obligated This Action	Total Estimated Contract Cost $
Contract For Technical Services	Request Document Number	
For	Contractor *(Name, Street, City, State, Postal Zone)*	
Contracting Office *(Name and Address)*		
Administered By *(If other than Contracting Office)*	Effective Date	Estimated Completion Date
Cognizant Scientific/Technical Office *(Name, Office Symbol, Address)*	Accounting and Appropriation Data Resource Category _____ Organization _____ Request ID _____ Activity _____ Fund _____ Fund Account _____ Allotment Symbol _____	
Supervising Officer		
Payment Will be Made By	Type of Advance *("X" Appropriate Box)* ☐ INITIAL ☐ NONE AUTHORIZED	

The United States of America, hereinafter called the Government, represented by the Contracting Office executing this contract, and the Contractor agree that the Contractor shall perform all the services set forth in the attached Schedule, for the consideration stated therein. The rights and obligations of the parties to this contract shall be subject to and governed by the Schedule and the General Provisions. To the extent of any inconsistency between the Schedule or the General Provisions and any specifications or other provisions which are made a part of this contract, by reference or otherwise, the Schedule and the General Provisions shall control. To the extent of any inconsistency between the Schedule and the General Provisions, the Schedule shall control.

This Contract consists of this Cover Pager, the Schedule of _____pages, including the Table of Contents,

The General Provisions Section 12 and Section 13 FAR Clauses by reference.

	UNITED STATES OF AMERICA AGENCY FOR INTERNATIONAL DEVELOPMENT
Signature of Contractor	By *(Signature of Contracting Officer)*
Typed or Printed Name	Typed or Printed Name
Date	Date

AID 1420-36B (11/96)

10. "Schedule" for a Contract With a Cooperating Country National or Third Country National Personal Services Contracts

Contract No._____

Table of Contents

The Schedule on pages _____ through _____ consists of this Table of Contents, the following Articles, and General Provisions:

Article I Statement of Duties

Article II Period of Service
Article III Contractor's Compensation and Reimbursement
Article IV Costs Reimbursable and Logistic Support
Article V Precontract Expenses
Article VI Additional Clauses

General Provisions

The following provisions, numbered as shown below, omitting number(s) _____, are the General Provisions (GPs) of this Contract:

1. Definitions
2. Compliance with Applicable Laws and Regulations
3. Physical Fitness
4. Security
5. Workweek
6 Leave and Holidays
7. Social Security and Cooperating Country Taxes
8. Insurance
9. Travel and Transportation
10. Payment
11. Contractor-Mission Relationships
12. Termination
13. Allowances
14. Advance of Dollar Funds
15. Conversion of U.S. Dollars to Local Currency
16. Post of assignment Privileges
17. Release of Information
18. Notices
19. Incentive Awards
20. Training
21. Medical Evacuation Services

Schedule

NOTE: Use of the following Schedule is not mandatory.

The Schedule is intended to serve as a guideline and as a checklist for contracting offices in drafting contract schedules. Article language shall be changed to suit the needs of the particular contract. Special attention should be given to the financial planning sections where unnecessary line items should be eliminated.

ARTICLE I—STATEMENT OF DUTIES

[The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Orientation or training to be provided by USAID.]

ARTICLE II—PERIOD OF SERVICE

Within _____ days after written notice from the Contracting Officer that all clearances, including the statement of medical opinion required under General Provision Clause 3, have been received, unless another date is specified by the contracting officer in writing, the contractor shall proceed to _____ and shall promptly commence performance of the duties specified above. The contractor's period of service shall be approximately _____ in _____. (Specify time of duties in each location.)

ARTICLE III—CONTRACTOR'S COMPENSATION AND REIMBURSEMENT

A. Except as reimbursement may be specifically authorized by the Mission Director or contracting officer, USAID shall pay the contractor compensation after it has accrued and make reimbursements, if any are due, in currency of the post or for necessary and reasonable costs actually incurred in the performance of this contract within the categories listed in Paragraph D, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GPs).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) (which is to include) (1) vacation and sick leave which may be earned during contractor's tour of duty (GP Clause No. 6), (2) _____ days for authorized travel (GP Clause 9), and (3) _____ days for orientation and consultation if required by the Statement of Duties.

C. The contractor shall earn vacation leave at the rate of _____ days per year under the contract (provided the contract is in force for at least 90 days) and shall earn sick leave at the rate of _____ days per year under the contract.

D. Allowable Costs.

1. Compensation at the rate of LC _____ per (year) (month) (week) (day), equivalent to Grade FSN–_____/_____ in accordance with the Mission's Local Compensation Plan. If during the effective period of this contract the Local Compensation Plan is revised, contractor's compensation will be revised accordingly and contractor will be notified in writing by the contracting officer. Adjustments in compensation for periods when the contractor is not in compensable pay status shall be calculated as follows: Rate of LC _____ per (day) (hour).

LC _____

2. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.)

3. Travel and Transportation (Ref. GP Clause 9). (Includes the value of TRs furnished by the Government, not payable to contractor).

a. United States—$_____
b. International—$_____
c. Cooperating and Third Country—$_____, LC _____

Subtotals Item 3—$_____, LC _____

4. Subsistence or Per Diem (Ref. GP Clause 9).

a. United States—$_____

b. International—$_____

c. Cooperating and Third Country—$_____, LC_____

Subtotals Item 4—$_____, LC_____

5. Other Direct Costs

a. Physical Examination (Ref. GP Clause 3)—LC_____

b. Miscellaneous—LC_____

Subtotal Item—LC_____

Total Estimated Costs (Lines 1 thru 5) $_____ LC _____

E. Maximum U.S. Dollar and Local Currency Obligation.

In no event shall the maximum U.S. Dollar obligation under this contract exceed $_____ nor shall the maximum local currency obligation exceed LC _____. Contractor shall keep a close account of all obligations incurred and accrued hereunder and promptly notify the contracting officer whenever it appears that the said maximum is not sufficient to cover all compensation and costs reimbursable which are anticipated under the contract.

F. Under the Joint Incentive Awards Program for FSN monetary awards will be made pending availability of funds. The increase for the award will be effected by the execution of an SF–1126 which will be attached to the contract and will form a part of the contract. In no event may costs under the contract exceed the total amount obligated.

Meritorious Step Increases for FSN PSCs may be authorized provided the granting of such increase is the general practice locally.

ARTICLE IV—COSTS REIMBURSABLE AND LOGISTIC SUPPORT

A. General.

The contractor shall be provided with or reimbursed in local currency

(_____) for the following: [Complete]

B. Method of Payment of Local Currency Costs.

Those contract costs which are specified as local currency costs in Paragraph A, above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with GP Clause 10. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

C. Cooperating or U.S. Government Furnished Equipment and Facilities.

[List any logistical support, equipment, and facilities to be provided by the cooperating government or the U.S. Government at no cost to this contract; e.g., office space, supplies, equipment, secretarial support, etc., and the conditions, if any, for use of such equipment.]

ARTICLE V—PRECONTRACT EXPENSES

No expense incurred before signing of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

ARTICLE VI—ADDITIONAL CLAUSES

[Additional Schedule Clauses may be added to meet specific requirements of an individual contract.]

11. Optional Schedule for a Contract With a Cooperating Country National or Third Country National Personal Services Contracts

Contract No. _____

Table of Contents

(Optional Schedule)

[Use of the Optional Schedule is not mandatory. It is intended to serve as an alternate procedure for OE funded Cooperating Country National and Third Country National PSCs. The schedule was developed for use when the Contracting Officer anticipates incremental recurring cost funded contracts.

It should be noted that use of the Optional Schedule eliminates the need to amend the contract each time funds are obligated. However, Contracting Officer is required to amend each contract not less than twice during a 12 month period to ensure that the contract record of obligations is up to date and agrees with the figures in the master funding document.]

The Schedule on pages _____ through _____ consists of this Table of Contents and the following Articles:

Article I Statement of Duties
Article II Period of Service
Article III Contractor's Compensation and Reimbursement
Article IV Costs Reimbursable and Logistic Support
Article V Precontract Expenses
Article VI Additional Clauses

General Provisions

The following provisions, numbered as shown below, omitting number(s) _____, are the General Provisions (GPs) of this contract.

1. Definitions
2. Compliance with Applicable Laws and Regulations
3. Physical Fitness
4. Security
5. Workweek
6. Leave and Holidays
7. Social Security and Cooperating Country Taxes
8. Insurance

9. Travel and Transportation
10. Payment
11. Contractor-Mission Relationships
12. Termination
13. Allowances
14. Advance of Dollar Funds
15. Conversion of U.S. Dollars to Local Currency
16. Post of Assignment Privileges
17. Release of Information
18. Notices
19. Incentive Awards
20. Training
21. Medical Evacuation Services

ARTICLE I—STATEMENT OF DUTIES

[The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Orientation or training to be provided by USAID.]

ARTICLE II—PERIOD OF SERVICE

Employment under this contract is of a continuing nature. Its duration is expected to be part of a series of sequential contracts; all contract provisions and clauses and regulatory requirements concerning availability of funds and the specific duration of this contract shall apply.

Within 10 days after written notice from the Contracting Offices that all clearances have been received, unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to (name place) and shall promptly commence performance of the duties specified in Article I of this contract. The contractor's period of service shall be approximately (specify duration from date to date).

ARTICLE III—CONTRACTOR'S COMPENSATION AND REIMBURSEMENT

A. Except as reimbursement may be specifically authorized by the Mission Director or Contracting Officer, USAID shall pay the contractor compensation after it has accrued and make reimbursements, if any are due in currency of the cooperating country (LC) in accordance with the prevailing practice of the post or for necessary and reasonable costs actually incurred in the performance of this contract within the categories listed in paragraph E, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GPs).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) (which is to include) (1) vacation and sick leave which may be earned during the contractor's tour of duty (GP Clause No. 6), (2) _____ days for authorized travel (GP Clause 9), and (3) _____ days for orientation and consultation if required by the Statement of Duties.

C. The contractor shall earn vacation leave at the rate of _____ days per year under the contract (provided the contract is in force for at least 90 days) and shall earn sick leave at the rate of _____ days per year under the contract.

D. All employee rights and benefits from the previous contract or employment, i.e., accumulated annual and sick leave balances, original service computation dates, reserve fund contributions, accumulated compensatory time, social security contributions, seniority and longevity bonuses are considered allowable costs and as a continuation as long as the break in service does not exceed three days.

E. Allowable Costs.

1. The following illustrative budget details allowable costs under this contract and provides estimated incremental recurrent cost funding in the total amount shown. Additional funds for the full term of this contract will be provided by the preparation of a master PSC funding document issued by the Mission Controller for the purpose of providing additional funding for a specific period. The master PSC funding document will be attached to this contract and will form a part of the executed contract while also serving to amend the budget.

2. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.)

LC_____

3. Travel and Transportation (Ref. GP Clause 9). (Includes the value of TRs furnished by the Government, not payable to contractor).

a. United States—$_____
b. International—$_____
c. Cooperating and Third Country—$_____, LC _____

Subtotals Item 3—$_____, LC _____

4. Subsistence or Per Diem (Ref. GP Clause 9.)

a. United States—$_____
b. International—$_____
c. Cooperating and Third Country—$_____, LC _____

Subtotals Item 4—$_____, LC _____

5. Other Direct Costs.

a. Physical Examination (Ref. GP Clause 3)—$_____, LC _____
b. Miscellaneous—$_____, LC _____

Subtotals Item 5—$_____, LC _____

Total Estimated Costs (Lines 1 thru 5) $_____, LC _____

F. Allowable costs compensation and all terms and benefits of employment under this contract will be in accordance with the Mission's local compensation plan. Salary

changes and personnel-related contract actions will be made by processing the same forms as used in making such changes and actions for direct-hire FSN employees. When issued by the Contracting Officer, the forms utilized will be attached to the contract and will form a part of the contract terms and conditions.

Any adjustment or increase in the compensation granted to direct-hire employees under the local compensation plan will be allowed for in PSCs subject to the availability of funds. Such an adjustment will be effected by a mass pay adjustment notice from the Contracting Officer, which will be attached to the contract and form a part of the executed contract.

At the end of each year of satisfactory service, PSC contractors will be eligible to receive an increase equal to one annual step increase as shown in the local compensation plan, pending availability for funds. Such increase will be effected by the execution of an SF–1126, Payroll Change Slip which is to be attached to each contract and each action forms a part of the official contract file.

Under the Joint Inventive Awards Program for FSNs, monetary awards will be made pending availability of funds. The increase for the award will be effected by the execution of an SF–1126 which will be attached to the contract and will form a part of the contract. In no event may costs under the contract exceed the total amount obligated.

Meritorious Step Increases for FSN PSCs may be authorized provided the granting of such increase is the general practice locally.

The master PSC funding document may not exceed the term or estimated total cost of this contract. Notwithstanding that additional funds are obligated under this contract through the issuance and attachment of the master PSC funding document, all other contract terms and conditions remain in full effect.

ARTICLE IV—COSTS REIMBURSABLE AND LOGISTIC SUPPORT

A. General.

The contractor shall be provided with or reimbursed in local currency

_____ for the following: [Complete]

B. Method of Payment of Local Currency Costs.

Those contract costs which are specified as local currency costs in Paragraph A, above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with GP Clause 10. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

C. Cooperating or U.S. Government Furnished Equipment and Facilities.

[List any logistical support, equipment, and facilities to be provided by the cooperating government or the U.S. Government at no cost to this contract; e.g., office space, supplies, equipment, secretarial support, etc., and the conditions, if any, for use of such equipment.]

ARTICLE V—PRECONTRACT EXPENSES

No expense incurred before signing of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

ARTICLE VI—ADDITIONAL CLAUSES

[Additional Schedule Clauses may be added to meet specific requirements of an individual contract.]

12. General Provisions for a Contract With a Cooperating Country National or With a Third Country National for Personal Services

To be used to contract with cooperating country nationals or third country nationals for personal services.

Index of Clauses

1. Definitions
2. Compliance with Applicable Laws and Regulations
3. Physical Fitness
4. Security
5. Workweek
6. Leave and Holidays
7. Social Security and Cooperating Country Taxes
8. Insurance
9. Travel and Transportation
10. Payment
11. Contractor-Mission Relationships
12. Termination
13. Allowances
14. Advance of Dollar Funds
15. Conversion of U.S. Dollars to Local Currency
16. Post of Assignment Privileges
17. Release of Information
18. Notices
19. Incentive Awards
20. Training
21. Medical Evacuation Services

1. Definitions (JUL 1993)

[For use in both Cooperating Country National (CCN) and Third Country National (TCN) Contracts].

(a) *USAID* shall mean the U.S. Agency for International Development.

(b) *Administrator* shall mean the Administrator or the Deputy Administrator of the U.S. Agency for International Development.

(c) *Contracting Officer* shall mean a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(d) *Cooperating Country National* shall mean the individual engaged to serve in the Cooperating Country under this contract.

(e) *Cooperating Country* shall mean the foreign country in or for which services are to be rendered hereunder.

(f) *Cooperating Government* shall mean the government of the Cooperating Country.

(g) *Government* shall mean the United States Government.

(h) *Economy Class* air travel shall mean a class of air travel which is less than business or first class.

(i) *Local Currency* shall mean the currency of the cooperating country.

(j) *Mission* shall mean the United States USAID Mission to, or principal USAID office in, the Cooperating Country.

(k) *Mission Director* shall mean the principal officer in the Mission in the Cooperating Country, or his/her designated representative.

(l) *Third Country National* shall mean an individual (i) who is neither a citizen of the United States nor of the country to which assigned for duty, and (ii) who is eligible for return travel to the TCN's home country or country from which recruited at U.S. Government expenses, and (iii) who is on a limited assignment for a specific period of time.

(m) *Tour of Duty* shall mean the contractor's period of service under this contract and shall include, authorized leave and international travel.

(n) *Traveler* shall mean the contractor or dependents of the contractor who are in authorized travel status.

(o) *Dependents* shall mean spouse and children (including step and adopted children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support.

2. Compliance With Laws and Regulations Applicable Abroad (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) *Conformity to Laws and Regulations of the Cooperating Country.*

Contractor agrees that, while in the cooperating country, he/she as well as authorized dependents will abide by all applicable laws and regulations of the cooperating country and political subdivisions thereof.

(b) *Purchase or Sale of Personal Property or Automobiles.* [For TCNs Only].

To the extent permitted by the cooperating country, the purchase, sale, import, or export of personal property or automobiles in the cooperating country by the contractor shall be subject to the same limitations and prohibitions which apply to Mission U.S.-citizen direct-hire employees.

(c) *Code of Conduct.*

The contractor shall, during his/her tour of duty under this contract, be considered an ''employee'' (or if his/her tour of duty is for less than 130 days, a ''special Government employee'') for the purposes of, and shall be subject to, the provisions of 18 U.S.C. 202(a) the AID General Notice entitled Employee Review of the New Standards of Conduct. The contractor acknowledges receipt of a copy of these documents by his/her acceptance of this contract.

3. Physical Fitness (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) *Cooperating Country National.*

The contractor shall be examined by a licensed doctor of medicine, and shall obtain a statement of medical opinion that, in the doctor's opinion, the contractor is physically qualified to engage in the type of activity for which he/she is to be employed under the contract. A copy of the medical opinion shall be provided to the Contracting Officer before the contractor starts work under the contract. The contractor shall be reimbursed for the cost of the physical examination based on the rates prevailing locally for such examinations in accordance with Mission practice.

(b) *Third Country National.*

(i) The contractor shall obtain a physical examination for himself/herself and any authorized dependents by a licensed doctor of medicine. The contractor shall obtain a statement of medical opinion from the doctor that, in the doctor's opinion, the contractor is physically qualified to engage in the type of activity for which he/she is to be employed under the contract, and the contractor's authorized dependents are physically qualified to reside in the cooperating country. A copy of that medical opinion shall be provided to the Contracting Officer prior to the dependents' departure for the cooperating country.

(ii) The contractor shall be reimbursed for the cost of the physical examinations mentioned above as follows: (1) based on those rates prevailing locally for such examinations in accordance with Mission practice or (2) if not done locally, not to exceed $100 per examination for the contractor's dependents of 12 years of age and over and not to exceed $40 per examination for contractor's dependents under 12 years of age. The contractor shall also be reimbursed for the cost of all immunizations normally authorized and extended to FSN employees.

4. Security (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) The contractor is obligated to notify immediately the Contracting Officer if the

contractor is arrested or charged with any offense during the term of this contract.

(b) The contractor shall not normally have access to classified or administratively controlled information and shall take conscious steps to avoid receiving or learning of such information. However, based on contractor's need to know, Mission may authorize access to administratively controlled information for performance of assigned scope of work on a case-by-case basis in accordance with USAID Handbook 6 or superseding ADS Chapters.

(c) The contractor agrees to submit immediately to the Mission Director or Contracting Officer a complete detailed report, marked ''Privileged Information'', of any information which the contractor may have concerning existing or threatened espionage, sabotage, or subversive activity against the United States of America or the USAID Mission or the cooperating country government.

5. Workweek (OCT 1987)

[For use in both CCN and TCN Contracts].

The contractor's workweek shall not be less than 40 hours, unless otherwise provided in the Schedule, and shall coincide with the workweek for those employees of the Mission or the cooperating country agency must closely associated with the work of this contract. If approved in advance in writing, overtime worked by the contractor shall be paid in accordance with the procedures governing premium compensation applicable to direct-hire foreign service national employees. If the contract is for less than full time (40 hours weekly), the leave earned shall be prorated.

6. Leave and Holidays (OCT 1987)

[For use in both CCN and TCN Contracts].

(a) *Vacation Leave.*

The contractor may accrue, accumulate, use and be paid for vacation leave in the same manner as such leave is accrued, accumulated, used and paid to foreign service national direct-hire employees of the Mission. No vacation leave shall be earned if the contract is for less than 90 days. Unused vacation leave may be carried over under an extension or renewal of the contract as long as it conforms to Mission policy and practice. With the approval of the Mission Director, and if the circumstances warrant, a contractor may be granted advance vacation leave in excess of that earned, but in no case shall a contractor be granted advance vacation leave in excess of that which he/she will earn over the life of the contract. The contractor agrees to reimburse USAID for leave used in excess of the amount earned during the contractor's assignment under the contract.

(b) *Sick Leave.*

The contractor may accrue, accumulate, and use sick leave in the same manner as such leave is accrued, accumulated and used by foreign service national direct-hire employees of the Mission. Unused sick leave may be carried over under an extension of the contract. The contractor will not be paid for sick leave earned but unused at the completion of this contract.

(c) *Leave Without Pay.*

Leave without pay may be granted only with the written approval of the Contracting Officer or Mission Director.

(d) *Holidays.*

The contractor shall be entitled to all holidays granted by the Mission to direct-hire cooperating country national employees who are on comparable assignments.

7. Social Security and Cooperating Country Taxes (DEC 1986)

[For use in both CCN and TCN Contracts].

Funds for Social Security, retirement, pension, vacation or other cooperating country programs as required by local law shall be deducted and withheld in accordance with laws and regulations and rulings of the cooperating country or any agreement concerning such withholding entered into between the cooperating government and the United States Government.

8. Insurance (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) *Worker's Compensation Benefits.*

The contractor shall be provided worker's compensation benefits under the Federal Employees Compensation Act.

(b) *Health and Life Insurance.*

The contractor shall be provided personal health and life insurance benefits on the same basis as they are granted to direct-hire CCNs and TCN employees at the post under the Post Compensation Plan.

(c) *Insurance on Private Automobiles—Contractor Responsibility* [For use in TCN contracts]. If the contractor or dependents transport, or cause to be transported, any privately owned automobile(s) to the cooperating country, or any of them purchase an automobile within the cooperating country, the contractor agrees to ensure that all such automobile(s) during such ownership within the cooperating country will be covered by a paid-up insurance policy issued by a reliable company providing the following minimum coverages, or such other minimum coverages as may be set by the Mission Director, payable in U.S. dollars or its equivalent in the currency of the cooperating country: injury to persons, $10,000/$20,000; property damage, $5,000. The contractor further agrees to deliver, or cause to be delivered to the Mission Director, copies of the insurance policies required by this clause or satisfactory proof of the existence thereof, before such automobile(s) is operated within the cooperating country. The premium costs for such insurance shall not be a reimbursable cost under this contract.

(d) *Claims for Private Personal Property Losses* [For use in TCN contracts]. The contractor shall be reimbursed for private personal property losses in accordance with USAID Handbook 23, ''Overseas Support'', Chapter 10, or superseding ADS Chapter.

9. Travel and Transportation Expenses (JUL 1993)

[For use in both CCN and TCN Contracts as appropriate].

(a) *General.* The contractor will be reimbursed in currency consistent with the prevailing practice at post and at the rates established by the Mission Director for authorized travel in the cooperating country in connection with duties directly referable to work under this contract. In the absence of such established rates, the contractor shall be reimbursed for actual costs of authorized travel in the cooperating country if not provided by the cooperating government or the Mission in connection with duties directly referable to work hereunder, including travel allowances at rates prescribed by USAID Handbook 22, ''Foreign Service Travel Regulations'' or superseding ADS Chapters as from time to time amended. The Executive or Administrative Officer at the Mission may furnish Transportation Requests (TR's) for transportation authorized by this contract which is payable in local currency or is to originate outside the United States. When transportation is not provided by Government issued TR, the contractor shall procure the transportation, and the costs will be reimbursed. The following paragraphs provide specific guidance and limitations on particular items of cost.

(b) *International Travel.* For travel to and from post of assignment the TCN contractor shall be reimbursed for travel costs and travel allowances from place of residence in the country of recruitment (or other location provided that the cost of such travel does not exceed the cost of the travel from the place of residence) to the post of duty in the cooperating country and return to place of residence in the country of recruitment (or other location provided that the cost of such travel does not exceed the cost of travel from the post of duty in the cooperating country to the contractor's residence) upon completion of services by the individual. Reimbursement for travel will be in accordance with USAID's established policies and procedures for its CCN and TCN direct-hire employees and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. If the contract is for longer than one year and the contractor does not complete one full year at post of duty (except for reasons beyond his/her control), the cost of going to and from the post of duty for the contractor and his/her dependents are not reimbursable hereunder. If the contractor serves more than one year but less than the required service in the cooperating country (except for reasons beyond his/her control) costs of going to the post of duty are reimbursable hereunder but the cost of going from post of duty to the contractor's permanent, legal place of residence at the time he or she was employed for work under this contract are not reimbursable under this contract for the contractor and his/her dependents. When travel is by economy class accommodations, the contractor will be reimbursed for the cost of transporting up to 10 kilograms/22 pounds of accompanied personal baggage per traveler in addition to that regularly allowed with the economy ticket provided that the total number of pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers shall not be in excess of the rates authorized in the Standardized Regulations (Government Civilians, Foreign Areas) hereinafter referred to as the Standardized Regulations—as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover enroute for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the Federal Travel Regulations as from time to time amended.

(c) *Local Travel.* Reimbursement for local travel in connection with duties directly referable to the contract shall not be in excess of the rates established by the Mission Director for the travel costs of travelers in the Cooperating Country. In the absence of such established rates the contractor shall be reimbursed for actual travel costs in the Cooperating Country by the Mission, including travel allowances at rates not in excess of those prescribed by the Standardized Regulations.

(d) *Indirect Travel for Personal Convenience of a TCN.* When travel is performed by an indirect route for the personal convenience of the traveler, the allowable costs of such travel will be computed on the basis of the cost of allowable air fare via the direct usually traveled route. If such costs include fares for air or ocean travel by foreign flag carriers, approval for indirect travel by such foreign flag carriers must be obtained from the Contracting Officer or the Mission Director before such travel is undertaken, otherwise only that portion of travel accomplished by the United States-flag carriers will be reimbursable within the above limitation of allowable costs.

(e) *Limitation on Travel by TCN Dependents.* Travel costs and allowances will be allowed

for authorized dependents of the contractor and such costs shall be reimbursed for travel from place of abode in the country of recruitment to the assigned station in the Cooperating Country and return, only if the dependent remains in the Cooperating Country for at least 9 months or one-half of the required tour of duty of the contract, whichever is greater, except as otherwise authorized hereunder for education, medical, or emergency visitation travel. Dependents of the TCN contractor must return to the country of recruitment or home country within thirty days of the termination or completion of the contractor's employment, otherwise such travel will not be reimbursed under this contract.

(f) *Delays Enroute.* The contractor may be granted reasonable delays enroute while in travel status when such delays are caused by events beyond the control of the contractor and are not due to circuitous routing. It is understood that if delay is caused by physical incapacitation, he/she shall be eligible for such sick leave as provided under the ''Leave and Holidays'' clause of this contract.

(g) *Travel by Privately Owned Automobile (POV).* If travel by POV is authorized in the contract schedule or approved by the Contracting Officer, the contractor shall be reimbursed for the cost of travel performed in his/her POV at a rate not to exceed that authorized in the Federal Travel Regulations plus authorized per diem for the employee and, if the POV is being driven to or from the cooperating country as authorized under the contract, for each of the authorized dependents traveling in the POV, provided that the total cost of the mileage and per diem paid to all authorized travelers shall not exceed the total constructive cost of fare and normal per diem by all authorized travelers by surface common carrier or authorized air fare, whichever is less.

(h) *Emergency and Irregular Travel and Transportation.* [For TCNs only]. Emergency transportation costs and travel allowances while enroute, as provided in this section, will be reimbursed not to exceed amounts authorized by the Foreign Service Travel Regulations for FSN direct-hire employees in like circumstances under the following conditions:

(1) The costs of going from post of duty in the cooperating country to another approved location for the contractor and authorized dependents and returning to post of duty, subject to the prior written approval of the Mission Director, when such travel is necessary for one of the following reasons:

(i) Need for medical care beyond that available within the area to which contractor is assigned.

(ii) Serious effect on physical or mental health if residence is continued at assigned post of duty.

(iii) Serious illness, injury, or death of a member of the contractor's immediate family or a dependent, including preparation and return of the remains of a deceased contractor or his/her dependents.

(2) Emergency evacuation when ordered by the principal U.S. Diplomatic Officer in the cooperating country. Transportation and travel allowances at safe haven and the transportation of household effects and automobile or storage thereof when authorized by the Mission Director, shall be payable in accordance with established Government regulations.

(3) The Mission Director may also authorize emergency or irregular travel and transportation in other situations when in his/her opinion the circumstances warrant such action. The authorization shall include the kind of leave to be used and appropriate restrictions as to time away from post, transportation of personal and household effects, etc.

(i) *Country of Recruitment Travel and Transportation.* [For TCNs only]. The contractor shall be reimbursed for actual transportation costs and travel allowances in the country of recruitment as authorized in the Schedule or approved in advance by the Contracting Officer or the Mission Director. Transportation costs and travel allowances shall not be reimbursed in any amount greater than the cost of, and time required for, economy-class commercial-scheduled air travel by the most expeditious route except as otherwise provided in paragraph (h) above, unless economy air travel is not available and the contractor adequately documents this to the satisfaction of the Contracting Officer in documents submitted with the voucher.

(j) *Rest and Recuperation Travel.* [For TCNs only].

If approved in writing by the Mission Director, the contractor and his/her dependents shall be allowed rest and recuperation travel on the same basis as direct-hire TCN employees and their dependents at the post under the local compensation plan.

(k) *Transportation of Personal Effects (Excluding Automobiles and Household Goods).* [For TCNs only].

(1) *General.* Transportation costs will be paid on the same basis as for direct-hire employees at post serving the same length tour of duty, as authorized in the schedule. Transportation, including packing and crating costs, will be paid for shipping from contractor's residence in the country of recruitment or other location, as approved by the Contracting Officer (provided that the cost of transportation does not exceed the cost from the contractor's residence) to post of duty in the cooperating country and return to the country of recruitment or other location provided the cost of transportation of the

personal effects of the contractor not to exceed the limitations in effect for such shipments for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations in effect at the time shipment is made. These limitations may be obtained from the Contracting Officer. The cost of transporting household goods shall not exceed the cost of packing, crating, and transportation by surface common carrier.

(2) *Unaccompanied Baggage.* Unaccompanied baggage is considered to be those personal belongings needed by the traveler immediately upon arrival of the contractor and dependents. To permit the arrival of effects to coincide with the arrival of the contractor and dependents, consideration should be given to advance shipments of unaccompanied baggage. The contractor will be reimbursed for costs of shipment of unaccompanied baggage (in addition to the weight allowance for household effects) not to exceed the limitations in effect for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations in effect when shipment is made. These limitations are available from the Contracting Officer. This unaccompanied baggage may be shipped as air freight by the most direct route between authorized points of origin and destination regardless of the modes of travel used.

(l) *Reduced Rates on U.S.-Flag Carriers.* Reduced rates on U.S.-flag carriers are in effect for shipments of household goods and personal effects of USAID contractors between certain locations. These reduced rates are available provided the shipper furnishes to the carrier at the time of the issuance of the Bill of Lading documentary evidence that the shipment is for the account of USAID. The Contracting Officer will, on request, furnish to the contractor current information concerning the availability of a reduced rate with respect to any proposed shipment. The contractor will not be reimbursed for shipments of household goods or personal effects in amounts in excess of the reduced rates which are available in accordance with the foregoing.

(m) *Transportation of things.* [For TCNs Only]. Where U.S. flag vessels are not available, or their use would result in a significant delay, the contractor may obtain a release from the requirement to use U.S. flag vessels from the Transportation Division, Office of Acquisition and Assistance, U.S. Agency for International Development, Washington, DC 20523–1419, or the Mission Director, as appropriate, giving the basis for the request.

(n) *Repatriation Travel.* [For TCNs Only]. Notwithstanding other provisions of this Clause 9, a TCN must return to the country of recruitment or to the TCN's home country within 30 days after termination or completion of employment or forfeit all right to reimbursement for repatriation travel. The return travel obligation [repatriation travel] assumed by the U.S. Government may have been the obligation of another employer in the area of assignment if the employee has been in substantially continuous employment which provided for the TCN's return to home country or country from which recruited.

(o) *Storage of household effects.* [For TCNs Only]. The cost of storage charges (including packing, crating, and drayage costs) in the country of recruitment of household goods of regular employees will be permitted in lieu of transportation of all or any part of such goods to the Cooperating Country under paragraph (k) above provided that the total amount of effects shipped to the Cooperating Country or stored in the country of recruitment shall not exceed the amount authorized for USAID direct-hire employees under the Foreign Service Travel Regulations. These amounts are available from the Contracting Officer.

10. Payment (MAY 1997)

[For use in both CCN and TCN Contracts].

(a) Payment of compensation shall be based on written documentation supporting time and attendance which may be (1) maintained by the Mission in the same way as for direct-hire CCNs and TCNs or (2) the contractor may submit such written documentation in a form acceptable to Mission policy and practice as required for other personal services contractors and as directed by the Mission Controller or paying office. The documentation will also provide information required to be filed under cooperating country laws to permit withholding by USAID of funds, if required, as described in the clause of these General Provisions entitled Social Security and Cooperating Country Taxes.

(b) Any other payments due under this contract shall be as prescribed by Mission policy for the type of payment being made.

11. Contractor-Mission Relationships (DEC 1986)

[For use in both CCN and TCN Contracts].

(a) The contractor acknowledges that this contract is an important part of the U.S. Foreign Assistance Program and agrees that his/her duties will be carried out in such a manner as to be fully commensurate with the responsibilities which this entails. Favorable relations between the Mission and the Cooperating Government as well as with the people of the cooperating country require that the contractor shall show respect for the conventions, customs, and institutions of the cooperating country and not become involved in any illegal political activities.

(b) If the contractor's conduct is not in accordance with paragraph (a), the contract may be terminated pursuant to the General

Provision of this contract, entitled ''Termination.'' If a TCN, the contractor recognizes the right of the U.S. Ambassador to direct his/her immediate removal from any country when, in the discretion of the Ambassador, the interests of the United States so require.

(c) The Mission Director is the chief representative of USAID in the cooperating country. In this capacity, he/she is responsible for the total USAID Program in the cooperating country including certain administrative responsibilities set forth in this contract and for advising USAID regarding the performance of the work under the contract and its effect on the U.S. Foreign Assistance Program. The contractor will be responsible for performing his/her duties in accordance with the statement of duties called for by the contract. However, he/she shall be under the general policy guidance of the Mission Director and shall keep the Mission Director or his/her designated representative currently informed of the progress of the work under this contract.

12. Termination (NOV 1989)

[For use in both CCN and TCN Contracts].

(This is an approved deviation to be used in place of the clause specified in FAR 52.249–12.)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part:

(1) For cause, which may be effected immediately after establishing the facts warranting the termination, by giving written notice and a statement of reasons to the contractor in the event (i) the contractor commits a breach or violation of any obligations herein contained, (ii) a fraud was committed in obtaining this contract, or (iii) the contractor is guilty (as determined by USAID) of misconduct in the cooperating country. Upon such a termination, the contractor's right to compensation shall cease when the period specified in such notice expires or the last day on which the contractor performs services hereunder, whichever is earlier. No costs of any kind incurred by the contractor after the date such notice is delivered shall be reimbursed hereunder except the cost of return transportation (not including travel allowances), if approved by the Contracting Officer. If any costs relating to the period subsequent to such date have been paid by USAID, the contractor shall promptly refund to USAID any such prepayment as directed by the Contracting Officer.

(2) For the convenience of USAID, by giving not less than 15 calender days advance written notice to the contractor. Upon such a termination, contractor's right to compensation shall cease when the period specified in such notice expires except that the contractor shall be entitled to any accrued, unused vacation leave, return transportation costs and travel allowances and transportation of unaccompanied baggage costs at the rates specified in the contract and subject to the limitations which apply to authorized travel status.

(3) For the convenience of USAID, when the contractor is unable to complete performance of his/her services under the contract by reason of sickness or physical or emotional incapacity based upon a certification of such circumstances by a duly qualified doctor of medicine approved by the Mission. The contract shall be deemed terminated upon delivery to the contractor of a termination notice. Upon such a termination, the contractor shall not be entitled to compensation except to the extent of any accrued, unused vacation leave, but shall be entitled to return transportation, travel allowances, and unaccompanied baggage costs at rates specified in the contract and subject to the limitations which apply to authorized travel status.

(b) The contractor, with the written consent of the Contracting Officer, may terminate this contract upon at least 15 days' written notice to the Contracting Officer.

13. Allowances (DEC 1986)

[For TCNs only].

Allowances will be granted to the contractor and authorized dependents on the same basis as to direct-hire TCN employees at the post under the Post Compensation Plan. The allowances provided shall be paid to the contractor in the currency of the cooperating country or in accordance with the practice prevailing at the Mission.

14. Advance of Dollar Funds (DEC 1986)

[For TCNs only].

If requested by the contractor and authorized in writing by the Contracting Officer, USAID will arrange for an advance of funds to defray the initial cost of travel, travel allowances, authorized precontract expenses, and shipment of personal property. The advance shall be granted on the same basis as to an USAID U.S.-citizen direct-hire employee in accordance with USAID Handbook 22, Chapter 4 or superseding ADS Chapters.

15. Conversion of U.S. Dollars to Local Currency (DEC 1986)

[For TCNs only].

Upon arrival in the cooperating country, and from time to time as appropriate, the contractor shall consult with the Mission Director or his/her authorized representative who shall provide, in writing, the policy the contractor shall follow in the conversion of one currency to another currency. This may include, but not be limited to, the conversion of said currency through the cognizant U.S. Disbursing Officer, or Mission Controller, as appropriate.

16. Post of Assignment Privileges (DEC 1986)

[For TCNs only].

Privileges such as the use of APO, PX's, commissaries and officer's clubs are established at posts abroad pursuant to agreements between the U.S. and host governments. These facilities are intended for and usually limited to U.S. citizen members of the official U.S. Mission including the Embassy, USAID, Peace Corps, U.S. Information Services and the Military. Normally, the agreements do not permit these facilities to be made available to non-U.S. citizens if they are under contract to the United States Government. However, in those cases where the facilities are open to TCN contractor personnel, they may be used.

17. Release Of Information (DEC 1986)

[For use in both CNN and TCN Contracts].

All rights in data and reports shall become the property of the U.S. Government. All information gathered under this contract by the contractor and all reports and recommendations hereunder shall be treated as privileged information by the contractor and shall not, without the prior written approval of the Contracting Officer, be made available to any person, party, or government, other than USAID, except as otherwise expressly provided in this contract.

18. Notices (DEC 1986)

[For use in both CNN and TCN Contracts].

Any notice, given by any of the parties hereunder, shall be sufficient only if in writing and delivered in person or sent by telegraph, telegram, registered, or regular mail as follows:

(a) TO USAID: To the Mission Director of the Mission in the Cooperating Country with a copy to the appropriate Contracting Officer.

(b) TO THE CONTRACTOR: At his/her post of duty while in the Cooperating Country and at the contractor's address shown on the Cover Page of this contract or to such other address as either of such parties shall designate by notice given as herein required.

Notices hereunder shall be effective when delivered in accordance with this clause or on the effective date of the notice, whichever is later.

19. Incentive Awards (DEC 1996)

[For CNN and TCN Contracts].

(a) All Cooperating Country National (CCN) Personal Services Contractors (PSCs) and Third Country Nationals (TCNs) of the Foreign Affairs Community are eligible for the Joint Embassy Incentive Awards Program. The program is administered by each post's (Embassy) Joint Country Awards Committee.

(b) Meritorious Step Increases

Meritorious step increases may be granted to CNNs and TCNs paid under the local compensation plan provided the granting of such increases is the general practice locally.

20. Training (JUL 1993)

[For CNN and TCN Contracts].

The contractor may be provided job related training to develop growth potential, expand capabilities and increase knowledge and skills. The training may be funded under the personal services contract.

21. Medical Evacuation (MEDEVAC) Services (JUL 2007)

[For TCN Contracts Only].

(a) The PSC must obtain MEDEVAC service coverage including coverage for authorized dependents while performing personal services abroad.

(b) *Exceptions.* (1) A PSC and authorized dependents with a health insurance program that includes sufficient MEDEVAC coverage as approved by the Contracting Officer are not required to obtain MEDEVAC service coverage.

(2) The Mission Director at the post of assignment may make a written determination to waive the requirement for such coverage. The determination must be based on findings that the quality of local medical services or other circumstances obviate the need for such coverage for PSCs and their dependents located at post.

13. FAR Clauses

The following FAR Clauses are always to be used along with the General Provisions. They are required in full text.

1. Covenant Against Contingent Fees 52.203–5
2. Disputes 52.233–1 (Alternate 1)
3. Preference for U.S. Flag Air Carriers 52.247–63

The following FAR Clauses are to be used along with the General Provisions, and when appropriate, be incorporated in each personal services contract by reference:

1. Anti-Kickback Procedures 52.203–7
2. Limitation on Payments to Influence Certain Federal Transactions 52.203–12
3. Audit and Records—Negotiation 52.215–2
4. Privacy Act Notification 552.224–1
5. Privacy Act 52.224–2
6. Taxes—Foreign Cost Reimbursement Contracts 52.229–8
7. Interest 52.232–17
8. Limitation of Cost 52.232–20
9. Limitation of Funds 52.232–22
10. Assignment of Claims 52.232–23
11. Protection of Government Buildings, Equipment, and Vegetation 52.237–2
12. Notice of Intent to Disallow Costs 52.242–1
13. Inspection 52.246–5
14. Limitation of Liability—Services 52.246–25

[62 FR 42929, Aug. 11, 1997, as amended at 72 FR 19670, Apr. 19, 2007]

CHAPTER 8—DEPARTMENT OF VETERANS AFFAIRS

SUBCHAPTER A—GENERAL

Part		*Page*
801	Department of Veterans Affairs acquisition regulation system	143
802	Definitions of words and terms	164
803	Improper business practices and personal conflicts of interest	164
804	Administrative matters	168

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

805	Publicizing contract actions	170
806	Competition requirements	170
807	Acquisition planning	172
808	Required sources of supplies and services	173
809	Contractor qualifications	174
811	Describing agency needs	181
812	Acquisition of commercial items	186

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

813	Simplified acquisition procedures	188
814	Sealed bidding	189
815	Contracting by negotiation	193
816	Types of contracts	195
817	Special contracting methods	197

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

819	Small business programs	199
822	Application of labor laws to Government acquisitions	201
823	Environment, energy and water efficiency, renewable energy technologies, occupational safety, and drug-free workplace [Reserved]	
824	Protection of privacy and freedom of information	202
825	Foreign acquisition	202

Part		Page
826	Other socioeconomic programs [Reserved]	
	SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS	
828	Bonds and insurance	206
829	Taxes	208
830	Cost accounting standards administration [Reserved]	
831	Contract cost principles and procedures	209
832	Contract financing	212
833	Protests, disputes, and appeals	216
	SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING	
836	Construction and architect-engineer contracts	221
837	Service contracting	226
839	Acquisition of information technology [Reserved]	
841	Acquisition of utility services	228
	SUBCHAPTER G—CONTRACT MANAGEMENT	
842	Contract administration and audit services	230
844	Subcontracting policies and procedures [Reserved]	
846	Quality assurance	231
847	Transportation	235
849	Termination of contracts	236
	SUBCHAPTER H—CLAUSES AND FORMS	
852	Solicitation provisions and contract clauses	238
853	Forms	262
	SUBCHAPTER I—DEPARTMENT SUPPLEMENTARY REGULATIONS	
870	Special procurement controls	264
871	Loan guaranty and vocational rehabilitation and employment programs	265
872	[Reserved]	
873	Simplified acquisition procedures for health-care resources	270

SUBCHAPTER A—GENERAL

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM

Sec.
801.000 Scope of part.

Subpart 801.1—Purpose, Authority, Issuance

801.101 Purpose.
801.103 Authority.
801.104 Applicability.
801.104–70 Exclusions.
801.105 Issuance.
801.105–2 Arrangement of regulations.
801.106 OMB approval under the Paperwork Reduction Act.

Subpart 801.2—Administration

801.201 Maintenance of the FAR.
801.201–1 The two councils.

Subpart 801.3—Department Acquisition Regulations

801.304 Department control and compliance procedures.

Subpart 801.4—Deviations From the FAR or VAAR

801.403 Individual deviations.
801.404 Class deviations.

Subpart 801.6—Career Development, Contracting Authority, and Responsibilities

801.601 General.
801.602 Contracting officers.
801.602–2 Responsibilities.
801.602–3 Ratification of unauthorized commitments.
801.602–70 General review requirements.
801.602–71 Basic review requirements.
801.602–72 Exceptions and additional review requirements.
801.602–73 Review requirements for scarce medical specialist contracts and contracts for health-care resources.
801.602–74 Review requirements for an interagency agreement.
801.602–75 Review requirements—OGC.
801.602–76 Business clearance review.
801.602–77 Processing solicitations and contract documents for legal or technical review—general.
801.602–78 Processing solicitations and contract documents for legal or technical review—Veterans Health Administration field facilities, Central Office (except Office of Construction and Facilities Management), the National Acquisition Center, and the Denver Acquisition and Logistics Center.
801.602–79 Processing solicitations and contract documents for legal or technical review—Veterans Benefits Administration.
801.602–80 Legal and technical review-Office of Construction and Facilities Management and National Cemetery Administration.
801.602–81 Documents required for business clearance reviews.
801.602–82 Documents to submit for legal or technical review—general.
801.602–83 Documents to submit for legal or technical review—contract modifications.
801.602–84 Documents to submit for business clearance reviews.
801.602–85 Results of review.
801.603 Selection, appointment, and termination of appointment.
801.603–1 General.
801.603–70 Representatives of contracting officers.
801.603–71 Representatives of contracting officers; receipt of equipment, supplies, and nonpersonal services.
801.670 Special and limited delegation.
801.670–1 Issuing bills of lading.
801.670–3 Medical, dental, and ancillary service.
801.670–4 National Cemetery Administration.
801.670–5 Letters of agreement.
801.680 Contracting authority of the Inspector General.
801.690 VA's COCP.
801.690–1 Definitions.
801.690–2 General.
801.690–3 Responsibility under the COCP.
801.690–4 Selection.
801.690–5 Requirements for contracting authority.
801.690–6 Appointment.
801.690–7 Termination.
801.690–8 Interim appointment provisions.
801.690–9 Distribution of Certificates of Appointment.
801.695 VA's Appointment of HCAs program.
801.695–1 Policy.
801.695–2 Procedures for appointment of HCAs.
801.695–3 Authority of the HCA.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

801.000 Scope of part.

This part sets out general Department of Veterans Affairs (VA) Acquisition Regulation (VAAR) policies, including information regarding the maintenance and administration of the VAAR, acquisition policies and practices, and procedures for deviation from the VAAR and the Federal Acquisition Regulation (FAR).

Subpart 801.1—Purpose, Authority, Issuance

801.101 Purpose.

(a) VA established the VAAR to codify and publish uniform policies and procedures for VA's acquisition of supplies and services, including construction.

(b) The VAAR implements and supplements the FAR.

801.103 Authority.

The Secretary issues the VAAR under the authority of 40 U.S.C. 121(c), Title 48 of the Code of Federal Regulations (CFR) 1.301 through 1.304, and other authorities as cited.

801.104 Applicability.

(a) Unless otherwise specified in this chapter or excepted by statute (i.e., expenditures of the VA Canteen Service) or other VA regulations, the FAR and VAAR apply to all VA acquisitions (including construction) made with appropriated funds. Supply Fund monies (38 U.S.C. 8121) and General Post Funds (38 U.S.C. 8302) are appropriated funds.

(b) Use the VAAR and the FAR together. The FAR applies to VA acquisitions except as provided in the VAAR.

801.104–70 Exclusions.

The FAR and VAAR do not apply to purchases and contracts that use General Post Funds if using the FAR and the VAAR would infringe upon a donor's right to specify the exact item to be purchased and/or the source of supply (38 U.S.C. 8303).

801.105 Issuance.

801.105–2 Arrangement of regulations.

(a) *General.* The VAAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.

(b) *Numbering.* (1) The numbering system permits the discrete identification of every VAAR paragraph. The digits to the left of the decimal point represent the part number. The numbers to the right of the decimal point and to the left of the dash represent, in order, the subpart (one or two digits), and the section (two digits). The number to the right of the dash represents the subsection. Subdivisions may be used at the section and subsection level to identify individual paragraphs.

(2) Subdivisions below the section or subsection level consist of parenthetical alphanumerics using the following sequence: (a)(1)(i)(A)(*1*)(*i*).

(c) *References and citations.* (1) Unless otherwise stated, cross-references indicate parts, subparts, sections, subsections, paragraphs, subparagraphs, or subdivisions of this Chapter.

(2) This Chapter may be referred to as the ''Department of Veterans Affairs Acquisition Regulation'' or the ''VAAR''.

(3) Using the VAAR coverage at 809.106–4(c) as a typical illustration, reference to the—

(i) Part would be ''VAAR Part 809'' outside the VAAR and ''Part 809'' within the VAAR.

(ii) Subpart would be ''VAAR Subpart 809.1'' outside the VAAR and ''Subpart 809.1'' within the VAAR.

(iii) Section would be ''VAAR 809.106'' outside the VAAR and ''809.106'' within the VAAR.

(iv) Subsection would be ''VAAR 809.106–4'' outside the VAAR and ''809.106–4'' within the VAAR.

(v) Paragraph would be ''VAAR 809.106–4(c)'' outside the VAAR and ''809.106–4(c)'' within the VAAR.

(4) Citations of authority (e.g., statutes or Executive orders) in the VAAR shall follow the FEDERAL REGISTER form guides.

801.106 OMB approval under the Paperwork Reduction Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), the Office of Management and Budget (OMB) has approved the reporting or recordkeeping provisions that are included in the VAAR and has

given VA the following approval numbers:

48 CFR part or section where identified and described	Current OMB control number	48 CFR part or section where identified and described	Current OMB control number
809.106–1	2900–0418	852.214–70	2900–0593
809.504(d)	2900–0418	852.228–71	2900–0590
813	2900–0393	852.236–72	2900–0422
832.006–4	2900–0688	852.236–79	2900–0208
832.202–4	2900–0688	852.236–80 (Alt. I)	2900–0422
836.606–71	2900–0208	852.236–82 through 852.236–84	2900–0422
852.207–70	2900–0590	852.236–88	2900–0422
852.209–70	2900–0418	852.236–89	2900–0622
852.211–70	2900–0587	852.236–91	2900–0623
852.211–71	2900–0588	852.237–7	2900–0590
852.211–72	2900–0586	852.270–3	2900–0589
852.211–73	2900–0585		

Subpart 801.2—Administration

801.201 Maintenance of the FAR.

801.201–1 The two councils.

Revisions to the FAR are prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council. A designee of the Office of Acquisition and Materiel Management will represent VA on the Civilian Agency Acquisition Council.

Subpart 801.3—Department Acquisition Regulations

801.304 Department control and compliance procedures.

The Assistant Secretary for Management is designated as the Department's Chief Acquisition Officer. The Deputy Assistant Secretary (DAS) for Acquisition and Materiel Management is designated as the Department's Senior Procurement Executive (SPE). The Associate DAS for Acquisitions is designated as the Deputy Senior Procurement Executive (DSPE). The DSPE is responsible for amending the VAAR for compliance with FAR 1.304.

Subpart 801.4—Deviations from the FAR or VAAR

801.403 Individual deviations.

(a) Authority to authorize individual deviations from the FAR and VAAR is delegated to the SPE and is further delegated to the DSPE.

(b) When a contracting officer considers it necessary to deviate from the policies in the FAR or VAAR, the contracting officer, in accordance with Administration or staff office procedures, must submit a request through the HCA to the DSPE for authority to deviate.

(c) The request to deviate must clearly state the circumstances warranting the deviation and the nature of the deviation.

(d) The DSPE may authorize individual deviations from the FAR and VAAR when an individual deviation is in the best interest of the Government. When the DSPE authorizes a deviation, the contracting officer must file the authorization in the purchase order or contract file.

801.404 Class deviations.

Authority to authorize class deviations from the FAR and VAAR is delegated to the SPE and is further delegated to the DSPE. The DSPE may authorize class deviations from the FAR and VAAR when a class deviation is in the best interest of the Government. The DSPE must comply with the provisions of FAR 1.404 through the SPE.

Subpart 801.6—Career Development, Contracting Authority, and Responsibilities

801.601 General.

(a) The HCA or the DSPE, within their authority, may appoint a contracting officer under FAR 1.603 and VA's Contracting Officer Certification Program (COCP).

(b) In addition, the HCA may delegate micro-purchase authority to VA employees under VA's purchase card program.

(c) An individual may not commit the Government for purchases of supplies, equipment, or services unless the individual has received delegated contracting authority as a contracting officer or purchase card holder or as provided in 801.670. Individuals making such commitments or acting beyond the scope of their authority may be held financially liable.

801.602 Contracting officers.

(a) Except as otherwise provided by statute, VA regulations, the VAAR, or the FAR, the authority vested in the Secretary to do the following is delegated to the SPE and is further delegated from the SPE to the DSPE:

(1) Execute, award, and administer contracts, purchase orders, and other agreements (including interagency agreements) for the expenditure of funds for construction and the acquisition of personal property and services (including architect-engineer services).

(2) Issue bills of lading.

(3) Sell personal property.

(4) Enter into leases, sales agreements, and other transactions.

(5) Prescribe and publish acquisition policies and procedures.

(6) Establish clear lines of contracting authority.

(7) Manage and enhance career development of the procurement work force.

(8) Examine, in coordination with the Office of Federal Procurement Policy, the procurement system to determine specific areas where VA should establish and apply Government-wide performance standards, and to participate in developing Government-wide procurement policies, regulations, and standards.

(9) Oversee the competition advocate program.

(b) The DSPE may further delegate authority to execute, award, and administer contracts, purchase orders, and other agreements to other VA officials, such as HCAs and contracting officers, in accordance with the COCP.

801.602–2 Responsibilities.

In the administration of a contract, many problems can and do arise that make the advice and assistance of the Office of General Counsel (OGC) either desirable or necessary. The final decision as to the action to be taken, however, must be made by the contracting officer in each instance. To reduce to the absolute minimum the possibility of litigation resulting from his/her decision, the contracting officer shall submit the problem through channels in sufficient detail to the General Counsel for advice or assistance.

801.602–3 Ratification of unauthorized commitments.

(a) This section applies to unauthorized commitments, including any commitment made by a contracting officer that exceeds that contracting officer's contracting authority and unauthorized commitments made by individuals who lack contracting authority.

(b) A contracting officer must not ratify unauthorized commitments made by other VA personnel or by another contracting officer who lacks authority without prior approval as specified in paragraphs (b)(1) through (b)(3) of this section. The specified approval authorities may not be re-delegated.

(1) At field facilities, for supplies, services (except leases of real property), and construction, the approving authority for unauthorized commitments made by staff assigned to a field facility is the HCA.

(2) For VA Central Office (VACO) organizations, for supplies, services (except leases of real property), and construction, the approving authorities for unauthorized commitments made by staff assigned to the Administrations are the respective chief financial officers of the Administrations concerned. The approving authority for unauthorized commitments made by staff assigned to any other organization within VACO is the Deputy Assistant Secretary for Acquisition and Materiel Management.

(3) For unauthorized commitments for leasehold interest in real property, the approving authority is:

(i) The Director, Office of Construction and Facilities Management, for unauthorized commitments for 1–5,000

square feet of space or for 1–100 parking spaces costing less than $50,000 per annum.

(ii) The Under Secretary for Health for unauthorized commitments for 5,001–20,000 square feet of space or for more than 100 parking spaces costing less than $100,000 per annum.

(iii) The Deputy Secretary for 20,001 square feet of space and above or for more than 100 parking spaces costing more than $100,000 per annum.

(c) The process for contracting officer requests for ratification will be as follows:

(1) The individual who made the unauthorized commitment will furnish the contracting officer with all records and documents concerning the commitment and a complete written statement of facts that includes the following:

(i) Why the procurement office was not used.

(ii) Why the proposed contractor was selected.

(iii) Other sources that were considered.

(iv) A description of work to be performed or products to be furnished.

(v) The estimated or agreed contract price.

(vi) A citation of the appropriation available.

(vii) A statement of whether the contractor has commenced performance.

(viii) The name of the individual responsible for the unauthorized commitment.

(2) The contracting officer will review the file and forward it to the approving authority specified in paragraph (b) of this section with any comments or information that the approving authority should consider in evaluating the request for ratification. If the approving authority determines that a legal review would be desirable, the approving authority will coordinate the request for ratification with OGC or the Regional Counsel, as appropriate.

(3) If the approving authority authorizes the ratification, the approving authority will return the file to the contracting officer for issuance of a purchase order or contract, as appropriate.

(d) If an otherwise proper contract award exceeds the limits of the contracting officer's delegated authority, the ratifying contracting officer must comply with the above requirements and the approving authority must inform the HCA. The HCA will take action to preclude future instances of such awards.

801.602–70 General review requirements.

(a) Contracting officers shall ensure that any document listed under 801.602–71 through 801.602–76 that is submitted for technical or legal review is submitted through or by an official at least one level above the contracting officer.

(b) Before opening a bid, awarding a contract, or signing a contract-related document as specified in 801.602–71 through 801.602–76, the contracting officer shall ensure that the appropriate VA official, including appropriate staff of the Acquisition Resources Service regional or VA Central Office, has reviewed and concurred with the document.

(c) Before signing a contract for a Veterans Benefits Administration field facility for any guidance center or vocational rehabilitation service with an anticipated expenditure of $100,000 or more, the contracting officer shall ensure that the Director, Vocational Rehabilitation and Employment Service, has reviewed and approved the solicitation or proposed contract.

(d) When the following items are for the management, sale, or lease of properties acquired by VA after liquidation of a guaranteed, direct, acquired, or vendee loan, the review requirements specified in 801.602–71 through 801.602–76 do not apply:

(1) Agreements.

(2) Licenses.

(3) Easements.

(4) Deeds.

(e) If there is insufficient time for the legal review required in 801.602–75(a)(3), the contracting officer (except contracting officers in the Office of Construction and Facilities Management) must at least obtain verbal concurrence from Acquisition Resources Service staff before issuing a change order where:

(1) The change order (unilateral agreement) has an anticipated value of $100,000 or more; or

(2) The change order is for a time extension of 60 days or more.

(f) Unless otherwise stated, all dollar values in 801.602–71 through 801.602–76 are expressed in total dollars involved in the acquisition action.

(1) The contracting officer may not consider the positive and negative status of the figures in determining the total dollar values involved.

(2) An acquisition of $550,000 with a trade-in credit of $70,000 would be valued at $620,000 for legal or technical review purposes rather than the net amount of $480,000. An Energy Savings Performance Contract requiring payment from savings of $10,000,000 to the contractor over the life of the contract would be valued at $10,000,000, despite the fact that there is no immediate cost to VA and no payment if there are no savings.

(g) By separate notice, the DSPE may require technical review of any contract-related materials, regardless of dollar value.

(h) Except as set forth in 801.602–73 and 801.602–75, at its discretion, the Office of Acquisition and Materiel Management may request OGC review.

(i) The requirements of this section or sections 801.602–71 through 801.602–76 do not apply to contracts awarded by or on behalf of the VA Office of Inspector General.

(j) Contracting officers and purchase card holders must ensure compliance with separate guidance on information technology (IT) tracking and approval prior to processing requests for acquisitions of IT and telecommunications software, equipment, and/or services, regardless of dollar value.

801.602–71 Basic review requirements.

Contracting officers must obtain technical review from Acquisition Resources Service staff of the documents set forth in column one of Table 801.602–71 that have anticipated award values equal to or greater than the value in column two.

TABLE 801.602–71

Document	Anticipated contract award value
(a) Supply or service solicitations or quotations (except as provided in 801.602–72 through 801.602–75) (includes indefinite quantity, option year, and multi-year solicitations or quotations where the contracting officer reasonably expects expenditures of $500,000 or more, inclusive of options).	$500,000 or more.
(b) Supply or service solicitations or quotations where a consolidated acquisition activity is performing acquisitions for three or more physically separated VA medical centers (excluding outpatient clinics).	$750,000 or more.
(c) Fixed price, sealed bid construction solicitations, other than 8(a) construction solicitations.	$1 million or more.
(d) 8(a) construction solicitations and task orders.	$500,000 or more.
(e) Request for Proposal (negotiated) construction solicitations and task orders.	$500,000 or more.
(f) Proposed task/delivery orders and blanket purchase agreements (includes orders under Federal Supply Schedule contracts).	$500,000 or more.
(g) Proposed cost-reimbursement, incentive, time-and-materials, and labor-hour contracts (see 816.102(b)).	$100,000 or more.
(h) Utility service agreements	$50,000 or more.
(i) Solicitations for advisory and assistance services (see 837.2).	$100,000 or more.
(j) Proposed letter contracts and ensuing formal contracts.	$25,000.

801.602–72 Exceptions and additional review requirements.

(a) In addition to the general review requirements in 801.602–71, contracting officers must obtain technical reviews from Acquisition Resources Service staff of any proposed agreement that is unique, novel, or unusual.

(b) Contracting officers must obtain technical reviews from Acquisition Resources Service staff of the following:

(1) Documents relating to bonds (see FAR 28.102–1 and 28.203 through 28.203–5) as follows:

(i) An irrevocable letter of credit.

(ii) A tripartite escrow agreement.

(iii) An individual surety bond. (Note that the FAR at 28.203(f) also requires legal review of the documents pledging the assets of an individual surety.)

(2) Proposed novation and change-of-name agreements (see FAR Subpart 42.12).

(3) Solicitations or proposed contracts containing an economic price

adjustment clause (other than a pre-approved VA clause) based on a cost index of material or labor (e.g., the urban consumer price index (CPI–U) (see FAR 16.203–4(d)) or where one of the economic price adjustment clauses specified in FAR 16.203–4 are used.

(4) Proposed multi-year contracts where the cancellation ceiling exceeds 20 percent of the contract amount, regardless of the dollar value of the proposed contract (see 817.105–1(b)).

(5) Proposed solicitations where the contract term total of the basic and option periods may exceed 5 years, regardless of the dollar value of the proposed acquisition (see 817.204).

(6) Proposed membership agreements in a group purchasing organization.

(7) A proposed termination settlement or determination of amounts due the contractor under a terminated contract that involves the expenditure of $100,000 or more of Government funds. Acquisition Resources Service staff shall obtain legal review (see 849.111–70).

(8) Consignment agreements with an anticipated expenditure of $250,000 or more per year (except for a consignment agreement established under, and provided for in, a Federal Supply Schedule contract).

(c) Contracting officers, including purchase card holders, must obtain technical and legal review of all proposed contracts with hotels or similar facilities for conferences or similar functions (e.g., training, meetings) where VA's commitment, expenditure, and liability (combined) exceed $25,000. This dollar figure is based on the combination of all direct costs to VA under the contract (e.g., conference rooms, audio-visual charges, refreshments, catering) and all potential liability (e.g., room guarantee liability, cancellation costs). Even if there is no direct cost to VA, if the proposed contract includes a guarantee on room usage or a cancellation fee that could potentially exceed $25,000, the proposed contract requires legal and technical review. Signing a contract committing VA to hold a conference at a particular hotel is a procurement and procurement laws and regulations must be followed.

801.602–73 Review requirements for scarce medical specialist contracts and contracts for health-care resources.

For contracts to be awarded under the authority of either 38 U.S.C. 7409 or 38 U.S.C. 8153, contracting officers must obtain technical and legal reviews from the Medical Sharing Office, OGC, and Acquisition Resources Service staff of the following documents:

(a) Each competitive solicitation, quotation, proposed contract, or agreement with an anticipated contract award value of $1,500,000 or more, inclusive of options.

(b) Each noncompetitive solicitation, quotation, proposed contract, or agreement with an anticipated contract award value of $500,000 or more, inclusive of options.

801.602–74 Review requirements for an interagency agreement.

Contracting officers or other staff must obtain technical review from Acquisition Operations Service staff of the following documents:

(a) Each proposed VA Central Office interagency agreement with another Federal agency to be awarded under authority of the Economy Act, regardless of dollar value. For VA Central Office, only the DSPE or designee may sign an interagency agreement.

(b) Each proposed VA field facility interagency agreement with another Federal agency awarded under authority of the Economy Act involving an anticipated expenditure of VA funds of $250,000 or more. A VA field facility contracting officer or a contracting officer at the VA National Acquisition Center or the Denver Acquisition and Logistics Center may sign an interagency agreement if the dollar threshold is within the contracting officer's warrant limit.

801.602–75 Review requirements—OGC.

(a) Contracting officers must obtain legal review or concurrence from OGC for the following categories of proposed contractual actions.

(1) Each contract termination, final decision, cure letter, or ''show cause'' notice proposed under any contract where the total value of the contract is

$100,000 or more. A contracting officer may not sign or release a document subject to this provision until OGC has concurred.

(2) Each dispute or claim from a contractor involving a potential total dollar value of $100,000 or more. A contracting officer may not sign or release a document subject to this provision until OGC has concurred.

(3) Each proposed contract modification, including any proposed modification to a supply or service contract, where the total value of the modification is $100,000 or more (*e.g.*, a modification for a $60,000 increase and a $50,000 decrease equals $110,000). Contract modifications issued only to exercise contract options are exempt from this review requirement.

(4) Each proposed contract modification granting a time extension of more than 60 days. The Director, Acquisition Resources Service, may waive the preapproval requirement under this paragraph for an individual facility when the Director determines that the facility has obtained appropriate ''consideration'' for past time extensions and the extensions were otherwise appropriately granted.

(5) Each proposed modification increasing the value of a letter contract, regardless of dollar value.

(6) Each proposed contract modification for which the contractor takes exception to the accord and satisfaction language specified by VA. The contracting officer may not execute any proposed contract modification under this requirement until the contracting officer receives OGC's concurrence in the proposed language.

(7) An assignment of claims (see FAR Subpart 32.8).

(8) Each change or revision to a FAR or VAAR provision or clause or an internal VA-approved clause (e.g., architect/engineer ''SP'' clauses) not specifically authorized by the regulations.

(9) Each change or revision to a prescribed VA contract form.

(10) A proposed utility construction or connection contract with an anticipated contract award value of $50,000 or more.

(11) Each proposed novation and change-of-name agreement (see 842.1203).

(b) For an action specified in paragraph (a)(1) or (2) of this section, OGC may comment or concur in writing or by telephone.

(c) When a Central Office contracting activity requests legal assistance, the contracting officer will brief OGC on the facts and points of issue to facilitate prompt resolution.

(d) For each solicitation or contract awarded and administered by a Central Office contracting activity, that contracting activity will ask OGC to participate in conferences where legal problems or modifications to contract provisions may be considered and in meetings attended by legal representatives of private parties or other Government agencies. The contracting activity will request assigned procurement counsel participation in drafting correspondence involving significant controversial or sensitive contractual matters.

(e) OGC will prepare any response to the Government Accountability Office (GAO) on GAO bid protests. (See 833.104).

801.602–76 Business clearance review.

(a) A business clearance review is a technical review of all solicitation and contract award or modification documents immediately prior to contract award or modification over the specified dollar threshold.

(b) All VA contracting officers must obtain a business clearance review prior to award of any contract, task or delivery order, or blanket purchase agreement or execution of any contract modification with a value of $5 million or more or prior to award of any lease with a value of $300,000 or more per year.

(c) The dollar threshold in this paragraph is based on the total dollar value of all awards expected under a single solicitation, not the value of each individual award under a solicitation. For example, a solicitation for home oxygen for a Veterans Integrated Service Network (VISN) might result in multiple awards, each of which has a value of less than $5 million. If the total of all awards under that solicitation will exceed $5 million, the contracting officer must obtain a business clearance

review of the entire package, including all proposed individual awards.

801.602–77 Processing solicitations and contract documents for legal or technical review—general.

(a) Under 801.602–70 through 801.602–76, before taking contract action, a contracting officer must ensure that any required legal or technical review or concurrence is complete. Contracting officers shall not award or sign contracts, task or delivery orders, blanket purchase agreements, or contract modifications prior to receipt of the final legal and technical review. Should the contracting officer disagree with the advice provided, the contracting officer shall document in the contract file the reasons therefore and provide a copy of that document to the reviewing Office of Acquisition and Materiel Management office. The contracting officer must fully implement any accepted review comments as follows:

(1) Before opening the bid or proposal for a competitively awarded contract.

(2) Before executing contract documents for a contract modification or noncompetitive contract award.

(b) The contracting officer must advise potential bidders or offerors of changes made to the solicitation by issuing an amendment. The contracting officer must give bidders and offerors sufficient time for evaluation before the bid or proposal opens.

801.602–78 Processing solicitations and contract documents for legal or technical review—Veterans Health Administration field facilities, Central Office (except Office of Construction and Facilities Management), the National Acquisition Center, and the Denver Acquisition and Logistics Center.

(a) If legal or technical review is required, the documents listed in Table 801.602–78 must be forwarded for review and approval as shown therein.

TABLE 801.602–78

Documents	Person forwarding	Forward to
(1) Proposed solicitations, quotations, contract-related documents, and agreements specified in Table 801.602.71 and in 801.602–72.	One level above the contracting officer.	Appropriate Acquisition Resources Service central or regional office.
(2) Scarce medical specialist and health-care resource solicitations, quotations, and proposed contracts (i.e., contracts to be awarded under the authority of 38 U.S.C. 7409 or 8153) specified in 801.602–73.	One level above the contracting officer.	Director, Enhanced Sharing Program (10FL), VACO.
(3) Interagency agreements specified in 801.602–74	Approving official, contracting officer.	DSPE, Acquisition Operations Service.
(4) Proposed contract modifications, proposed contract modifications for which the contractor takes exception to the accord and satisfaction language VA specifies, assignment of claims, changes to clauses, and proposed utility connection agreements specified in 801.602–75(a)(3) through (a)(7) and in 801.602–75(a)(9) and (a)(10).	Contracting officer	OGC.
(5) Proposed contract terminations, final decisions, cure letters, show cause notices, disputes, and claims specified in 801.602–75(a)(1) and (a)(2).	Contracting officer	Regional Office of the General Counsel.

(b) The director of the Acquisition Resources Service office conducting the technical review has authority to determine whether to forward documents for legal review.

(c) When the contractor takes exception to the accord and satisfaction language VA specifies in a proposed contract modification, the contracting officer must not sign the modification until OGC concurs with the language proposed by the contractor.

(d) The contracting officer either must fax or send via overnight mail or e-mail all of the relevant documents on proposed contract terminations, final decisions, cure letters, show cause notices, disputes, and claims specified in 801.602–75(a)(1) and (a)(2). OGC will provide concurrence or comments either in writing or by telephone. The contracting officer must not sign or release a document to the contractor until OGC concurs.

(e) For any VA contract form subject to legal review under 801.602–75(a)(8), the contracting officer must process the change or revision in accordance with VA Manual MP–1, Part II, Chapter 4 and any supplements to it (*http://www.va.gov/publ/direc/benefits/mp1p2ch4.htm*).

801.602–79 Processing solicitations and contract documents for legal or technical review—Veterans Benefits Administration.

(a) Contracting officer must ensure that proposed solicitations, quotations, contract-related documents, and agreements listed in Table 801.602–71 are reviewed by the Office of Resource Management prior to document execution. The Office of Resource Management must request legal review of all these documents.

(b) Contracting officer must ensure that proposed solicitations or agreements for guidance center and vocational rehabilitation services are reviewed by the Director, Vocational Rehabilitation and Employment Service, if there is an anticipated expenditure of $100,000 or more.

801.602–80 Legal and technical review-Office of Construction and Facilities Management and National Cemetery Administration.

An Office of Construction and Facilities Management or National Cemetery Administration (Construction Support Division) contracting officer shall submit all A/E contracts, and all construction contracts, time extensions, and modifications, directly to Office of General Counsel (OGC) for review.

801.602–81 Documents required for business clearance reviews.

When a bid or offer, proposed contract modification, or proposed lease requires a business clearance review under 801.602–76, the contracting officer must forward the required documents (see 801.602–84) and the following information to the appropriate Acquisition Resources Service central or regional office. Office of Construction and Facilities Management and National Cemetery Administration (Construction Support Division) contracting officers shall forward the documents to OGC (025):

(a) The date on which award is anticipated.

(b) Results or efforts made to determine whether the contractor is responsible under FAR Subpart 9.4.

(c) A determination of price reasonableness.

(d) An explanation (e.g., the source selection decision as specified in FAR 15.308) if the contracting officer proposes an award to a contractor other than the low responsible bidder or offeror.

801.602–82 Documents to submit for legal or technical review—general.

Table 801.602–82 specifies the documents that must be submitted when a legal or technical review is required.

TABLE 801.602–82

Action or document subject to review	Documents to submit
(a) Proposed construction contract	One copy of each solicitation document, excluding drawings. Submit not later than the date on which the contracting officer furnishes the documents to prospective bidders.
(b) Proposed solicitation or contract for scarce medical specialist services or health-care resources.	One copy of the solicitation or proposed contract and documents required under VA Manual M–1, Part 1, Chapter 34.
(c) All other proposed solicitations, contracts, and agreements	One copy of each document to be used in the contract solicitation or award, and any other document that supports the proposed procurement action. Submit not later than the date on which the contracting officer furnishes the documents to prospective bidders.

801.602–83 Documents to submit for legal or technical review—contract modifications.

(a) The documents specified in this section related to proposed contract modifications must be submitted to Acquisition Resources Service for review under one or more of the following conditions:

(1) When the total modification value is $100,000 or more.

(2) When the modification is for a time extension of 60 days or more.

(3) Where the contractor takes exception to VA's accord and satisfaction language.

(b) The contracting officer must submit the following documents for review:

(1) A draft of the proposed modification prepared on SF 30, Amendment of Solicitation/Modification of Contract, specifying the exact language proposed and describing any change in work, time, or cost.

(2) A statement describing the need for the changed work with any back-up documentation, including a copy of the general statement of work in the original contract and any existing contract language that will be modified.

(3) A statement addressing whether the proposed modification is within the original scope of the contract and specifically addressing the facts considered in reaching the conclusion.

(4) A statement analyzing what necessitated the modification (e.g., a design error, technical changes, or medical center requirements).

(5) The contracting officer's technical representative's (COTR) technical evaluation of the proposed change.

(6) A memorandum from the appropriate office indicating that funds are available or a statement concerning the actions that must be taken to secure the required funds.

(7) The names and telephone numbers of the contracting officer and COTR.

(8) Costing information including the following:

(i) The contractor's cost proposal in the format required by the contract.

(ii) The COTR's independent cost evaluation.

(iii) The architect/engineer's independent cost evaluation, if applicable and available.

(iv) The contracting officer's Price Negotiation Memorandum under FAR 15.406–3.

(v) Any other relevant costing information, such as independent market research, that VA used or will use as negotiation criteria.

(c) For a proposed modification to an architect/engineer contract, the contracting officer must submit for review each document specified in paragraph (b) of this section and the following additional documents.

(1) A listing of the fees awarded in the original contract and previous modifications.

(2) For a working drawing contract, a statement regarding the actual or estimated cost of the original construction and any estimated change to the overall project cost as a result of the proposed modification.

(d) For a modification to a construction contract or, where applicable, to an architect/engineer contract, the contracting officer must submit for review a copy of the COTR's mark-up of any drawing that delineates the proposed changed work, including a copy of any pertinent technical specifications. When there is a proposed modification involving numerous changes to drawings and specifications for a VA Central Office project, the drawings and specifications must be available for review in the Office of the Project Director in VA Central Office.

801.602–84 Documents to submit for business clearance reviews.

A contracting officer must submit to Acquisition Resources Service (Office of Construction and Facilities Management and National Cemetery Administration contracting officers shall forward the documents to OGC (025)) for review copies of the following documents when a business clearance review is required in accordance with 801.602–76:

(a) The request for contract action, including a justification of need (i.e., the using service purchase request).

(b) The solicitation.

(c) The abstract of the subject bid or offer.

(d) Any applicable Price Negotiation Memorandum.

(e) A statement of the contracting officer's rationale for award.

(f) Any applicable justification and approval under FAR 6.303 and 6.304.

(g) Documents relevant to determining whether the contractor is responsible, including:

(1) Verification that the vendor is not suspended, debarred, or on the Department of Health and Human Services Exclusionary List;

(2) Verification that the vendor has filed any required VETS 100 report (not required if the acquisition is for a commercial item); and

(3) For acquisitions exceeding $10 million, the Equal Employment Opportunity Clearance.

(h) Any applicable approved subcontracting plan.

(i) Documents relevant to price reasonableness (i.e., all documents used to support the contracting officer's determination of price reasonableness).

801.602–85 Results of review.

(a) When the review is complete, the reviewing office will advise the appropriate Central Office activity or contracting officer that the proposal was approved as submitted or provide them with recommended changes. If the Central Office activity is notified, the Central Office activity will forward the information to the contracting officer.

(b) When changes are recommended by technical or legal review staff, if the contracting officer concurs, the contracting officer must take immediate action to amend the document. If the contracting officer does not concur, the contracting officer must discuss the recommended changes with the technical reviewer or the attorney involved and document in the contract file the reasons why the contracting officer is not following the reviewer's recommendations.

(c) Acquisition Resources Service and OGC will complete reviews as expeditiously as possible, with due regard for procurement actions that require an unusually short period for completing the procurement.

801.603 Selection, appointment, and termination of appointment.

801.603–1 General.

VAAR 801.690 through 801.690–9 and 801.670 establish the policy and procedures for selecting, appointing, and terminating a contracting officer.

801.603–70 Representatives of contracting officers.

(a) In carrying out the responsibilities of FAR 1.602–2, the contracting officer may designate another Government employee as COTR to perform the functions in this section and 801.603–71.

(1) Except as indicated in 801.603–71, a designation under this section must be in writing, must define the scope and limitation of the representative's authority, and must be addressed to the COTR with a copy forwarded to the contractor.

(2) The COTR may not re-delegate authority received under this paragraph.

(3) The contracting officer may not authorize a representative to make any commitment or change that will affect the price, quantity, quality, or delivery terms of a contract.

(4) A contracting officer acting within his or her warranted contracting authority must authorize any change to a contract.

(b) A contracting officer may authorize his or her technical representative to do the following:

(1) Furnish technical guidance and advice or generally supervise the work performed under the contract.

(2) Take any action authorized in the contract, such as issuing a delivery order, rejecting an unsatisfactory item, ordering a replacement of an unsatisfactory item (materials or services) or declaring a contractor in default on specific delivery orders.

(i) Except for a contract for blood, the contracting officer may delegate this authority only to other Government contracting officers under centralized indefinite delivery type contracts and the contract will so state.

(ii) A centralized contract for blood must state that a contracting officer at an ordering office may designate representatives and alternate representatives to place a delivery order subject to the same restrictions in paragraph (b)(3) of this section.

(3) Place an oral or other informal delivery order for items such as, but not limited to, bread, milk, and blood against a local indefinite delivery type contract for which there is a blanket purchase arrangement and for which funds have been obligated.

(c) In the administration of research and development contracts, any representative appointed under this section must be acceptable to the contracting officer and the head of the organization concerned.

(d) When the contracting officer intends to designate a representative under this section for a particular solicitation or contract, the contracting officer must include the clause in 852.270–1, Representatives of contracting officers, in the solicitation and contract.

801.603–71 Representatives of contracting officers; receipt of equipment, supplies, and nonpersonal services.

(a) Without prior notification to the contractor or vendor, the contracting officer may designate other competent personnel, *i.e.*, COTRs, to represent him or her to receive and inspect supplies, equipment and services at a VA facility. The COTRs may perform duties, as specified by the contracting officer, such as, but not limited to, the following:

(1) Inspect and certify compliance with the quality and quantity requirements of the purchase order or contract.

(2) Inspect supplies and equipment for condition and quantity and accept supplies, equipment, and services, based on quality inspection made by another authorized representative.

(b) The Director, Library Services, VA Central Office, and the Chief, Library Service, at a field facility may act as representatives of the contracting officer to receive, inspect and accept library books, newspapers, and periodicals. Purchase documents will specify that delivery will be made directly to the library.

801.670 Special and limited delegation.

The authority vested in the Secretary to execute, award, and administer a contract, purchase order, or other agreement for the expenditure of funds to acquire the specific services set forth in 801.670–1 through 801.670–4 is delegated to the SPE. The SPE further delegates this authority to the DSPE and to employees appointed or designated to the positions specified in those sections.

801.670–1 Issuing bills of lading.

The authority to issue bills of lading previously contained in this section is rescinded. Except for individual small package shipments (e.g., United Parcel Service, Federal Express, or United States Postal Service small package shipments), no VA employee may issue a bill of lading or otherwise procure transportation services for goods unless the employee has been delegated authority to do so as a warranted contracting officer under the VA Contracting Officer Certification Program (ref. 801.690). All transportation services for goods, other than for small package shipments, require a bill of lading. Except for individual small package shipments, individuals with only micro-purchase authority may not issue bills of lading or otherwise procure transportation services. The dollar value of the bill of lading issued or transportation services acquired must not exceed the delegated authority of the contracting officer. Candidates for appointment as transportation contracting officers whose delegated authority will be limited to the acquisition of transportation services for goods only shall comply with the Education, Experience, and Training requirements, if any, in Part 102–117 of title 41 Code of Federal Regulations, the Federal Management Regulation, rather than the requirements in 801.690.

801.670–3 Medical, dental, and ancillary service.

(a) When medical, dental, and ancillary services under $10,000 per authorization are not available from an existing contract or agreement, the following VA officials at VA medical facilities may authorize these services:

(1) The Chief of Staff and the physician assigned the responsibility for the ambulatory care function.

(2) Chief, Medical Administration Service, or the person designated by the facility director to perform medical administration functions.

(b) Forms specified in Part 853 shall be used for ordering services under this paragraph from existing contracts.

(c) The officials named in paragraph (a) of this section may designate one or more of their subordinates to exercise the authority in paragraph (a) of this section.

(d) A designation under this section must be in writing and specifically set forth the scope and limitations of the designee's authority.

801.670–4 National Cemetery Administration.

The Director of Logistics Management Service, the Centralized Contracting Division, and the Construction Support Division are authorized to procure supplies, equipment and non-personal services (including construction) for National Cemetery Administration (NCA) field facilities and other NCA offices when there is an emergency during which the servicing supply organization cannot be used.

801.670–5 Letters of agreement.

(a) Letters of agreement shall not be used. The authority previously contained in this section is rescinded.

(b) The VA Office of Inspector General may issue contracts for commercial items, including services, using a letter format (see FAR 12.204(a)), provided billing information and required clauses are included in the contract. If the dollar value of the acquisition will exceed the simplified acquisition threshold, this is a deviation from the requirement to use Standard Form 1449 at FAR 12.204(a).

801.680 Contracting authority of the Inspector General.

(a) Under section 6(a) of Public Law 95–452 (October 12, 1978), the Inspector General may do the following:

(1) Contract or arrange for audits, studies, analyses, and other services with public agencies and with private persons.

(2) Make payments necessary to carry out the provisions of the Act, to the extent and in amounts provided in advance by appropriations acts.

(b) In exercising the special authority provided in paragraph (a) of this section, the Inspector General may ask the servicing head of the contracting activity for assistance in developing appropriate contract or agreement documents.

(c) The FAR applies to contracts made under paragraph (a) of this section. Such contracts also are subject to provisions of the VAAR that implement and supplement the FAR on matters other than those stemming from or related to delegations of the Secretary's contracting authority. (For example, management controls and approvals specified in subpart 837.2 will not apply to contract actions under the contract authority of the Inspector General.)

801.690 VA's COCP.

801.690–1 Definitions.

Accredited college or university means a college or university that has been accredited by an accrediting agency recognized by the U.S. Department of Education (see *http://www.ed.gov/admins/finaid/accred/index.html*) or accredited by a foreign government.

ACEP means the Acquisition Continuing Education Program, a program to provide VA's acquisition workforce with classroom knowledge to further develop their acquisition skills. The program supports VA personnel in the GS 1102 contracting series, other contracting officers (regardless of General Schedule series), contracting officers' technical representatives, and contracting officers' representatives to ensure that they meet the continuing education requirements mandated by OFPP Policy Letter No. 05–01, Developing and Managing the Acquisition Workforce, dated April 15, 2005 (see *http://www.whitehouse.gov/omb/procurement/policy_letters/05–01_041505.html*) and the OFPP Memorandum dated January 20, 2006, titled The Federal Acquisition Certification in Contracting Program (see *http://www.whitehouse.gov/omb/procurement/acq_wk/fac_contracting_program.pdf*).

ACM means the Acquisition Career Manager, who is the Associate Deputy Assistant Secretary for Acquisitions.

Acquisition Workforce means those VA employees who are classified as: GS 1102 contract specialists; GS 1105 purchasing agents; contracting officers warranted above the micro-purchase

threshold; program and project managers and other significant acquisition-related positions as otherwise identified by the VA Chief Acquisition Officer; contracting officers' technical representatives; and contracting officers' representatives. The acquisition workforce may also include a limited number of employees that perform significant acquisition-related responsibilities, (e.g., employees in the GS–345, GS–346, GS–801, GS–1101, GS–1106, GS–1170, GS–2001, GS–2003, and GS–2005 job series and select program officials).

Appointment means the delegation of authority to any VA employee to enter into, administer, or terminate contracts and to make related determinations and findings.

ATCD means the Acquisition Training and Career Development Division.

Certificate of Appointment as Contracting Officer is a signed certificate on Standard Form 1402 used for the written appointment of contracting officers that states the scope, limitation, and term of the contracting officer's authority.

CLP means continuous learning point, as provided in OFPP Policy Letter 05–01. One CLP is generally equivalent to one hour of classroom training.

COCB means the Contracting Officers Certification Board, a group of VA officials, listed at 801.690–3(c), who evaluate and recommend to the DSPE individuals for delegation of contracting authority as Level II warrant or Level III warrant (Senior Limited or Unlimited) contracting officers.

COCP means the Contracting Officers Certification Program, VA's program established for the selection, appointment, and termination of appointment of contracting officers.

COQS means the Contracting Officer Qualification Statement, a document completed by a candidate for a position as contracting officer that accompanies the request for contracting authority. The certified statement includes information on experience, education, training, and pertinent contracting authority information. The COQS is accompanied by supporting documentation such as training certificates, copies of prior and current warrants, college transcripts, and other relevant information.

Federal Acquisition Certification (see OFPP Policy Letter 05–01, paragraph 8) means a certification program developed by the Federal Acquisition Institute and OFPP that generally reflects a Government-wide standard for education, training, and experience leading to the fulfillment of core competencies in acquisition-related disciplines.

Selection means the appointment of an employee as a contracting officer. The selection process shall consider the complexity and dollar value of the assigned work, the candidate's experience, training, education, business acumen, judgment, character, reputation, and knowledge of acquisition policies, rules and regulations.

Skills Currency means the level of knowledge and abilities that a Level I warrant or higher level warrant contracting officer attains as the result of participating in a minimum of 80 CLPs of continuing education or training every two years. The training is intended to ensure that the employee maintains current acquisition knowledge and skills, as mandated by OFPP Policy Letter No. 05–01 and the OFPP Memorandum dated January 20, 2006, titled The Federal Acquisition Certification in Contracting Program.

Termination means the revocation or rescission of an appointment as contracting officer.

801.690–2 General.

(a) The VA COCP applies to all VA programs except for the appointment of contracting officers under the Inspector General Act (Pub. L. 95–452) and for contracting officers designated in sections 801.670 through 801.670–5. The COCP also applies to VA officials granted authority to enter into sales agreements (see separate guidance under VA's Directives Management System).

(b) A Certificate of Appointment is not required for a contracting officer designated in 801.670 who exercises special and limited delegations of authority.

(c) Warrant levels are synonymous with the Federal Acquisition Certification in Contracting Program certification levels specified in the OFPP Memorandum dated January 20, 2006,

titled ''The Federal Acquisition Certification in Contracting Program.'' The COCP is based on the following levels and types of authority:

(1) *Level I warrant.* Authority for expenditures at or below the simplified acquisition threshold (see FAR 2.101) for open market contracts, blanket purchase agreements, basic ordering agreements, and delivery/task orders against established contracts (except Federal Supply Schedule (FSS) contracts), within the specified geographical limits of the contracting officer's warrant. For FSS contracts, Level I warrant authority includes authority for expenditures up to the maximum order threshold of the FSS contract, within the specified geographical limits of the contracting officer's warrant. This level was formally titled ''Basic'' and any current Basic Level warrant need not be reissued solely to change the title.

(2) *Level II warrant.* Authority for expenditures at or below $5,000,000 or as stated on Standard Form 1402 for open market contracts, blanket purchase agreements, basic ordering agreements, and delivery/task orders against established contracts, within the specified geographic limits of the contracting officer's warrant. This level was formally titled ''Intermediate'' and any current Intermediate Level warrant need not be reissued solely to change the title.

(3) *Level III (Senior Limited) warrant.* Authority for expenditures at or below the dollar threshold and within the geographical limits specified on the contracting officer's warrant, Standard Form 1402. This level was formally titled ''Senior Limited'' and any current Senior Limited Level warrant need not be reissued solely to change the title.

(4) *Level III (Senior Unlimited) warrant.* Authority granted to VA's contracting officers in contracting activities (e.g., the VA National Acquisition Center, Hines, IL, and Acquisition Operations Service, VA Central Office, Washington, DC) that are charged with meeting Department-wide acquisition needs of VA and its customers. The authority is for expenditures at any dollar level without geographical restriction. This level was formally titled ''Senior Unlimited'' and any current Senior Unlimited Level warrant need not be reissued solely to change the title.

(5) *Multi-VISN.* Authority at the Level II warrant and Level III (Senior Limited) warrant levels, granted by the DSPE, that permits procurement consolidations among Veterans Health Administration VISNs, Veterans Benefits Administration Area Offices, and other Government agencies that exist outside the contracting officer's normally assigned geographical area of appointed authority. Multi-VISN authority is generally granted to contracting officers for procurement-specific requirements or to contracting officers who are members of groups or consortiums established for regional contracting initiatives.

(d) *Micro-purchase Level.* Micro-purchase Level authority, not to exceed the micro-purchase threshold (currently $3,000) ($2,500 for acquisition of services subject to the Service Contract Act, and $2,000 for acquisition of construction subject to the Davis Bacon Act) (see FAR 2.101), is separately addressed under VA's purchase card program. Under that program, the HCA may delegate authority to a VA employee as a purchase card holder through the issuance of VA Form 0242.

801.690–3 Responsibilities under the COCP.

(a) *DSPE.* The DSPE is responsible for the following:

(1) Administering and overseeing the COCP;

(2) Appointing and terminating Level II warrant and Level III (Senior Limited and Unlimited) warrant contracting officers;

(3) Establishing and developing additional agency-specific training; and

(4) Developing and implementing policy, procedures, and guidance for VA's acquisition program.

(b) *The Chief, Acquisition Program Management Division.* The Chief, Acquisition Program Management Division, serves as the Executive Secretary to the COCB and is responsible for the following:

(1) Coordinating requests for contracting authority with the COCB;

(2) Proceeding accordingly with appropriate action to carry out the decisions of the DSPE and the COCB;

(3) Maintaining individual records on the appointment and termination of appointment of contracting officers. Records on contracting officers include HCA certifications and qualification statements, Certificates of Appointment, and other supporting documentation used to grant authority; and

(4) Ensuring appropriate and timely disposition of records through the Office of Acquisition and Materiel Management's Records Control Officer.

(c) *The COCB.* (1) The Director, Acquisition Resources Service, will chair the COCB.

(2) COCB membership consists of:

(i) The Chief, Acquisition Program Management Division; and

(ii) The Chief, Acquisition Training and Career Development Division (ATCD).

(d) *HCAs.* HCAs are responsible for the following:

(1) Implementing and maintaining an effective and efficient program for the procurement of personal property and nonpersonal services required by the activity to which the HCA is assigned;

(2) Establishing adequate controls to ensure compliance with applicable laws and regulations;

(3) Appointing or terminating the appointment of contracting officers at the Micro-purchase Level and Level I warrant level within their assigned activity;

(4) Establishing procedures and maintaining records for the appointment and termination of appointment of purchase card holders at the Micro-purchase Level and Level I warrant contracting officers. Records maintained on contracting officers shall include the contracting authority, certification and qualification statements;

(5) Recommending to the DSPE the appointment or termination of appointment of contracting officers at the Level II warrant and Level III (Senior Limited or Unlimited) warrant levels of authority, certifying the candidate's qualifications, and justifying the organizational need;

(6) Ensuring that all GS 1102 contract specialists and other contracting officers meet the minimum core training and continuing education requirements; and

(7) Certifying that the assigned acquisition workforce meets the minimum training, education, and skills currency requirements prescribed by OFPP and the DSPE.

(e) *VA Acquisition Workforce.* All employees identified as members of VA's acquisition workforce (see 801.690–1) are responsible for maintaining records that include certificates of acquisition training, continuing education, college transcripts, work experience, and other supporting documentation needed to substantiate successful completion of all warrant requirements. These employees shall enroll in the Acquisition Career Management Information System (ACMIS), the data system that serves as the repository of required information on VA's acquisition workforce.

801.690–4 Selection.

(a) The HCA may appoint Level I warrant contracting officers or submit written requests to the DSPE for appointment of Level II warrant or Level III (Senior Limited or Unlimited) warrant contracting officers. A VA official one level above the HCA may submit a written request to the DSPE for the appointment of an HCA as a contracting officer.

(b) Appointment can only be requested in those circumstances where it can be demonstrated that a valid organizational need exists. In making this assessment and justification, the HCA will consider the complexity of the work, volume of actions, organizational structure, and human resource management actions and forecasts, such as rates of retirement, reassignment, and retention.

(c) The request shall consist of the following:

(1) Justification for requesting contracting authority to be granted;

(2) Certification that the candidate's experience and training meet the established minimum qualifications for the requested contracting authority;

(3) Certification that the candidate has a satisfactory-or-above performance rating;

(4) Certification that the candidate maintains high standards of conduct

and avoids apparent or actual conflicts of interest, and

(5) Certification that the candidate has appropriate working knowledge of the FAR, VAAR, and other applicable laws, regulations, policies and procedures.

(d) The accompanied COQS shall include the following information:

(1) Candidate's name, position title, series, grade, and location;

(2) Candidate's relevant acquisition or business-related experience that reflects the required number of years of progressive work assignments leading to broader technical abilities;

(3) Education background, including number of acquisition or business-related college credits;

(4) List of core training requirements or equivalent courses that have been successfully completed;

(5) List of continuing education requirements successfully completed within the last two years;

(6) List of current and prior warrant authorities, limitations, and information on termination and cause for termination;

(7) List of other acquisition related activities or memberships;

(8) Certification that the statement is accurate and complete to the best of the candidate's knowledge; and

(9) Attached copies of acquisition or business-related training certificates, course certificates, and diplomas, transcripts, or degrees from accredited colleges or universities.

801.690–5 Requirements for contracting authority.

(a) Effective January 1, 2007, no individual, regardless of job series, may be issued a new contracting officer warrant above the micro-purchase threshold unless the individual meets the requirements for Federal Acquisition Certification (Certification) for the applicable Level I, II, or III warrant level as specified in OFPP Policy Letter 05–01 and the OFPP Memorandum dated January 20, 2006, titled ''the Federal Acquisition Certification in Contracting Program.'' A new contracting officer warrant is defined in OFPP Policy Letter 05–01 as a warrant issued for the first time at a department or agency. For contracting officers warranted before January 1, 2007, certification will not be required to retain their existing warrants, but will be required before higher level warrants can be issued. Certification includes minimum requirements for education, training, and experience. A candidate for a warrant must have at least a satisfactory-or-above performance rating during the most recent performance period.

(b) For contracting officer warrants issued prior to January 1, 2007, the minimum requirements for qualifying as a contracting officer previously specified in VA regulation and other internal VA guidance shall apply.

(c) *Multi-VISN.* The HCA shall obtain written or e-mail concurrence from the HCAs of the other affected VISNs or Area Offices when requesting Multi-VISN contracting authority.

(d) *Training.* (1) Contracting officers and non-warranted contract specialists shall complete the required coursework and on-the-job training needed to possess the established competencies listed in OFPP's Federal Acquisition Institute Contract Specialist Training Blueprints (*http://www.fai.gov/policies/contract.htm*).

(2) The Chief, ATCD, oversees the ATP.

(3) Training course equivalency will be determined and approved by the Chief, ATCD. Candidates should contact the Chief, ATCD, for an equivalency determination and must furnish any information or evidence necessary to support the request. Appeals of decisions may be made to the VA ACM and the decisions of the ACM shall be final.

(e) *Skills Currency.* (1) Contracting officers and non-warranted contract specialists who have completed the core training requirements shall obtain a minimum of 80 CLPs of continuing education or training every two fiscal years to stay abreast of current acquisition knowledge and skills as mandated by OFPP. The HCA (for Level I warrant contracting officers) and the Chief, ATCD (for Level II warrant and Level III warrant contracting officers), shall make written determinations every October 1 for each warranted contracting officer on whether the required CLPs, as specified in OFPP guidance, were completed during the two prior fiscal years. The HCA shall

assign CLP values to training taken by Level I warrant contracting officers for training that does not have pre-assigned CLP or continuing education unit (CEU) values assigned to the training by the provider. The Chief, ATCD, shall assign CLP values to training taken by Level II warrant and Level III warrant contracting officers for training that does not have pre-assigned CLP or CEU values assigned to the training by the provider. Values shall be assigned based on guidance provided by OFPP and the combined efforts of the Federal Acquisition Institute and the Defense Acquisition University. Questions regarding the CLP or CEU values assigned to training shall be resolved by the ACM.

(2) The Chief, ATCD, is responsible for the management of the ACEP, the program that assists contracting officers and contract specialists to meet the training requirements.

(3) An expiring warrant will not be re-issued if the contracting officer has not met the continuing education or training requirement.

(f) *Education.* (1) The 24 business-related college credits shall be in any combination of the following fields of study at an accredited college or university: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management.

(2) The HCA will make the final determination whether a course is accepted as business-related for the purpose of granting Level I warrant authority. The Chief, ATCD, will make the final determination whether a course is accepted as business-related for the purpose of granting Level II warrant or Level III warrant contracting authority.

(3) American Council on Education (ACE) credits are not considered as college credits until they are converted and included on a transcript from an accredited college or university.

(g) *Grandfather Provision for the Education Requirement.* (1) VA contracting officers, regardless of grade level, who currently hold Level I, Level II, or Level III (Senior Limited or Unlimited) warrants are considered as having met the Experience, Education, and Training requirements for their respective warrant levels. This includes transfers or laterals to other VA contracting activities with similar geographical restrictions. Contracting officers who are promoted up to a GS–12 can maintain their current warrant level authority.

(2) This Grandfather provision does not cover new VA employees, current VA employees who are not warranted, former VA employees who held contracting authority at their previous Federal Government agencies or VA positions, or VA employees whose warrants have been rescinded or have expired. VA contracting officers who are promoted to GS 13-and-above will no longer be covered by this Grandfather provision and, therefore, must meet the current Experience, Education, and Training requirements for the specific warrant authority that they currently hold or to which they wish to be appointed. Contracting officers requesting a higher level warrant (e.g., from Level I warrant to Level II warrant or from Level III (Senior Limited) warrant to Level III (Senior Unlimited) warrant) must also meet the current Experience, Education, and Training requirement for the specific warrant authority requested.

(3) This Grandfather provision for retaining a contracting officer's current warrant authority is voided if the contracting officer does not fully meet the minimum Skills Currency requirement prior to warrant expiration or when the warrant authority is suspended or revoked. The contracting officer will then need to meet all of the current warrant prerequisites before a new warrant can be issued or before the suspended or revoked warrant can be reinstated.

(h) The training requirements for contracting officers whose delegated authority is limited to the acquisition of transportation services, as provided in Part 102–117 of title 41 Code of Federal Regulations, the Federal Management Regulation, shall be as specified therein.

801.690–6 Appointment.

(a) Only the DSPE (for Level II and Level III (Senior Limited or Unlimited)) warrants and the respective HCA (for Level I warrants) may sign the

Certificate of Appointment as Contracting Officer. HCAs are authorized to grant Micro-purchase Level and Level I warrant contracting authority up to the thresholds specified for these authorities at 801.690–2(c). The HCA may recommend a candidate to the DSPE for appointment as a Level II warrant or Level III warrant contracting officer. Only the DSPE may grant Level II warrant, Level III (Senior Limited or Unlimited) warrant, and Multi-VISN authority.

(b) All Certificates of Appointment as Contracting Officers and other written documents must clearly state any limitations or restrictions on the authority.

(c) The Privacy Act of 1974 applies to the information collected during contracting officer selection and appointment.

801.690–7 Termination.

(a) The DSPE (for all warrant levels) or HCA (for Micro-purchase Level and Level I warrants) may revoke or rescind the appointment of a contracting officer at any time. HCAs may submit a recommendation to revoke or rescind the appointment of a contracting officer's Level II warrant or Level III (Senior Limited or Unlimited) warrant to the DSPE. Revocation may be based on the following circumstances:

(1) There is no longer a need for the appointment;

(2) There has been a personnel action such as a resignation, retirement, transfer;

(3) Unsatisfactory performance;

(4) Alleged official misconduct pending criminal or administrative investigations;

(5) Failure to meet training or skills currency requirements;

(6) A contracting officer taking an action that exceeds his or her authority;

(7) Blatant disregard for adhering to acquisition regulations, policies and procedures; or

(8) Situations similar to those in paragraphs (a)(1) through (7) of this section that may require remedial action.

(b) The HCA should discuss a termination of contracting authority for cause with the servicing Human Resource Management Office to determine the impact, if any, on the contracting officer's continued employment.

(c) All changes in the status (e.g., departure, name, position, or grade change) of a micro-purchase cardholder or Level I warrant holder shall be reported in writing by the individual's supervisor to the HCA within five workdays of occurrence. All changes in the status of a Level II warrant or Level III (Senior Limited or Unlimited) warrant holder shall be reported in writing by the HCA to the DSPE within five workdays of occurrence. Level II warrants or Level III (Senior Limited or Unlimited) warrants that are terminated, rescinded, or superseded should be returned to the Director, Acquisition Resources Service (049A5), citing the exact reason for the termination, rescission, or supersession.

801.690–8 Interim appointment provisions.

(a) To ensure availability of procurement support, an interim appointment may be granted for a limited period of time when a candidate does not fully meet the minimum qualifications for Experience, Education, or successful completion of all acquisition Training requirements in previous VA regulations or VA internal guidance, if applicable, or as provided in the OFPP Memorandum dated January 20, 2006, titled ''the Federal Acquisition Certification in Contracting Program.'' All interim appointments made after January 1, 2007, for individuals who do not meet the minimum Experience, Education, or Training requirements for Levels I through III warrants shall be signed by the SPE or, if so delegated, the ACM, without power to redelegate, as provided in the OFPP Memorandum dated January 20, 2006, titled ''the Federal Acquisition Certification in Contracting Program.''

(1) In a request for an interim appointment, the HCA must include the information required by 801.690–4 on the candidate's training, experience, performance, and education, and a justification for the interim appointment.

(2) The HCA must ensure that the candidate with interim appointment

meets the minimum Experience, Education, and Training requirements within the time specified on the warrant.

(3) A contracting officer with interim appointment should successfully complete all remaining required courses or equivalent courses within the time specified on the warrant.

(b) At the HCA's written request, a permanent warrant may be issued during the interim appointment period when the contracting officer has satisfactorily met the requirements. The appropriate documentation (copies of course certificates) must be submitted with the HCA's request.

(c) An interim appointment may be appropriate for instances such as organizational changes or sudden, extreme, and unexpected increases in workload complexity and/or volume.

(d) Interim appointments will not be granted under the following circumstances:

(1) To a candidate who is warranted but does not meet the Education or Training requirements for higher level (e.g., from Level I warrant to Level II warrant) contracting authority (unless waived by the SPE);

(2) To a candidate who does not have a current record of satisfactory-or-above performance; or

(3) To a contracting officer whose authority has expired and who has not met the continuing education requirement during the two preceding years.

(e) Generally, an interim appointment may not exceed one year.

801.690–9 Distribution of Certificates of Appointment.

(a) The DSPE or HCA will issue an original Certificate of Appointment as Contracting Officer to the appointed candidate, who must display the Certificate at his or her duty station.

(b) The HCA shall file a copy of the warrant in the delegation of authority file.

(c) The contracting officer must furnish a copy to the respective fiscal activity.

(d) Each Certificate will be serially numbered, reflecting the facility number, the year of issuance (e.g., facility number—year of issuance (2 digits)—sequential number, 560–04–10), and have an effective and expiration date.

801.695 VA's Appointment of HCAs Program.

801.695–1 Policy.

(a) VA's policy is to have a minimum number of HCAs. Generally, there will be one HCA per VISN, other major VA organizational element, or major acquisition organization. The authority vested in the Secretary to select, appoint, and terminate HCAs is delegated to the SPE and is further delegated from the SPE to the DSPE.

(b) Under the FAR at 1.601(a) and 2.101, an HCA is a senior level position. The official who occupies this position should have the education, training, and experience necessary to make the decisions required of an HCA.

(c) Except as provided in the FAR, an HCA may delegate his or her authority to other individuals within the HCA's acquisition activity. Such delegations must be in writing and must set forth the specific limitations on the designee's authority. The delegation may include authority to appoint a contracting officer at the Micro-purchase Level or the Level I warrant levels.

801.695–2 Procedures for appointment of HCAs.

An HCA must be appointed in writing by the DSPE and in accordance with internal VA policy. The written delegation must state any limitation on the HCA's authority, other than a limitation contained in an applicable law or regulation.

801.695–3 Authority of the HCA.

(a) The HCA has overall responsibility for managing the procurement program assigned to the activity.

(b) The HCA's level of contracting authority, if any, shall be specified in the HCA's appointment letter.

(c) The HCA has the authority to appoint and terminate contracting officers with authority to conduct procurements of up to and including the simplified acquisition threshold or the maximum order threshold or limitation for orders placed against Federal

Supply Schedule contracts, and to terminate such appointments (Micro-purchase Level and Level I warrant appointments).

PART 802—DEFINITIONS OF WORDS AND TERMS

Subpart 802.1—Definitions

Sec.
802.101 Definitions.

AUTHORITY: 40 U.S.C. 121(C) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 802.1—Definitions

802.101 Definitions.

A/E means architect/engineer.

Chief Acquisition Officer means the Assistant Secretary for Management.

COTR means Contracting Officer's Technical Representative or Contracting Officer's Representative.

D&S Committee means the VA Debarment and Suspension Committee, a committee consisting of the Director, Acquisition Resources Service (chair), and representatives of the Office of Management, Office of Inspector General, and the program office to which the particular debarment or suspension case relates. A representative from OGC will serve as legal counsel to the D & S Committee.

Debarring official means the DSPE, who is also the Associate Deputy Assistant Secretary for Acquisitions. Authority to impose debarment is delegated to the SPE and is further delegated to the DSPE.

DSPE means the Deputy Senior Procurement Executive, who is also the Associate Deputy Assistant Secretary for Acquisitions. The DSPE must be career member of the Senior Executive Service.

FAR means the Federal Acquisition Regulation.

GAO means the Government Accountability Office.

HCA means the Head of the Contracting Activity, an individual appointed in writing by the DSPE under VA's Appointment of HCAs Program (see 801.695).

OGC means the Office of the General Counsel.

Resident Engineer has the same meaning as contracting officer's technical representative or contacting officer's representative (see 852.270–1).

SPE means the Senior Procurement Executive who is also the Deputy Assistant Secretary for Acquisition and Materiel Management. The SPE is responsible for the management direction of the VA acquisition system. The SPE may further delegate authority to the DSPE.

Suspending official means the DSPE. Authority to impose suspension is delegated to the SPE and is further delegated to the DSPE.

VA means the Department of Veterans Affairs.

VAAR means the Department of Veterans Affairs Acquisition Regulation.

VISN means Veterans Integrated Service Network, an integrated network of VA facilities that are focused on pooling and aligning resources to best meet local needs in the most cost-effective manner and provide greater access to care.

PART 803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 803.1—Safeguards

Sec.
803.101 Standards of conduct.
803.101–3 Department regulations.
803.104 Procurement integrity.
803.104–7 Violations or possible violations.

Subpart 803.2—Contractor Gratuities to Government Personnel

803.203 Reporting suspected violations of the Gratuities clause.
803.204 Treatment of violations.

Subpart 803.3—Reports of Suspected Antitrust Violations

803.303 Reporting suspected antitrust violations.

Subpart 803.4—Contingent Fees

803.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 803.5—Other Improper Business Practices

803.502 Subcontractor kickbacks.
803.570 Commercial advertising.
803.570–1 Policy.
803.570–2 Contract clause.

Subpart 803.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

803.602 Exceptions.

Subpart 803.7—Voiding and Rescinding Contracts

803.703 Authority.
803.705 Procedures.

Subpart 803.8—Limitation on the Payment of Funds to Influence Federal Transactions

803.804 Policy.
803.806 Processing suspected violations.

Subpart 803.70—Contractor Responsibility To Avoid Improper Business Practices

803.7000 Display of the VA Hotline poster.
803.7001 Contract clause.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 803.1—Safeguards

803.101 Standards of conduct.

803.101–3 Department regulations.

(a) Part 0 of 38 Code of Federal Regulations (CFR) states the standards of conduct for all VA employees, including contracting officials.

(b) Subpart B of 38 CFR part 0 states the employee financial disclosure requirements.

803.104 Procurement integrity.

803.104–7 Violations or possible violations.

(a) Contracting officers must forward the information required by FAR 3.104–7(a)(1) to the HCA. In consultation with OGC, the HCA may make the determination and concurrence specified in FAR 3.104–7(a)(1).

(b) Upon receipt of information describing a violation or possible violation of subsections 27(a), (b), (c), or (d) of the Office of Federal Procurement Policy Act of 1974 (see FAR 3.104–3), the HCA will take action in accordance with FAR 3.104–7(b). The HCA must also report violations or possible violations to the VA Office of the Inspector General.

(c) The authority to make the determinations specified in FAR 3.104–7(b)(5) and 3.104–7(d)(2)(ii)(B) is delegated to the SPE and is further delegated to the DSPE.

(d) As provided in FAR 3.104–7(f), the HCA may authorize a contracting officer to award a contract after notifying the DSPE of the circumstances warranting such an award.

Subpart 803.2—Contractor Gratuities to Government Personnel

803.203 Reporting suspected violations of the Gratuities clause.

(a) Any VA employee must report a suspected violation of the Gratuities clause to the contracting officer or a higher level VA official.

(b) The report must identify the contractor and the personnel involved, provide a summary of the pertinent evidence and circumstances that indicate a violation, and include any other available supporting documentation.

(c) The contracting officer or higher level official must supplement the file with appropriate information and promptly forward the report to the DSPE, with copies to the VA Office of the Inspector General and the Assistant Secretary for Management.

803.204 Treatment of violations.

In providing the notice and hearing required by FAR 3.204, the SPE may make the determinations required by FAR 3.204. This authority is further delegated to the DSPE. The DSPE shall use the following procedures to determine whether or not a violation of the Gratuities clause has occurred:

(a) Upon receipt of an allegation or evidence of a violation of the Gratuities clause, the DSPE shall refer the matter to the D&S Committee to conduct a fact-finding. Upon completion of the fact-finding, the D&S Committee shall present the facts and recommendations for further action to the DSPE.

(b) If the DSPE finds a basis for further action, the D&S Committee shall prepare a notice under FAR 3.204 for signature of the DSPE. If suspension or debarment is also being considered, the D&S Committee shall also follow the procedures contained in 809.4. The signed notice will be sent to the last known address of the contractor, the contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other method that provides signed evidence of receipt. In the case of a business, the D&S Committee may send the notice to any partner, principal, officer, director, owner or co-owner, or joint venture.

(c) If VA does not receive a reply from the contractor within 45 calendar days of sending the notice, the D&S Committee will prepare a recommendation and refer the case to the DSPE for a decision on whether or not to take further action under FAR 3.204.

(d) If VA receives a reply from the contractor within 45 calendar days of sending the notice, the D&S Committee must consider the information in the reply before the D&S Committee makes its recommendation to the DSPE.

(e) The D&S Committee, upon the request of the contractor, must, as soon as practicable, allow the contractor an opportunity to appear before the D&S Committee, in person or through a representative, to present information or argument. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript. The D&S Committee shall prepare a report of the presentation for submission to the DSPE and must consider the information presented when making its recommendation to the DSPE.

(f) If the D&S Committee finds that the contractor's submission in opposition to further action under FAR 3.204 raises a genuine dispute over facts material to the action, then the D&S Committee shall submit to the DSPE the information establishing the dispute of material facts. If the DSPE agrees that there is a genuine dispute of material facts, the DSPE shall refer the dispute to a designee for resolution under 809.470. The DSPE may reject the findings of the fact-finding official only if the findings are clearly erroneous or arbitrary and capricious.

(g) If there are no disputes over material facts or if all disputes over material facts have been resolved under 809.470, the DSPE will make a decision on the basis of all information available, including findings of facts and oral or written arguments presented or submitted to the D & S Committee by the contractor. The DSPE should consider any mitigating factors, such as those listed at FAR 9.406–1 and 809.406–1, prior to making a final decision.

Subpart 803.3—Reports of Suspected Antitrust Violations

803.303 Reporting suspected antitrust violations.

(a) Any VA employee who suspects or has evidence of possible antitrust violations must report the suspected violations, in accordance with FAR 3.303, to the VA Office of the Inspector General and to the Assistant Secretary for Management for review and submission to OGC.

(b) Either the General Counsel or the Inspector General will determine whether to submit the case to the U.S. Attorney General.

Subpart 803.4—Contingent Fees

803.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) A VA employee who suspects or has evidence of an attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or any other violation of the Covenant Against Contingent Fees must report the matter to the contracting officer or to the VA Office of Inspector General.

(b) In addition to the requirement in paragraph (a) of this section, a contracting officer must report a suspected or actual misrepresentation or violation to the DSPE.

(c) Before taking any administrative action under FAR 3.405, a contracting officer must consult with his or her Regional Counsel. A contracting officer in

the Central Office must consult with OGC.

(d) Contracting officers shall route any referrals of suspected fraudulent or criminal matters to the Department of Justice under FAR 3.405(b)(4) through OGC or the VA Office of the Inspector General, with a copy to the Assistant Secretary for Management. The General Counsel or the Inspector General will determine whether to forward the referral to the Department of Justice.

Subpart 803.5—Other Improper Business Practices

803.502 Subcontractor kickbacks.

A VA employee who suspects a violation of the Anti-kickback Act must report the suspected violation to OGC for review.

803.570 Commercial advertising.

803.570–1 Policy.

It is VA policy that contractors will not advertise the award of contracts or refer to VA contracts in contractors' commercial advertising in such a manner as to state or imply that VA endorses a product, project, or commercial line of endeavor. The intent of this policy is to preclude the appearance of bias toward any product or service.

803.570–2 Contract clause.

The contracting officer shall insert the clause at 852.203–70, Commercial advertising, in solicitations and contracts expected to equal or exceed the micro-purchase threshold.

Subpart 803.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

803.602 Exceptions.

The authority to authorize an exception to the policy in FAR 3.601 is delegated to the SPE and is further delegated to the DSPE.

Subpart 803.7—Voiding and Rescinding Contracts

803.703 Authority.

The authority to make determinations under FAR Subpart 3.7, Voiding and Rescinding Contracts, is delegated to the SPE and is further delegated to the DSPE.

803.705 Procedures.

In making a determination to void or rescind a contract, the DSPE must follow the procedures of FAR 3.705 and the following:

(a) Upon receipt of an allegation or evidence of situations meeting the provisions of FAR 3.700, the DSPE shall refer the matter to the D&S Committee to conduct a finding of facts. Upon completion of the fact-finding, the D&S Committee shall present the facts and recommendations for further action to the DSPE.

(b) If the DSPE finds a basis for further action, the D&S Committee shall prepare a notice under FAR 3.705 for signature of the DSPE. If suspension or debarment is being considered, the D&S Committee shall also follow the procedures of 809.4. The signed notice will be sent to the last known address of the contractor, the contractor's counsel, or registered agent, by certified mail, return receipt requested. In the case of a business, the D&S Committee may send the notice to any partner, principal, officer, director, owner or co-owner, or joint venture.

(c) If VA does not receive a reply from the contractor within 30 calendar days of receipt of the notice by the addressee, the D&S Committee will prepare a recommendation and refer the case to the DSPE for a decision on whether or not to take further action under FAR 3.705.

(d) If VA receives a reply from the contractor within 30 calendar days of receipt of the notice, the D&S Committee must consider the information in the reply before the D&S Committee makes its recommendation to the DSPE.

(e) The D&S Committee, upon the request of the contractor, must, as soon as practicable, allow the contractor an opportunity to appear before the D&S

Committee, in person or through a representative, to present information or argument. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript. The D&S Committee shall prepare a report of the presentation for submission to the DSPE.

(f) If the D&S Committee finds that the contractor's submission in opposition to further action under FAR 3.705 raises a genuine dispute over facts material to the action, then the D&S Committee shall submit to the DSPE the information establishing the dispute of material facts. If the DSPE agrees that there is a genuine dispute of material facts, the DSPE shall refer the dispute to a designee for resolution under 809.470. The DSPE may reject the findings of the fact-finding official only if the findings are clearly erroneous or arbitrary and capricious.

(g) If there are no disputes over material facts or if all disputes over material facts have been resolved under 809.470, the DSPE will make a decision on the basis of all information available, including findings of facts and oral or written arguments presented or submitted to the D&S Committee by the contractor.

Subpart 803.8—Limitation on the Payment of Funds to Influence Federal Transactions

803.804 Policy.

A contracting officer must forward a copy of all contractor disclosures furnished under the clause at FAR 52.203–12, Limitations on Payments to Influence Certain Federal Transactions, to the Director, Acquisition Resources Service, for subsequent submission by the Secretary to Congress.

803.806 Processing suspected violations.

A VA employee must report suspected violations of 31 U.S.C. 1352, Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions, to the Assistant Secretary for Management and the VA Office of the Inspector General.

Subpart 803.70—Contractor Responsibility to Avoid Improper Business Practices

803.7000 Display of the VA Hotline poster.

(a) Under the circumstances described in paragraph (b) of this section, a contractor must display prominently a VA Hotline poster prepared by the VA Office of Inspector General in a common work area within a business segment performing work under a VA contract.

(b) A contractor must comply with paragraph (a) of this section when all of the following apply:

(1) The contractor is awarded a VA contract for $500,000 or more for supplies or services, or $3 million or more for construction.

(2) The contractor has not established an internal reporting mechanism and program, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

803.7001 Contract clause.

The contracting officer shall insert the clause at 852.203–71, Display of Department of Veterans Affairs Hotline poster, in solicitations and contracts expected to equal or exceed the dollar thresholds established in 803.7000.

PART 804—ADMINISTRATIVE MATTERS

Subpart 804.1—Contract Execution

Sec.

804.101 Contracting officer's signature.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 804.1—Contract Execution

804.101 Contracting officer's signature.

(a) If a contracting officer's name and title has been typed, stamped, or printed on the contract, and that contracting officer is not available to sign the contract, another contracting officer, as specified in 801.602, may sign the contract.

(b) The contracting officer who signs the contract must have contracting authority to cover the contract to be signed and must annotate his or her name and title below his or her signature.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 805—PUBLICIZING CONTRACT ACTIONS

Subpart 805.2—Synopses of Proposed Contract Actions

Sec.
805.202 Exceptions.
805.205 Special situations.
805.207 Preparation and transmittal of synopses.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 805.2—Synopses of Proposed Contract Actions

805.202 Exceptions.

In accordance with FAR 5.202, the contract actions in 806.302–5 do not require synopsizing.

805.205 Special situations.

(a) A contracting officer may procure paid advertising in a daily newspaper circulated in the local area to publicize a proposed procurement of architectural and engineering (A/E) services not expected to exceed $10,000. See FAR 5.101(b)(4)(i) and 5.502(a).

(b) A contracting officer may procure paid advertising in a daily newspaper circulated in the local area or in professional journals to publicize a proposed procurement of professional services (e.g., scarce medical specialist services, health-care resources, advisory and assistance services). See FAR 5.101(b)(4)(i) and 5.502(a).

805.207 Preparation and transmittal of synopses.

(a) When an A/E evaluation board is ready to advertise for A/E services, the board must establish the geographic area within which it will consider A/E firms (including joint ventures).

(b) The geographic area must be large enough to assure selection of three to five firms highly qualified for the particular project involved, but not so large as to make the evaluation process unduly burdensome.

PART 806—COMPETITION REQUIREMENTS

Subpart 806.3—Other Than Full and Open Competition

Sec.
806.302 Circumstances permitting other than full and open competition.
806.302–5 Authorized or required by statute.
806.302–7 Public interest.
806.304 Approval of the justification.

Subpart 806.5—Competition Advocates

806.501 Requirement.
806.570 Planning requirements.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 806.3—Other Than Full and Open Competition

806.302 Circumstances permitting other than full and open competition.

806.302–5 Authorized or required by statute.

(a) Full and open competition need not be provided for when awarding:

(1) Scarce Medical Specialist contracts negotiated under the authority of 38 U.S.C. 7409, but only when such contracts are with institutions affiliated with VA under 38 U.S.C. 7302. (38 U.S.C. 7409)

(2) Contracts for health-care resources negotiated under the authority of 38 U.S.C. 8153, but only when such contracts are with institutions affiliated with VA under 38 U.S.C. 7302, including medical practice groups and other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), or with blood banks, organ banks, or research centers. The justification and approval requirements of FAR 6.303 and

806.304 do not apply to such contracts or agreements. (38 U.S.C. 8153)

(3) Contracts for health-care resources, negotiated under the authority of 38 U.S.C. 8153, that are not acquired under the authority of paragraph (a)(2) of this section, but only when the procurement is conducted in accordance with part 873. The justification and approval requirements of FAR 6.303 and 806.304 shall apply to such contracts and agreements conducted on a sole-source basis. (38 U.S.C. 8153)

(b) Various sections of title 38 U.S.C. authorize the Secretary to enter into certain contracts and certain types of contracts without regard to any other provisions of law. When the contracting officer enters into a contract without providing full and open competition for any of the following items or services, the contracting officer must cite 41 U.S.C. 253(c)(5) and the following authorities:

(1) For contracts for orthopedic and prosthetic appliances and related services including research, cite 38 U.S.C. 8123. (38 U.S.C. 8123)

(2) For contracts to purchase or sell merchandise, equipment, fixtures, supplies and services for the operation of the Veterans Canteen Service, cite 38 U.S.C. 7802. (38 U.S.C. 7802)

(3) For contracts or leases for the operation of parking facilities established under authority of 38 U.S.C. 8109(b), provided that the establishment, operation, and maintenance of such facilities have been authorized by the Secretary or designee, cite 38 U.S.C. 8109(f). (38 U.S.C. 8109)

(4) For contracts for laundry and other common services, such as the purchase of steam, negotiated with non-profit, tax-exempt, educational, medical, or community institutions, when specifically approved by the Secretary or designee and when such services are not reasonably available from private commercial sources, cite 38 U.S.C. 8122(c). (38 U.S.C. 8122)

(5) For contracts or agreements with public or private agencies for services of translators, cite 38 U.S.C. 513. (38 U.S.C. 513)

(c) Except for an acquisition under paragraph (a)(2) of this section, the contracting officer must provide a justification under FAR 6.303 and obtain an approval under 806.304 for each acquisition described in this section.

806.302–7 Public interest.

(a) When the contracting officer uses 41 U.S.C. 253(c)(7) to support a contract award using other than full and open competition, the contracting officer must prepare a Determination and Finding (D&F) under FAR 1.7 and a justification under FAR 6.303. The D&F must be signed by the Secretary.

(b) The contracting officer must submit the D&F and justification through the HCA to the Agency Competition Advocate for signature by the Secretary. The submission must include the date the contracting officer expects to award the contract.

(c) VA must notify Congress 30 days before the expected award date. The Agency Competition Advocate is responsible for preparing this notice. The contracting officer may not award the contract until notified by the Agency Competition Advocate.

806.304 Approval of the justification.

(a) For a justification other than a class justification specified in FAR 6.304(c), Table 806.304–1 provides the authorities who may approve a justification:

TABLE 806.304.1

Proposed contract amount	Approving authority	Alternate approving authority
(1) Not exceeding $500,000	The contracting officer, as provided in FAR 6.304(a)(1).	Not applicable.
(2) Over $500,000 but not exceeding $10 million.	Contracting Activity Competition Advocate (see 806.501(b) and (c)) unless that Advocate is the contracting officer.	The Agency Competition Advocate (see 806.501(a)).
(3) Over $10 million but not exceeding $50 million.	Agency Competition Advocate	Not applicable.
(4) Over $50 million	Senior Procurement Executive (see 802.100).	Not applicable.

(b) For class justifications specified in FAR 6.304(c), the contracting officer must obtain the approval of the Agency Competition Advocate for all proposed justifications with an estimated value of up to $50 million. The contracting officer must obtain the approval of the SPE for all proposed justifications with an estimated value of more than $50 million.

Subpart 806.5—Competition Advocates

806.501 Requirement.

(a) The Associate Deputy Assistant Secretary for Acquisitions is the Agency Competition Advocate. The Agency Competition Advocate may further delegate authority to other VA officials in VA Administrations and staff offices.

(b) The Executive Director and Chief Operating Officer, National Acquisition Center, is the Contracting Activity Competition Advocate for the Center.

(c) Each HCA (see Subpart 802.1) will serve as the Contracting Activity Competition Advocate in all other cases.

(d) The authority in paragraphs (b) and (c) of this section is not delegable.

806.570 Planning requirements.

(a) Each Contracting Activity Competition Advocate must do the following:

(1) Develop a Competition Plan.

(2) Incorporate the Plan in the internal operating procedures of the facility or organization in which the contracting activity is located.

(3) Obtain the endorsement and support of the facility or staff office director.

(4) Ensure that the services and offices that the contracting activity supports understand the plan.

(b) At a minimum, the Competition Plan must include the following:

(1) Approval requirements for other than full and open competition specified in FAR 6.304.

(2) A description of the synopsis requirements in FAR Subpart 5.2 to ensure that responsible staff fully understand the advance procurement planning that is required.

(3) A description of how to integrate the Competition Plan into advance procurement planning.

(4) A listing of obstacles to competition and a proposal for overcoming them.

(5) A method for increasing cost competition for contracts and competition on other significant factors.

PART 807—ACQUISITION PLANNING

Subpart 807.1—Acquisition Plans

Sec.
807.103 Agency-head responsibilities.

Subpart 807.3—Contractor Versus Government Performance

807.300 Scope of subpart.
807.304–77 Right of first refusal.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 807.1—Acquisition Plans

807.103 Agency-head responsibilities.

The authority to prescribe procedures in FAR 7.103 is delegated to the SPE and is further delegated to the DSPE.

Subpart 807.3—Contractor Versus Government Performance

807.300 Scope of subpart.

This subpart prescribes the use of VAAR clause at 852.207–70, Report of employment under commercial activities, when contracting for commercial services under Office of Management and Budget (OMB) Circular A–76 or VA's cost comparison process. The cost comparison process is used by VA to determine whether to use commercial or Government resources to provide commercial services.

807.304–77 Right of first refusal.

(a) In addition to the Right of First Refusal of Employment clause specified in FAR 52.207–3, the contracting officer must include the clause ''Report of Employment Under Commercial Activities'' at 852.207–70 in all cost comparison solicitations where VA personnel may be displaced. This clause is primarily intended to verify that the

contractor is meeting its obligation to provide Federal workers who are adversely affected by the contract award and who are qualified for the jobs the first opportunity for employment openings created by the contract.

(b) The Report of Employment Under Commercial Activities clause is also prescribed to avoid inappropriate severance payment. To implement the clause, the contracting officer (or COTR) must first obtain a list of Federal personnel who will be adversely affected as a result of the anticipated contract from the servicing Human Resources Service office. The list should be requested as soon as a preliminary determination is made to contract out a function subject to OMB Circular A–76. (Contracting officers may designate a COTR to coordinate the information and reporting requirements.)

PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Sec.
808.002 Priorities for use of Government supply sources.

Subpart 808.4—Federal Supply Schedules

808.402 General.

Subpart 808.8—Acquisition of Printing and Related Supplies

808.802 Policy.

AUTHORITY: 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

808.002 Priorities for use of Government supply sources.

(a) *Supplies.* (1) As used in FAR 8.002(a)(1)(i), the term ''agency inventories'' includes Supply Fund Stock and VA Excess.

(2) A national committed use contract awarded by the VA National Acquisition Center has a priority between wholesale supply sources (FAR 8.002(a)(1)(v)) and mandatory Federal Supply Schedules (FAR 8.002(a)(1)(vi)).

(3) Federal Supply Schedule contracts awarded by the VA National Acquisition Center in Federal Supply Classification (FSC) Groups 65 and 66 shall be mandatory for use by VA and shall have the same order of priority as mandatory Federal Supply Schedules (FAR 8.002(a)(1)(vi)). VA contracting officers must place orders against Federal Supply Schedules contracts awarded by the VA National Acquisition Center in FSC Groups 65 and 66 in the following descending order of priority:

(i) Nationally awarded Blanket Purchase Agreements (BPAs), issued by the VA National Acquisition Center against Federal Supply Schedules.

(ii) Multi-VISN, single-VISN, or locally awarded BPAs, issued by VISN, regional, or local VA contracting officers against Federal Supply Schedules.

(iii) Federal Supply Schedules without BPAs.

(4) Indefinite delivery indefinite quantity (IDIQ) contracts, awarded by VISN, regional, or local facility VA contracting officers, for supplies not covered by national committed use contracts or Federal Supply Schedule contracts shall have an order of priority between optional use Federal Supply Schedules (FAR 8.002(1)(a)(vii)) and commercial sources (including educational and nonprofit institutions) (FAR 8.002(1)(a)(viii)). VA contracting officers must place delivery orders against IDIQ contracts, awarded by VISN, regional, or a local facility contracting officers, for supplies not covered by national committed use contracts or Federal Supply Schedule contracts in the following descending order of priority:

(i) VISN or regionally awarded contracts.

(ii) Locally awarded contracts.

(5) Open market purchases (purchases not falling within any of the higher priorities in paragraphs (a)(2) through (4) of this section) have the same priority as commercial sources (including educational and nonprofit institutions) (FAR 8.002(1)(a)(viii)).

(b) *Unusual or compelling urgency.* The contracting officer may use a source lower in priority than as specified in paragraph (a) of this section when the need for supplies or services is of an unusual or compelling urgency (see FAR 6.302–2). The Contracting Officer must include a justification for each deviation in the procurement file.

(c) *Eligible Beneficiaries.* (1) A contracting officer may authorize an acquisition from the Veterans Canteen Service or a commercial source when a VA healthcare official (e.g., social worker, physician) determines that personal selection of shoes, clothing, and incidentals will result in a therapeutic benefit to an eligible beneficiary.

(2) The contracting officer must cite Federal Prison Industries, Inc., clearance No. 1206 in the purchase document for any purchase from a commercial source of dress shoes similar to Federal Prison Industries, Inc., Style No. 86–A.

Subpart 808.4—Federal Supply Schedules

808.402 General.

The Executive Director and Chief Operating Officer, VA National Acquisition Center, advertises, negotiates, awards, administers, and issues the Federal Supply Schedules for Federal Supply Classification Groups 62, 65, and 89 and for cost-per-test services under Group 66.

Subpart 808.8—Acquisition of Printing and Related Supplies

808.802 Policy.

The Director, Publications Staff, Office of Acquisition and Materiel Management, VA Central Office, is the Central Printing Authority for VA (see FAR 8.802(b)).

PART 809—CONTRACTOR QUALIFICATIONS

Subpart 809.1—Responsible Prospective Contractors

Sec.
809.104 Standards.
809.104–2 Special standards.
809.106 Preaward surveys.
809.106–1 Conditions for preaward surveys.

Subpart 809.2—Qualifications Requirements

809.201 Definitions.
809.202 Policy.
809.204 Responsibilities for establishment of a qualification requirement.
809.206 Acquisitions subject to qualification requirements.
809.206–1 General.
809.270 Qualified products for convenience/labor-saving foods.

Subpart 809.4—Debarment, Suspension, and Ineligibility

809.400 Scope of subpart.
809.402 Policy.
809.404 Excluded Parties List System.
809.405 Effect of listing.
809.405–1 Continuation of current contracts.
809.405–2 Restrictions on subcontracting.
809.406 Debarment.
809.406–1 General.
809.406–3 Procedures.
809.406–4 Period of debarment.
809.407 Suspension.
809.407–1 General.
809.407–3 Procedures.
809.470 Fact-finding procedures.

Subpart 809.5—Organizational and Consultant Conflicts of Interest

809.503 Waiver.
809.504 Contracting officer responsibilities.
809.507 Solicitation provisions and contract clause.
809.507–1 Solicitation provisions.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 809.1—Responsible Prospective Contractors

809.104 Standards.

809.104–2 Special standards.

(a) For a pre-award survey prescribed by 809.106–1, a contracting officer must develop special standards of sanitation applicable to the acquisition of subsistence and services prescribed by 809.106–1(a).

(b) An appropriate specialist will assist the contracting officer in developing the special standards under paragraph (a) of this section.

809.106 Pre-award surveys.

809.106–1 Conditions for pre-award surveys.

(a) Except as provided in paragraphs (b) through (e) of this section, a committee under the direction of the contracting officer and composed of representatives of the medical service or

using service chiefs or designees appointed by the facility or VISN director will conduct a pre-award on-site evaluation of the plant, personnel, equipment and processes of the prospective contractor for contracts covering the products and services of the following:

(1) Bakeries.

(2) Dairies.

(3) Ice cream plants.

(4) Laundry and dry cleaning activities.

(b) Before any inspection, the contracting officer will determine whether another VA facility or another Federal agency has recently inspected and approved the plant.

(1) The contracting officer will accept an approved inspection report of another VA facility.

(2) If another Federal agency made a plant inspection not more than 6 months before the proposed VA contract period, the contracting officer may accept an approved inspection report of that other Federal agency as satisfactory evidence that the facilities of the bidder meet the bid requirements.

(c) VA will not conduct a pre-award on-site evaluation of a dairy plant when VA receives an acceptable bid from a supplier of dairy products designated as No.1 in the Federal Specifications if the following conditions are met:

(1) The supplier has received a pasteurized milk rating of 90 percent or more for the type of product being supplied, on the basis of the U.S. Public Health Service milk ordinance and code.

(2) The rating is current (not over 2 years old) and has been determined by a certified State milk sanitation rating officer in the State of origin or by the Public Health Service. The contractor must maintain the rating of 90 percent or more during the period of the contract.

(3) The solicitation specifications must include the requirements in paragraphs (c)(1) and (2) of this section.

(d) A dairy plant that does not meet paragraph (c) of this section may offer only dairy products designated as No. 2 in the Federal Specifications. VA will make an award to such a firm only after it completes a pre-award on-site evaluation conducted under paragraph (a) of this section.

(e) Before it makes an open market purchase of fresh bakery products (such as pies, cakes, and cookies), VA will inspect and evaluate the plant where these products are produced or prepared under paragraph (a) of this section. VA will make an on-site evaluation at least annually and record the results on VA Form 10–2079, Inspection Report of Bakery.

Subpart 809.2—Qualifications Requirements

809.201 Definitions.

For the purposes of this subpart:

VA QPL means a VA Qualified Products List, a list of products qualified by the VA under VA specifications, or purchase descriptions, or commercial item descriptions.

VISN QPL means a VISN Qualified Products List, a list of products qualified by a VISN under VA specifications, or purchase descriptions, or commercial item descriptions.

809.202 Policy.

The HCA may sign a justification required by FAR 9.202(a)(1).

809.204 Responsibilities for establishment of a qualification requirement.

(a) Under FAR Subpart 9.2, VA may create VA QPLs for use on individual solicitations or on multiple solicitations issued by one or more VA facilities.

(b) An HCA or designee must support the creation of a VA QPL using one or more of the following justifications:

(1) The time required for testing the product after award would unduly delay product delivery.

(2) The cost of repetitive product testing would be excessive.

(3) Testing the product would require purchasing an expensive or complicated apparatus not commonly available.

(4) It is in the Government's interest to be assured before contract award that the product is satisfactory for its intended use.

(5) Determining acceptability would require providing product performance data to supplement technical requirements in the specification.

(6) Conducting a test would result in substantial or repetitive rejections.

(7) VA cannot economically develop clear, professional specifications for the product performance, balance, design, or construction, and professional judgment is required to determine whether the product is acceptable under VA requirements.

(c) If VA plans to establish a VA QPL for any given product, the contracting officer may limit known suppliers to suppliers whose products are covered by a Federal Supply Schedule contract, as provided at FAR Subpart 8.4.

(d) VA will pay the costs to inspect and test a product sample submitted under this section.

(1) The product supplier must pay for the sample and its transportation to the place of inspecting and testing.

(2) After inspection and testing, VA will return any product sample to the supplier ''as is'' unless:

(i) The inspection or test destroys the sample; or

(ii) The supplier authorizes VA to retain or dispose of the sample.

(e) Once VA accepts a product for the VA QPL, VA may review the product for compliance with the applicable specification at any time.

(1) Where there is a variance between a VA specification that was the basis for the VA QPL and the product furnished by the supplier, the supplier must furnish an item that conforms to the VA specification.

(2) If the supplier fails to or is unable to provide a product that conforms to the applicable VA specification, the product will be removed from the VA QPL.

(f) VA's acceptance of a product for listing on the VA QPL does not:

(1) Guarantee that VA will accept the product in any future purchase; or

(2) Constitute a waiver of the specifications as to acceptance, inspection, testing, or other provisions of any future contract involving the product.

809.206 Acquisitions subject to qualification requirements.

809.206–1 General.

The HCA may determine that an emergency exists, as provided in FAR 9.206–1(b).

809.270 Qualified products for convenience/labor-saving foods.

(a) Each VISN Nutrition and Food Service representative is authorized to establish a common VISN QPL for convenience and labor-saving foods for use at medical facilities within the representative's VISN.

(1) The VISN Nutrition and Food Service representative must notify the Director, Nutrition and Food Service, VA Central Office, of the establishment or amendment of any VISN QPL.

(2) To avoid unnecessary duplication within a VISN, for medical facilities using an applicable VISN QPL under paragraph (b) of this section, the VISN Nutrition and Food Service representative must coordinate and consolidate test results and recommendations.

(b) Each medical facility may:

(1) Use its VISN QPL; and

(2) Test food of its choice, provided that the facility submits test results to the VISN Nutrition and Food Service representative.

(c) The VISN representative must provide a copy of each approved VISN QPL to the following:

(1) Each contracting office in the VISN.

(2) The Director, Nutrition and Food Service, VA Central Office.

(3) Upon request, the Office of Acquisition and Materiel Management, VA Central Office.

Subpart 809.4—Debarment, Suspension, and Ineligibility

809.400 Scope of subpart.

This subpart supplements provisions of the FAR concerning procedures and related actions for the debarment and suspension of contractors.

809.402 Policy.

(a) When VA receives information that another agency is pursuing a debarment or suspension identical to a VA action against the same contractor,

the Debarment and Suspension (D&S) Committee will coordinate prospective action with the appropriate official of the other agency to establish a lead agency.

(b) The D&S Committee will provide the designated lead agency with any information relevant to the action for consideration in the decision-making process.

(c) The D&S Committee will maintain close coordination with the appropriate official through completion of a final debarment or suspension decision.

809.404 Excluded Parties List System.

Acquisition Resources Service, Office of Acquisition and Materiel Management, is responsible for the actions described in FAR 9.404(c).

809.405 Effect of listing.

The authority under FAR 9.405(a), 9.405(d)(2), and 9.405(d)(3) to determine whether to solicit from, evaluate bids or proposals from, or award contracts to contractors whose names appear on the Excluded Parties List System is delegated to the SPE and is further delegated to the DSPE.

809.405–1 Continuation of current contracts.

Authority to make the determinations under FAR 9.405–1 is delegated to the SPE and is further delegated to the DSPE.

809.405–2 Restrictions on subcontracting.

When a subcontract is subject to Government consent, authority to make the written determination required under FAR 9.405–2 consenting to a contractor's use of a subcontractor who is debarred, suspended, or proposed for debarment is delegated to the SPE and is further delegated to the DSPE.

809.406 Debarment.

809.406–1 General.

(a) As provided in FAR 9.406–1(c), authority to determine whether to continue business dealings between VA and a contractor debarred or proposed for debarment is delegated to the SPE and is further delegated to the DSPE.

(b) For the purposes of FAR 9.406–1, the DSPE is the debarring official under the Federal Management Regulation at 41 CFR 102–117.295.

(c) Additional factors that a debarring official should consider before arriving at a debarment decision include the following:

(1) Whether the contractor had a mechanism, such as a hotline, by which employees could have reported suspected instances of improper conduct, and instructions in place that encouraged employees to make such reports.

(2) Whether the contractor conducted periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting.

(3) Whether the contractor conducted internal and external audits as appropriate.

(4) Whether the contractor timely reported to appropriate Government officials any suspected or possible violations of law in connection with Government contracts or any other irregularities in connection with such contracts.

809.406–3 Procedures.

(a) Any individual may submit a recommendation to debar a contractor to the DSPE. The recommendation to debar must be supported with evidence of a cause for debarment listed in FAR 9.406–2. When the DSPE receives a recommendation for debarment, he or she will refer the matter to the D&S Committee. If the reporting individual is a VA employee and the recommendation to debar is based on possible criminal or fraudulent activities, the VA employee must report the circumstances to the VA Office of Inspector General before making a recommendation to the DSPE.

(b) When the D&S Committee finds evidence of a cause for debarment, as listed in FAR 9.406–2, with or without a recommendation, it will conduct a fact-finding and present facts to the debarring official.

(c) If the debarring official finds a basis for proposing a contractor for debarment, the D&S Committee will prepare a notice of proposed debarment

under FAR 9.406–3(c) for the signature of the debarring official. The signed notice of proposed debarment will be sent to the last known address of the contractor, the contractor's counsel, or agent for service of process, by certified mail, return receipt requested. In the case of a business, the D&S Committee may send the notice of proposed debarment to any partner, principal, officer, director, owner or co-owner, or joint venture. The D&S Committee concurrently must post notice of proposed debarment to the General Services Administration Excluded Parties List System pending a debarment decision.

(d) If VA does not receive a reply from the contractor within 45 calendar days of sending the notice of proposed debarment, the D&S Committee will prepare a recommendation and refer the case to the debarring official for a decision on whether or not to debar based on the information available.

(e) If VA receives a reply from the contractor within 45 calendar days of sending the notice of proposed debarment, the D&S Committee must consider the information in the reply before the D&S Committee makes its recommendation to the debarring official.

(f) The D&S Committee, upon the request of the contractor proposed for debarment, must, as soon as practicable, allow the contractor an opportunity to appear before the D&S Committee to present information or argument in person or through a representative. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript. The D&S Committee shall prepare a report of the proceeding for the debarring official.

(g) If the D&S Committee finds that the contractor's submission in opposition to the debarment raises a genuine dispute over facts material to the proposed debarment and the debarment action is not based on a conviction or civil judgment, then the D&S Committee shall submit to the debarring official the information establishing the dispute of material facts. If the debarring official agrees that there is a genuine dispute of material facts, the debarring official shall refer the dispute to a designee for resolution pursuant to 809.470.

(h) If there are no disputes over material facts, the debarment action is based on a conviction or civil judgment, or all disputes over material facts have been resolved pursuant to 809.470, the debarring official will make a decision on the basis of all information available, including findings of facts and oral or written arguments presented or submitted to the D&S Committee by the contractor. The D&S Committee must update the status of the action on the General Services Administration Excluded Parties List System.

809.406–4 Period of debarment.

(a) Except in an unusual circumstance, the period of debarment will not exceed 3 years. The debarring official will base the period of debarment on the circumstances surrounding the cause for debarment.

(b) The DSPE may remove a debarment, amend its scope, or reduce the period of debarment based on a D&S Committee recommendation if:

(1) VA has debarred the contractor;

(2) The action is indicated after the DSPE reviews documentary evidence submitted by or on behalf of the contractor setting forth the appropriate grounds for granting relief. Appropriate grounds include newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, elimination of the cause for which debarment was imposed, or any other appropriate grounds.

809.407 Suspension.

809.407–1 General.

(a) As provided in FAR 9.407–1(d), authority to determine whether to continue business dealings between VA and a suspended contractor is delegated to the SPE and is further delegated to the DSPE.

(b) For the purposes of FAR 9.407–1, the DSPE is the suspending official under the Federal Management Regulation at 41 CFR 102–117.295.

809.407–3 Procedures.

(a) Any individual may submit a recommendation to suspend a contractor to the DSPE. The recommendation to suspend must be supported with evidence of a cause for suspension listed in FAR 9.407–2. When the DSPE receives a recommendation for suspension, he or she will refer the matter to the D&S Committee. If the reporting individual is a VA employee and the recommendation to suspend is based on possible criminal or fraudulent activities, the VA employee must report the circumstances to the VA Office of Inspector General before making a recommendation to the DSPE.

(b) When the D&S Committee finds evidence of a cause for suspension, as listed in FAR 9.407–2, with or without a recommendation, it will conduct a fact-finding and present facts and recommendations to the suspending official.

(c) If the suspending official finds a basis for suspending a contractor, the D&S Committee will prepare a notice of suspension under FAR 9.407–3(c) for the signature of the suspending official. The signed notice of suspension will be sent to the last known address of the contractor, the contractor's counsel, or agent for service of process, by certified mail, return receipt requested. In the case of a business, the D&S Committee may send the notice of suspension to any partner, principal, officer, director, owner or co-owner, or joint venture. The D&S Committee concurrently must post notice of suspension to the General Services Administration Excluded Parties List System pending completion of investigation and any ensuing legal proceedings.

(d) If VA receives a reply from the contractor within 45 calendar days of sending the notice of suspension, the D&S Committee must consider the information in the reply before the Committee makes further recommendations to the suspending official. The D&S Committee, upon the request of a suspended contractor, must, as soon as practicable, allow the contractor an opportunity to appear before the D&S Committee to present information or argument in person or through a representative. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript. The D&S Committee shall prepare a report of the proceeding for the suspending official.

(e) In actions not based on an indictment, if the D&S Committee finds that the contractor's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, the D&S Committee shall submit to the suspending official the information establishing the dispute of material facts. However, the D&S Committee must first coordinate any further proceeding regarding the facts in dispute with the Department of Justice or with a State prosecuting authority in a case involving a State jurisdiction. VA will take no further action to determine disputed material facts pursuant to this section or 809.470 if the Department of Justice or a State prosecuting authority advises VA that additional proceedings to make such a determination would prejudice Federal or State legal proceedings.

(f) If the suspending official agrees that there is a genuine dispute of material facts, the suspending official shall refer the dispute to the designee for resolution pursuant to 809.470.

809.470 Fact-finding procedures.

The provisions of this section constitute the procedures to be used to resolve genuine disputes of fact pursuant to 809.406–3 and 809.407–3 of this chapter. The DSPE shall appoint a designee to conduct the fact-finding. OGC shall represent VA at any fact-finding hearing and may present witnesses for VA and question any witnesses presented by the contractor. The hearings shall be conducted in Washington, DC. The proceedings before the fact-finder will be limited to a finding of the facts in dispute, as determined by the debarring or suspending official. The fact-finder will establish the date for the fact-finding hearing, normally to be held within 45 working days of the submission of the dispute.

(a) The Government's representative and the contractor will have an opportunity to present evidence relevant to the facts at issue. The contractor may

appear in person or through a representative at the fact-finding hearing. The contractor may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the fact-finder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall determine the disputed fact(s) by a preponderance of the evidence. As required by FAR 9.406–3(d)(2)(i) and 9.407–3(d)(2)(i), written findings of fact shall be prepared by the fact-finder. A copy of the findings of fact shall be provided to the debarring or suspending official, the Government's representative, and the contractor.

Subpart 809.5—Organizational and Consultant Conflicts of Interest

809.503 Waiver.

The HCA is delegated authority to waive any general rule or procedure of FAR Subpart 9.5. As provided at FAR 9.503, this authority may not be redelegated.

809.504 Contracting officer responsibilities.

(a) A contracting officer must determine whether awarding a contract will result in an actual or potential conflict of interest for the contractor.

(1) The contracting officer will make a conflict of interest determination after reviewing information submitted by offerors, evaluating information gathered under FAR 9.506, and exercising his or her own judgment.

(2) In evaluating possible organizational conflicts of interest, the contracting officer may obtain the advice of legal counsel and the assistance of technical specialists.

(b) If the contracting officer determines that there is no way to avoid or mitigate an organizational conflict of interest arising from a contract award, the contracting officer may disqualify the offeror from award under FAR 9.504(e).

(c) Even if awarding a contract will result in an organizational conflict of interest, the contracting officer may request a waiver from his or her HCA if awarding the contract is in the best interests of the Government.

(1) Before granting a waiver request under this paragraph, the HCA must obtain the concurrence of OGC.

(2) If the HCA grants a waiver request, the contracting officer may set contract terms and conditions to reduce any organizational conflict of interest to the greatest extent possible.

(d) In any solicitation for the services addressed at FAR 9.502, the contracting officer must require that each offeror submits a statement with its offer disclosing all facts relevant to an existing or potential organizational conflict of interest involving the contractor or any subcontractor during the life of the contract (see 809.507–1(b) and 852.209–70).

809.507 Solicitation provisions and contract clause.

809.507–1 Solicitation provisions.

(a) While conflicts of interest may not presently exist, award of certain types of contracts may create potential future organizational conflicts of interest (see FAR 9.508 for examples). If a solicitation may create a potential future organizational conflict of interest, the contracting officer shall insert a provision in the solicitation imposing an appropriate restraint on the contractor's eligibility for award of contracts in the future. Under FAR 9.507–1, the restraint must be appropriate to the nature of the conflict and may exclude the contractor from award of one or more contracts in the future.

(b) The clause at 852.209–70, Organizational conflicts of interest, must be included in any solicitation for the services addressed in FAR 9.502.

PART 811—DESCRIBING AGENCY NEEDS

Subpart 811.0—Definitions

Sec.
811.001 Definitions.

Subpart 811.1—Selecting and Developing Requirements Documents

811.103 Market acceptance.
811.103–70 Technical industry standards.
811.104 Use of brand name or equal purchase descriptions.
811.104–70 Brand name or equal purchase descriptions.
811.104–71 Purchase description clauses.
811.104–72 Limited application of brand name or equal.
811.104–73 Bid samples.
811.104–74 Bid evaluation and award.
811.104–75 Procedure for negotiated procurements.
811.105 Items peculiar to one manufacturer.
811.107 Contract clauses.

Subpart 811.2—Using and Maintaining Requirements Documents

811.202 Maintenance of standardization documents.
811.204 Contract clause.

Subpart 811.4—Delivery or Performance Schedules

811.404 Contract clause.

Subpart 811.5—Liquidated Damages

811.501 Policy.
811.503 Contract clause.

Subpart 811.6—Priorities and Allocations

811.602 General.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

811.001 Definitions.

For the purposes of this part:

Brand name product means a commercial product described by brand name and make or model number or other appropriate nomenclature by which the product is offered for sale to the public by the particular manufacturer, producer or distributor.

Salient characteristics means those particular characteristics that specifically describe the essential physical and functional features of the material or service required. They are features that are identified in the specifications as a mandatory requirement that a proposed ''equal'' product or material must possess for the bid to be considered responsive.

Subpart 811.1—Selecting and Developing Requirements Documents

811.103 Market acceptance.

811.103–70 Technical industry standards.

Where items are required to conform to technical industry standards, such as those adopted by: Underwriters Laboratories, Inc.; Factory Mutual Laboratories; American Gas Association; American Society of Mechanical Engineers; National Electrical Manufacturers Association; American Society of Heating, Refrigerating and Air-Conditioning Engineers; or similar organizations, where such standards are generally recognized and accepted in the industry involved, the invitation for bids, request for proposals or request for quotations will so state. In no instance, where there is a multiple choice of laboratories, shall the invitation for bid, request for proposal, or request for quotation indicate that the label or certificate of only one such laboratory is acceptable. The contracting officer shall include the provision at 852.211–72, Technical industry standards, in solicitations requiring conformance to technical industry standards unless comparable provisions are contained in the item specification.

811.104 Use of brand name or equal purchase descriptions.

811.104–70 Brand name or equal purchase descriptions.

(a) The specification writer may use purchase descriptions that contain references to one or more brand name products only in accordance with 811.104–71 through 811.104–75.

(b) Purchase descriptions that contain references to one or more brand name products must be followed by the words ''or equal,'' except when the acquisition of a specific brand name is

fully justified under FAR Subpart 6.3 and 806.3. If more than one brand name is acceptable, the contracting officer should list the known acceptable brand name products in the solicitation.

(c) Where a ''brand name or equal'' purchase description is used, the contracting officer must give bidders an opportunity to offer products other than those specifically referenced by brand name. Following bid opening or receipt of offers, the contracting officer must determine if non-''brand name'' substitute products fully meet the salient characteristics listed in the solicitation.

(d) When using a ''brand name or equal'' purchase description, the specification writer must set forth those salient physical, functional, or other characteristics of the referenced products that are essential to the minimum needs of the Government. For example, when interchangeability of parts is required, the specification writer must specify this requirement. The purchase description must contain the following information to the extent available:

(1) Complete common generic identification of the item required.

(2) Applicable model, make, or catalog number for each brand name product referenced and identity of the commercial catalog in which it appears.

(3) Name of manufacturer, producer, or distributor of each brand name product referenced (and address if not well known).

(4) Any other information necessary to describe the item required.

(e) When necessary to adequately describe the item required, the contracting officer may use an applicable commercial catalog description or pertinent extract if the description is identified in the solicitation as being that of the particular named manufacturer, producer, or distributor. The contracting officer must insure that a copy of any catalog referenced (except a parts catalog) is available on request for review by bidders at the purchasing office.

(f) Except as noted in paragraph (d) of this section, the specification writer must not include in a purchase description either minimum or maximum restrictive dimensions, weights, materials, or other salient characteristics that are unique to a brand name product or that would tend to eliminate competition or other products that are only marginally outside the restrictions. However, the specification writer may include in a purchase description restrictive dimensions, weights, materials, or other salient characteristic if:

(1) The user determines in writing that the restrictions are essential to the Government's requirements;

(2) The specification writer includes the brand name of the product in the purchase description; and,

(3) The contracting officer makes all other determinations required by 811.105.

(g) The contracting officer must include in the contract file, as appropriate, written justifications for using the ''brand name or equal'' description, the contracting officer's determinations, and bidder submissions.

811.104–71 Purchase description clauses.

(a) When a solicitation uses ''brand name or equal'' purchase descriptions, the contracting officer must include in the solicitation the clause at 852.211–73, Brand name or equal, and the provision set forth at FAR 52.214–21, Descriptive Literature. The contracting officer must review the requirements at FAR 14.202–5 when using the descriptive literature provision.

(b) When a ''brand name or equal'' purchase description is included in an invitation for bids, the contracting officer shall insert the following after each item so described in the solicitation, for completion by the bidder:

Bidding on:

Manufacturer name _____

Brand _____

No. _____

811.104–72 Limited application of brand name or equal.

If the contracting officer determines that the clause at 852.211–73, Brand name or equal, applies to only certain line items of a solicitation, the requirements of 811.104–71(b) apply to those line items and the contracting officer must include a statement in the solicitation as follows:

The clause entitled ''Brand name or equal'' applies only to the following line items: [*List the line items to which the clause applies*]

811.104–73 Bid samples.

(a) When a solicitation contains ''brand name or equal'' purchase descriptions, the contracting officer must not require a bidder who offers brand name products, including component parts, referenced in the descriptions to furnish bid samples of the referenced brand name products.

(b) A solicitation may require the submission of bid samples in the case of a bidder offering ''or equal'' products. If bid samples are required, the contracting officer must include in the solicitation the provision set forth at FAR 52.214–20, Bid Samples.

(c) A bidder must furnish all descriptive literature in accordance with and for the purpose set forth in the ''Brand Name or Equal'' clause, 852.211–73(c)(1) and (c)(2), even though bid samples may not be required.

811.104–74 Bid evaluation and award.

(a) A bid offering products that differ from brand name products referenced in a ''brand name or equal'' purchase description must be considered for award if the contracting officer determines in accordance with the terms of the clause at 852.211–73, Brand name or equal, that the offered products are clearly identified in the bid and are equal in all material respects to the products specified.

(b) In award documents, the contracting officer must include, or incorporate by reference, an identification of the specific products that the contractor is to furnish. The identification must include any brand name and make or model number, descriptive material, and any modifications of brand name products specified in the bid. This requirement also applies when the descriptions of the end items contain ''brand name or equal'' purchase descriptions of component parts or of accessories related to the end item, and the clause at 852.211–73, Brand name or equal, was applied to the component parts or accessories (see 811.104–72).

811.104–75 Procedure for negotiated procurements.

(a) The specification writer and contracting officer must use the policies and procedures prescribed in 811.104–70 through 811.104–74 as a guide in developing adequate purchase descriptions for negotiated procurements.

(b) The contracting officer may adapt the clause at 852.211–73, Brand name or equal, for use in negotiated procurements. When use of the clause is not practical (as may be the case in unusual and compelling urgency purchases), the contracting officer must inform suppliers that proposals offering products different from the products referenced by brand name will be considered if the contracting officer determines that the offered products are equal in all material respects to the products referenced. The contracting officer must place decisions under this paragraph in writing for the contract file, as appropriate.

811.105 Items peculiar to one manufacturer.

(a) Except as provided in paragraph (b) of this section, the specification writer must write specifications in accordance with FAR 11.002.

(b)(1) When the specification writer determines that a particular physical or functional characteristic of only one product will meet the minimum requirements of VA (see FAR 11.105) or that a ''brand name or equal'' purchase description must be used (see FAR 11.104), the specification writer must identify the item(s) for the contracting officer and do one of the following:

(i) Provide a full written justification of the reason the particular characteristic is essential to the Government's requirements.

(ii) Explain why the ''brand name or equal'' purchase description is necessary.

(2) The contracting officer makes the final determination whether restrictive specifications or ''brand name or equal'' purchase descriptions will be included in the solicitation.

811.107 Contract clauses.

(a) Insert the clause at 852.211–70, Service data manuals, paragraph (a), in solicitations and requests for proposals

for technical medical and other technical equipment and devices issued by a field facility unless the facility Chief, Engineering Service, indicates that the service data manuals are not needed. The purpose of the clause is to require the manufacturer to provide VA a manual or groups of manuals that will allow for the in-house repair of the equipment purchased.

(b) Insert the clause at 852.211–70, Service data manuals, paragraph (b), in solicitations and requests for proposals for mechanical equipment (other than technical medical and other technical equipment and devices) issued by a field station.

Subpart 811.2—Using and Maintaining Requirements Documents

811.202 Maintenance of standardization documents.

(a) *Military and departmental specifications.* Contracting officers may, when it is advantageous to VA, use these specifications when procuring supplies and equipment costing less than the simplified acquisition threshold. When purchasing items of perishable subsistence, contracting officers may take into account only those exemptions set forth in paragraphs (b)(2) and (b)(3) of this section.

(b) *Nutrition and Food Service specifications.* (1) VA has adopted for use in the procurement of packinghouse products the purchase descriptions and specifications set forth in the Institutional Meat Purchase Specifications (IMPS) and the IMPS General Requirements, which have been developed by the U.S. Department of Agriculture. Purchase descriptions and specifications for dairy products, poultry, eggs, fresh and frozen fruits and vegetables, as well as certain packinghouse products selected from the IMPS especially for VA use, are contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, Publication No. C8900–SL.

(2) The military specifications for meat and meat products contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, must be used by VA only when purchasing such items of subsistence from the Defense Logistics Agency (DLA). Military specifications for poultry, eggs, and egg products contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, may be used when purchasing either from DLA or from local dealers.

(3) Except as authorized in Part 846, a contracting officer must not deviate from the specifications contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, and the IMPS without prior approval from the DSPE.

(4) Items of meat, cured pork and poultry purchased under the Subsistence Prime Vendor national contract or other local procurement sources should be purchased via Commercial Item Descriptions (CID) that require all products meet USDA Grading standards and/or the IMPS as applicable.

(c) *Department of Veterans Affairs specifications.* (1) The Director, Publications Staff, is responsible for developing, publishing, and distributing VA specifications covering printing and binding.

(2) VA specifications, as they are revised, are placed in stock in the VA Forms and Publications Depot. The contracting officer may requisition facility requirements for these specifications from that source.

(d) *Government paper specification standards.* (1) Invitations for bids, requests for proposals, purchase orders, or other procurement instruments covering the purchase of paper stocks to be used in duplicating or printing, or which specify the paper stocks to be used in buying printing, binding, or duplicating, must require that the paper stocks be in accordance with the Government Paper Specification Standards issued by the Congressional Joint Committee on Printing.

(2) All binding or rebinding of books, magazines, pamphlets, newspapers, slip cases, and boxes must be procured in accordance with Government Printing Office (GPO) specifications and must be procured from the servicing GPO Regional Printing Procurement Office or, when appropriate, from commercial sources.

(3) There are three types of binding/rebinding: Class A (hard cover); Perfect

(glued); and Lumbinding (sewn). The most suitable type of binding must be procured to satisfy the requirements, based upon the intended use of the bound material.

811.204 Contract clause.

Insert the clause at 852.211–75, Product specifications when product specifications are cited in an invitation for bids or a request for proposals.

Subpart 811.4—Delivery or Performance Schedules

811.404 Contract clause.

When delivery is required by or on a particular date for f.o.b. destination contracts, the contracting officer must add a statement following the Time of Delivery clause in FAR 52.211–8 that the delivery date specified is the date by which the shipment is to be delivered, not the shipping date. In f.o.b. origin contracts, the contracting officer must add a statement following this clause that the date specified is the date shipment is to be accepted by the carrier.

Subpart 811.5—Liquidated Damages

811.501 Policy.

The contracting officer must not routinely include a liquidated damages provision in supply or construction contracts, regardless of dollar amount. The decision to include liquidated damages provisions must conform to the criteria in FAR 11.501. In making this decision, the contracting officer must consider whether the necessity for timely delivery or performance as required in the contract schedule is so critical that a probable increase in contract price is justified. The contracting officer must not use a liquidated damages provision for any of the following reasons:

(a) As insurance against selection of a non-responsible bidder.

(b) As a substitute for efficient contract administration.

(c) As a penalty for failure to perform on time.

811.503 Contract clause.

When the contracting officer determines that the Liquidated damages clause prescribed in FAR 52.211–11 or 52.211–12 must be used and where partial performance by the contractor may be to the advantage of the Government, the contracting officer must include the clause in 852.211–74, Liquidated damages, in the contract.

Subpart 811.6—Priorities and Allocations

811.602 General.

(a) Priorities and allocations of critical materials are controlled by the Department of Commerce. Essentially, priorities and allocations of critical materials are restricted to projects having a direct connection with supporting current defense needs. VA is not authorized to assign a priority rating to its purchase orders or contracts involving the acquisition or use of critical materials.

(b) When it has been technically established that it is not feasible to use a substitute material, the Department of Commerce has agreed to assist the VA in obtaining critical materials for maintenance and repair projects. The Department of Commerce will also, when possible, render assistance in connection with the purchase of new items, which may be in short supply because of their use in connection with the defense effort.

(c) A contracting officer having problems acquiring critical materials must ascertain all the facts necessary to enable the Department of Commerce to render assistance to VA in acquiring these materials. The contracting officer must submit a request for assistance to the DSPE containing the following information:

(1) A description of the maintenance and repair project or the new item.

(2) The critical material and the amount required.

(3) The contractor's sources of supply, including any addresses. If the source is other than the manufacturer or producer, also list the name and address of the manufacturer or producer.

(4) The VA contract or purchase order number.

(5) The contractor's purchase order number, if known, and the delivery time requirement as stated in the solicitation or offer.

(6) The additional time the contractor claims is necessary to deliver the materials if priority assistance is not provided.

(7) The nature and extent of the emergency that will be generated at the station, such as any of the following:

(i) Damage to the physical plant.

(ii) Impairment of the patient care program.

(iii) Creation of safety hazards.

(iv) Any other pertinent condition that could result because of failure to secure assistance in obtaining the critical materials.

(8) If applicable, a statement that the item required is for use in a construction contract that was authorized by the Director, Office of Construction and Facilities Management, to be awarded and administered by the facility contracting officer.

PART 812—ACQUISITION OF COMMERCIAL ITEMS

Subpart 812.1—Acquisition of Commercial Items—General

Sec.

812.102 Applicability.

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 812.1—Acquisition of Commercial Items—General

812.102 Applicability.

(a) This part shall be used for the acquisition of supplies and services that meet the definition of commercial items at FAR 2.101.

(b) Contracting officers shall use the policies in this part in conjunction with the policies and procedures for the solicitation, evaluation, and award prescribed in Parts 813, Simplified Acquisition Procedures, 814, Sealed Bidding, and 815, Contracting by Negotiation, as appropriate for the particular acquisition.

(c) Contracts for the acquisition of commercial items are subject to the policies of other parts of this chapter. When a policy in another part of this chapter differs from a policy in this part, this Part 812 applies to the acquisition of commercial items.

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(a) Regardless of provisions in other parts of the VAAR, contracting officers may use, as appropriate, only those provisions and clauses referred to in this part when acquiring commercial items.

(b) Contracting officers may use the provisions and clauses in the following VAAR sections, as appropriate and in accordance with the prescriptions for the provisions and clauses, in requests for quotations, solicitations, and contracts:

(1) 852.203–70, Commercial advertising.

(2) 852.203–71, Display of Department of Veterans Affairs Hotline poster.

(3) 852.207–70, Report of employment under commercial activities.

(4) 852.209–70, Organizational conflicts of interest.

(5) 852.211–71, Special notice.

(6) 852.211–72, Technical industry standards.

(7) 852.211–73, Brand name or equal.

(8) 852.211–75, Product specifications.

(9) 852.214–70, Caution to bidders—bid envelopes.

(10) 852.214–71, Restrictions on alternate item(s).

(11) 852.214–72, Alternate item(s).

(12) 852.214–73, Alternate packaging and packing.

(13) 852.214–74, Bid samples.

(14) 852.216–70, Estimated quantities.
(15) 852.228–71, Indemnification and insurance.
(16) 852.229–70, Sales and use taxes.
(17) 852.233–70, Protest content/alternative dispute resolution.
(18) 852.233–71, Alternate protest procedure.
(19) 852.237–7, Indemnification and medical liability insurance.
(20) 852.237–70, Contractor responsibilities.
(21) 852.246–70, Guarantee.
(22) 852.246–71, Inspection.
(23) 852.246–72, Frozen processed foods.
(24) 852.252–70, Solicitation provisions or clauses incorporated by reference.
(25) 852.270–1, Representatives of contracting officers.
(26) 852.270–2, Bread and bakery products—quantities.
(27) 852.270–3, Purchase of shellfish.
(28) 852.271–72, Time spent by counselee in counseling process.
(29) 852.271–73, Use and publication of counseling results.
(30) 852.271–74, Inspection.
(31) 852.271–75, Extension of contract period.

(c) When appropriate in accordance with the prescriptions for the clauses, the contracting officer may use the clauses in the following VAAR sections in requests for quotations, solicitations, and contracts for the acquisition of commercial items if the contracting officer determines that the use is consistent with customary commercial practices:
(1) 852.211–70, Service data manuals.
(2) 852.211–74, Liquidated damages.

(d) All requests for quotations, solicitations, and contracts for commercial item services to be provided to beneficiaries must include the clause at 852.271–70, Nondiscrimination in services provided to beneficiaries.

(e) Micro-purchases that use the procedures of this part in conjunction with part 813 do not require clauses unless the contracting officer determines that the use of clauses serves the Government's best interest.

(f) When soliciting for health care resources that are commercial services or the use of medical equipment or space under the authority of part 873 and 38 U.S.C. 8151–8153, the provisions and clauses in the following VAAR sections may be used in accordance with the prescriptions contained therein or elsewhere in the VAAR:
(1) 852.273–70, Late offers.
(2) 852.273–71, Alternative negotiation techniques.
(3) 852.273–72, Alternative evaluation.
(4) 852.273–73, Evaluation—health-care resources.
(5) 852.273–74, Award without exchanges.

(38 U.S.C. 8151–8153)

812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(a) Contracting officers may tailor solicitations to be inconsistent with customary commercial practice if they prepare and obtain approval of a waiver under paragraph (c) of this section.

(b) The contracting officer must prepare the waiver in accordance with FAR 12.302(c). The waiver is subject to the tailoring prohibitions in FAR 12.302(b)(1) through 12.302(b)(6).

(c) The contracting officer must obtain approval for waivers from the following:
(1) The Chief, Acquisition Assistance Division, for individual contracts.
(2) The Chief, Acquisition Program Management Division, for a class of contracts.

(d) Contracting officers must submit waiver requests no later than the solicitation issue date.

(e) Contracting officers must retain approved requests in the contract file.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 813—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 813.1—Procedures

Sec.

813.106 Soliciting competition, evaluation of quotations or offers, award and documentation.
813.106–3 Award and documentation.
813.106–70 Oral purchase orders.

Subpart 813.3—Simplified Acquisition Methods

813.302 Purchase orders.
813.302–5 Clauses.
813.307 Forms.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 813.1—Procedures

813.106 Soliciting competition, evaluation of quotations or offers, award and documentation.

813.106–3 Award and documentation.

The contracting officer may record a quotation on an Abstract of Offers (SF 1409 or 1419), the purchase request if space permits, or other supplemental sheet or form, such as VA Form 10–2237b, Request for Dietetic Supplies.

813.106–70 Oral purchase orders.

When advantageous to VA, the contracting officer may use an oral purchase order for transactions not in excess of $3,000. This limitation does not apply to delivery orders against existing contracts, e.g., delivery orders against Federal Supply Schedule contracts. The contracting officer must assign a purchase order number to the transaction. A copy of any electronically generated purchase order may be used as a property voucher and receiving report to document receipt.

Subpart 813.3—Simplified Acquisition Methods

813.302 Purchase orders.

813.302–5 Clauses.

When using the VA Form 90–2138 or 90–2138–ADP for maintenance contracts involving services performed on Government property that have the potential for property damage and liability claims, the contracting officer shall insert in the purchase order the Contractor's Responsibilities clause found at 852.237–70. Applicable maintenance contracts include, but are not limited to, window washing, pest control, and elevator maintenance.

813.307 Forms.

(a) The following forms provide a purchase or delivery order, vendor's invoice, and receiving report:

(1) VA Form 90–2138, Order for Supplies or Services.

(2) VA Form 90–2139, Order for Supplies or Services (Continuation).

(3) VA Form 90–2138–ADP, Purchase Order for Supplies or Services.

(4) VA Form 2139–ADP, Order for Supplies and Services (Continuation).

(b) The contracting officer may use the forms specified in paragraphs (a)(1) through (a)(4) of this section instead of OF 347, Order for Supplies or Services, OF 348, Order for Supplies or Services Schedule—Continuation, and SF 1449, Solicitation/Contract/Order for Commercial Items.

(c) The contracting officer or other properly delegated official (see 801.670–3) may use the following order forms when ordering the indicated medical, dental, and ancillary services totaling up to $10,000 per authorization when such services are not available under existing contracts:

(1) VA Form 10–7078, Authorization and Invoice for Medical and Hospital Services.

(2) VA Form 10–7079, Request for Outpatient Medical Services.

(3) VA Form 10–2570d, Dental Record Authorization and Invoice for Outpatient Service.

(d) In authorizing patient travel as set forth in VA manual MP–1, Part II, Chapter 3, the contracting officer or other properly delegated official (see 801.670–3) may use VA Form 10–2511, Authority and Invoice for Travel by Ambulance or Other Hired Vehicle, as provided by that manual.

(e) The contracting officer must use SF 182, Request, Authorization, Agreement, and Certification of Training, for procurement of training.

(f) The contracting officer must use VA Form 10–2421, Prosthetics Authorization for Items or Services, for indicated services not in excess of $300.

PART 814—SEALED BIDDING

Subpart 814.1—Use of Sealed Bidding

Sec.
814.104 Types of contracts.
814.104–70 Fixed-price contracts with escalation.

Subpart 814.2—Solicitation of Bids

814.201 Preparation of invitations for bids.
814.201–6 Solicitation provisions.
814.203 Methods of soliciting bids.
814.203–1 Transmittal to prospective bidders.
814.204 Records of invitations for bids and records of bids.
814.208 Amendment of invitation for bids.

Subpart 814.3—Submission of Bids

814.301 Responsiveness of bids.
814.302 Bid submission.
814.304 Submission, modification, and withdrawal of bids.

Subpart 814.4—Opening of Bids and Award of Contract

814.401 Receipt and safeguarding of bids.
814.402 Opening of bids.
814.403 Recording of bids.
814.404 Rejection of bids.
814.404–1 Cancellation of invitations after opening.
814.404–2 Rejection of individual bids.
814.404–70 Questions involving the responsiveness of a bid.
814.407 Mistakes in bids.
814.407–3 Other mistakes disclosed before award.
814.407–4 Mistakes after award.
814.408 Award.
814.408–70 Award when only one bid is received.
814.408–71 Recommendation for award (construction).
814.409 Information to bidders.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 814.1—Use of Sealed Bidding

814.104 Types of contracts.

814.104–70 Fixed-price contracts with escalation.

When fixed price contracts with escalation are authorized under 816.102(a), a contracting officer must comply with FAR 16.203–1 through 16.203–4.

Subpart 814.2—Solicitation of Bids

814.201 Preparation of invitations for bids.

(a) An invitation for bids for supplies, equipment, and services must be serially numbered at the time of issue. Numbers assigned locally must consist of the facility or VA National Acquisition Center division number, the serial number of the invitation, and the fiscal year in which the VA facility issues the invitation, e.g., 533–24–07 for the 24th invitation issued by VA facility 533 in Fiscal Year 2007. A series beginning with the number 1 must be started each fiscal year. Numbers assigned from a national register may be sequential, without regard to year, and use whatever numbering system assigned by the national system or VA's Electronic Contract Management System (eCMS). VHA shall use eCMS for all solicitation numbering.

(1) An invitation for bid for supplies, equipment, and services that is numbered locally must be numbered in the series of the year in which it is issued, will be accepted, and will become a contract in the same fiscal year but, because of procurement lead time, will not be performed until the next fiscal year.

(2) An invitation for bid that is numbered locally must be numbered in the next fiscal year series if it is issued in

one fiscal year but the contract will become effective and will be performed only in the next fiscal year.

(b) An invitation for a construction contract must bear the applicable invitation for bid number and the project number, if assigned.

(c) An invitation for bid containing a summary bid request must include the following statement:

''The award will be made on either an individual item basis or summary bid basis, whichever results in the lowest cost to the Government. Therefore, to assure proper evaluation of all bids, a bidder quoting a summary bid price must also quote a price on each individual item included in the summary bid price.''

(d) When a contracting officer determines that it will be to the Government's advantage to make an award by group or groups of items, the contracting officer must include a provision for the award by group or groups of items in the invitation for bids. This may apply when the items in the group or groups are readily available from sources to be solicited; and one of the following apply:

(1) It is desirable to award a minimum number of contracts.

(2) Furniture or fixtures are required for a single project and uniformity of design is desirable.

(3) The articles required will be assembled and used as a unit.

(e) A solicitation for a construction contract must contain a statement on the order of priority in which VA will award any alternative bid items, based on the relative importance of the items, VA's cost estimate, and the amount of funds available, when the following apply:

(1) VA intends to make a single aggregate award for all items in the solicitation within certain fiscal limitations.

(2) The solicitation asks for prices on an item and alternate item basis.

(f) A bid item schedule in a solicitation issued in compliance with paragraph (e) of this section should be structured substantially as follows:

A single award will be made on Item No. 1, but in the event the offer exceeds the funds available, a single award will be made on Item No. 2 or Item No. 3, in that order, based on available funding. Offerors should quote a price on each item listed.

Item No. 1—Furnish all labor, material, equipment, etc., to paint Buildings No. 1, 2, and 3: $___.

Alternate items in order of priority:

Item No. 2—Furnish all labor, material, equipment, etc., to paint Building Nos. 1 and 2: $___.

Item No. 3—Furnish all labor, material, equipment, etc., to paint Building No. 1: ___.

814.201–6 Solicitation provisions.

(a) The contracting officer must place the provision entitled ''Caution to Bidders-Bid Envelopes,'' as set forth in 852.214–70, in all invitations for bids where bid submissions are by other than electronic means.

(b) In an invitation for bid for supplies, equipment, or services (other than construction), the contracting officer must define the extent to which VA will authorize and consider alternate bids. VA will consider for acceptance an alternate specified on construction projects only as a part of the basic item.

(1) When VA will consider an alternate item only if no bids or insufficient bids are received on an item desired, the contracting officer must include the provision set forth in 852.214–71, Restrictions on alternate item(s), in the invitation.

(2) When VA will consider an alternate item on an equal basis with the item specified, the contracting officer must include the provision set forth in 852.214–72, Alternate items, in the invitation.

(3) In addition to the provision referenced in paragraph (b)(1) or (2) of this section, the contracting officer must include the provision set forth in 852.214–73, Alternate packaging and packing, in the invitation when bids will be allowed on different packaging, unit designation, etc.

(c) When the contracting officer determines that samples are necessary to the proper awarding of a contract, the contracting officer must include the provision set forth in 852.214–74, Bid samples, in the solicitation, along with the provision in FAR 52.214–20, Bid samples.

814.203 Methods of soliciting bids.

814.203–1 Transmittal to prospective bidders.

The contracting officer should include either a bid envelope or OF 17, Sealed Bid Label, with each invitation for bids furnished by mail or hand delivered to prospective bidders.

814.204 Records of invitations for bids and records of bids.

(a) The issuing office must establish and maintain a single register on a fiscal year basis for all solicitations. For each invitation to bid or request for proposal, the register must include the following:

(1) Bid or proposal number.

(2) Date of issue.

(3) Date of opening.

(4) Commodity or service involved.

(5) Disposition (i.e., contract number or purchase order number or, when applicable, no award).

(b) Maintenance of the contract file prescribed by Part 804 and retention of canceled Invitation for Bid files will fulfill the requirements set forth in FAR 14.204(b).

814.208 Amendment of invitation for bids.

The contracting officer must send amendments to holders of drawings and specifications by certified mail, return receipt requested, or any other method that provides evidence of receipt. The contracting officer may send amendments by telegram, facsimile, or other method of rapid delivery that provides evidence of receipt, if time does not permit mailing.

Subpart 814.3—Submission of Bids

814.301 Responsiveness of bids.

Where a contracting officer cannot administratively determine, in accordance with FAR 14.301, the timeliness of the submission of a bid, modification, or withdrawal, the contracting officer must submit the matter through the DSPE to the Comptroller General for a decision. The submission must include copies of all pertinent papers.

814.302 Bid submission.

A bid hand-carried by the bidder or his agent will be considered late unless delivered to the addressee designated in the bid invitation before the time set for opening.

814.304 Submission, modification, and withdrawal of bids.

(a) A notification to late bidders must specify the final date by which VA must receive evidence. This date must be within the time allowed by the apparent low bidder for acceptance of the low bidder's bid.

(b) All bids received by mail or delivered in person by the bidder (or telegram where authorized) must be time and date stamped immediately upon receipt at the VA facility mail room and in the office of the addressee designated in the invitation.

Subpart 814.4—Opening of Bids and Award of Contract

814.401 Receipt and safeguarding of bids.

The contracting officer is designated as the official to open bids for identification, as provided in FAR 14.401.

814.402 Opening of bids.

(a) The contracting officer must serve as, or designate, a bid opening officer, and must also designate a recorder.

(b) If a bid bond is required, the bid opening officer must read aloud the form and amount of bid security and the name of the surety. The recorder must record this information.

814.403 Recording of bids.

(a) The recorder must transcribe the information required for bid evaluation on the appropriate Abstract of Offers form (SF 1409 or OF 1419). The evaluation data may be recorded on supplemental sheets or forms such as VA Form 10–2237b, Request for Dietetic Supplies, provided that any supplemental sheets or forms are covered by one of the forms authorized for recording bid or price data.

(b) The bid opening officer must comply with the instructions in FAR 14.403 and certify on the abstract the date

and hour at which the bids were opened. Where erasures, strikeovers, or changes in price are noted at the time of bid opening, a statement to that effect must also be included on, or attached to, the abstract or record of bids.

814.404 Rejection of bids.

814.404–1 Cancellation of invitations after opening.

(a) For each invitation to bid that VA cancels or for which it receives no bid, the contracting officer must do the following:

(1) File a copy of the invitation for bids, as provided for in FAR 14.404–1, together with the abstract showing to whom such bids were sent, in a separate folder identified by the invitation number.

(2) Annotate the abstract to show why an award was not made.

(3) Retain the folders for the current and two succeeding fiscal years.

(b) The HCA may approve cancellation of invitations for bid after opening and may approve completion of the acquisition after cancellation, as provided in FAR 14.404–1(e). The contracting officer must submit a Determination and Finding to the HCA for approval and signature.

814.404–2 Rejection of individual bids.

(a) When a contracting officer finds a bid that is being considered for an award is incomplete, e.g., all pages of the invitation have not been returned by the bidder, the contracting officer will take whichever of the following actions that is appropriate:

(1) Make a determination that the bid as submitted is in such a form that acceptance would create a valid and binding contract, requiring the contractor to perform in accordance with all of the material terms and conditions of the invitation. The determination may be based on the fact that the bid as submitted includes evidence that the offeror intends to be bound by all the material terms and conditions of the invitation.

(2) Make a determination that the bid as submitted is in such form that acceptance would not create a valid and binding contract.

(b) When VA receives a single bid in response to a solicitation, the contracting officer must not reject the offer simply because it specifies a bid acceptance time that is shorter than that contained in the solicitation, unless a compelling reason exists for rejecting such a bid. Insufficient time to properly evaluate an offer is a compelling reason for rejection; however, the contracting officer must first request the offeror to extend the acceptance date of the bid to allow for proper evaluation.

(c) In those cases where VA receives more than one bid, the contracting officer must reject as nonresponsive an individual bid that is not in compliance with the Government's bid acceptance time, since consideration of such an offer would unfairly disadvantage other bidders.

814.404–70 Questions involving the responsiveness of a bid.

If a contracting officer cannot resolve a question involving the responsiveness of a bid, the contracting officer may submit the question to the Comptroller General through the DSPE.

814.407 Mistakes in bids.

814.407–3 Other mistakes disclosed before award.

(a) In accordance with FAR 14.407–3(e), the authority of the Secretary to make the administrative determinations set forth in FAR 14.407–3(a), (b), (c), and (d) is delegated to the SPE and is further delegated, without power of redelegation, to the DSPE. This delegation in no way impairs the delegations contained in Unpublished Decision of the Comptroller General B–122003 dated November 22, 1954.

(b) When a bidder alleges a mistake in his or her bid before award, after complying with the provisions of FAR 14.407–3, the contracting officer must submit the complete file to the DSPE for an administrative determination. Based upon the evidence submitted, the DSPE shall determine the action the contracting officer is to take. The contracting officer may make no award until the DSPE makes a determination.

814.407–4 Mistakes after award.

(a) When a contracting officer corrects a mistake in bid under FAR 14.407–4(a), the contracting officer must forward a copy of the contract amendment or supplemental agreement and a copy of the contracting officer's determination, to the DSPE.

(b) For mistakes in a bid alleged after award, the contracting officer's proposed determination, prepared in accordance with FAR 14.407–4, must be forwarded to OGC through the DSPE, Acquisition Resources Service, for legal coordination. The DSPE shall transmit the results of this coordination to the contracting officer, who will make the final determination on the alleged mistake in bid after award.

(c) The DSPE, Acquisition Resources Service, must maintain the agency records of mistakes in bids after award required by FAR 14.407–4.

814.408 Award.

814.408–70 Award when only one bid is received.

(a) When VA receives only one bid in response to an invitation for bids, the contracting officer may consider and accept the bid if all of the following apply:

(1) The specifications used in the invitation were not restrictive.

(2) VA solicited adequate competition.

(3) The price is reasonable.

(4) The bid is otherwise in accordance with the invitation for bids.

(b) The contracting officer must make the determination in writing, and include it the contract file.

814.408–71 Recommendation for award (construction).

(a) For Central Office contracts, the Director, Office of Construction and Facilities Management, must analyze all bids received and submit a memorandum to the Secretary recommending award or other disposition of the project. A copy of each of the following must accompany the memorandum:

(1) The invitation.

(2) Each bid received.

(3) The abstract.

(4) Any other pertinent data.

(b) For facility-level contracts, the Chief, Engineering Service, must analyze all bids received and submit a memorandum recommending award or other disposition of the project to the contracting officer. The contracting officer alone must make the final decision to accept or reject the lowest responsive bid and the determination as to the responsibility of a prospective contractor.

814.409 Information to bidders.

(a) An employee of VA may not disclose information as to probable acceptance or rejection of any offer to any bidder or other person outside of VA, except as authorized by the FAR.

(b) Except as provided in paragraphs (c) and (d) of this section, information about performance under a contract or an accepted bid is not public information and will be released to persons outside of VA only upon the authority of the immediate supervisor of the contracting officer.

(c) Except as provided in paragraph (d) of this section, the contracting officer may furnish information on performance under a contract to those having a legitimate interest, such as sureties, banks, other financial companies and Government departments and agencies.

(d) When litigation is involved, all information must be furnished through OGC.

PART 815—CONTRACTING BY NEGOTIATION

Subpart 815.3—Source Selection

Sec.

815.303 Responsibilities.

Subpart 815.4—Contract Pricing

815.404 Proposal analysis.
815.404–1 Proposal analysis techniques.
815.404–2 Information to support proposal analysis.

Subpart 815.6—Unsolicited Proposals

815.604 Department points of contact.
815.606 Department procedures.
815.606–1 Receipt and initial review.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 815.3—Source Selection

815.303 Responsibilities.

The authority of the Secretary to appoint an individual other than the contracting officer to serve as the source selection authority for a particular acquisition or group of acquisitions is delegated to the SPE and is further delegated to the DSPE. If an HCA wishes to designate an individual other than the delegated contracting officer as the source selection authority for a particular acquisition or group of acquisitions, the HCA shall prepare a request and justification and shall submit the request through channels to the DSPE for approval.

Subpart 815.4—Contract Pricing

815.404 Proposal analysis.

815.404–1 Proposal analysis techniques.

(a) Contracting officers are responsible for the technical and administrative sufficiency of the contracts they enter into. Contracting officers must ensure that contracts undergo all applicable legal and technical reviews. (See 801.602–70.)

(b) Contracting officers determine the level of technical analyses necessary for initial and revised pricing of all negotiated prime contracts, including subcontract pricing under them, and contract modifications. Contracting officers must request technical analyses of the proposals from the appropriate technical personnel. The technical analyses must address, as a minimum, the items set forth in FAR 15.404–1(e)(2).

(c) The contracting officer must document the results of such analyses in the contract file and make the results available to the auditor performing the pre-award audit.

815.404–2 Information to support proposal analysis.

In evaluating start-up and other nonrecurring costs, the contracting officer must determine the extent to which these costs are included in the proposed price and the intent to absorb or recover the costs in any future noncompetitive procurement or other pricing action. The contracting officer must ensure, with the assistance of the Assistant Inspector General for Policy, Planning, and Resources, as required or considered necessary, that VA will not pay the costs twice. For example, the cost of equipment that the Government pays for through a setup or connection agreement must not be included in depreciation cost of a subsequently negotiated agreement.

Subpart 815.6—Unsolicited Proposals

815.604 Department points of contact.

A VA employee who receives an unsolicited proposal or inquiries from a potential offeror of an unsolicited proposal must refer the proposal or inquiries to the following:

(a) Facility level unsolicited proposals must be referred to the HCA for the field facility.

(b) Proposals to the VA National Acquisition Center must be referred to the Executive Director and Chief Operating Officer, VA National Acquisition Center.

(c) Proposals to VA Central Office must be referred to the Director, Acquisition Operations Service (049A3).

815.606 Department procedures.

(a) The VA contact point will do the following:

(1) Determine the nature of the potential proposal and which technical/professional disciplines within VA to consult to determine the need for the proposal and the likelihood that a formal proposal would earn favorable review.

(2) In consultation with such technical/professional offices, the VA contact point will furnish the potential offeror the information specified in FAR 15.604 and any other information that might be of assistance to the potential offeror.

(b) The contact point will maintain a record of advance guidance provided and the disposition/recommendation regarding the potential offer.

(c) The contact point will review the unsolicited proposal and ensure that it

is complete as prescribed in FAR 15.605. If required information is not submitted, the contact point will:

(1) Determine if FAR 15.604 requires advance guidance;

(2) Determine whether a comprehensive evaluation prescribed by FAR 15.606–2 is appropriate and, if so, request that the offeror provide the necessary information; and,

(3) Establish an estimated due date for completion of the review process.

815.606–1 Receipt and initial review.

(a) When the VA contact point determines a proposal warrants a comprehensive evaluation (i.e., the proposal complies with the requirements in FAR 15.606–1(a) and is related to VA's mission), the contact point must contact the offeror to ensure that all data that should be restricted in accordance with FAR 15.609 has been identified.

(b) The contact point must maintain a log of all unsolicited proposals to be evaluated. The log must indicate the following:

(1) The date the proposal was received.

(2) The date that the unsolicited proposal was determined to warrant a comprehensive evaluation.

(3) A description of the proposal.

(4) The offices requested to evaluate the proposal and the date the offices are requested to return their evaluations.

(5) The date the reviewing offices finalize their respective evaluations.

(6) The final disposition of the proposal.

(c) The contact point must advise each office assigned responsibility for reviewing an unsolicited proposal of the need to evaluate the proposal against the criteria set forth in FAR 15.607(a)(1) through (4). If the reviewers determine that the proposal fails to meet any of the criteria, the contact point must be advised. The contact point must return the proposal to the offeror, citing the reasons therefore.

(d) The contact point must obtain approval of the DSPE (049A5) before the contact point, if warranted as a contracting officer, or an appropriate contracting officer begins negotiation on proposals. The contact point must provide the DSPE (049A5) all necessary documentation supporting the noncompetitive negotiation, including any justification and approval required by FAR Subpart 6.3 and the results of any synopsis required by FAR Subpart 5.2. The DSPE (049A5) will consult the appropriate VA Central Office program official(s) and return the final decision to the contact point.

PART 816—TYPES OF CONTRACTS

Subpart 816.1—Selecting Contract Types

Sec.
816.102 Policies.

Subpart 816.5—Indefinite-Delivery Contracts

816.504 Indefinite-quantity contracts.
816.505 Ordering.

Subpart 816.70—Unauthorized Agreements

816.7001 Letters of availability.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 816.1—Selecting Contract Types

816.102 Policies.

(a) Contracting officers must obtain technical review of solicitations that include a clause that provides for economic price adjustment specified in FAR 16.203–4 or any locally developed clause (see FAR 16.203–4(d)(2) and 801.602–72(d)). The request for approval must include a clearly stated need for the clause.

(b) The contracting officer must obtain the approval of the Director, Acquisition Resources Service (049A5), VA Central Office, before issuing a solicitation or awarding a contract that includes time-and-material or labor-hour pricing provisions if the ceiling price or estimated value of the acquisition exceeds $100,000. See 801.602–71 for technical review requirements. Excluded from this requirement are time-and-material or labor-hour solicitations or proposed contracts covering emergencies, such as repair of a broken water, sewer, or communication line,

repair of storm damage, etc. (i.e., where FAR 6.302–2 applies).

(c) Except as provided in FAR 32.703–3, a contract that involves a direct obligation of appropriations and lasts for more than one year from the beginning of the contract period must provide that:

(1) The contract applies to the period stated in the contract, subject to availability of funds; and

(2) The contractor will not perform any service under the contract after September 30 of each fiscal year (or beyond the period of the basic contract or any authorized option if the contract crosses fiscal years as provided in FAR 32.703–3(b)) unless the contractor obtains specific authorization from the contracting officer.

(d) A/E contracts, construction contracts, or professional engineer contracts, financed by ''no year'' appropriations, are not subject to the requirements of paragraph (c) of this section.

Subpart 816.5—Indefinite-Delivery Contracts

816.504 Indefinite-quantity contracts.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, when the contracting officer cannot determine definite quantities to be acquired under a solicitation and intends to issue a solicitation for estimated quantities, the contracting officer shall insert the clause at 852.216–70, Estimated quantities.

(b) The contracting officer shall insert the Alternate I clause at 852.216–70 in solicitations for bulk coal.

(c) The contracting officer shall insert the Alternate II clause at 852.216–70 in solicitations for estimated quantities of orthopedic, prosthetic, and optical supplies.

(d) The contracting officer shall insert the Alternate III clause at 852.216–70 in solicitations for monuments and headstones.

816.505 Ordering

The task order contract and delivery order ombudsman for VA is the Associate Deputy Assistant Secretary for Acquisitions (see FAR 16.505(b)(5)). Contracting officers may obtain the name, telephone number, facsimile number, and e-mail address of the current Associate Deputy Assistant Secretary for Acquisitions by contacting: The Office of Acquisitions (049A), VA Central Office, 810 Vermont Ave., NW., Washington, DC 20420.

Subpart 816.70—Unauthorized Agreements

816.7001 Letters of availability.

(a) *Description*. A letter of availability (sometimes inappropriately called a letter of intent) is a letter to a supplier that primarily seeks to reserve a place on the supplier's production or delivery schedule for long lead-time items. A letter of availability usually indicates products or services being considered for procurement. A supplier should not construe a letter of availability as a commitment. Prospective contractors sometimes solicit letters of availability or the letters may originate from Government personnel. A letter of availability differs from a letter contract, which is specifically authorized in FAR 16.603.

(b) *Policy*. (1) For the following reasons, contracting officers may not use letters of availability unless the DSPE specifically authorizes them to do so:

(i) Letters of availability often cause potential contractors to initiate costly preparations in anticipation of contract award.

(ii) Procurements announced in such letters do not always materialize. The result may be costly to the Government, the prospective contractor, or both. If the author of the letter of availability is an authorized contracting officer of VA, the Government may be bound by the action, even though the action is contrary to sound procurement practices and/or fiscal regulations. If the author of the letter of availability lacks procurement authority, the prospective contractor may incur substantial expenditures that may not be recovered from the Government. In this instance, the prospective contractor may seek to hold the unauthorized author personally liable.

(iii) The issuance of a letter of availability may violate the ''Anti-Deficiency Act'' (31 U.S.C. 1341).

(2) Contractors need access to procurement information as soon as possible to make timely preparations. Therefore, procurement personnel should act as efficiently and expeditiously as possible on all procurement actions.

PART 817—SPECIAL CONTRACTING METHODS

Subpart 817.1—Multi-year Contracting

Sec.
817.105 Policy.
817.105–1 Uses.

Subpart 817.2—Options

817.202 Use of options.
817.204 Contracts.

Subpart 817.4—Leader Company Contracting

817.402 Limitations.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 817.1—Multi-year Contracting

817.105 Policy.

817.105–1 Uses.

(a) Under 38 U.S.C. 114, VA contracting officers may enter into multi-year contracts for supplies and services not to exceed 5 years (unless otherwise authorized by statue), provided the Secretary or designee makes the following determinations:

(1) Appropriations are available for obligation to pay for the total payments for the fiscal year in which the contract is awarded plus the estimated amount of any cancellation charges.

(2) The contract serves the best interest of the Government by:

(i) Reducing cost;

(ii) Achieving contract administration and other efficiencies;

(iii) Increasing quality contract performance; and

(iv) Encouraging effective competition.

(3) That, during the contract period:

(i) Demand for the supplies or services will continue;

(ii) Substantial changes in demand for supplies and services in terms of quantity or rate of delivery are unlikely; and

(iii) Specifications for the supplies or services will remain reasonably stable.

(4) The risk of the contractor's inability to perform under the terms and conditions of the contract is low.

(5) A multi-year contract will not inhibit competition from small businesses.

(6) For a pharmaceutical item for which a patent has expired less than 4 years before the solicitation issue date, that there is no substantial likelihood that increased competition among potential contractors would occur during the term of the contract as the result of the availability of generic equivalents increasing during the term of the contract.

(b) The Secretary has delegated authority to make the determinations specified in 817.105–1(a) as follows:

(1) HCAs may make the above determinations and approve contracts that do not require legal/technical reviews under 801.602–70 and that do not contain a first year cancellation ceiling exceeding 20 percent of the contract value over the full multi-year term.

(2) Authority to make the above determinations and to approve all other proposed multi-year contracts is delegated to the SPE and is further delegated to the DSPE. For approval purposes, the HCA will justify and document the use of a multi-year contract against each of the criteria specified in paragraphs (a)(1) through (a)(6) of this section and forward to the DSPE for approval. The justification must explain the cancellation ceiling and the method used to calculate that ceiling. The justification also must explain the advantages of multi-year contracts over other alternative methods, e.g., option year contracts.

(c) The contracting officer must develop the cancellation ceilings in accordance with FAR 17.106–1. (38 U.S.C. 114)

Subpart 817.2—Options

817.202 Use of options.

All solicitations developed under Office of Management and Budget Circular A–76 (Revised) cost comparisons will provide for four one-year renewal options as prescribed in FAR Subpart 17.2. The contracting officer must forward requests to use less or more than the prescribed contract period for Circular A–76 (Revised) cost comparisons to the DSPE for approval.

817.204 Contracts.

(a) The contracting officer must obtain the approval of the DSPE before awarding a contract that includes options exceeding the 5-year limitation specified in FAR 17.204(e). This requirement does not apply to contracts to be awarded by or on behalf of the VA Office of the Inspector General. The request for approval must include the following:

(1) Supporting documentation, rationale, and justifications for the use of options (see FAR 17.205) and for exceeding the 5-year limitation.

(2) Documentation that the contracting officer has considered and addressed the limitations specified in FAR 17.202(b) and (c).

(b) Solicitations that require technical review in accordance with 801.602–71 through 801.602–73 shall be submitted for review concurrently as provided therein.

Subpart 817.4—Leader Company Contracting

817.402 Limitations.

(a) Except as provided in paragraph (b) of this section, the Government shall not initiate or execute leader company contracts.

(b) The DSPE may designate a contracting officer to enter into a leader company contract for the benefit of VA and the Government. The DSPE must designate a contracting officer by name for a specific contract. The named contracting officer will submit the proposed contract, with a determination and finding, for legal review in accordance with 801.602–75.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 819—SMALL BUSINESS PROGRAMS

Subpart 819.2—Policies

Sec.
819.201 General policy.
819.202 Specific policies.
819.202–1 Encouraging small business participation in acquisitions.
819.202–5 Data collection and reporting requirements.
819.202–70 HCA responsibilities.
819.202–71 Additional contracting officer responsibilities.
819.202–72 Order of precedence. [Reserved]

Subpart 819.5—Set-Asides For Small Business

819.502 Setting aside acquisitions.
819.502–2 Total small business set-asides.
819.502–3 Partial set-asides.

Subpart 819.6—Certificates of Competency and Determinations of Responsibility

819.602 Procedures.
819.602–3 Resolving differences between VA and the Small Business Administration.

Subpart 819.8—Contracting with the Small Business Administration (The 8(a) Program)

819.800 General.

Subpart 819.70—Veteran-Owned and Operated Small Businesses

819.7001 Policy.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 819.2—Policies

819.201 General policy.

The Director, Office of Small and Disadvantaged Business Utilization (OSBDU), is designated as the official responsible for making the determination required by FAR 19.201(f).

819.202 Specific policies.

819.202–1 Encouraging small business participation in acquisitions.

Contracting officers may negotiate payment terms of less than 30 calendar days to encourage small business participation. A period of less than 7 days may not be prescribed (see FAR 32.908(c)(2)). The contracting officer and the local fiscal officer must be in agreement on the negotiated payment terms before awarding the contract.

819.202–5 Data collection and reporting requirements.

(a) Administration heads, staff office directors, and HCAs must, in addition to the responsibilities designated in FAR 19.202–5, cooperate with OSDBU in formulating specific small business program goals and providing other data necessary for goal assessment.

(b) Each VA acquisition activity shall establish goals for the expenditure of funds with preferred businesses within their projected annual budget. OSDBU is responsible for Department-wide goals and accomplishments and will approve or adjust each acquisition activity's goals.

(c) A Procurement Preference Program Goals Report (Report Control Symbol 00–0427) shall be submitted annually by each acquisition activity to reach OSDBU by November 1. Each report shall contain total expenditure estimates and goals for the current fiscal year and explanations of the methods utilized to arrive at each proposed goal. Anticipated problems in the attainment of the proposed goal in any category shall also be identified. This information will be used in negotiating the Department goals with the Small Business Administration (SBA).

(d) As an addendum to the report, each acquisition activity shall provide a narrative explaining the reason(s) for any shortfall(s) in the achievement of any previous fiscal year goal category.

(e) Upon review by OSDBU of the proposed goals, each acquisition activity will be notified of the acceptance of

goals as submitted, or of any deficiencies. If the goals are not acceptable, the acquisition activity will be requested to submit further written justification for the goals submitted. Based on documents submitted, OSDBU will make a final determination on the goal assignment.

(f) Accomplishment of goals will be determined by OSDBU from data reported by acquisition activities into the Federal Procurement Data System-Next Generation (FPDS–NG).

819.202–70 HCA responsibilities.

An HCA must perform the following functions in support of the small business program. These functions cannot be delegated without written approval of the Director, OSBDU:

(a) Develop, on an annual basis, a plan of operation to increase the share of contracts and purchase orders awarded to the small business programs prescribed in FAR Part 19. This plan must also include veteran-owned and service-disabled veteran-owned small business concerns.

(b) Promote goals for the small business programs set forth in FAR Part 19. This must also include veteran-owned and service-disabled veteran-owned small business concerns.

(c) Review the types and classes of items and services to be purchased to determine the applicability of individual small business set-asides.

(d) Review class set-asides, established in accordance with criteria in FAR 19.503, at least annually to determine whether items or services procured under a unilateral or joint set-aside should be modified or withdrawn.

(e) Maintain updated lists of acquisitions reserved for small business on a class basis.

(f) If the acquisition activity is assigned to an SBA Procurement Center Representative, assure that the representative is provided logistical support, cooperation, and access to all reasonably obtainable contract information directly pertinent to the SBA Procurement Center Representative's official duties.

(g) Encourage technical personnel and end-users to participate in discussions with veteran-owned and service-disabled veteran-owned small business concerns.

(h) Attend conferences and meetings publicizing small business programs. This responsibility may be delegated without the written approval of the Director, OSBDU.

819.202–71 Additional contracting officer responsibilities.

In addition to the duties designated in FAR 19.202 through 19.202–6, contracting officers must perform the following functions in support of the small business program:

(a) Make maximum use of small business source lists.

(b) Assure that small business firms are identified on solicitation mailing lists and bid abstracts.

(c) Assure that specifications are not unduly restrictive, thereby enabling small business participation to the maximum extent possible.

(d) Assist and counsel small business firms with individual problems.

(e) Provide for counseling non-responsive or non-responsible small business bidders to help qualify them for future awards.

(f) Submit informational copies of all small business protests and appeals to the Director, OSBDU, at the same time they are submitted to the SBA.

819.202–72 Order of precedence. [Reserved]

Subpart 819.5—Set-Asides for Small Business

819.502 Setting aside acquisitions.

819.502–2 Total small business set-asides.

(a) When a total small business set-aside is made, one of the following statements, as applicable, will be included in the solicitation for bids:

(1) Notice of total small business set-aside, page ____, applies to all items in this solicitation.

(2) Notice of total small business set-aside, page ____, applies to items ____ through ____ in this solicitation.

(b) Contracting officers must ensure that the appropriate product or service classification and the related size standard are included in each solicitation.

819.502–3 Partial set-asides.

When, in accordance with the provisions of FAR 19.502–3, the contracting officer determines that a particular procurement will be partially set aside for small business participation, the solicitation for bids shall include the appropriate product or service classification and appropriate size standard, and the following statement shall be placed on the face page:

Notice of partial set-aside, page ____, applies to item ____ through item ____ in this solicitation.

Subpart 819.6—Certificates of Competency and Determinations of Responsibility

819.602 Procedures.

819.602–3 Resolving differences between VA and the Small Business Administration.

The Director, OSDBU, is the VA liaison with the SBA. Information copies of correspondence sent to the SBA seeking a certificate of competency determination must be concurrently provided to the Director, OSDBU. Before appealing a certificate of competency, the HCA must seek concurrence from the Director, OSDBU.

Subpart 819.8—Contracting With the Small Business Administration (The 8(a) Program)

819.800 General.

(a) No contract will be entered into with SBA under section 8(a) of the Small Business Act (15 U.S.C. 637(a)) unless a certification is made by the Administrator of that agency, or designee, that SBA is competent to perform the contract.

(b) When it is determined that the requirements of VA are appropriate for inclusion in this program, the contracting officer will make this fact known to proper officials of the SBA regional office servicing his/her area. However, when projects funded from minor construction appropriation (between $400,000 and $2 million) are proposed for 8(a) acquisition, the Director, OSDBU (00SB), shall be contacted by telephone or notified in writing in order to afford the OSDBU an opportunity to identify possible 8(a) sources prior to apprising SBA officials. If the certification required by paragraph (a) of this section is received, the VA contracting officer will secure from SBA the name(s) and location(s) of their subcontractor(s) and the unit price(s) to be paid. Should these prices be within a range acceptable to VA, the contracting officer will notify SBA of acceptance.

(c) The contract will be made between VA and SBA and will be administered by VA.

Subpart 819.70—Veteran-Owned and Operated Small Businesses

819.7001 Policy.

(a) The Small Business Act directs the SBA to give ''special consideration'' to veterans of the Armed Forces in all SBA programs. It is the policy of VA to encourage participation by all veteran-owned and operated small businesses in VA acquisitions.

(b) All VA facilities having procurement requirements for which veteran-owned small businesses are known sources must take affirmative action to solicit these firms and assist them in participating in VA acquisition opportunities.

PART 822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 822.3—Contract Work Hours and Safety Standards Act

Sec.

822.304 Variations, tolerances, and exemptions.
822.305 Contract clause.

Subpart 822.4—Labor Standards for Contracts Involving Construction

822.406 Administration and enforcement.
822.406–11 Contract terminations.

AUTHORITY: 29 CFR 5.15(d); 40 U.S.C. 121(c); 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 822.3—Contract Work Hours and Safety Standards Act

822.304 Variations, tolerances, and exemptions.

When issuing a contract for nursing home care, a contracting officer may exempt a contractor from certain requirements of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708) regarding the payment of overtime (see 29 CFR 5.15(d)(2) and 852.222–70).

822.305 Contract clause.

The contracting officer shall insert the clause at 852.222–70, Contract Work Hours and Safety Standards Act—nursing home care contract supplement, in solicitations and contracts for nursing home care when the FAR clause at 52.222–4, Contract Work Hours and Safety Standards Act—Overtime Compensation, is included.

Subpart 822.4—Labor Standards for Contracts Involving Construction

822.406 Administration and enforcement.

822.406–11 Contract terminations.

(a) Contracting officers must submit any proposed termination of a contract based on violations of the labor standard provisions of the contract to OGC for review and comment prior to taking final action. The submittal must include a detailed explanation of the facts and circumstances involved. Contracting officers, except those in the Office of Construction and Facilities Management, shall forward the submittal to OGC through the DSPE. Contracting officers in the Office of Construction and Facilities Management shall forward the submittal to OGC through the Director, Office of Construction and Facilities Management.

(b) If the contract is to be terminated, the DSPE or the Director, Office of Construction and Facilities Management, must submit the reports required by 29 CFR 5.7(d) over the signature of the SPE.

PART 823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE [RESERVED]

PART 824—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 824.1—Protection of Individual Privacy

Sec.
824.102 General.

Subpart 824.2—Freedom of Information Act

824.203 Policy.

AUTHORITY: 38 CFR 1.550–1.559 and 1.575–1.584; 40 U.S.C. 121(c), and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 824.1—Protection of Individual Privacy

824.102 General.

VA rules implementing the Privacy Act of 1974 are in 38 CFR 1.575 through 1.584.

Subpart 824.2—Freedom of Information Act

824.203 Policy.

VA rules implementing the Freedom of Information Act are in 38 CFR 1.550 through 1.559.

PART 825—FOREIGN ACQUISITION

Subpart 825.1—Buy American Act—Supplies

Sec.
825.103 Exceptions.
825.104 Nonavailable articles.

Subpart 825.2—Buy American Act—Construction Materials

825.202 Exceptions.
825.205 Post-award determinations.

Subpart 825.6—Trade Sanctions

825.602 Exceptions.

Subpart 825.8—Other International Agreements and Coordination

825.870 Technical assistance.

Subpart 825.9—Customs and Duties

825.902 Procedures.
825.902–70 Technical assistance.

Subpart 825.10—Additional Foreign Acquisition Regulations

825.1001 Waiver of right to examination of records.

Subpart 825.11—Solicitation Provisions and Contract Clauses

825.1102 Acquisition of construction.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 825.1—Buy American Act—Supplies

825.103 Exceptions.

(a) *Public Interest.* When a contracting officer believes that a determination that domestic preference would be inconsistent with the public interest is necessary under FAR 25.103(a), the contracting officer must submit the request for determination to the DSPE for submission to the SPE, who will forward the request to the Secretary for approval. The request for determination must contain all the facts and other pertinent information upon which a determination may be made.

(b) *Non-availability.* (1) For each determination of non-availability made in accordance with FAR 25.103(b)(2)(i), the HCA must do the following:

(i) Factually support the determination and include the supporting facts in the contract file.

(ii) Forward a copy of the determination, along with supporting documentation, to the DSPE.

(2) If the HCA believes that the non-availability of an article is likely to affect future acquisitions, include a recommendation that a copy of the determination and supporting documentation be forwarded to the Civilian Agency Acquisition Council (CAAC) for possible addition to the list of non-available articles in FAR 25.104. The DSPE will decide whether to submit the material to the CAAC.

825.104 Nonavailable articles.

The following items are added to the list of nonavailable articles contained in FAR 25.104:

Glass, lead
Insulin, human

Subpart 825.2—Buy American Act—Construction Materials

825.202 Exceptions.

(a) When a determination is required under FAR 25.202(a)(1), the contracting officer must submit the request for determination to the DSPE for submission to the SPE, who will forward the request to the Secretary. The submission must contain all the facts and other pertinent information necessary for the Secretary to make a determination.

(b) For each determination of non-availability that the HCA makes in accordance with FAR 25.202(a)(2), the HCA must do the following:

(1) Factually support the determination in writing and include the determination in the contract file.

(2) Forward a copy of the determination, along with supporting documentation, to the Director, Office of Construction and Facilities Management, through the DSPE.

(3) If the HCA believes that the non-availability of an article is likely to affect future acquisitions, include a recommendation that a copy of the determination and supporting documentation be forwarded to the Civilian Agency Acquisition Council (CAAC) for possible addition to the list of non-available articles in FAR 25.104. The DSPE will decide whether to submit the material to the CAAC.

825.205 Post-award determinations.

A post-award determination that an exception to the Buy American Act applies, as provided in FAR 25.205(c), will be made in accordance with FAR 25.202 and 825.202.

Subpart 825.6—Trade Sanctions

825.602 Exceptions.

When the contracting officer determines it to be in the best interest of the Government, the contracting officer may request an exception to the requirements of FAR 25.601 from the Secretary through the DSPE and the SPE. Each such request must be fully justified and include all pertinent facts, as provided in FAR 25.602(b). The SPE is responsible for notifying the U.S. Trade Representative of approved requests, as required by FAR 25.602(b)(2).

Subpart 825.8—Other International Agreements and Coordination

825.870 Technical assistance.

Contracting officers may obtain technical information or guidance on international agreements and treaties for procurements outside of the United States by contacting the Executive Director and Chief Operating Officer, VA National Acquisition Center.

Subpart 825.9—Customs and Duties

825.902 Procedures.

825.902–70 Technical assistance.

Should the regulations contained in FAR Subpart 25.9 be inadequate to meet the particular needs of the contracting officer in clearing items through customs and/or obtaining duty-free entry of goods, the contracting officer should contact the nearest U.S. Customs and Boarder Protection office for technical assistance. The location of the nearest office can be found at *http://www.customs.gov/xp/cgov/toolbox/contacts/cmcs/*.

Subpart 825.10—Additional Foreign Acquisition Regulations

825.1001 Waiver of right to examination of records.

(a) The contracting officer must prepare proposed determinations and findings to use either of the following:

(1) Alternate I of the FAR clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

(2) Alternate III of the FAR clause at 52.215–2, Audit and Records—Negotiation.

(b) The contracting officer must submit the determinations and findings to the DSPE for submission to the SPE, who will forward the request to the Secretary for the signature, as provided in FAR 25.1001(a)(2)(iii). The submission must include all appropriate documentation.

(c) The Secretary, upon concurring with the contracting officer's proposed determination and findings, will, if required by FAR 25.1001(a)(2)(iii), forward the document to the Comptroller General for concurrence.

(d) The completed determination and findings will be made part of the contract file.

Subpart 825.11—Solicitation Provisions and Contract Clauses

825.1102 Acquisition of construction.

The Buy American Act (41 U.S.C. 10a–d), except as modified by various trade agreements (see FAR Part 25), requires that only domestic construction material be used in the performance of contracts for construction. For solicitations and contracts for construction that contain a FAR clause related to the Buy American Act, the contracting officer shall insert the applicable VAAR clause, with or without an alternate, as shown in Table 825.1102:

TABLE 825.1102

FAR clause	VAAR clause to be used
FAR 52.225–9, Buy American Act—Construction Materials	852.236–89, Buy American Act.
FAR clause 52.225–11, Buy American Act—Construction Materials under Trade Agreements, without its Alternate I (see FAR 25.1102(c)).	852.236–89, Buy American Act, with its Alternate I.
FAR clause 52.225–11, Buy American Act—Construction Materials under Trade Agreements, with its Alternate I (see FAR 25.1102(c)(3)).	852.236–89, Buy American Act, with its Alternate II.

PART 826—OTHER SOCIO-ECONOMIC PROGRAMS [RESERVED]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 828—BONDS AND INSURANCE

Subpart 828.1—Bonds and Other Financial Protections

Sec.
828.101 Bid guarantees.
828.101–2 Solicitation provision or contract clause.
828.101–70 Safekeeping and return of bid guarantee.
828.106 Administration.
828.106–6 Furnishing information.
828.106–70 Bond premium adjustment.

Subpart 828.2—Sureties and Other Security for Bonds

828.203 Acceptability of individual sureties.
828.203–7 Exclusion of individual sureties.

Subpart 828.3—Insurance

828.306 Insurance under fixed-price contracts.

Subpart 828.71—Indemnification of Contractors, Medical Research or Development Contracts

828.7100 Scope of subpart.
828.7101 Approval for indemnification.
828.7102 Extent of indemnification.
828.7103 Financial protection.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 828.1—Bonds and Other Financial Protections

828.101 Bid guarantees.

828.101–2 Solicitation provision or contract clause.

When a bid bond is required for supplies or services, the phrase ''any cost of acquiring the work'' in paragraph (e) of the Bid Guarantee clause in FAR 52.228–1 may be modified to refer to the cost of ''supplies,'' ''services,'' etc.

828.101–70 Safekeeping and return of bid guarantee.

(a) The contracting officer must retain, in a safe, certified checks or other negotiable security provided as bid security for the three lowest acceptable bids. After the contract and contract bonds have been signed and approved, the contracting officer must return the certified checks or other negotiable securities either:

(1) In person to the bidder who provides a proper receipt; or

(2) By any method that will provide evidence that the bidder received the security.

(b) The contracting officer should promptly return certified checks or other negotiable security furnished in support of bids, other than those determined to be the three lowest acceptable bids, to the respective bidders either:

(1) In person to the bidder who provides a proper receipt; or

(2) By any method that will provide evidence that the bidder received the security.

(c) The contracting officer will not return commercial bid bonds unless specifically requested to do so by the bidders. If any of the three low bidders request the return of a commercial bid bond, the contracting officer will not return those bid bonds until the contract and contract bonds have been executed by the successful bidder and approved by the contracting officer or all bids have been rejected.

828.106 Administration.

828.106–6 Furnishing information.

The contracting officer for the applicable contract will furnish copies of payment bonds to a requestor under the provisions of FAR 28.106–6(c).

828.106–70 Bond premium adjustment.

When performance and payment bonds or payment protection are required, the contract must contain the clause in 852.228–70, Bond premium adjustment.

Subpart 828.2—Sureties and Other Security for Bonds

828.203 Acceptability of individual sureties.

828.203–7 Exclusion of individual sureties.

The DSPE may make the determinations referenced in FAR 28.203–7:

(a) To exclude individuals from acting as surety on bonds; and

(b) To accept bonds from individuals named on the Excluded Parties List System.

Subpart 828.3—Insurance

828.306 Insurance under fixed-price contracts.

(a) Term contracts, or contracts of a continuing nature, for ambulance, automobile and aircraft service, must contain the provision in 852.228–71, Indemnification and insurance.

(b) Paragraph (a) of this section does not apply to emergency or sporadic ambulance service authorized by VA Manual MP–1, Part II, Chapter 3, or other emergency or sporadic vehicle or aircraft services if both of the following conditions exist:

(1) The service is not used solely for the purpose of avoiding entering into a continuing contract.

(2) The services will be obtained from firms known to carry insurance coverage in accordance with State or local requirements.

Subpart 828.71—Indemnification of Contractors, Medical Research or Development Contracts

828.7100 Scope of subpart.

(a) This subpart sets forth the policies and procedures concerning indemnification of contractors performing contracts covering medical research or development that involve risks of an unusually hazardous nature, as authorized by 38 U.S.C. 7317.

(b) The authority to indemnify the contractor under this subpart does not create any rights to third parties that would not otherwise exist by law.

(c) As used in this subpart, the term ''contractor'' includes subcontractors of any tier under a contract containing an indemnification provision under 38 U.S.C. 7317. (38 U.S.C. 7317)

828.7101 Approval for indemnification.

(a) The Secretary of Veterans Affairs will make the approval determinations for the indemnification of contractors.

(b) Contracting officers must submit requests for approval, together with all available information, to the DSPE for submission to the SPE, who will forward the request to the Secretary for approval. (38 U.S.C. 7317)

828.7102 Extent of indemnification.

(a) A contract for medical research or development authorized by 38 U.S.C. 7303, may provide that the Government will indemnify the contractor against losses or liability specified in paragraphs (b) and (c) of this section if all of the following apply:

(1) The contract work involves a risk of an unusually hazardous nature.

(2) The losses or liability arise out of the direct performance of the contract.

(3) The losses or liability are not covered by the financial protection required under 828.7103.

(b) The Government may indemnify a contractor for liability (including reasonable expenses of litigation or settlement) to third persons for death, bodily injury, or loss of or damage to property from a risk that the contract defines as unusually hazardous. The indemnification will not cover liability under State or Federal worker's injury compensation laws to employees of the contractor who are both:

(1) Employed at the site of the contract work; and

(2) Working on the contract for which indemnification is granted.

(c) The Government may indemnify the contractor for loss of or damage to property of the contractor from a risk that the contract defines as unusually hazardous.

(d) A contract that provides for indemnification in accordance with this subpart must also require that:

(1) The contractor must notify the contracting officer of any claim or suit

against the contractor for death, bodily injury, or loss of or damage to property; and

(2) The Government may choose to control or assist in the defense of any suit or claim for which indemnification is provided in the contract. (38 U.S.C. 7317)

828.7103 Financial protection.

(a) A contractor must have and maintain an amount of financial protection to cover liability to third persons and loss of or damage to the contractor's property that meets one of the following:

(1) The maximum amount of insurance available from private sources.

(2) A lesser amount that the Secretary establishes after taking into consideration the cost and terms of private insurance.

(b) Financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination that provides the maximum amount required. If a contractor elects to self-insure, the contractor must provide the contracting officer, before award, proof of financial responsibility up to the maximum amount required. (38 U.S.C. 7317)

PART 829—TAXES

Sec.

829.000 Scope of part.

Subpart 829.2—Federal Excise Taxes

829.202 General exemptions.
829.202–70 Tax exemptions for alcohol products.

Subpart 829.3—State and Local Taxes

829.302 Application of State and local taxes to the Government.
829.302–70 Purchases made from patients' funds.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

829.000 Scope of part.

This part states the policies and procedures for the following:

(a) Exemptions of alcohol products purchased for use by the VA medical care program from Federal excise taxes.

(b) Specified refund procedures for State and local taxes.

Subpart 829.2—Federal Excise Taxes

829.202 General exemptions.

829.202–70 Tax exemptions for alcohol products.

(a) *General.*

(1) VA is permitted to procure spirits to be used for non-beverage purposes free of tax under the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations (see 27 CFR 19.538 and 19.539, 20.241 through 20.246, 22.161 and 22.162, 22.171 through 22.176, 24.293, and 25.181 through 25.185). The use of tax-free alcohol, whiskey, beer, wine, and denatured spirits for non-beverage purposes shall include, but is not limited to, medicinal and scientific purposes.

(2) The Executive Director and Chief Operating Officer, National Acquisition Center, and the Head of the Contracting Activity may sign application permits on Department of Treasury-TTB Form 5150.33, Spirits for Use of The United States. This authority may not be delegated.

(b) *Whiskey, alcohol, and denatured alcohol.*

(1) The contracting officer may obtain application forms for tax-free purchases from the TTB Distribution Center, P.O. Box 5950, Springfield, VA 22150–5950. The completed forms must be submitted to the Associate Director (Compliance Operations), Alcohol and Tobacco Tax and Trade Bureau, Washington, DC 20226.

(2) Permits previously issued on Alcohol, Tobacco, and Firearms (ATF) Form 1444, Tax-Free Spirits for Use of United States, remain valid until surrendered or cancelled. A copy of the current ATF Form 1444 or TTB Form 5150.33 must be made available to the supplier with the initial order. The permit number only needs to be referenced on any future orders with the same supplier.

(3) Contracting officers may make purchases of excise tax-free whiskey

and alcohol only from qualified distillery plants or bonded dealers. The accountable officer must ensure that accurate records of all receipts, usage, and destruction of tax-free distilled spirits are maintained at each medical center and must conduct a semi-annual physical inventory of the tax-free alcohol in the possession of the medical center (see 27 CFR 22.161 and 22.162).

(c) *Wine.* No tax exemption form or ATF/TTB permit is required for the tax-free procurement of wine from bonded wine premises. The purchase order must show the kind, quantity, and alcohol content of the wine and must state the purpose for which wine is to be used (see 27 CFR 24.293). An extra copy of a properly executed purchase order may be furnished to the bonded wine premises from which wine is purchased to facilitate record keeping.

(d) *Beer.* The contracting officer may procure tax-free beer only from licensed breweries and only when such product is prescribed for patients' therapeutic use.

(1) The contracting officer must submit an application for a TTB permit to purchase tax-free beer in letter form to the Director of the nearest TTB Regional Office or to the Director, Alcohol and Tobacco Tax and Trade Bureau, Washington, DC 20226. The following information must be included:

(i) Name and address of facility.

(ii) Specific purpose for which the beer will be used.

(iii) Quantity proposed to buy each month, year, etc.

(iv) Name and address of brewery.

(v) Copy of document authorizing the head of the contracting activity to sign the request (i.e., paragraph (a)(2) of this section).

(2) The contracting officer must obtain a separate permit for each brewery from which beer is to be purchased.

Subpart 829.3—State and Local Taxes

829.302 Application of State and local taxes to the Government.

(a) If a vendor refuses to sell at a price exclusive of the State and local tax, the contracting officer must use Standard Form (SF) 1094, U.S. Tax Exemption Certificate, as a basis for billing taxing authorities for a refund of taxes paid.

(b) A contracting officer may not furnish an SF 1094 to a vendor or use SF 1094 to claim reimbursement from the taxing authority when the total amount of State and local tax on any one purchase is $10 or less.

829.302–70 Purchases made from patients' funds.

The contracting officer shall insert the clause at 852.229–70, Sales or use taxes, in solicitations and contracts when items are to be purchased solely from the personal funds of patients.

PART 830—COST ACCOUNTING STANDARDS ADMINISTRATION [RESERVED]

PART 831—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 831.70—Contract Cost Principles and Procedures

Sec.

831.7000 Scope of subpart.
831.7001 Allowable costs under cost reimbursement vocational rehabilitation and education contracts or agreements.
831.7001–1 Tuition.
831.7001–2 Special services or courses.
831.7001–3 Books, supplies, and equipment required to be personally owned.
831.7001–4 Medical services and hospital care.
831.7001–6 Consumable instructional supplies.
831.7001–7 Reimbursement for other supplies and services.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 831.70—Contract Cost Principles and Procedures

831.7000 Scope of subpart.

This subpart contains general cost principles and procedures for the determination and allowance of costs in connection with the negotiation and administration of cost reimbursement type contracts for providing vocational rehabilitation, education, and training to eligible veterans under 38 U.S.C.

Chapter 31, (referred to as a ''Chapter 31 program'').

831.7001 Allowable costs under cost reimbursement vocational rehabilitation and education contracts or agreements.

831.7001–1 Tuition.

(a) Except as provided in this section, when the contractor has a customary cost of tuition, the charge to VA may not exceed that charged to similarly circumstanced nonveteran students. If the contractor has more than one standard charge for the same service, the charge to VA must be the lowest price that is offered or published for the entire course, semester, quarter, or term.

(b) VA will not normally pay tuition or incidental fees to institutions or establishments furnishing apprentice or other on-the-job training. VA may elect to pay charges or expenses that fall into either of the following categories:

(1) Charges customarily made by a nonprofit workshop or similar establishment for providing work adjustment training to similarly circumstanced nonveterans even if the trainee receives an incentive wage as part of the training.

(2) Training expenses incurred by an employer who provides on-the-job training following rehabilitation to the point of employability when VA determines that the additional training is necessary.

(c) When Federal funds pay the total cost of instruction, or grants from the Federal Government pay a portion of the cost (e.g., Smith-Hughes or other laws, excluding Federal Land Grant Funds), that subsidy will be taken into consideration in determining the charge to VA. The term ''Federal Land Grant Funds'' refers to those funds received under the Morrill-Nelson Act (Morrill Acts of 1862 and 1890 and the Nelson amendment of 1907) and section 22 of the Bankhead-Jones Act of 1935.

(d) A veteran who is participating in a Chapter 31 program and receives an award of a fellowship, scholarship, grant-in-aid, assistantship, or similar award will have that award treated according to the following requirements:

(1) If the award limits its use to payment of tuition, fees, or any charge that VA normally pays as part of a Chapter 31 program, VA will pay the portion of the charges remaining after applying the award.

(2) In all other cases, VA will pay the full amount of the tuition, fees, or other charges.

(e) If a State or other Government authority waives a veteran's tuition and fees, VA will reduce its payment of those charges by the amount of the waiver.

(f) VA will pay enrollment fees for registration if both of the following conditions exist:

(1) The institution or training establishment usually makes this charge.

(2) The charge is not more than other students or trainees pay.

831.7001–2 Special services or courses.

Special services or courses are those services or courses that VA requests that are over and above those the institution customarily provides for similarly circumstanced nonveterans and that the contracting officer considers to be necessary for the rehabilitation of the trainee. VA will negotiate the costs of special services or courses before paying them.

831.7001–3 Books, supplies, and equipment required to be personally owned.

(a) Reimbursement for supplies (including books, equipment, or other supplies) will be made as provided in this section.

(b) VA will provide reimbursement for those supplies that all students taking the same course or courses are customarily required to own personally. In addition, VA may provide reimbursement for items that the school does not specifically require for pursuit of the course, but that VA determines are needed because of the demands of the course, general possession by other students, and the disadvantage imposed on a veteran by not having the item. In no instance will VA provide reimbursement for supplies in a greater variety, quality, or amount than required of nonveteran students. In this instance, an item is not considered to

be required if it is ''requested'' or ''desirable to have'' or ''necessary for a future profession or job but not required by the institution of all students in the course''.

(c) When supplies are available in several prices, grades, or qualities, VA will provide reimbursement only for that quality or grade that will meet the requirements.

(d) Partial payment agreements, in which VA shares payment with the veterans, are not allowed.

(e) The institution's costs in connection with a veteran's thesis are considered supplies and are therefore authorized for reimbursement if the veteran's committee chairman, major professor, department head, or appropriate dean certifies that the thesis is a course requirement and the expenses are required to complete the thesis. These expenses may include research expenses, typing, printing, microfilming, or otherwise reproducing the required number of copies.

(f) When the institution operates a bookstore or supply store for all students, reimbursement to the bookstore or supply store for supplies issued to trainees will be no greater than charges made to nonveteran students.

(g) When the institution, training establishment, or employer arranges for stores or other non-institutionally owned establishments to issue supplies to all students and a veteran is to pay the store or establishment for supplies issued to trainees, VA will provide reimbursement for those charges if they are no greater than those nonveterans pay or paid to the institutions, whichever is the lesser.

(h) Supplies that the institution purchases specifically for trainees will be reimbursed at the net cost to the institution.

(i) When the institution does not provide or arrange for issuance of generally required books, tools and supplies for students attending the facility, the institution, in cooperation with VA, may designate certain stores and establishments to provide generally required books, tools and supplies for veterans pursuing a vocational rehabilitation program. The vendor will be reimbursed in the same manner as for supplies provided or arranged for by the institutions.

(j) When it is customary in a survey class to permit each student to rent books for the subject (commonly referred to as a rental set), and the student is not required to own the books/materials, reimbursement is authorized for the rental charge as long as it does not exceed the charge made to nonveteran students.

(k) Educational and training institutions that furnish supplies to trainees that all students pursuing the same or similar course are required to own personally or obtain may be compensated for furnishing the supplies in an amount not exceeding 10 percent of the allowable charge for the supplies furnished or rented subject to the following conditions:

(1) When the tuition covers the charges for supplies or rentals or a stipulated fee is assessed to all students, handling charges are not allowable.

(2) The handling charge is not allowable for Government-owned books that the institution procures from the Library of Congress.

831.7001–4 Medical services and hospital care.

(a) VA may pay the customary student health fee when payment of the fee is required for similarly circumstanced nonveterans. If payment of the fee is not required for similarly circumstanced nonveterans, payment may be made if it is determined by the Veterans Health Administration that payment is in the best interest of the veteran and the Government.

(b) When the customary student's health fee does not cover medical services or hospital care, but these medical services are available in a school-operated facility or with doctors and hospitals in the immediate area through a prior arrangement, the Veterans Benefits Administration may provide reimbursement for these services in a contract for the services if:

(1) An arrangement is necessary to provide timely medical services for veterans attending the facility under provisions of Chapter 31; and

(2) The general rates established for medical services do not exceed the

rates established by the Under Secretary for Health.

(c) VA may reimburse a rehabilitation facility for incidental medical services provided during a veteran's program at the facility.

831.7001–6 Consumable instructional supplies.

(a) VA will provide reimbursement for consumable instructional supplies that the institution requires for the instruction of all students, veteran or nonveteran, pursuing the same or comparable course or courses when:

(1) The supplies are entirely consumed in the fabrication of a required project; or

(2) The supplies are not consumed but are of such a nature that they cannot be salvaged from the end product for reuse by disassembling or dismantling the end product.

(b) VA will not provide reimbursement for consumable instructional supplies if any of the following apply:

(1) The supplies can be salvaged for reuse.

(2) The supplies are used in a project that the student has elected as an alternate class project to produce an end product of greater value than that normally required to learn the skills of the occupation, and the end product will become the veteran's property upon completion.

(3) The supplies are used in a project that the institution has selected to provide the student with a more elaborate end product than is required to provide adequate instruction as an inducement to the veteran to elect a particular course of study.

(4) The sale value of the end product is equal to or greater than the cost of supplies plus assembly, and the supplies have not been reasonably used so that the supplies are not readily salvaged from the end product to be reused for instructional purposes.

(5) The end product is of permanent value and retained by the institution.

(6) A third party loans the articles or equipment for repair or improvement and the third party would otherwise pay a commercial price for the repair or improvement.

(7) The number of projects resulting in end products exceeds the number normally required to teach the recognized job operations and processes of the occupation stipulated in the approved course of study.

(8) The cost of supplies is included in the charge for tuition or as a fee designated for such purpose.

831.7001–7 Reimbursement for other supplies and services.

VA will provide reimbursement for other services and assistance that may be authorized under provisions of applicable Chapter 31 regulations, including, but not limited to, employment and self-employment services, initial and extended evaluation services, and independent living services.

PART 832—CONTRACT FINANCING

Sec.

832.006 Reduction or suspension of contract payments upon finding of fraud.
832.006–1 General.
832.006–2 Definitions.
832.006–3 Responsibilities.
832.006–4 Procedures.

Subpart 832.1—Non-Commercial Item Purchase Financing

832.111 Contract clauses for non-commercial purchases.

Subpart 832.2—Commercial Item Purchase Financing

832.201 Statutory authority.
832.202 General.
832.202–1 Policy.
832.202–4 Security for Government financing.

Subpart 832.4—Advance Payments for Non-Commercial Items

832.402 General.
832.404 Exclusions.

Subpart 832.5—Progress Payments Based on Costs

832.502 Preaward matters.
832.502–2 Contract finance office clearance.

Subpart 832.8—Assignment of Claims

832.805 Procedure.
832.805–70 Distribution/notification of assignment of claims.

Subpart 832.9—Prompt Payment

832.904 Determining payment due dates.

Subpart 832.11—Electronic Funds Transfer

832.1106 EFT mechanisms.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

832.006 Reduction or suspension of contract payments upon finding of fraud.

832.006–1 General.

The SPE is authorized to make determinations that there is substantial evidence that contractors' requests for advance, partial, or progress payments are based on fraud and may direct that further payments to the contractors be reduced or suspended, as provided in FAR 32.006. This authority may not be redelegated.

832.006–2 Definitions.

The *remedy coordination official* for VA is the DSPE.

832.006–3 Responsibilities.

VA personnel must report suspected fraud related to advance, partial, or progress payments to the DSPE and VA Office of the Inspector General. The report must include all available information supporting the suspicion.

832.006–4 Procedures.

(a) Any recommendation from a VA employee through the DSPE to the SPE to reduce or suspend payment to a contractor under FAR 32.006 must address the considerations in FAR 32.006–4(d).

(b) The DSPE shall carry out the responsibilities of the Secretary or designee in FAR 32.006–4(e) to notify the contractor of proposed action under FAR 32.006. The notice of proposed action will be sent to the last known address of the contractor, the contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other method that provides signed evidence of receipt. In the case of a business, the notice of proposed action may be sent to any partner, principal, officer, director, owner or co-owner, or joint venture. The contractor will be afforded an opportunity to appear before the DSPE to present information or argument in person or through a representative. The contractor may supplement the oral presentation with written information and argument. The proceedings will be conducted in an informal manner and without the requirement for a transcript. If the DSPE does not receive a reply from the contractor within 30 calendar days, the DSPE will base his or her recommendations on the information available. Any recommendation of the DSPE under paragraph (a) of this section must address the results of this notification and the information, if any, provided by the contractor.

(c) The SPE must provide a copy of each final determination and the supporting documentation to the contractor, the DSPE and the contracting officer. The contracting officer will place a copy of the determination and the supporting documentation in the contract file.

Subpart 832.1—Non-Commercial Item Purchase Financing

832.111 Contract clauses for non-commercial purchases.

In solicitations and contracts for construction that include the FAR clause at 52.232–5, Payments under Fixed-Price Construction Contracts, the contracting officer shall insert the following clauses:

(a) If the solicitation or contract does not contain a section entitled ''Network Analysis System (NAS),'' the contracting officer must insert the clause at 852.236–82, Payments under fixed-price construction contracts (without NAS). When the solicitation or contract includes guarantee period services, the contracting officer must use the clause with its Alternate I.

(b) If the solicitation or contract contains a section entitled ''Network Analysis System (NAS),'' the contracting officer must insert the clause at 852.236–83, Payments under fixed-price construction contracts (including NAS). When the solicitation or contract includes guarantee period services, the contracting officer must use the clause with its Alternate I.

Subpart 832.2—Commercial Item Purchase Financing

832.201 Statutory authority.

The contracting officer may make the determination that terms and conditions for payment for commercial items are appropriate and customary in the commercial marketplace and are in the best interest of the Government, provided the terms and conditions for payment do not conflict with FAR Subpart 32.2.

832.202 General.

832.202–1 Policy.

As provided in FAR 32.202–1(d), contracting officers must obtain the approval of the DSPE before awarding a contract that includes unusual contract financing. The contracting officer must fully support the request with the reasons why the proposed unusual contract financing is in the best interest of the Government. In addition, contracting officers must not use commercial interim payment or commercial advance payment terms in solicitations or contracts without the approval of the DSPE.

832.202–4 Security for Government financing.

An offeror's financial condition may be considered adequate security to protect the Government's interest when the Government provides contract financing. In assessing the offeror's financial condition, the contracting officer may obtain, to the extent required, the following information to establish the offeror's financial capability and to determine the offeror's financial condition:

(a) A current year interim balance sheet and income statement and balance sheets and income statements for the two preceding fiscal years. The statements should be prepared in accordance with generally accepted accounting principles and must be audited and certified by an independent public accountant or an appropriate officer of the firm.

(b) A cash flow forecast for the remainder of the contract term showing the planned origin and use of cash within the firm or branch performing the contract.

(c) Information on financing arrangements disclosing the availability of cash to finance contract performance, the contractor's exposure to financial crisis, and credit arrangements.

(d) A statement of the status of all State, local, and Federal tax accounts, including any special mandatory contributions.

(e) A description and explanation of the financial effects of any leases, deferred purchase arrangements, patent or royalty arrangements, insurance, planned capital expenditures, pending claims, contingent liabilities, and other financial aspects of the business.

(f) Any other financial information deemed necessary.

(g) A Dun and Bradstreet Report on the company.

Subpart 832.4—Advance Payments for Non-Commercial Items

832.402 General.

Authority to make the determination required by FAR 32.402(c)(1)(iii) and to approve contract terms, as provided by FAR 32.402(e)(1), is delegated to the SPE and is further delegated to the DSPE. Before award, contracting officers must submit a request for approval to use advance payment to the DSPE. The request must include the information required by FAR 32.409–1 and must address the standards for advance payment in FAR 32.402(c)(2).

832.404 Exclusions.

(a) Under 31 U.S.C. 3324(d)(2), VA allows advance payment for subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use, notwithstanding the provisions of 31 U.S.C. 3324(a). The term ''other publications'' includes any publication printed, microfilmed, photocopied or magnetically or otherwise recorded for auditory or visual use.

(b) Under 31 U.S.C. 1535, VA allows advance payment for services and supplies obtained from another Government agency.

(c) Under 5 U.S.C. 4109, VA allows advance payment for all or any part of

the necessary expenses for training Government employees in Government or non-Government facilities, including the purchase or rental of books, materials, and supplies or services directly related to the training of a Government employee.

Subpart 832.5—Progress Payments Based on Costs

832.502 Pre-award matters.

832.502–2 Contract finance office clearance.

Contracting officers must obtain approval from the DSPE before taking the actions listed in FAR 32.502–2. Full justification and the recommendations of the contracting officer must accompany requests for approval.

Subpart 832.8—Assignment of Claims

832.805 Procedure.

832.805–70 Distribution/notification of assignment of claims.

(a) Prior to acknowledgement of receipt, in addition to the requirements of FAR 32.805(d), the contracting officer shall obtain legal review of the assignment (see 801.602–75(a)(7)). Upon acknowledgement of receipt, the contracting officer shall:

(1) File the retained copy of the notice of assignment and the certified copy of the original instrument of assignment with the Government Accountability Office copy of the contract; and

(2) Forward a copy of the notice of assignment and instrument of assignment to the local finance office and to the payment office cited in the contract.

(b) Contracting officers must notify field facilities of any recognized assignment of payments for contracts under which payment for articles and services is certified and approved for payment in the field.

Subpart 832.9—Prompt Payment

832.904 Determining payment due dates.

(a) When preparing specification packages, contracting officers must give full consideration to the time reasonably required for constructive acceptance or approval of the goods or services and for making invoice payments. Based on this analysis, contracting officers may, when authorized by FAR 32.904, modify the number of days allowed for notifying contractors of defects in invoices or, for construction solicitations, the number of days allowed for payment of invoices specified in the applicable prompt payment clause. Changes, if any, should be made before issuing the solicitation.

(b)(1) For construction solicitations, the analysis specified in paragraph (a) of this section may routinely take more than the 7 days provided in paragraph (a)(2) of the FAR clause at 52.232–27, Prompt Payment for Construction Contracts, to evaluate and return defective progress payment invoices.

(2) It also may take more than the 14 days provided in paragraph (a)(1)(i)(A) of the prompt payment clause to adequately inspect the work, determine the adequacy of the contractor's performance, approve, and pay progress payment invoices.

(3) Contracting officers should consider the following and, if necessary, revise the number of days stated in paragraphs (a)(2) and (a)(1)(i)(A) of the prompt payment clause before issuing construction solicitations (see FAR 32.904(d)(1)(i)):

(i) Recent interest payment history.

(ii) The complexity of the project.

(iii) Workload.

(iv) Work site location.

(4) In no event may the number of days be set in excess of 14 days for return of a defective progress payment invoice or 30 days for payment of the invoice.

Subpart 832.11—Electronic Funds Transfer

832.1106 EFT mechanisms.

(a) The Assistant Secretary for Management may, with the concurrence of the Department of the Treasury office

responsible for making payment, authorize the use of EFT mechanisms other than those authorized under FAR 32.1106(a).

(b) The Assistant Secretary for Management may, with the concurrence of the Department of the Treasury office responsible for making payment, authorize the use of EFT for payments to be received by or on behalf of a contractor outside the United States or Puerto Rico or for contracts paid in other than United States currency, as provided in FAR 32.1106(b).

PART 833—PROTESTS, DISPUTES, AND APPEALS

Subpart 833.1—Protests

Sec.
833.102 General.
833.103 Protests to VA.
833.104 Protests to GAO.
833.106 Solicitation provision and contract clause.

Subpart 833.2—Disputes and Appeals

833.209 Suspected fraudulent claims.
833.211 Contracting officer's decision.
833.212 Contracting officer's duties upon appeal.
833.213 Obligation to continue performance.
833.214 Alternative dispute resolution (ADR).
833.215 Contract clause.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 833.1—Protests

833.102 General.

Solicitations must instruct interested parties (see FAR provision 52.233–2) to send a copy of any protest filed with the Government Accountability Office (GAO) to the contracting officer and the appropriate VA Central Office activity as follows:

(a) For contracts to be awarded by the Office of Construction and Facilities Management: Director, Office of Construction and Facilities Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

(b) For all other contracts: Deputy Assistant Secretary for Acquisition and Materiel Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

833.103 Protests to VA.

(a) *Filing of protests.* (1) An interested party may protest to the contracting officer or, as an alternative, may request an independent review by filing a protest with the Deputy Assistant Secretary for Acquisition and Materiel Management (DAS for A&MM), or for solicitations issued by the Director, Office of Construction and Facilities Management. A protest filed with the DAS for A&MM or the Director, Office of Construction and Facilities Management, will not be considered if the interested party has a protest on the same or similar issues pending with the contracting officer.

(2) Protests to the contracting officer must be in writing and addressed where the offer/bid is to be submitted.

(3) Protests requesting an independent review must be in writing and addressed to the Deputy Assistant Secretary for Acquisition and Materiel Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; or, for solicitations issued by the Office of Construction and Facilities Management, to the Director, Office of Construction and Facilities Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

(4) The following types of protests may be dismissed by VA without consideration of the merits or forwarded to another agency for appropriate action:

(i) *Contract administration.* Disputes between a contractor and VA are resolved under the disputes clause of the contract and the Contract Disputes Act of 1978. (41 U.S.C. 601–613).

(ii) *Small business size standards and standard industrial classification.* Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification are for review solely by the Small Business Administration (SBA). (15 U.S.C. 637(b)(6); 13 CFR 121.1002).

(iii) *Small business certificate of competency program.* A protest made under section 8(b)(7) of the Small Business

Act, or in regard to any issuance of a certificate of competency or refusal to issue a certificate under that section, is not reviewed in accordance with bid protest procedures unless there is a showing of possible fraud or bad faith on the part of Government officials.

(iv) *Protests under section 8(a) of the Small Business Act.* The decision to place or not to place a procurement under the 8(a) program is not subject to review unless there is a showing of possible fraud or bad faith on the part of Government officials or that regulations may have been violated. (15 U.S.C. 637(a)).

(v) *Affirmative determination of responsibility by the Contracting Officer.* An affirmative determination of responsibility will not be reviewed unless there is a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

(vi) *Walsh-Healey Public Contract Act.* Challenges of the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act is determined solely by the procuring agency, the SBA (if a small business is involved), and the Secretary of Labor. (41 U.S.C. 35–45).

(vii) *Subcontractor protests.* The contracting agency will not consider subcontractor protests except where the subcontract is by or for the Government.

(viii) *Judicial proceedings.* The contracting agency will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction.

(b) *Alternative dispute resolution.* Bidders/offerors and VA contracting officers are encouraged to use alternative dispute resolution (ADR) procedures to resolve protests at any stage in the protest process. If ADR is used, VA will not furnish any documentation in an ADR proceeding beyond what is allowed by the FAR.

(c) *Action upon receipt of protest.* For protests filed with the contracting officer, the HCA will be the approving official for the determinations identified in FAR 33.103(f)(1) and (f)(3). If the HCA is also the contracting officer, the approving official will be the DAS for A&MM. For protests filed with the DAS for A&MM or the Director, Office of Construction and Facilities Management, those individuals will be the approving officials for the determinations identified in FAR 33.103(f)(1) and (f)(3).

(d) *Requests for GAO advance decisions.* When a written protest has been filed with the contracting officer and the contracting officer considers it desirable to do so, the contracting officer may request an advance decision from the Comptroller General. The contracting officer must send the submission to the Comptroller General through the DAS for A&MM or the Director, Office of Construction and Facilities Management, as appropriate, and must include the material listed in FAR 33.104(a). The contracting officer must promptly notify the protesting individual or firm in writing of the decision of the Comptroller General.

(e) *Protest after award.* When a written protest is filed with the contracting officer after contract award, the following requirements apply:

(1) If FAR 33.103(f)(3) requires suspension of contract performance, the contracting officer must seek to obtain a mutual agreement with the contractor to suspend performance on a no-cost basis. If unsuccessful, the contracting officer must issue a stop-work order in accordance with contract clause FAR 52.233–3, Protest after Award.

(2) If suspension of contract performance is not required by FAR 33.103(f)(3) and if the contracting officer determines that the award was proper, the contracting officer must furnish the protester a written explanation of the basis for the award that is responsive to the allegations of the protest. The contracting officer will advise the protester that the protester may appeal the determination to one of the following:

(i) The DAS for A&MM.

(ii) The Director, Office of Construction and Facilities Management, in the case of a contract awarded by the Office of Construction and Facilities Management.

(iii) The Comptroller General.

(3) If suspension of contract performance is not required by FAR 33.103(f)(3) but the contracting officer determines that the award is questionable, the contracting officer, after consulting

with OGC, will advise the contractor of the protest and invite the contractor to submit comments and relevant information. The contracting officer must submit the case promptly to the DAS for A&MM for advice. The DAS for A&MM may consult with OGC and will either advise the contracting officer of the appropriate action to take, or submit the case to the Comptroller General, through the Assistant Secretary for Management, for a decision. The contracting officer will provide interested parties with a copy of the final decision.

(f) *Agency appellate review of the contracting officer's protest decision.* An interested party may request an independent review of a contracting officer's protest decision by filing an appeal with the DAS for A&MM or, for solicitations issued by the Office of Construction and Facilities Management, with the Director, Office of Construction and Facilities Management. To be considered timely, the appeal must be received by the appropriate official named in this paragraph within 10 calendar days of the date the interested party knew, or should have known, whichever is earlier, of the basis for the appeal. Appeals must be addressed as provided in paragraph (a)(3) of this section. Appeals do not extend GAO's timeliness requirements for appeals to GAO. By filing an appeal as provided in this paragraph, an interested party may waive its rights to further appeal to the Comptroller General at a later date. Agency responses to appeals submitted to the agency shall be reviewed and concurred in by OGC (025).

833.104 Protests to GAO.

(a) *General procedures.* (1) Procedures for protests to GAO are at 4 CFR Part 21 (GAO Bid Protest Regulations). If guidance concerning GAO procedure in this section differs from 4 CFR Part 21, 4 CFR Part 21 applies.

(2) When a protest before or after award has been filed with GAO, the contracting officer must submit a report to the DAS for A&MM, or the Director, Office Construction and Facilities Management, as appropriate, within 5 workdays after receipt of verbal or written notice of the protest, whichever occurs first. The report must include a copy of the documentation indicated in FAR 33.104(a)(3).

(3) Contracting officers are responsible for the notification procedures outlined in FAR 33.104(a)(4).

(b) *Protests before award.* When VA receives notice from GAO of a pre-award protest filed directly with GAO, award will normally not be made until the matter is resolved. However, award may be made despite the protest if the DAS for A&MM, or the Director, Office of Construction and Facilities Management, as appropriate, approves the findings of the HCA required by FAR 33.104(b)(1) and GAO has been notified as provided by FAR 33.104(b)(2). The Director, Acquisition Resources Service, or the Director, Office of Construction and Facilities Management, as appropriate, is responsible for notifying GAO.

(c) *Protests after award.* When, after award of a contract, VA receives notice from GAO of a protest filed directly with GAO, the contracting officer must, if required to do so by FAR 33.104(c)(1), immediately suspend performance. However, contract performance need not be suspended, despite the protest, if the SPE approves the HCA's findings required by FAR 33.104(c)(2) and GAO has been notified under FAR 33.104(c)(3). Authority to approve the HCA's findings is further delegated to the DSPE and, for solicitations issued by the Officer of Construction and Facilities Management, the Director, Office of Construction and Facilities Management. The Director, Acquisition Resources Service, or the Director, Office of Construction and Facilities Management, as appropriate, is responsible for notifying GAO.

833.106 Solicitation provisions.

(a) The contracting officer shall insert the provision at 852.233–70, Protest content/alternative dispute resolution, in each solicitation expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the provision at 852.233–71, Alternative protest procedure, in solicitations expected to exceed the simplified acquisition threshold.

Subpart 833.2—Disputes and Appeals

833.209 Suspected fraudulent claims.

The contracting officer must refer matters relating to suspected fraudulent claims to the Office of Inspector General for investigation and referral to the Department of Justice. The contracting officer may not initiate any collection, recovery, or other settlement action while the matter is in the hands of the Department of Justice without first obtaining the concurrence of the U.S. Attorney concerned, through the Office of the Inspector General.

833.211 Contracting officer's decision.

(a) When a dispute cannot be settled by agreement and a final decision under the Disputes clause of the contract is necessary, the contracting officer must furnish the contractor the contracting officer's final decision in the matter.

(b) The contracting officer must identify the decision, in writing, as a final decision and include a statement of facts in sufficient detail to enable the contractor to fully understand the decision and the basis on which it was made. The decision must set forth those facts relevant to the dispute with which the contractor and the contracting officer are in agreement, and as clearly as possible, the area of disagreement.

(c) For VA contracts, the Board of Contract Appeals noted in FAR 33.211 is the Civilian Board of Contract Appeals (CBCA), 1800 F Street, NW., Washington, DC 20405.

833.212 Contracting officer's duties upon appeal.

(a) When a contracting officer receives notice of appeal in any form, the contracting officer must do the following:

(1) Annotate the appeal with the date of mailing (or date of receipt, if otherwise conveyed).

(2) Within 10 days, forward the original notice of appeal and a copy of the contracting officer's final decision letter to the OGC.

(3) Concurrently transmit copies of the notice of appeal and the final decision letter to the DAS for A&MM. (In cases of construction contracts administered by the Office of Construction and Facilities Management, copies of the appeal and the final decision letter need not be transmitted to the DAS for A&MM but instead should be sent to the Director, Office of Construction and Facilities Management.)

(b) Within 20 days of receipt of an appeal, or advice that an appeal has been filed, the contracting officer must assemble and transmit to the OGC, an appeal file consisting of all documents pertinent to the appeal, including all of the following:

(1) The decision and findings of fact that are being appealed.

(2) The contract, including specifications and pertinent amendments, plans and drawings.

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued.

(4) Transcripts of any testimony taken during the course of proceedings and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal.

(5) Any additional information considered pertinent.

833.213 Obligation to continue performance.

(a) As provided in FAR 33.213, contracting officers shall use FAR clause 52.233–1, Disputes, with its Alternate I. Clause 52.233–1 requires the contractor to continue performance in accordance with the contracting officer's decision in the event of a claim arising *under* a contract. Alternate I expands this authority, adding a requirement for the contractor to continue performance in the event of a claim *relating* to the contract.

(b) In the event of a dispute not arising under, but relating to, the contract, if the contracting officer directs continued performance, the contracting officer may consider providing financing for the continued performance, provided that the Government's interests are properly secured. The contracting officer will contact the

DAS for A&MM and OGC for advice prior to authorizing such financing.

833.214 Alternative dispute resolution (ADR).

Contracting officers and contractors are encouraged to use alternative dispute resolution (ADR) procedures. CBCA guidance on ADR may be obtained at *http://www.cbca.gsa.gov*.

833.215 Contract clause.

The contracting officer must use the clause at 52.233–1, Disputes, with its Alternate I (see 833.213).

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 836.2—Special Aspects of Contracting for Construction

Sec.
836.202 Specifications.
836.203 Government estimate of construction costs.
836.204 Disclosure of the magnitude of construction projects.
836.206 Liquidated damages.
836.209 Construction contracts with architect-engineer firms.
836.213 Special procedures for sealed bidding in construction contracting.
836.213–4 Notice of award.
836.213–70 Notice to proceed.

Subpart 836.5—Contract Clauses

836.500 Scope of subpart.
836.501 Performance of work by the contractor.
836.513 Accident prevention.
836.521 Specifications and drawings for construction.
836.570 Correspondence.
836.571 Reference to ''standards.''
836.572 Government supervision.
836.573 Daily report of workers and materials.
836.574 Subcontracts and work coordination.
836.575 Schedule of work progress.
836.576 Supplementary labor standards provisions.
836.577 Worker's compensation.
836.578 Changes—supplement.
836.579 Special notes.

Subpart 836.6—Architect-Engineer Services

836.602 Selection of firms for architect-engineer contracts.
836.602–1 Selection criteria.
836.602–2 Evaluation boards.
836.602–4 Selection authority.
836.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.
836.603 Collecting data on and appraising firms qualifications.
836.606 Negotiations.
836.606–70 General.
836.606–71 Architect-engineer's proposal.
836.606–72 Contract price.
836.606–73 Application of 6 percent architect-engineer fee limitation.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 836.2—Special Aspects of Contracting for Construction

836.202 Specifications.

(a) The procedures described in Part 811 are applicable to construction specifications.

(b) During the design stage, contract architect-engineers must not use ''brand name or equal'' or other restrictive specifications without the prior written approval of the contracting officer. The contracting officer must inform prospective architect-engineers of this requirement during the negotiation phase, prior to award of a contract for design.

(c) If VA has determined that only one product will meet the Government's minimum needs and VA will not allow the submission of ''equal'' products, the contracting officer must include the clause found at 852.236–90, Restriction on Submission and Use of Equal Products, in the solicitation and complete the clause by listing the items to which the clause applies. This clause places bidders on notice that the ''brand name or equal'' provisions of the clause found at FAR 52.236–5, Materials and Workmanship, and any other provision that may authorize the submission of an ''equal'' product, will not apply to the specific items listed.

836.203 Government estimate of construction costs.

The overall amount of the Government estimate must not be disclosed until after award of the contract. After award, the contracting officer may disclose the overall amount upon request.

836.204 Disclosure of the magnitude of construction projects.

In lieu of the estimated price ranges described in FAR 36.204, the contracting officer must identify the magnitude of a VA project in advance notices and solicitations in terms of one of the following price ranges:

(a) Less than $25,000.

(b) Between $25,000 and $100,000.

(c) Between $100,000 and $250,000.
(d) Between $250,000 and $500,000.
(e) Between $500,000 and $1,000,000.
(f) Between $1,000,000 and $2,000,000.
(g) Between $2,000,000 and $5,000,000.
(h) Between $5,000,000 and $10,000,000.
(i) Between $10,000,000 and $20,000,000.
(j) Between $20,000,000 and $50,000,000.
(k) Between $50,000,000 and $100,000,000.
(l) More than $100,000,000.

836.206 Liquidated damages.

The contracting officer may include a liquidated damages provision in a construction contract when the criteria of FAR 11.501 and 811.501 are met. If partial performance may be accepted and used to the advantage of the Government, the contracting officer must include the clause substantially as set forth in 852.211–74, Liquidated Damages, in addition to the clause set forth in FAR 52.211–12.

836.209 Construction contracts with architect-engineer firms.

(a) When the contracting officer considers it necessary or advantageous to award a contract for construction of a design-bid-build project, as defined at FAR 36.102, to a firm or person that designed the project, the contracting officer must request prior approval from one of the following:

(1) The facility or VISN director, as appropriate, or, for National Cemetery Administration contracts, the Director, Technical Support Service, for contracts involving nonrecurring maintenance (NRM) funds.

(2) The Director, Office of Construction and Facilities Management, for contracts involving construction funds.

(b) The contracting officer must furnish complete justification in the request.

(c) This section does not apply to design-build contracts, as defined at FAR 36.102.

836.213 Special procedures for sealed bidding in construction contracting.

836.213–4 Notice of award.

The contracting officer must provide to the contractor a notice of award (letter of acceptance) for any contract award in excess of $25,000.

836.213–70 Notice to proceed.

(a) The contracting officer must provide construction contractors with a written notice to proceed for the work. A notice to proceed will normally be sent only after the contractor has provided performance and payment bonds or payment protection and the completed contract forms, where applicable, and the contracting officer has accepted them. If the urgency of the work or other proper reason requires the contractor to begin work immediately, the contracting officer may include in the award letter a notice to proceed, with the reservation that payments are contingent upon receipt and approval of the required bonds or payment protection.

(b) If the contract provides for liquidated damages, the contracting officer must send the notice to proceed by certified mail, return receipt requested, or any other method that provides signed evidence of receipt. The notice to proceed will advise the contractor that the work must be completed within ___ (insert contract time for completion) calendar days from the date of receipt shown on the certified mail receipt card returned by the post office or on the proof of delivery provided by the delivery service.

(c) If the contract does not provide for liquidated damages, certified mail is not required. In notices to proceed for these contracts, the contracting officer must establish a date for completion that takes into consideration the time required for the notice to arrive by regular mail.

(d) At the time the notice to proceed is sent to the contractor, the contracting officer must furnish a copy to the resident engineer or the Chief, Engineering Service.

(e) The contracting officer must file a copy of the notice to proceed with copy A of the contract. When certified mail or other method of certified delivery is used, the contracting officer must attach the certified mail receipt card returned by the post office or the proof of delivery provided by the delivery service to the copy of the notice to proceed. The contracting officer must file copies of the notice to proceed with copies C and D of the contract after the

date of receipt has been established and indicated on the notice to proceed.

Subpart 836.5—Contract Clauses

836.500 Scope of subpart.

(a) The clauses and provisions prescribed in this subpart are set forth for use in fixed-price construction contracts in addition to those in FAR Subpart 52.2.

(b) Additional clauses and provisions not inconsistent with those in FAR Subparts 36.5 and 52.2 and those prescribed in this subpart are authorized when determined necessary or desirable by the contracting officer, and when approved as provided in Subpart 801.4.

(c) Clauses and provisions that differ from those contained in FAR Subparts 36.5 and 52.2 and this subpart, but considered essential to the procurement of VA requirements, shall not be used unless the deviation procedure set forth in Subpart 801.4 has been complied with.

836.501 Performance of work by the contractor.

The contracting officer shall insert the clause at 852.236–72, Performance of work by the contractor, in solicitations and contracts for construction that contain the FAR clause at 52.236–1, Performance of Work by the Contractor. When the solicitations or contracts include a section entitled ''Network Analysis System (NAS),'' the contracting officer must use the clause with its Alternate I.

836.513 Accident prevention.

The contracting officer must insert the clause at 852.236–87, Accident Prevention, in solicitations and contracts for construction that contain the clause at FAR 52.236–13, Accident Prevention.

836.521 Specifications and drawings for construction.

The contracting officer shall insert the clause at 852.236–71, Specifications and drawings for construction, in solicitations and contracts for construction that include the FAR clause at 52.236–21, Specifications and Drawings for Construction.

836.570 Correspondence.

The contracting officer shall insert the clause at 852.236–76, Correspondence, in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction (currently $2,000).

836.571 Reference to "standards."

The contracting officer shall insert the clause at 852.236–77, Reference to ''standards,'' in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction.

836.572 Government supervision.

The contracting officer shall insert the clause at 852.236–78, Government supervision, in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction.

836.573 Daily report of workers and materials.

The contracting officer shall insert the clause at 852.236–79, Daily report of workers and materials, in solicitations and contracts for construction expected to exceed the simplified acquisition threshold. The contracting officer may, when in the best interest of the Government, insert the clause in solicitations and contracts for construction when the contract amount is expected to be at or below the simplified acquisition threshold.

836.574 Subcontracts and work coordination.

The contracting officer shall insert the clause at 852.236–80, Subcontracts and work coordination, in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction. When the solicitations or contracts are for new construction work with complex mechanical-electrical work, the contracting officer may use the clause with its Alternate I.

836.575 Schedule of work progress.

The contracting officer shall insert the clause at 852.236–84, Schedule of

work progress, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction and that do not contain a section entitled ''Network Analysis System (NAS).''

836.576 Supplementary labor standards provisions.

The contracting officer shall insert the clause at 852.236–85, Supplementary labor standards provisions, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

836.577 Workers' compensation.

The contracting officer shall insert the clause at 852.236–86, Workers' compensation, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

836.578 Changes—supplement.

(a) The contracting officer shall insert the clause at 852.236–88, Contract changes—supplement, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction. (This section has been promulgated as a deviation from the FAR as provided in 801.4.)

(b) When negotiated changes exceed $500,000, paragraph (a) of the clause at 852.236–88 will apply. Because paragraph (a) does not provide ceiling rates for indirect expenses, the contractor must furnish cost breakdowns and other supporting data on its rates for indirect expenses as part of its price proposal. The contracting officer must negotiate the rates for indirect expenses with the contractor and may request an audit in accordance with FAR 15.404–2.

(c) When the negotiated change will be $500,000 or less, paragraph (b) of the clause at 852.236–88 will apply. Because the indirect cost rates in paragraph (b) of the clause at 852.236–88 are ceiling rates, the contracting officer must negotiate indirect expense rates within the ceiling limitations.

836.579 Special notes.

The contracting officer shall insert the clause at 852.236–91, Special notes, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

Subpart 836.6—Architect-Engineer Services

836.602 Selection of firms for architect-engineer contracts.

836.602–1 Selection criteria.

(a) In addition to the evaluation criteria set forth in FAR 36.602–1, the evaluation board must consider the factors set forth in paragraph (b) of this section as they apply to the project or purpose of the selection. Values must be assigned to each factor in determining the relative qualifications of the firms identified as qualified through the pre-selection process. The board may adjust the assigned values after its discussions.

(b) The following factors must be considered:

(1) Reputation and standing of the firm and its principal officials with respect to professional performance, general management, and cooperativeness.

(2) Record of significant claims against the firm because of improper or incomplete architectural and engineering services.

(3) Specific experience and qualifications of personnel proposed for assignment to the project and their record of working together as a team.

836.602–2 Evaluation boards.

(a) The Director, Office of Construction and Facilities Management, shall appoint an evaluation board to select architect-engineer contractors for Office of Construction and Facilities Management projects. The Director, Office of Construction and Facilities Management, shall appoint an evaluation board to select architect-engineer contractors for National Cemetery Administration projects. The facility or VISN director, as appropriate, shall appoint an evaluation board to select architect-engineer contractors for field facility projects.

(b) The Director, A/E Evaluation and Program Support Service, will chair the evaluation board for Office of Construction and Facilities Management

architect-engineer contracts. The Chair may designate the Project Director or Project Manager to act as Chair when necessary. When appointing the board's members, the Director, Office of Construction and Facilities Management, must include the appropriate Project Manager and as many qualified professional architects or engineers from the Office of Construction and Facilities Management technical services as may be considered appropriate for the particular project. The Director, Office of Construction and Facilities Management may designate additional members from the Office of Construction and Facilities Management or from other Department administrations and staff offices when appropriate.

(c) The Director, Office of Construction and Facilities Management, shall ensure that the board consists of no fewer than three members, one of whom must be a National Cemetery Administration senior level contracting officer. The Director shall designate one of the board members as the Chair.

(d) The evaluation board for a VA field facility must consist of no fewer than two members, one of whom will be the HCA (or the senior contracting officer at the facility if there is no HCA on site) and the other will be the Chief, Engineering Service, or their alternates. Where a facility has two or more engineers on its staff, the facility or VISN director must appoint an additional engineer to the board. The Chair of the board will be the senior engineer.

836.602–4 Selection authority.

The Director, Office of Construction and Facilities Management (for Central Office contracts), the Director, Office of Construction Management (for National Cemetery Administration contracts), and the facility or VISN director (for field facility contracts), as appropriate, or persons acting in those capacities, are designated as the approving officials for the recommendations of the respective evaluation boards.

836.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.

Either of the procedures provided in FAR 36.602–5 may be used to select firms for architect-engineer contracts that are not expected to exceed the simplified acquisition threshold.

836.603 Collecting data on and appraising firms qualifications.

The Director, Office of Construction and Facilities Management, for Central Office; the Director, Office of Construction Management, for National Cemetery Administration; and the Chief, Engineering Service, for field facilities, are responsible for collecting Standard Forms 330 and maintaining a data file on architect-engineer qualifications.

836.606 Negotiations.

836.606–70 General.

To assure that the fee limitation is not violated, the contracting officer must maintain suitable records to be able to isolate the amount in the total fee to which the 6-percent limitation applies.

836.606–71 Architect-engineer's proposal.

(a) When the contract price is estimated to be $50,000 or more, the contracting officer must use VA Form 10–6298, Architect-Engineer Fee Proposal, to obtain the proposal and supporting cost data from the proposed contractor and subcontractor in the negotiation of an architect-engineer contract for design services.

(b) In obtaining architect-engineer services for research study, seismic study, master planning study, construction management and other related services contracts, the contracting officer must use VA Form 10–6298 supplemented or modified as needed for the particular project type.

836.606–72 Contract price.

(a) Where negotiations with the top-rated firm are unsuccessful, the contracting officer shall, after authorization by the Director, Office of Construction and Facilities Management, the Director, Office of Construction Management, or the facility or VISN

director, as appropriate, terminate the negotiations and undertake negotiations with the firm next in order of preference.

(b) The contracting officer shall submit a recommendation for award of the contract at the negotiated fee to the Director, Office of Construction and Facilities Management, the Director, Office of Construction Management, or the facility or VISN director, as appropriate. A copy of the negotiation memorandum prepared in accordance with FAR 15.406–3 and, whenever a field pricing report has been received, a copy of the report must accompany the recommendation.

836.606–73 Application of 6 percent architect-engineer fee limitation.

(a) The total cost of the architect or engineer services contracted for must not exceed 6 percent of the estimated cost of the construction project plus any fees for related services and activities such as those shown in paragraph (c) of this section.

(b) To support project submissions, the engineering officer or project engineer must use VA Form 10–1193, Application for Health Care Facility Project, and Form 10–6238, EMIS Construction Program Estimate Worksheet, and must show the proposed technical services where necessary and applicable.

(c) The 6 percent fee limitation does not apply to the following architect or engineer services:

(1) Investigative services including but not limited to:

(i) Determination of program requirements, including schematic or preliminary plans and estimates;

(ii) Determination of feasibility of proposed project;

(iii) Preparation of measured drawings of existing facility;

(iv) Subsurface investigation;

(v) Structural, electrical, and mechanical investigation of existing facility; and

(vi) Surveys: topographic, boundary, utilities, etc.

(2) Special consultant services that are not normally available in organizations of architects or engineers and that are not specifically applied to the actual preparation of working drawings or specifications of the project for which the service are required.

(3) Other:

(i) Reproduction of approved designs through models, color renderings, photographs, or other presentation media;

(ii) Travel and per diem allowances other than those required for the development and review of working drawings and specifications;

(iii) Supervision or inspection of construction, review of shop drawings or samples, and other services performed during the construction phase; and

(iv) All other services that are not an integral part of the production and delivery of plans, designs, and specifications.

(4) The cost of reproducing drawings and specifications for bidding and their distribution to prospective bidders and plan file rooms.

PART 837—SERVICE CONTRACTING

Subpart 837.1—Service Contracts—General

Sec.
837.103 Contracting officer responsibility.
837.110 Solicitation provisions and contract clauses.
837.110–70 Services provided to eligible beneficiaries.

Subpart 837.2—Advisory and Assistance Services

837.203 Policy.

Subpart 837.4—Nonpersonal Health Care Services

837.403 Contract clause.

Subpart 837.70—Mortuary Services

837.7001 General.
837.7002 List of qualified funeral directors.
837.7003 Funeral authorization.
837.7004 Administrative necessity.
837.7005 Unclaimed remains—all other cases.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 837.1—Service Contracts—General

837.103 Contracting officer responsibility.

When the contracting officer determines that legal assistance is necessary in determining whether a proposed service contract is for personal or non-personal services, the contracting officer will request a legal opinion from the appropriate Regional Counsel.

837.110 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 852.237–70 Contractor responsibilities, in solicitations and contracts for services.

837.110–70 Services provided to eligible beneficiaries.

Contracting officers shall include the clause at 852.271–70, Nondiscrimination in services provided to beneficiaries, in all solicitations and contracts covering services provided to eligible beneficiaries.

Subpart 837.2—Advisory and Assistance Services

837.203 Policy.

The definition of advisory and assistance services includes, in addition to examples listed in FAR 37.203, services to obtain peer review of research proposals.

Subpart 837.4—Nonpersonal Health Care Services

837.403 Contract clause.

The contracting officer shall insert the clause at 852.237–7, Indemnification and medical liability insurance, in lieu of FAR Clause 52.237–7, in solicitations and contracts for nonpersonal health-care services, including contracts awarded under the authority of 38 U.S.C. 7409, 38 U.S.C. 8151–8153, and part 873. The contracting officer may include the clause in bilateral purchase orders for nonpersonal health-care services awarded under the procedures in FAR Part 13 and Part 813.

Subpart 837.70—Mortuary Services

837.7001 General.

This subpart establishes the policies and procedures governing the procurement of funeral and burial services for deceased beneficiaries of VA, as provided in 38 U.S.C. 2302, 2303, and 2308.

837.7002 List of qualified funeral directors.

Contracting officers will establish, in coordination with cognizant Chief, Medical Administration Service (MAS) personnel or other personnel designated by the facility director to perform these functions, a list of funeral directors capable of performing the burial services specified in 837.7003. The contracting officer will attempt to establish a commitment to perform these services within the statutory limitation of $300 (see 38 U.S.C. 2302). Each funeral director must be fully licensed in the jurisdiction in which the business operates. If there has been no prior experience with the funeral director that would ensure the adequacy of the funeral director's services and casket, arrangements will be made before contract negotiation to inspect the premises and the casket to be provided, as well as to check with the local business bureau and/or Chamber of Commerce. (38 U.S.C. 2302)

837.7003 Funeral authorization.

(a) When a veteran dies while receiving care in a VA health care facility or in a non-VA institution at VA's expense, and the decedent's remains are unclaimed, the Chief, MAS, or the person designated by the facility director to perform these functions, will forward to the HCA a properly executed VA form 10–2065, Funeral Arrangements, requesting that funeral and burial services for the deceased be procured.

(b) The contracting officer will enter into negotiations with local funeral directors to procure a complete funeral and burial service within the statutory allowance of $300. The purchase order must list the specific services to be provided. The services must consist of the following:

(1) Preparation of the body, embalming.

(2) Clothing.

(3) Casket. (The casket, at a minimum, must be constructed from thick, strong particle board and must be of sufficient strength to support the weight of an adult human body. Cardboard or press paper or similar materials are not acceptable.)

(4) The securing of all necessary permits.

(5) Ensuring that a United States flag (provided the funeral director in accordance with M–1, Part I, paragraph 14.40) accompanies the casket to the place of burial.

(c) An additional allowance for transportation of the body to the place of burial is provided in 38 U.S.C. 2308. This allowance will cover the transportation cost of shipment of the body by common carrier or by hearse from the VA facility to the funeral home and to the place of burial, any charges for an outside shipping box, and the charges for securing all necessary permits for removal or shipment of the body. These costs are not chargeable against the $300 allowance.

(d) In accordance with M–1, Part I, paragraph 14.37, the contracting officer will designate the Chief, MAS, or the person designated by the facility director to perform these functions, to be responsible for the medical inspection of the mortuary services performed and inspection of the merchandise furnished. This designee will also be responsible for certifying receipt on the receiving report.

(e) The HCA will assist the Chief, MAS, or the person designated by the facility director to perform these functions, in developing the local procedures specified in M–1, Part I, paragraph 14.37c. (38 U.S.C. 2302, 2303, and 2308)

837.7004 Administrative necessity.

(a) VA may make arrangements and assume expenses for local burial under separate contractual agreement when:

(1) A person dies under VA care who is not legally entitled to such care at VA's expense;

(2) No relatives or friends claim the remains; and

(3) The municipal, county, or State officials refuse to provide for final disposition.

(b) When the contracting officer cannot obtain a full and complete funeral and burial service as prescribed in 837.7003 within the statutory allowance, before taking any further action, the contracting officer will secure from the facility or VISN director, as appropriate, a written determination that VA must accomplish the disposition of the remains as an administrative necessity. The facility director will also authorize in writing the expenditure of such additional funds as may be necessary for this purpose.

(c) The contracting officer will make the facility director's determination and authorization a part of the contract file. (38 U.S.C. 2302)

837.7005 Unclaimed remains—all other cases.

Requests for information on the disposition of the unclaimed remains of a veteran whose death occurs while not under the direct care or treatment of VA will be referred to the Veterans Services Officer for processing in accordance with M27–1, Part II.

PART 839—ACQUISITION OF INFORMATION TECHNOLOGY [RESERVED]

PART 841—ACQUISITION OF UTILITY SERVICES

Subpart 841.1—General

Sec.

841.100 Scope of part.
841.103 Statutory and delegated authority.

Subpart 841.2—Acquiring Utility Services

841.201 Policy.

AUTHORITY: 40 U.S.C. 121(c) and (d); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 841.1—General

841.100 Scope of part.

This part prescribes procedures for obtaining delegations of authority to award contracts for utility connection charges and provides guidance on review requirements for such proposed contracts.

841.103 Statutory and delegated authority.

(a) The Assistant Commissioner for Procurement, General Services Administration (GSA), has delegated the Secretary of Veterans Affairs authority to enter into public utility contracts for connection charges for utility services.

(b) Except as provided in paragraph (a) of this section, the authority to award all other contracts for utility services, as defined in FAR 41.101, is vested in GSA (see FAR 41.103). VA contracting officers who wish to award local contracts for utility services, other than for connection charges, must first obtain a delegation of authority to award such contracts from GSA. Contracting officers shall submit requests for delegation of authority directly to GSA.

(c) Any authority described in paragraphs (a) or (b) of this section delegated to the Secretary is further delegated to the SPE and is further delegated to the DSPE and to VA contracting officers within the limits of their warrants.

Subpart 841.2—Acquiring Utility Services

841.201 Policy.

As required by 801.602–71, contracting officers must submit solicitations and proposed agreements for utility services exceeding $50,000 in total costs to the appropriate Acquisition Resources Service office for technical and legal review.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 842—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Sec.
842.000 Scope of part.
842.070 Definitions.

Subpart 842.1—Contract Audit Services

842.101 Contract audit responsibilities.
842.102 Assignment of contract audit services.

Subpart 842.7—Indirect Cost Rates

842.705 Final indirect cost rates.

Subpart 842.8—Disallowance of Costs

842.801 Notice of intent to disallow costs.
842.801–70 Audit assistance prior to disallowing costs.
842.803 Disallowing costs after incurrence.

Subpart 842.12—Novation and Change-of-Name Agreements

842.1203 Processing agreements.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

842.000 Scope of part.

This part applies to all contracts, whether awarded through sealed bidding or negotiation.

842.070 Definitions.

Contract administration is the coordination of actions required for the performance of a contract. This includes the contracting officer's guidance and supervision necessary to assure that the contractor fulfills all contractual obligations.

Subpart 842.1—Contract Audit Services

842.101 Contract audit responsibilities.

(a) Contracting officers may use the support services of other agencies to the extent feasible. Examples of such services include: pre-award surveys; quality assurance and technical inspection of contract items; and review of contractors' procurement systems. Contracting officers obtaining support services from any other Government department or agency must do so on the basis of an approved negotiated interagency support agreement.

(b) An interagency support agreement is a written instrument of understanding between the parties to the agreement. The agreement should clearly state the following:

(1) The accord reached between the two parties involved, especially the obligations assumed and the rights granted each party.

(2) The resources that both the supplying and receiving parties will provide.

(3) The funding and reimbursement arrangements.

(4) Clauses permitting revisions, modifications, or cancellation of the agreement.

842.102 Assignment of contract audit services.

(a) When required, contracting officers shall request the assistance of the VA Office of the Inspector General (OIG), Office of Contract Review, to provide pre- and post-award audit, review, and advisory services associated with the award or modification of:

(1) Federal Supply Schedule and other contracts awarded by the VA National Acquisition Center;

(2) Scarce medical specialist or sharing contracts awarded under the authority of 38 U.S.C. 7409 or 8153, and;

(3) Claims involving such contracts.

(b) Contracting officers may request the assistance of either the VA OIG Office of Contract Review or the Defense Contract Audit Agency (DCAA) to provide pre- and post-award audit, review, and advisory services associated with other types of contracts or claims.

Subpart 842.7—Indirect Cost Rates

842.705 Final indirect cost rates.

(a) Except when the quick-closeout procedures described in FAR 42.708 are used, contracting officers must request audits on proposed final indirect cost rates and billing rates for use in cost

reimbursement, fixed-price incentive, and fixed-price redeterminable contracts as prescribed in FAR Subpart 42.7.

(b) When the quick closeout procedures are used, the contracting officers must perform a review and validation of the contractor's data for accuracy and reasonableness of the proposed rates for negotiating the settlement of indirect costs for a specific contract.

Subpart 842.8—Disallowance of Costs

842.801 Notice of intent to disallow costs.

842.801–70 Audit assistance prior to disallowing costs.

If a contracting officer determines that costs should be disallowed during the performance of a cost reimbursement, fixed-price incentive, or fixed-price redetermination contract exceeding the thresholds specified in FAR 15.403–4, the contracting officer must request audit assistance. The VA OIG shall conduct audits of contracts for health care resources and contracting officers shall request such audits directly from that office. For all other types of contracts, the contracting officer must obtain an audit control number from Acquisition Resources Service and send a formal request to conduct the audit directly to the nearest Defense Contract Audit Agency (DCAA) office, referencing the audit control number and the project number (if any).

842.803 Disallowing costs after incurrence.

Contracting officers may approve or disapprove contractors' vouchers for payment and process them to the servicing fiscal office. Such approval or disapproval must be within the limitations of the contracting officer's warrant and the contract for which the voucher is submitted must be within the contracting officer's delegation of contracting authority.

Subpart 842.12—Novation and Change-of-Name Agreements

842.1203 Processing agreements.

Before execution of novation and change-of-name agreements, contracting officers must submit all supporting agreements and documentation to the OGC for review as to legal sufficiency.

PART 844—SUBCONTRACTING POLICIES AND PROCEDURES [RESERVED]

PART 846—QUALITY ASSURANCE

Subpart 846.3—Contract Clauses

Sec.

846.302 Fixed-price supply contracts.
846.302–70 Guarantee clause.
846.302–71 Inspection.
846.302–72 Frozen processed foods.
846.302–73 Noncompliance with packaging, packing and/or marking requirements.
846.312 Construction contracts.

Subpart 846.4—Government Contract Quality Assurance

846.408 Single-agency assignments of Government contract quality assurance.
846.408–70 Inspection of subsistence.
846.408–71 Waiver of USDA inspection and specifications.
846.470 Use of commercial organizations for inspections and grading services.
846.471 Determination authority.
846.472 Inspection of repairs for properties under the Loan Guaranty and Direct Loan Programs.
846.472–1 Repairs of $1,000 or less.
846.472–2 Repairs in excess of $1,000.

Subpart 846.7—Warranties

846.710 Contract clauses.
846.710–70 Special warranties.
846.710–71 Warranty for construction—guarantee period services.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 846.3—Contract Clauses

846.302 Fixed-price supply contracts.

846.302–70 Guarantee clause.

(a) The contracting officer shall insert the clause at 852.246–70, Guarantee, in solicitations for the acquisition of equipment.

(b) If it is industry policy to furnish, but not install, replacement material and parts at the contractor's expense, the last sentence of the clause at 852.248–70 will be changed to indicate that cost of installation shall be borne by the Government. Where it is industry policy to guarantee components for the life of the equipment (e.g., crystals in transmitters and receivers in radio communications systems) or to require that highly technical equipment be returned to the factory (at the contractor's or the Government's expense) for replacement of defective materials or parts, then the clause will be revised to be compatible with such policy.

846.302–71 Inspection.

The contracting officer shall include a ''Rejected Goods'' contract clause in solicitations and contracts as follows:

(a) Except as provided in paragraph (b) of this section, insert the clause at 852.246–71, Inspection, in solicitations and contracts for the acquisition of supplies or equipment.

(b) In solicitations and contracts for packing house and dairy products, bread and bakery products, and for fresh and frozen fruits and vegetables, insert the Alternate I clause at 852.246–71, Inspection.

846.302–72 Frozen processed foods.

The contracting officer shall insert the clause at 852.246–72, Frozen processed foods, in solicitations and contracts for frozen processed foods.

846.302–73 Noncompliance with packaging, packing and/or marking requirements.

The contracting officer shall insert the clause at 852.246–73, Noncompliance with packaging, packing, and/or marking requirements, in non-commercial item solicitations and contracts for supplies or equipment where there are special packaging, packing and/or marking requirements. The clause may be used in commercial item acquisitions if a waiver is approved in accordance with FAR 12.302(c) and 812.302.

846.312 Construction contracts.

The contracting officer shall insert the clause at 852.236–74, 852.236–74, Inspection of construction, in solicitations and contracts for construction that include the FAR clause at 52.246–12, Inspection of Construction.

Subpart 846.4—Government Contract Quality Assurance

846.408 Single-agency assignments of Government contract quality assurance.

846.408–70 Inspection of subsistence.

(a) Before issuing a solicitation for subsistence, the contracting officer must determine whether:

(1) Representatives of the U.S. Department of Agriculture (USDA) or the Department of Commerce will inspect for specification compliance before shipment; or

(2) Personnel of the purchasing activity will inspect for specification compliance at the time of delivery.

(b) The contracting officer must indicate the time and place of inspection in the solicitation.

(c) Because the requirement for USDA or Department of Commerce inspections and certifications result in additional contractor costs that may be ultimately reflected in bid prices, the contracting officer, in consultation with the Chief, Nutrition and Food Service, must evaluate the need for such inspections. The evaluation must include the following:

(1) The quality assurance already provided by other mandatory inspection systems.

(2) The proposed suppliers' own quality control system.

(3) Experience with the proposed suppliers.

(4) The pre-qualifying of the suppliers' quality assurance systems and subsequently waiving inspections and certifications for future solicitations.

(5) The cost of the inspections.

(d) When the contracting officer indicates that either the USDA or the Department of Commerce will conduct the inspection, the contracting officer must also provide in the solicitation that the contractor is responsible for all of the following:

(1) Arranging and paying for inspection services.

(2) Obtaining from the inspectors a certificate indicating that the product complies with specifications.

(3) Assuring that the certificate, or copy, accompanies the shipment or is furnished to the receiving installation before shipment, or notifying the installation when the certificate is not immediately available.

(4) Seeing that acceptable products are covered by an inspection agency checkloading certificate or stamped by the inspector as prescribed by the contracting officer.

(5) Furnishing samples for inspection at the contractor's expense.

(6) Indicating the address where inspection will occur.

(e) The contracting officer must furnish a copy of the purchase document to the inspecting activity.

846.408–71 Waiver of USDA inspection and specifications.

(a) When the amount of an item to be purchased will not exceed 500 pounds per delivery, the contracting officer may purchase the following without reference to the specifications in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, Publication No. C8900–SL, and the USDA inspection requirements:

(1) Butter.

(2) Cheese (except cottage cheese).

(3) Sausage.

(4) Meat food products*.

(5) Bacon, smoked.

(6) Bacon, Canadian style.

(b) When the items listed in paragraph (a) of this section are procured together with items that are not exempt, the contracting officer must include the following in the solicitation:

> Items * * * are not required to be in accordance with the specifications contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, Publication No. C8900-SL, and the special USDA inspection is not required. VA will inspect for quality and condition upon delivery at destination. These items are, however, subject to the quality controls stated herein.

(c) As appropriate, the contracting officer must include the following statements in each invitation for bid, request for proposal, quotation, or purchase order:

(1) Butter. This product must be graded by the USDA and labeled ''Grade A'' or the grade specified herein.

(2) Sausage and meat food products.*

(i) This product must be a high commercial product and must have been prepared in a federally inspected plant and bear the USDA establishment number stamp evidencing that it is sound, healthful, wholesome, and fit for human consumption; and

(ii) This product must bear a label complying with the Federal Food, Drug and Cosmetic Act that requires the listing of all ingredients in the order of their predominance.

(3) Bacon, smoked; and bacon, Canadian style. This product must be a high commercial product and must have been prepared in a federally inspected plant and bear the USDA establishment number stamp evidencing that it is sound, healthful, wholesome, and fit for human consumption.

(d) When using a ''brand name or equal'' purchase description, the contracting officer must list every brand name item that is known to be acceptable and available in the area.

846.470 Use of commercial organizations for inspections and grading services.

The contracting officer may use a commercial organization for inspection and grading services when the contracting officer determines that all of the following conditions exist:

(a) The results of a technical inspection or grading are dependent upon the application of scientific principles or specialized techniques.

*''Meat food products'' means processed foods containing meat in substantial proportion and other listed ingredients including seasoning, e.g., frankfurters, coldcuts. Whole or prefabricated meats, e.g., pork chops, hamburger, are considered meats, not meat food products.

(b) VA is unable to employ the personnel qualified to properly perform the services and is unable to locate another Federal agency capable of providing the service.

(c) The inspection or grading results issued by a private organization are essential to verify the acceptance or rejection of a special commodity.

(d) The services may be performed without direct Government supervision.

846.471 Determination authority.

The following officials must make the determinations required in 846.470:

(a) The Director, Office of Construction and Facilities Management, for those items and services for which purchase authority has been assigned to the Office of Construction and Facilities Management.

(b) The Director, Veterans Canteen Service, for those items and services purchased, or contracted for, by the Veterans Canteen Service (except those items purchased from VA supply sources).

(c) The DSPE for all other supplies, equipment, and services.

846.472 Inspection of repairs for properties under the Loan Guaranty and Direct Loan Programs.

As provided in 846.472–1 and 846.472–2, management brokers or qualified fee or staff inspectors must conduct a final inspection of all repair programs upon completion. In addition, the broker or inspector must conduct intermediate or progress inspections on extensive or technical jobs as specified in the contract.

846.472–1 Repairs of $1,000 or less.

(a) Generally, the management broker must make any required inspections for repairs of $1,000 or less. A qualified fee or staff inspector must make any required inspection for repairs of $1,000 or less if the contracting officer:

(1) Has not assigned the property to a management broker; or,

(2) Has determined that the nature of the repairs requires supervision by a technician.

(b) There is no form prescribed for inspection of repairs of $1,000 or less, but the inspector may use VA Form 26–1839, Compliance Inspection Report. Regardless of the form in which the report is submitted, the inspector must identify the contractor, property, and the repair program and provide sufficient detail to enable the contracting officer to make a determination that the work is being performed satisfactorily or completed in accordance with the terms of the contract.

846.472–2 Repairs in excess of $1,000.

(a) A qualified fee or staff inspector must make the final inspection and any intermediate or progress inspections on repairs exceeding $1,000.

(b) The inspector must make the report of inspection on VA Form 26–1839, Compliance Inspection Report. The inspector must identify the property, contractor, and repair program and provide sufficient detailed information to enable the contracting officer to make a determination that the work is being performed satisfactorily or that it has been completed in accordance with the terms of the contract. The inspector must itemize any deficiencies and explain the deficiencies in detail.

Subpart 846.7—Warranties

846.710 Contract clauses.

The contracting officer shall insert the clause at FAR 52.246–21, Warranty of Construction, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold.

846.710–70 Special warranties.

The contracting officer shall insert the clause at 852.246–74, Special warranties, in solicitations and contracts for construction that include the FAR clause at 52.246–21, Warranty of Construction.

846.710–71 Warranty for construction—guarantee period services.

The contracting officer shall insert the clause at 852.246–75, Warranty of construction—guarantee period services, in solicitations and contracts for construction that include the FAR clause at 52.246–21, Warranty of Construction, and that also include guarantee period services.

PART 847—TRANSPORTATION

Subpart 847.3—Transportation in Supply Contracts

Sec.
847.303 Standard delivery terms and contract clauses.
847.303–1 F.o.b. origin.
847.303–70 F.o.b. origin, freight prepaid, transportation charges to be included on the invoice.
847.305 Solicitation provisions, contract clauses, and transportation factors.
847.305–70 Potential destinations known but quantities unknown.
847.306 Transportation factors in the evaluation of offers.
847.306–70 Transportation payment and audit.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 847.3—Transportation in Supply Contracts

847.303 Standard delivery terms and contract clauses.

847.303–1 F.o.b. origin.

Shipments falling within this category must be shipped on a bill of lading, except as provided in 41 CFR 102–118.40. Contracting officers must comply with 41 CFR Parts 102–117 and 102–118. Contact the Traffic Manager for assistance in determining when to issue the applicable bill of lading (VA Commercial Bill of Lading for domestic use or Government Bill of Lading for international shipments and domestic offshore shipments) and for all freight estimates.

847.303–70 F.o.b. origin, freight prepaid, transportation charges to be included on the invoice.

(a) The delivery terms will be stated as ''f.o.b. origin, transportation prepaid, with transportation charges to be included on the invoice,'' under any of the following circumstances:

(1) When it is determined that an f.o.b. origin purchase or delivery order will have transportation charges that do not exceed $250 and the occasional exception does not exceed that amount by more than $50.

(2) Single parcel shipments via express, courier, small package, or similar carriers, regardless of shipping cost, if the shipped parcel weighs 70 pounds or less and does not exceed 108 inches in length and girth combined.

(3) Multi-parcel shipments via express, courier small package, or similar carriers for which transportation charges do not exceed $250 per shipment.

(b) Orders issued on VA Form & 90–2138, Orders for Supplies or Services, must identify shipping instructions on the reverse side of the form. When VA Form 90–2138 is not used, the vendor must do the following:

(1) Consistent with the terms of the contract, pack, mark, and prepare shipment in conformance with carrier requirements to protect the personal property and assure the lowest applicable transportation charge. Follow package specifications found in the National Motor Freight Classification 100 Series.

(2) Add transportation charges as a separate item on the invoice. The invoice must include the following certification: ''The invoiced transportation charges have been paid and evidence of such payment will be furnished upon the Government's request.''

(3) Not include charges for insurance or valuation on the invoice unless the order specifically requires that the shipment be insured or the value be declared.

(4) Not prepay transportation charges on the order if such charges are expected to exceed $250. Ship collect and annotate the commercial bill of lading, ''To be converted to VA Commercial Bill of Lading.'' Contact the VA Traffic Manager for routing instructions and freight estimate.

(c) Each contracting officer is responsible for:

(1) Obtaining the most accurate estimate possible of transportation charges.

(2) Using the authority in paragraph (a) of this section only when consistent with the circumstances in that paragraph.

(d) When, in accordance with FAR Subpart 28.3 and FAR 47.102, a shipment must be insured or the value declared, the contracting officer will specifically instruct the vendor to do so on the order when a written order is used. If the order is oral, the vendor must annotate all copies of the purchase request to show that the insurance/declared value was specifically requested.

847.305 Solicitation provisions, contract clauses, and transportation factors.

847.305–70 Potential destinations known but quantities unknown.

When the VA National Acquisition Center contracts with multiple bidders to provide items directly to VA field installations on an f.o.b. origin basis, the evaluation of bids must follow specific procedures. To place each bid on an equal basis, even though specific quantities required by each facility cannot be predetermined, the contracting officer must use an anticipated demand factor in proportion to the number of hospital beds or patient workload. The clause prescribed in 852.247–70 must be used in these instances.

847.306 Transportation factors in the evaluation of offers.

847.306–70 Transportation payment and audit.

Transportation payments are audited by the Traffic Manager to ensure that payment and payment mechanisms for agency transportation are uniform and appropriate in accordance with 41 CFR part 102–118.

PART 849—TERMINATION OF CONTRACTS

Subpart 849.1—General Principles

Sec.

849.101 Authorities and responsibilities.
849.106 Fraud or other criminal conduct.
849.111 Review of proposed settlements.
849.111–70 Required review.
849.111–71 Submission of information.

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 849.1—General Principles

849.101 Authorities and responsibilities.

(a) While legal review and concurrence of the General Counsel is required prior to a default termination, in some cases where a quick response is necessary, this review can be expedited by express mailing or faxing the default letter and related documents which are required to make an evaluation directly to General Counsel (025). The default termination letter should contain, at a minimum, the following:

(1) The proposed termination (FAR 49.102);

(2) An explanation of what necessitated the default, including the reasons why the contracting officer considers the contractor to be in default;

(3) A statement that the factors set forth in FAR 49.402–3(f) have been fully considered; and

(4) Final decision language and appeal rights.

(b) Contracts containing a mutual termination clause may be terminated without reference to the General Counsel.

849.106 Fraud or other criminal conduct.

(a) If the contracting officer suspects fraud or other criminal conduct related to the settlement of a terminated contract, the contracting officer must do the following:

(1) Immediately discontinue all negotiations.

(2) Submit all of the pertinent facts necessary to support the suspicions to either of the following:

(i) The DSPE.

(ii) The Director, Office of Construction and Facilities Management, in the case of contracting officers from the Office of Construction and Facilities Management.

(3) Follow procedures as provided in 809.406–3 and 809.407–3.

(b) The DSPE or the Director, Office of Construction and Facilities Management, must review the submission and fully develop the facts.

(c) If the evidence indicates fraud or other criminal conduct, the DSPE or the Director, Office of Construction and Facilities Management, must forward the submission with recommendations through channels (to include OGC, if appropriate), to the Office of the Inspector General (OIG) for referral to the Department of Justice.

(d) The DSPE or the Director, Office of Construction and Facilities Management, will advise the contracting officer as to any further action to be taken. Pending receipt of this advice, no VA employee may discuss the matter with the contractor.

(e) VA will not initiate a collection, recovery or other settlement action while the matter is in the hands of the Department of Justice without first obtaining the concurrence of the U.S. Attorney concerned, through OIG.

(f) If the contractor makes an inquiry, the contracting officer will advise only that the proposal has been forwarded to higher authority.

849.111 Review of proposed settlements.

849.111–70 Required review.

(a) FAR 49.111 requires each agency to establish procedures, when necessary, for the administrative review of proposed termination settlements. Contracting officers shall submit proposed termination settlements or determinations of amounts due the contractor under a terminated contract that involve the expenditure of $100,000 or more of Government funds to the Director, Acquisition Program Management Division, or the Director, Acquisition Assistance Team, as appropriate, for technical and legal review (see 801.602–72(i)). Contracting officers shall not execute the settlement agreement or determination prior to receipt of the technical and legal review. The legal review of contracts awarded by or on behalf of the VA OIG will be conducted by the Counselor to the Inspector General.

(b) If the contracting officer declines to implement one or more of the recommendations or comments contained in the review memorandum, the contracting officer shall submit a written response to the Director, Acquisition Program Management Division, or the Director, Acquisition Assistance Team, as appropriate, explaining why the recommendations or comments were not followed. For contracts awarded by or on behalf of the VA OIG, the response shall be submitted to the Counselor to the Inspector General.

849.111–71 Submission of information.

(a) The contracting officer shall submit to the appropriate Acquisition Program Management Division or Acquisition Assistance Team office a copy of the proposed settlement agreement or determination, supported by such detailed information as is required for an adequate review. This information should normally include copies of:

(1) The contractor's or subcontractor's settlement proposal.

(2) The audit report.

(3) The property disposed report and any required approvals in connection therewith,

(4) The contracting officer's memorandum explaining the settlement, and

(5) Any other relevant material that will assist the procurement analyst in the review. The procurement analyst may, at his or her discretion, require the submission of additional information.

(b) The Director, Acquisition Program Management Division, or the Director, Acquisition Assistance Team, will obtain the concurrence or comments of OGC prior to forwarding the review to the contracting officer, except that the concurrence or comments will be obtained from the Counselor to the Inspector General for contracts awarded by or on behalf of the VA Office of Inspector General.

SUBCHAPTER H—CLAUSES AND FORMS

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 852.1—Instructions for Using Provisions and Clauses

Sec.
852.101 Using part 852.
852.102 Incorporating provisions and clauses.

Subpart 852.2—Text of Provisions and Clauses

852.203–70 Commercial advertising.
852.203–71 Display of Department of Veterans Affairs hotline poster.
852.207–70 Report of employment under commercial activities.
852.209–70 Organizational conflicts of interest.
852.211–70 Service data manuals.
852.211–71 Special notice.
852.211–72 Technical industry standards.
852.211–73 Brand name or equal.
852.211–74 Liquidated damages.
852.211–75 Product specifications.
852.214–70 Caution to bidders—bid envelopes.
852.214–71 Restrictions on alternate item(s).
852.214–72 Alternate item(s).
852.214–73 Alternate packaging and packing.
852.214–74 Bid samples.
852.216–70 Estimated quantities.
852.222–70 Contract Work Hours and Safety Standards Act—nursing home care contract supplement.
852.228–70 Bond premium adjustment.
852.228–71 Indemnification and insurance.
852.229–70 Sales or use taxes.
852.229–71 [Reserved]
852.233–70 Protest content/alternative dispute resolution.
852.233–71 Alternate protest procedure.
852.236–70 [Reserved]
852.236–71 Specifications and drawings for construction.
852.236–72 Performance of work by the contractor.
852.236–73 [Reserved]
852.236–74 Inspection of construction.
852.236–75 [Reserved]
852.236–76 Correspondence.
852.236–77 Reference to ''standards.''
852.236–78 Government supervision.
852.236–79 Daily report of workers and material.
852.236–80 Subcontracts and work coordination.
852.236–81 [Reserved]
852.236–82 Payments under fixed-price construction contracts (without NAS).
852.236–83 Payments under fixed-price construction contracts (including NAS).
852.236–84 Schedule of work progress.
852.236–85 Supplementary labor standards provisions.
852.236–86 Worker's compensation.
852.236–87 Accident prevention.
852.236–88 Contract changes—supplement.
852.236–89 Buy American Act.
852.236–90 Restriction on submission and use of equal products.
852.236–91 Special notes.
852.237–7 Indemnification and medical liability insurance.
852.237–70 Contractor responsibilities.
852.246–70 Guarantee.
852.246–71 Inspection.
852.246–72 Frozen processed foods.
852.246–73 Noncompliance with packaging, packing and/or marking requirements.
852.246–74 Special warranties.
852.246–75 Warranties for construction—guarantee period services.
852.247–70 Determining transportation costs for bid evaluation.
852.252–70 Solicitation provisions or clauses incorporated by reference.
852.270–1 Representatives of contracting officers.
852.270–2 Bread and bakery products—quantities.
852.270–3 Purchase of shellfish.
852.271–70 Nondiscrimination in services provided to beneficiaries.
852.271–71 [Reserved]
852.271–72 Time spent by counselee in counseling process.
852.271–73 Use and publication of counseling results.
852.271–74 Inspection.
852.271–75 Extension of contract period.
852.273–70 Late offers.
852.273–71 Alternative negotiation techniques.
852.273–72 Alternative evaluation.
852.273–73 Evaluation—health-care resources.
852.273–74 Award without exchanges.

AUTHORITY: 38 U.S.C. 501 and 8151–8153; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 852.1—Instructions for Using Provisions and Clauses

852.101 Using part 852.

Part 852 prescribes supplemental provisions and clauses to the FAR. Provision and clause numbering are as prescribed in FAR 52.101 (*e.g.*, supplementary construction clauses under Part 836 are numbered 852.236–71, 852.236–72, etc.).

852.102 Incorporating provisions and clauses.

(a) As authorized by FAR 52.102(c), any 48 CFR Chapter 8 (VAAR) provision or clause may be incorporated in a quotation, solicitation, or contract by reference, provided the contracting officer complies with the requirements stated in FAR 52.102(c)(1), (c)(2), and (c)(3). To ensure compliance with FAR 52.102(c)(1) and (c)(2), contracting officers shall insert the provision found at 852.252–70, Solicitation provisions or clauses incorporated by reference, in full text in a quotation, solicitation, or contract if the quotation, solicitation, or contract incorporates by reference a FAR or 48 CFR Chapter 8 (VAAR) provision or clause that requires completion by the offeror or prospective contractor and submittal with the quotation or offer.

(b) For any FAR or 48 CFR Chapter 8 (VAAR) provision or clause that requires completion by the contracting officer, the contracting officer shall, as a minimum, insert the title of the provision or clause and the paragraph that requires completion in full text in the quotation, solicitation, or contract. The balance of the provision or clause may be incorporated by reference.

(c) When one or more FAR or 48 CFR Chapter 8 (VAAR) provisions, or portions thereof, are incorporated in a quotation or solicitation by reference, the contracting officer shall insert in the quotation or solicitation the provision found at FAR 52.252–1, Solicitation Provisions Incorporated by Reference.

(d) When one or more FAR or 48 CFR Chapter 8 (VAAR) clauses, or portions thereof, are incorporated in a quotation, solicitation, or contract by reference, the contracting officer shall insert in the quotation, solicitation, or contract the clause found at FAR 52.252–2, Clauses Incorporated by Reference.

(e) If one or more FAR provisions or clauses, or portions thereof, are incorporated in a quotation, solicitation, or contract by reference, the contracting officer shall insert in the FAR provision or clause required by paragraph (c) or (d) of this section the following Internet address: *http://www.acquisition.gov/comp/far/index.html.*

(f) If one or more 48 CFR Chapter 8 (VAAR) provisions or clauses, or portions thereof, are incorporated in a quotation, solicitation, or contract by reference, the contracting officer shall insert in the FAR provision or clause required by paragraph (c) or (d) of this section the following Internet address: *http://www1.va.gov/oamm/acquisitions/ars/policyreg/vaar/index.htm.*

Subpart 852.2—Texts of Provisions and Clauses

852.203–70 Commercial advertising.

As prescribed in 803.570–2, insert the following clause:

COMMERCIAL ADVERTISING (JAN 2008)

The bidder or offeror agrees that if a contract is awarded to him/her, as a result of this solicitation, he/she will not advertise the award of the contract in his/her commercial advertising in such a manner as to state or imply that the Department of Veterans Affairs endorses a product, project or commercial line of endeavor.

(End of clause)

852.203–71 Display of Department of Veterans Affairs hotline poster.

As prescribed in 803.7001, insert the following clause:

DISPLAY OF DEPARTMENT OF VETERANS AFFAIRS HOTLINE POSTER (DEC 1992)

(a) Except as provided in paragraph (c) below, the Contractor shall display prominently, in common work areas within business segments performing work under VA contracts, Department of Veterans Affairs Hotline posters prepared by the VA Office of Inspector General.

(b) Department of Veterans Affairs Hotline posters may be obtained from the VA Office of Inspector General (53E), P.O. Box 34647, Washington, DC 20043–4647.

(c) The Contractor need not comply with paragraph (a) above if the Contractor has established a mechanism, such as a hotline, by

which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(End of clause)

852.207–70 Report of employment under commercial activities.

As prescribed in 807.304–77 and 873.110, the following clause will be included in A–76 cost comparison solicitations and solicitations issued under the authority of 38 U.S.C. 8151–8153 that may result in conversion from in-house to contract performance of work:

REPORT OF EMPLOYMENT UNDER COMMERCIAL ACTIVITIES (JAN 2008)

(a) Consistent with the Government post-employment conflict of interest regulations, the contractor shall give adversely affected Federal personnel the right of first refusal for all employment openings under this contract for which they are qualified.

(b) *Definitions.*

(1) *Adversely affected Federal personnel* means:

(i) Permanent Federal personnel who are assigned to the government commercial activity, or

(ii) Federal personnel who are identified for release from their competitive levels or separated as a result of the contract.

(2) *Employment openings* means position vacancies created by this contract that the contractor is unable to fill with personnel in the contractor's employ at the time of the contract award. The term includes positions within a 50-mile radius of the commercial activity that indirectly arise in the contractor's organization as a result of the contractor's reassignment of employees due to the award of this contract.

(3) *Contract start date* means the first day of contractor performance.

(c) *Filling employment openings.* (1) For a period beginning with contract award and ending 90 calendar days after the contract start date, no person other than adversely affected Federal personnel on the current listing provided by the contracting officer shall be offered an employment opening until all adversely affected and qualified Federal personnel identified by the contracting officer have been offered the job and refused it.

(2) The contractor may select any person for an employment opening when there are no qualified adversely affected Federal personnel on the latest current listing provided by the contracting officer.

(d) *Contracting reporting requirements.* (1) No later than 5 working days after contract award, the contractor shall furnish the contracting officer with the following:

(i) A list of employment openings including salaries and benefits, and

(ii) Sufficient job application forms for adversely affected Federal personnel.

(2) By the contract start date, the contractor shall provide the contracting officer with the following:

(i) The names of adversely affected Federal personnel offered an employment opening;

(ii) The date the offer was made;

(iii) A brief description of the position;

(iv) The date of acceptance of the offer and the effective date of employment;

(v) The date of rejection of the offer, if applicable, and the salary and benefits contained in the rejected offer; and

(vi) The names of any adversely affected Federal personnel who applied but were not offered employment and the reason(s) for withholding an offer.

(3) For the first 90 calendar days after the contract start date, the contractor shall provide the contracting officer with the names of all persons hired or terminated under the contract within 5 working days of such hiring or termination.

(e) *Information provided to the contractor.* (1) No later than 10 calendar days after the contract award, the contracting officer shall furnish the contractor a current list of adversely affected Federal personnel exercising the right of first refusal, along with their completed job application forms.

(2) Between the contract award and start dates, the contracting officer shall inform the contractor of any reassignment or transfer of adversely affected Federal personnel to other Federal positions.

(3) For a period of up to 90 calendar days after the contract start date, the contracting officer will periodically provide the contractor with an updated listing of adversely affected Federal personnel reflecting personnel who were recently released from their competitive levels or separated as a result of the contract award.

(f) *Qualifications determination.* The contractor has a right under this clause to determine adequacy of the qualifications of adversely affected Federal personnel for any employment openings. However, adversely affected Federal personnel who held jobs in the Government commercial activity that directly correspond to an employment opening shall be considered qualified for the job. Questions concerning the qualifications of adversely affected Federal personnel for specific employment openings shall be referred to the contracting officer for determination. The contracting officer's determination shall be final and binding on all parties.

(g) *Relating to other statutes, regulations and employment policies.* The requirements of this clause shall not modify or alter the contractor's responsibilities under statutes, regulations or other contract clauses pertaining to

the hiring of veterans, minorities, or persons with disabilities.

(h) *Penalty for noncompliance.* Failure of the contractor to comply with any provision of the clause may be grounds for termination for default.

(End of clause)

852.209–70 Organizational conflicts of interest.

As prescribed in 809.507–1(b), insert the following provision:

ORGANIZATIONAL CONFLICTS OF INTEREST (JAN 2008)

(a) It is in the best interest of the Government to avoid situations which might create an organizational conflict of interest or where the offeror's performance of work under the contract may provide the contractor with an unfair competitive advantage. The term ''organizational conflict of interest'' means that because of other activities or relationships with other persons, a person is unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or the person has an unfair competitive advantage.

(b) The offeror shall provide a statement with its offer which describes, in a concise manner, all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organizational, or otherwise) or actual or potential organizational conflicts of interest relating to the services to be provided under this solicitation. The offeror shall also provide statements with its offer containing the same information for any consultants and subcontractors identified in its proposal and which will provide services under the solicitation. The offeror may also provide relevant facts that show how its organizational and/or management system or other actions would avoid or mitigate any actual or potential organizational conflicts of interest.

(c) Based on this information and any other information solicited or obtained by the contracting officer, the contracting officer may determine that an organizational conflict of interest exists which would warrant disqualifying the contractor for award of the contract unless the organizational conflict of interest can be mitigated to the contracting officer's satisfaction by negotiating terms and conditions of the contract to that effect. If the conflict of interest cannot be mitigated and if the contracting officer finds that it is in the best interest of the United States to award the contract, the contracting officer shall request a waiver in accordance with FAR 9.503 and 48 CFR 809.503.

(d) Nondisclosure or misrepresentation of actual or potential organizational conflicts of interest at the time of the offer, or arising as a result of a modification to the contract, may result in the termination of the contract at no expense to the Government.

(End of provision)

852.211–70 Service data manuals.

(a) As prescribed in 811.107(a), insert the following clause:

SERVICE DATA MANUALS (NOV 1984)

(a) The successful bidder will supply operation/maintenance (service data) manuals with each piece of equipment in the quantity specified in the solicitation and resulting purchase order. As a minimum, the manual(s) shall be bound and equivalent to the manual(s) provided the manufacturer's designated field service representative as well as comply with all the requirements in paragraphs (b) through (i) of this clause. Sections, headings and section sequence identified in (b) through (i) of this clause are typical and may vary between manufacturers. Variances in the sections, headings and section sequence, however, do not relieve the manufacturer of his/her responsibility in supplying the technical data called for therein.

(b) *Title Page and Front Matter.* The title page shall include the equipment nomenclature, model number, effective date of the manual and the manufacturer's name and address. If the manual applies to a particular version of the equipment only, the title page shall also list that equipment's serial number. Front matter shall consist of the Table of Contents, List of Tables, List of Illustrations and a frontispiece (photograph or line drawing) depicting the equipment.

(c) *Section I, General Description.* This section shall provide a generalized description of the equipment or devices and shall describe its purpose or intended use. Included in this section will be a table listing all pertinent equipment specifications, power requirements, environmental limitations and physical dimensions.

(d) *Section II, Installation.* Section II shall provide pertinent installation information. It shall list all input and output connectors using applicable reference designators and functional names as they appear on the equipment. Included in this listing will be a brief description of the function of each connector along with the connector type. Instructions shall be provided as to the recommended method of repacking the equipment for shipment (packing material, labeling, etc.).

(e) *Section III, Operation.* Section III will fully describe the operation of the equipment and shall include a listing of each control

with a brief description of its function and step-by-step procedures for each operating mode. Procedures will use the control(s) nomenclature as it appears on the equipment and will be keyed to one or more illustrations of the equipment. Operating procedures will include any preoperational checks, calibration adjustments and operation tests. Notes, cautions and warnings shall be set off from the text body so they may easily be recognizable and will draw the attention of the reader. Illustrations should be used wherever possible depicting equipment connections for test, calibration, patient monitoring and measurements. For large, complex and/or highly versatile equipment capable of many operating modes and in other instances where the Operation Section is quite large, operational information may be bound separately in the form of an Operators Manual. The providing of a separate Operators manual does not relieve the supplier of his responsibility for providing the minimum acceptable maintenance data specified herein. When applicable, flow charts and narrative descriptions of software shall be provided. If programming is either built-in and/or user modifiable, a complete software listing shall be supplied. Equipment items with software packages shall also include diagnostic routines and sample outputs. Submission information shall be given in the Maintenance Section to identify equipment malfunctions that are software related.

(f) *Section IV, Principles of Operation.* This section shall describe in narrative form the principles of operation of the equipment. Circuitry shall be discussed in sufficient detail to be understood by technicians and engineers who possess a working knowledge of electronics and a general familiarity with the overall application of the devices. The circuit descriptions should start at the overall equipment level and proceed to more detailed circuit descriptions. The overall description shall be keyed to a functional block diagram of the equipment. Circuit descriptions shall be keyed to schematic diagrams discussed in paragraph (i) below. It is recommended that for complex or special circuits, simplified schematics should be included in this section.

(g) *Section V, Maintenance.* The maintenance section shall contain a list of recommended test equipment, special tools, preventive maintenance instructions and corrective information. The list of test equipment shall be that recommended by the manufacturer and shall be designated by manufacturer and model number. Special tools are those items not commercially available or those that are designed specifically for the equipment being supplied. Sufficient data will be provided to enable their purchase by the Department of Veterans Affairs. Preventive maintenance instructions shall consist of those recommended by the manufacturer to preclude unnecessary failures. Procedures and the recommended frequency of performance shall be included for visual inspection, cleaning, lubricating, mechanical adjustments and circuit calibration. Corrective maintenance shall consist of the data necessary to troubleshoot and rectify a problem and shall include procedures for realigning and testing the equipment. Troubleshooting shall include either a list of test points with the applicable voltage levels or waveforms that would be present under a certain prescribed set of conditions, a troubleshooting chart listing the symptom, probable cause and remedy, or a narrative containing sufficient data to enable a test technician or electronics engineer to determine and locate the probable cause of malfunction. Data shall also be provided describing the preferred method of repairing or replacing discrete components mounted on printed circuit boards or located in areas where special steps must be followed to disassemble the equipment. Procedures shall be included to realign and test the equipment at the completion of repairs and to restore it to its original operating condition. These procedures shall be supported by the necessary waveforms and voltage levels, and data for selecting matched components. Diagrams, either photographic or line, shall show the location of printed circuit board mounted components.

(h) *Section VI, Replacement Parts List.* The replacement parts list shall list, in alphanumeric order, all electrical/electronic, mechanical and pneumatic components, their description, value and tolerance, true manufacturer and manufacturers' part number.

(i) *Section VII, Drawings.* Wiring and schematic diagrams shall be included. The drawings will depict the circuitry using standard symbols and shall include the reference designations and component values or type designators. Drawings shall be clear and legible and shall not be engineering or productions sketches.

(End of clause)

Alternate I (JAN 2008). If the bid or proposal will result in the initial purchase (including each make and model) of a centrally procured item, insert the following paragraph:

(j) *Initial purchase.* The contractor agrees, when requested by the contracting officer, to furnish not more than three copies of the technical documentation required by paragraph 852.211–70(a) to the Service and Reclamation Division, Hines, IL. In addition, the contractor agrees to furnish two additional copies of the technical documentation required by 852.211–70(a) with each piece of equipment sold as a result of the invitation for bid or request for proposal.

(b) As prescribed in 811.107(b), insert the following clause:

Service Data Manuals, Mechanical Equipment (JAN 2008)

The contractor agrees to furnish two hard copies of a manual, handbook or brochure containing operating, installation, and maintenance instructions (including pictures or illustrations, schematics, and complete repair/test guides as necessary). Where applicable, it will include electrical data and connection diagrams for all utilities. The instructions shall also contain a complete list of all replaceable parts showing part number, name, and quantity required.

(End of clause)

852.211–71 Special notice.

As prescribed in 870.112, insert the following provision:

SPECIAL NOTICE (JAN 2008)

Descriptive literature. The submission of descriptive literature with offers is not required and voluntarily submitted descriptive literature that qualifies the offer will require rejection of the offer. However, within 5 days after award of the contract, the contractor will submit to the contracting officer literature describing the equipment he/she intends to furnish and indicating strict compliance with the specification requirements. The contracting officer will, by written notice to the contractor within 20 calendar days after receipt of the literature, approve, conditionally approve, or disapprove the equipment being proposed. The notice of approval or conditional approval will not relieve the contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the contractor. A notice of disapproval will cite reasons therefore. If the equipment is disapproved by the Government, the contractor will be subject to action under the Default or Termination for Cause provision of this contract. However, prior to default or termination for cause action the contractor will be permitted a period (at least 10 days) under that clause to submit additional descriptive literature on equipment originally offered or descriptive literature on other equipment. The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule necessitated by additional descriptive literature evaluations.

(End of provision)

852.211–72 Technical industry standards.

As prescribed in 811.103–70, insert the following provision:

TECHNICAL INDUSTRY STANDARDS (JAN 2008)

The supplies or equipment required by this invitation for bid or request for proposal must conform to the standards of the [ ]* and [ ]* as to [ ]**. The successful bidder or offeror will be required to submit proof that the item(s) he/she furnishes conforms to this requirement. This proof may be in the form of a label or seal affixed to the equipment or supplies, warranting that they have been tested in accordance with and conform to the specified standards. Proof may also be furnished in the form of a certificate from one of the above listed organizations certifying that the item(s) furnished have been tested in accordance with and conform to the specified standards.

(End of provision)

852.211–73 Brand name or equal.

As prescribed in 811.104–71, insert the following clause:

BRAND NAME OR EQUAL (JAN 2008)

(NOTE: As used in this clause, the term ''brand name'' includes identification of products by make and model.)

(a) If items called for by this invitation for bids have been identified in the schedule by a ''brand name or equal'' description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering ''equal'' products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation.

(b) Unless the bidder clearly indicates in the bid that the bidder is offering an ''equal'' product, the bid shall be considered as offering a brand name product referenced in the invitation for bids.

(c)(1) If the bidder proposes to furnish an ''equal'' product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise

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**Insert name(s) of organization(s), the standards of which are pertinent to the Government's needs.*

***Insert pertinent standards, e.g., fire and casualty, safety and fire protection.*

clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his/her bid as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information that is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his/her bid all descriptive material (such as cuts, illustrations, drawings or other information) necessary for the purchasing activity to:

(i) Determine whether the product offered meets the salient characteristics requirement of the Invitation for Bids, and

(ii) Establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he/she shall:

(i) Include in his/her bid a clear description of such proposed modifications, and

(ii) Clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the Invitation for Bids will not be considered.

(End of clause)

852.211–74 Liquidated damages.

As prescribed in 811.503 and 836.206, the contracting officer may insert the following clause when appropriate:

Liquidated Damages (JAN 2008)

If any unit of the work contracted for is accepted in advance of the whole, the rate of liquidated damages assessed will be in the ratio that the value of the unaccepted work bears to the total amount of the contract. If a separate price for unaccepted work has not been stated in the contractor's bid, determination of the value thereof will be made from schedules of costs furnished by the contractor and approved by the contracting officer, as specified elsewhere in the contract.

(End of clause)

852.211–75 Product specifications.

As prescribed in 811.204, insert the following clause:

PRODUCT SPECIFICATIONS (JAN 2008)

The products offered under this solicitation shall be type _____, grade _____, in accordance with [type of specification] No. _____, dated _____ and amendment _____ dated _____, except for paragraphs _____ and _____ which are amended as follows: [List any amendments to the specifications]

(End of clause)

852.214–70 Caution to bidders—bid envelopes.

As provided in 814.201–6(a), the following provision will be included in all invitations for bid:

CAUTION TO BIDDERS—BID ENVELOPES (JAN 2008)

It is the responsibility of each bidder to take all necessary precautions, including the use of proper mailing cover, to insure that the bid price cannot be ascertained by anyone prior to bid opening. If a bid envelope is furnished with this invitation, the bidder is requested to use this envelope in submitting the bid. The bidder may, however, use any suitable envelope, identified by the invitation number and bid opening time and date. If an Optional Form (OF) 17, Sealed Bid Label, is furnished with this invitation in lieu of a bid envelope, the bidder is advised to complete and affix the OF 17 to the lower left corner of the envelope used in submitting the bid.

(End of provision)

852.214–71 Restrictions on alternate item(s).

As prescribed in 814.201–6(b)(1), insert the following provision:

RESTRICTIONS ON ALTERNATE ITEM(S) (JAN 2008)

Bids on [ ]* will be considered only if acceptable bids on [ ]** are not received or do not satisfy the total requirement.

**Contracting officer will insert an alternate item that is considered acceptable.*

***Contracting officer will insert the required item and item number.*

(End of provision)

852.214–72 Alternate item(s).

As prescribed in 814.201–6(b)(2), insert the following provision:

ALTERNATE ITEM(S) (JAN 2008)

Bids on [ ]* will be given equal consideration along with bids on [ ]** and any such bids received may be accepted if to the advantage of the Government. Tie bids will be decided in favor of [ ].**

(End of provision)

852.214–73 Alternate packaging and packing.

As prescribed in 814.201–6(b)(3), insert the following provision:

ALTERNATE PACKAGING AND PACKING (JAN 2008)

The bidder's offer must clearly indicate the quantity, package size, unit, or other different feature upon which the quote is made. Evaluation of the alternate or multiple alternates will be made on a common denominator such as per ounce, per pound, etc., basis.

(End of provision)

852.214–74 Bid samples.

As prescribed in 814.201–6(c), insert the following provision:

Bid Samples (JAN 2008)

Any bid sample(s) furnished must be in the quantities specified in the solicitation and plainly marked with the complete lettering/numbering and description of the related bid item(s); the number of the Invitation for Bids; and the name of the bidder submitting the bid sample(s). Cases or packages containing any bid sample(s) must be plainly marked ''Bid Sample(s)'' and all changes pertaining to the preparation and transportation of bid sample(s) must be prepaid by the bidder. Bid sample(s) must be received at the location specified in the solicitation by the time and date for receipt of bids.

(End of provision)

852.216–70 Estimated quantities.

As prescribed in 816.504(a), insert the following clause:

**Contracting officer will insert an alternate item that is considered acceptable.*

***Contracting officer will insert the required item and item number.*

ESTIMATED QUANTITIES (APR 1984)

As it is impossible to determine the exact quantities that will be required during the contract term, each bidder whose bid is accepted wholly or in part will be required to deliver all articles or services that may be ordered during the contract term, except as he/she otherwise indicates in his/her bid and except as otherwise provided herein. Bids will be considered if made with the proviso that the total quantities delivered shall not exceed a certain specified quantity. Bids offering less than 75 percent of the estimated requirement or which provide that the Government shall guarantee any definite quantity, will not be considered. The fact that quantities are estimated shall not relieve the contractor from filling all orders placed under this contract to the extent of his/her obligation. Also, the Department of Veterans Affairs shall not be relieved of its obligation to order from the contractor all articles or services that may, in the judgment of the ordering officer, be needed except that in the public exigency procurement may be made without regard to this contract.

(End of clause)

Alternate I (APR 1984). As prescribed in 816.504(b), insert the following clause:

ESTIMATED QUANTITIES (APR 1984)

The estimated requirements shown in this invitation for bids cover the requirements for the entire contract period. It is understood and agreed that during the period of this contract the Government may order and the contractor will haul such coal as may, in the opinion of the Government, be required, except that in the public exigency procurement may be made without regard to this contract.

(End of clause)

Alternate II (APR 1984). As prescribed in 816.504(c), insert the following clause:

ESTIMATED QUANTITIES (APR 1984)

The supplies and/or services listed in the attached schedule will be furnished at such time and in such quantities as they are required.

(End of clause)

Alternate III (JUL 1989). As prescribed in 816.504(d), insert the following clause:

ESTIMATED QUANTITIES (JUL 1989)

As it is impossible to determine the exact quantities that will be required during the contract term, each bidder whose bid is accepted wholly or in part will be required to deliver all articles that may be ordered during the contract term, except as he or she otherwise indicates in his or her bid and except as otherwise provided herein. Bids will be considered if made with the proviso that the total quantities delivered shall not exceed a certain specified quantity. The fact that quantities are estimated shall not relieve the contractor from filling all orders placed under this contract to the extent of his/her obligation. Also, the Department of Veterans Affairs shall not be relieved of its obligation to order from the contractor all articles that may, in the judgment of the ordering officer, be needed except that in the public exigency procurement may be made without regard to this contract.

(End of clause)

§ 852.222–70 Contract Work Hours and Safety Standards Act—nursing home care contract supplement.

As prescribed in 822.305, for nursing home care requirements, insert the following clause:

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—NURSING HOME CARE CONTRACT SUPPLEMENT (JAN 2008)

The following exemption to FAR clause 52.222–4, Contract Work Hours and Safety Standards Act—Overtime Compensation, applies to this contract: A contractor and subcontractor under this contract will not be required to pay overtime wages to their employees for work in excess of 40 hours in any workweek, which would otherwise be a violation of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708), provided:

(a) The contractor or subcontractor is primarily engaged in the care of nursing home patients residing on the contractor's or subcontractor's premises;

(b) There is an agreement or understanding between the contractor or subcontractor and their employees, before performance of work, that a work period of 14 consecutive days is acceptable in lieu of a work period of 7 consecutive days for the purpose of overtime compensation;

(c) Employees receive overtime compensation at a rate no less than 1½ times the employees' regular hourly rate of pay for work in excess of 80 hours in any 14 day period; and

(d) Pay is otherwise computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

(End of clause)

§ 852.228–70 Bond premium adjustment.

As prescribed in 828.106–70, insert the following clause:

BOND PREMIUM ADJUSTMENT (JAN 2008)

When net changes in original contract price affect the premium of a Corporate Surety Bond by $5 or more, the Government, in determining the basis for final settlement, will provide for bond premium adjustment computed at the rate shown in the bond.

(End of clause)

§ 852.228–71 Indemnification and insurance.

As prescribed in 828.306, insert the following clause:

INDEMNIFICATION AND INSURANCE (JAN 2008)

(a) *Indemnification.* The contractor expressly agrees to indemnify and save the Government, its officers, agents, servants, and employees harmless from and against any and all claims, loss, damage, injury, and liability, however caused, resulting from, arising out of, or in any way connected with the performance of work under this agreement. Further, it is agreed that any negligence or alleged negligence of the Government, its officers, agents, servants, and employees, shall not be a bar to a claim for indemnification unless the act or omission of the Government, its officers, agents, servants, and employees is the sole, competent, and producing cause of such claims, loss, damage, injury, and liability. At the option of the contractor, and subject to the approval by the contracting officer of the sources, insurance coverage may be employed as guaranty of indemnification.

(b) *Insurance.* Satisfactory insurance coverage is a condition precedent to award of a contract. In general, a successful bidder must present satisfactory evidence of full compliance with State and local requirements, or those below stipulated, whichever are the greater. More specifically, workers' compensation and employer's liability coverage will conform to applicable State law requirements for the service contemplated, whereas general liability and automobile liability of comprehensive type shall, in the absence of higher statutory minimums, be required in the amounts per vehicle used of not less than $200,000 per person and $500,000 per occurrence for bodily injury and $20,000 per occurrence for property damage. State-approved sources of insurance coverage ordinarily will be deemed acceptable to the Department of Veterans Affairs installation, subject to timely certifications by such

sources of the types and limits of the coverages afforded by the sources to the bidder. [*Contracting Officer's Note: In those instances where airplane service is to be used, substitute the word ''aircraft'' for ''automobile'' and ''vehicle'' and modify coverage to require aircraft public and passenger liability insurance of at least $200,000 per passenger and $500,000 per occurrence for bodily injury, other than passenger liability, and $200,000 per occurrence for property damage. Coverage for passenger liability bodily injury shall be at least $200,000 multiplied by the number of seats or passengers, whichever is greater.*]

(End of clause)

§ 852.229–70 Sales or use taxes.

As prescribed in 829.302–70, insert the following provision:

SALES OR USE TAXES (JAN 2008)

This provision replaces paragraph (k) of Federal Acquisition Regulation clause 52.212–4, Contract Terms and Conditions—Commercial Items. The articles listed in this solicitation will be purchased from the personal funds of patients and prices submitted herein include any sales or use tax heretofore imposed by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, applicable to the material in this solicitation.

(End of clause)

§ 852.229–71 [Reserved]

§ 852.233–70 Protest content/alternative dispute resolution.

As prescribed in 833.106, insert the following provision:

PROTEST CONTENT/ALTERNATIVE DISPUTE RESOLUTION (JAN 2008)

(a) Any protest filed by an interested party shall:

(1) Include the name, address, fax number, and telephone number of the protester;

(2) Identify the solicitation and/or contract number;

(3) Include an original signed by the protester or the protester's representative and at least one copy;

(4) Set forth a detailed statement of the legal and factual grounds of the protest, including a description of resulting prejudice to the protester, and provide copies of relevant documents;

(5) Specifically request a ruling of the individual upon whom the protest is served;

(6) State the form of relief requested; and

(7) Provide all information establishing the timeliness of the protest.

(b) Failure to comply with the above may result in dismissal of the protest without further consideration.

(c) Bidders/offerors and contracting officers are encouraged to use alternative dispute resolution (ADR) procedures to resolve protests at any stage in the protest process. If ADR is used, the Department of Veterans Affairs will not furnish any documentation in an ADR proceeding beyond what is allowed by the Federal Acquisition Regulation.

(End of provision)

§ 852.233–71 Alternate protest procedure.

As prescribed in 833.106, insert the following provision:

ALTERNATE PROTEST PROCEDURE (JAN 1998)

As an alternative to filing a protest with the contracting officer, an interested party may file a protest with the Deputy Assistant Secretary for Acquisition and Materiel Management, Acquisition Administration Team, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or for solicitations issued by the Office of Construction and Facilities Management, the Director, Office of Construction and Facilities Management, 810 Vermont Avenue, NW., Washington, DC 20420. The protest will not be considered if the interested party has a protest on the same or similar issues pending with the contracting officer.

(End of provision)

§ 852.236–70 [Reserved]

§ 852.236–71 Specifications and drawings for construction.

As prescribed in 836.521, insert the following clause:

SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (JUL 2002)

The clause entitled ''Specifications and Drawings for Construction'' in FAR 52.236–21 is supplemented as follows:

(a) The contracting officer's interpretation of the drawings and specifications will be final, subject to the disputes clause.

(b) Large scale drawings supersede small scale drawings.

(c) Dimensions govern in all cases. Scaling of drawings may be done only for general location and general size of items.

(d) Dimensions shown of existing work and all dimensions required for work that is to connect with existing work shall be verified by the contractor by actual measurement of the existing work. Any work at variance with that specified or shown in the drawings

shall not be performed by the contractor until approved in writing by the contracting officer.

(End of clause)

852.236–72 Performance of work by the contractor.

As prescribed in 836.501, insert the following clause:

PERFORMANCE OF WORK BY THE CONTRACTOR (JUL 2002)

The clause entitled ''Performance of Work by the Contractor'' in FAR 52.236–1 is supplemented as follows:

(a) Contract work accomplished on the site by laborers, mechanics, and foremen/forewomen on the contractor's payroll and under his/her direct supervision shall be included in establishing the percent of work to be performed by the contractor. Cost of material and equipment installed by such labor may be included. The work by the contractor's executive, supervisory and clerical forces shall be excluded in establishing compliance with the requirements of this clause.

(b) The contractor shall submit, simultaneously with the schedule of costs required by the Payments Under Fixed-Price Construction Contracts clause of the contract, a statement designating the branch or branches of contract work to be performed with his/her forces. The approved schedule of costs will be used in determining the value of a branch or branches, or portions thereof, of the work for the purpose of this article.

(c) If, during the progress of work hereunder, the contractor requests a change in the branch or branches of the work to be performed by his/her forces and the contracting officer determines it to be in the best interest of the Government, the contracting officer may, at his/her discretion, authorize a change in such branch or branches of said work. Nothing contained herein shall permit a reduction in the percentage of work to be performed by the contractor with his/her forces, it being expressly understood that this is a contract requirement without right or privilege of reduction.

(d) In the event the contractor fails or refuses to meet the requirement of the FAR clause at 52.236–1, it is expressly agreed that the contract price will be reduced by 15 percent of the value of that portion of the percentage requirement that is accomplished by others. For the purpose of this clause, it is agreed that 15 percent is an acceptable estimate of the contractor's overhead and profit, or mark-up, on that portion of the work which the contractor fails or refuses to perform, with his/her own forces, in accordance with the FAR clause at 52.236–1.

(End of clause)

Alternate I (Date). For requirements which include Network Analysis System (NAS), substitute the following paragraphs (b) and (c) for paragraphs (b) and (c) of the basic clause:

(b) The contractor shall submit, simultaneously with the cost per activity of the construction schedule required by Section 01310 or 01311, NETWORK ANALYSIS SYSTEM, a responsibility code for all activities of the network for which the contractor's forces will perform the work. The cost of these activities will be used in determining the portions of the total contract work to be executed by the contractor's forces for the purpose of this article.

(c) If, during progress of work hereunder, the contractor requests a change in activities of work to be performed by the contractor's forces and the contracting officer determines it to be in the best interest of the Government, the contracting officer may, at his or her discretion, authorize a change in such activities of said work.

852.236–73 [Reserved]

852.236–74 Inspection of construction.

As prescribed in 846.312, insert the following clause:

INSPECTION OF CONSTRUCTION (JUL 2002)

The clause entitled ''Inspection of Construction'' in FAR 52.246–12 is supplemented as follows:

(a) Inspection of materials and articles furnished under this contract will be made at the site by the resident engineer, unless otherwise provided for in the specifications.

(b) Final inspection will not be made until the contract work is ready for beneficial use or occupancy. The contractor shall notify the contracting officer, through the resident engineer, fifteen (15) days prior to the date on which the work will be ready for final inspection.

(End of clause)

852.236–75 [Reserved]

852.236–76 Correspondence.

As prescribed in 836.570, insert the following clause:

CORRESPONDENCE (APR 1984)

All correspondence relative to this contract shall bear the Specification Number, Project Number, Department of Veterans Affairs Contract Number, title of project and name of facility.

(End of clause)

852.236–77 Reference to "standards".

As prescribed in 836.571, insert the following clause:

REFERENCE TO ''STANDARDS'' (JUL 2002)

Any materials, equipment, or workmanship specified by references to number, symbol, or title of any specific Federal, Industry or Government Agency Standard Specification shall comply with all applicable provisions of such standard specifications, except as limited to type, class or grade, or modified in contract specifications. Reference to ''Standards'' referred to in the contract specifications, except as modified, shall have full force and effect as though printed in detail in the specifications.

(End of clause)

852.236–78 Government supervision.

As prescribed in 836.572, insert the following clause:

GOVERNMENT SUPERVISION (APR 1984)

(a) The work will be under the direction of the Department of Veterans Affairs contracting officer, who may designate another VA employee to act as resident engineer at the construction site.

(b) Except as provided below, the resident engineer's directions will not conflict with or change contract requirements.

(c) Within the limits of any specific authority delegated by the contracting officer, the resident engineer may, by written direction, make changes in the work. The contractor shall be advised of the extent of such authority prior to execution of any work under the contract.

(End of clause)

852.236–79 Daily report of workers and material.

As prescribed in 836.573, insert the following clause:

DAILY REPORT OF WORKERS AND MATERIAL (APR 1984)

The contractor shall furnish to the resident engineer each day a consolidated report for the preceding work day in which is shown the number of laborers, mechanics, foremen/forewomen and pieces of heavy equipment used or employed by the contractor and subcontractors. The report shall bear the name of the firm, the branch of work that they perform, such as concrete, plastering, masonry, plumbing, sheet metal work, etc. The report shall give a breakdown of employees by crafts, location where employed, and work performed. The report shall also list materials delivered to the site on the date covered by the report.

(End of clause)

852.236–80 Subcontracts and work coordination.

As prescribed in 836.574, insert the following clause:

SUBCONTRACTS AND WORK COORDINATION (APR 1984)

(a) Nothing contained in this contract shall be construed as creating any contractual relationship between any subcontractor and the Government. Divisions or sections of specifications are not intended to control the contractor in dividing work among subcontractors, or to limit work performed by any trade.

(b) The contractor shall be responsible to the Government for acts and omissions of his/her own employees, and of the subcontractors and their employees. The contractor shall also be responsible for coordination of the work of the trades, subcontractors, and material suppliers.

(c) The Government or its representatives will not undertake to settle any differences between the contractor and subcontractors or between subcontractors.

(d) The Government reserves the right to refuse to permit employment on the work or require dismissal from the work of any subcontractor who, by reason of previous unsatisfactory work on Department of Veterans Affairs projects or for any other reason, is considered by the contracting officer to be incompetent or otherwise objectionable.

(End of clause)

Alternate I (JUL 2002). For new construction work with complex mechanical-electrical work, the following paragraph relating to work coordination may be substituted for paragraph (b) of the basic clause:

(b) The contractor shall be responsible to the Government for acts and omissions of his/her own employees, and subcontractors and their employees. The contractor shall also be responsible for coordination of the work of the trades, subcontractors, and material suppliers. The contractor shall, in advance of the work, prepare coordination drawings showing the location of openings through slabs, the pipe sleeves and hanger inserts, as well as the location and elevation of utility lines, including, but not limited to, conveyor systems, pneumatic tubes, ducts, and conduits and pipes 2 inches and larger in diameter. These drawings, including plans, elevations, and sections as appropriate, shall

clearly show the manner in which the utilities fit into the available space and relate to each other and to existing building elements. Drawings shall be of appropriate scale to satisfy the previously stated purposes, but not smaller than ⅜-inch scale. Drawings may be composite (with distinctive colors for the various trades) or may be separate but fully coordinated drawings (such as sepias or photographic paper reproducibles) of the same scale. Separate drawings shall depict identical building areas or sections and shall be capable of being overlaid in any combination. The submitted drawings for a given area of the project shall show the work of all trades that will be involved in that particular area. Six complete composite drawings or six complete sets of separate reproducible drawings shall be received by the Government not less than 20 days prior to the scheduled start of the work in the area illustrated by the drawings, for the purpose of showing the contractor's planned methods of installation. The objectives of such drawings are to promote carefully planned work sequence and proper trade coordination, in order to assure the expeditious solutions of problems and the installation of lines and equipment as contemplated by the contract documents while avoiding or minimizing additional costs to the contractor and to the Government. In the event the contractor, in coordinating the various installations and in planning the method of installation, finds a conflict in location or elevation of any of the utilities with themselves, with structural items or with other construction items, he/she shall bring this conflict to the attention of the contracting officer immediately. In doing so, the contractor shall explain the proposed method of solving the problem or shall request instructions as to how to proceed if adjustments beyond those of usual trades coordination are necessary. Utilities installation work will not proceed in any area prior to the submission and completion of the Government review of the coordinated drawings for that area, nor in any area in which conflicts are disclosed by the coordination drawings, until the conflicts have been corrected to the satisfaction of the contracting officer. It is the responsibility of the contractor to submit the required drawings in a timely manner consistent with the requirements to complete the work covered by this contract within the prescribed contract time.

852.236–81 [Reserved]

852.236–82 Payments under fixed-price construction contracts (without NAS).

As prescribed in 832.111, insert the following clause in contracts that do not contain a section entitled ''Network Analysis System (NAS).''

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1984)

The clause entitled ''Payments Under Fixed-Price Construction Contracts'' in FAR 52.232–5 is implemented as follows:

(a) Retainage:

(1) The contracting officer may retain funds:

(i) Where performance under the contract has been determined to be deficient or the contractor has performed in an unsatisfactory manner in the past; or

(ii) As the contract nears completion, to ensure that deficiencies will be corrected and that completion is timely.

(2) Examples of deficient performance justifying a retention of funds include, but are not restricted to, the following:

(i) Unsatisfactory progress as determined by the contracting officer;

(ii) Failure to meet schedule in Schedule of Work Progress;

(iii) Failure to present submittals in a timely manner; or

(iv) Failure to comply in good faith with approved subcontracting plans, certifications, or contract requirements.

(3) Any level of retention shall not exceed 10 percent either where there is determined to be unsatisfactory performance, or when the retainage is to ensure satisfactory completion. Retained amounts shall be paid promptly upon completion of all contract requirements, but nothing contained in this subparagraph shall be construed as limiting the contracting officer's right to withhold funds under other provisions of the contract or in accordance with the general law and regulations regarding the administration of Government contracts.

(b) The contractor shall submit a schedule of cost to the contracting officer for approval within 30 calendar days after date of receipt of notice to proceed. Such schedule will be signed and submitted in triplicate. The approved cost schedule will be one of the bases for determining progress payments to the contractor for work completed. This schedule shall show cost by the branches of work for each building or unit of the contract, as instructed by the resident engineer.

(1) The branches shall be subdivided into as many sub-branches as are necessary to cover all component parts of the contract work.

(2) Costs as shown on this schedule must be true costs and, should the resident engineer so desire, he/she may require the contractor to submit the original estimate sheets or other information to substantiate the detailed makeup of the schedule.

(3) The sum of the sub-branches, as applied to each branch, shall equal the total cost of

such branch. The total cost of all branches shall equal the contract price.

(4) Insurance and similar items shall be prorated and included in the cost of each branch of the work.

(5) The cost schedule shall include separate cost information for the systems listed in the table in this paragraph (b)(5). The percentages listed below are proportions of the cost listed in the contractor's cost schedule and identify, for payment purposes, the value of the work to adjust, correct and test systems after the material has been installed. Payment of the listed percentages will be made only after the contractor has demonstrated that each of the systems is substantially complete and operates as required by the contract.

VALUE OF ADJUSTING CORRECTING, AND TESTING SYSTEM

System	Percent
Pneumatic Tube System	10
Incinerators (medical waste and trash)	5
Sewage treatment plant equipment	5
Water treatment plant equipment	5
Washers (dish, cage, glass, etc.)	5
Sterilizing equipment	5
Water distilling equipment	5
Prefab temperature rooms (cold, constant temperature)	5
Entire air-conditioning system (Specified under 600 Sections)	5
Entire boiler plant system (Specified under 700 Sections)	5
General supply conveyors	10
Food service conveyors	10
Pneumatic soiled linen and trash system	10
Elevators and dumbwaiters	10
Materials transport system	10
Engine-generator system	5
Primary switchgear	5
Secondary switchgear	5
Fire alarm system	5
Nurse call system	5
Intercom system	5
Radio system	5
TV (entertainment) system	5

(c) In addition to this cost schedule, the contractor shall submit such unit costs as may be specifically requested. The unit costs shall be those used by the contractor in preparing his/her bid and will not be binding as pertaining to any contract changes.

(d) The contracting officer will consider for monthly progress payments material and/or equipment procured by the contractor and stored on the construction site, as space is available, or at a local approved location off the site, under such terms and conditions as such officer approves, including but not limited to the following:

(1) The material or equipment is in accordance with the contract requirements and/or approved samples and shop drawings.

(2) Only those materials and/or equipment as are approved by the resident engineer for storage will be included.

(3) Such materials and/or equipment will be stored separately and will be readily available for inspection and inventory by the resident engineer.

(4) Such materials and/or equipment will be protected against weather, theft and other hazards and will not be subjected to deterioration.

(5) All of the other terms, provisions, conditions and covenants contained in the contract shall be and remain in full force and effect as therein provided.

(6) A supplemental agreement will be executed between the Government and the contractor with the consent of the contractor's surety for off-site storage.

(e) The contractor, prior to receiving a progress or final payment under this contract, shall submit to the contracting officer a certification that the contractor has made payment from proceeds of prior payments, or that timely payment will be made from the proceeds of the progress or final payment then due, to subcontractors and suppliers in accordance with the contractual arrangements with them.

(f) The Government reserves the right to withhold payment until samples, shop drawings, engineer's certificates, additional bonds, payrolls, weekly statements of compliance, proof of title, nondiscrimination compliance reports, or any other things required by this contract, have been submitted to the satisfaction of the contracting officer.

(End of clause)

Alternate I (JUL 2002). If the specifications include guarantee period services, the contracting officer shall include the following paragraphs as additions to paragraph (b) of the basic clause:

(6)(i) The contractor shall at the time of contract award furnish the total cost of the guarantee period services in accordance with specification section(s) covering guarantee period services. The contractor shall submit, within 15 calendar days of receipt of the notice to proceed, a guarantee period performance program that shall include an itemized accounting of the number of work-hours required to perform the guarantee period service on each piece of equipment. The contractor shall also submit the established salary costs, including employee fringe benefits, and what the contractor reasonably expects to pay over the guarantee period, all of which will be subject to the contracting officer's approval.

(ii) The cost of the guarantee period service shall be prorated on an annual basis and paid in equal monthly payments by VA during the period of guarantee. In the event the

installer does not perform satisfactorily during this period, all payments may be withheld and the contracting officer shall inform the contractor of the unsatisfactory performance, allowing the contractor 10 days to correct deficiencies and comply with the contract. The guarantee period service is subject to those provisions as set forth in the Payments and Default clauses.

852.236–83 Payments under fixed-price construction contracts (including NAS).

As prescribed in 832.111, insert the following clause in contracts that contain a section entitled ''Network Analysis System (NAS).''

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (JUL 2002)

The clause entitled ''Payments Under Fixed-Price Construction Contracts'' in FAR 52.232–5 is implemented as follows:

(a) Retainage:

(1) The contracting officer may retain funds:

(i) Where the performance under the contract has been determined to be deficient or the contractor has performed in an unsatisfactory manner in the past; or

(ii) As the contract nears completion, to ensure that deficiencies will be corrected and that completion is timely.

(2) Examples of deficient performance justifying a retention of funds include, but are not restricted to, the following:

(i) Unsatisfactory progress as determined by the contracting officer;

(ii) Failure either to meet schedules in Section Network Analysis System (NAS), or to process the Interim Arrow Diagram/Complete Project Arrow Diagram;

(iii) Failure to present submittals in a timely manner; or

(iv) Failure to comply in good faith with approved subcontracting plans, certifications, or contract requirements.

(3) Any level of retention shall not exceed 10 percent either where there is determined to be unsatisfactory performance, or when the retainage is to ensure satisfactory completion. Retained amounts shall be paid promptly upon completion of all contract requirements, but nothing contained in this subparagraph shall be construed as limiting the contracting officer's right to withhold funds under other provisions of the contract or in accordance with the general law and regulations regarding the administration of Government contracts.

(b) The contractor shall submit a schedule of costs in accordance with the requirements of Section Network Analysis System (NAS) to the contracting officer for approval within 90 calendar days after date of receipt of notice to proceed. The approved cost schedule will be one of the bases for determining progress payments to the contractor for work completed.

(1) Costs as shown on this schedule must be true costs and, should the resident engineer so desire, he/she may require the contractor to submit his/her original estimate sheets or other information to substantiate the detailed makeup of the cost schedule.

(2) The total costs of all activities shall equal the contract price.

(3) Insurance and similar items shall be prorated and included in each activity cost of the critical path method (CPM) network.

(4) The CPM network shall include a separate cost loaded activity for adjusting and testing of the systems listed in the table in paragraph (b)(5) of this section. The percentages listed below will be used to determine the cost of adjust and test activities and identify, for payment purposes, the value of the work to adjust, correct and test systems after the material has been installed.

(5) Payment for adjust and test activities will be made only after the contractor has demonstrated that each of the systems is substantially complete and operates as required by the contract.

VALUE OF ADJUSTING, CORRECTING, AND TESTING SYSTEM

System	Percent
Pneumatic tube system	10
Incinerators (medical waste and trash)	5
Sewage treatment plant equipment	5
Water treatment plant equipment	5
Washers (dish, cage, glass, etc.)	5
Sterilizing equipment	5
Water distilling equipment	5
Prefab temperature rooms (cold, constant temperature)	5
Entire air-conditioning system (Specified under 600 Sections)	5
Entire boiler plant system (Specified under 700 Sections)	5
General supply conveyors	10
Food service conveyors	10
Pneumatic soiled linen and trash system	10
Elevators and dumbwaiters	10
Materials transport system	10
Engine-generator system	5
Primary switchgear	5
Secondary switchgear	5
Fire alarm system	5
Nurse call system	5
Intercom system	5
Radio system	5
TV (entertainment) system	5

(c) In addition to this cost schedule, the contractor shall submit such unit costs as may be specifically requested. The unit costs shall be those used by the contractor in preparing his/her bid and will not be binding as pertaining to any contract changes.

(d) The contracting officer will consider for monthly progress payments material and/or equipment procured by the contractor and

stored on the construction site, as space is available, or at a local approved location off the site, under such terms and conditions as such officer approves, including but not limited to the following:

(1) The material or equipment is in accordance with the contract requirements and/or approved samples and shop drawings.

(2) Only those materials and/or equipment as are approved by the resident engineer for storage will be included.

(3) Such materials and/or equipment will be stored separately and will be readily available for inspection and inventory by the resident engineer.

(4) Such materials and/or equipment will be protected against weather, theft and other hazards and will not be subjected to deterioration.

(5) All of the other terms, provisions, conditions and covenants contained in the contract shall be and remain in full force and effect as therein provided.

(6) A supplemental agreement will be executed between the Government and the contractor with the consent of the contractor's surety for off-site storage.

(e) The contractor, prior to receiving a progress or final payment under this contract, shall submit to the contracting officer a certification that the contractor has made payment from proceeds of prior payments, or that timely payment will be made from the proceeds of the progress or final payment then due, to subcontractors and suppliers in accordance with the contractual arrangements with them.

(f) The Government reserves the right to withhold payment until samples, shop drawings, engineer's certificates, additional bonds, payrolls, weekly statements of compliance, proof of title, nondiscrimination compliance reports, or any other things required by this contract, have been submitted to the satisfaction of the contracting officer.

(End of clause)

Alternate I (JUL 2002). If the specifications include guarantee period services, the contracting officer shall include the following paragraphs as additions to paragraph (b) of the basic clause:

(6)(i) The contractor shall show on the critical path method (CPM) network the total cost of the guarantee period services in accordance with the guarantee period service section(s) of the specifications. This cost shall be priced out when submitting the CMP cost loaded network. The cost submitted shall be subject to the approval of the contracting officer. The activity on the CPM shall have money only and not activity time.

(ii) The contractor shall submit with the CPM a guarantee period performance program which shall include an itemized accounting of the number of work-hours required to perform the guarantee period service on each piece of equipment. The contractor shall also submit the established salary costs, including employee fringe benefits, and what the contractor reasonably expects to pay over the guarantee period, all of which will be subject to the contracting officer's approval.

(iii) The cost of the guarantee period service shall be prorated on an annual basis and paid in equal monthly payments by VA during the period of guarantee. In the event the installer does not perform satisfactorily during this period, all payments may be withheld and the contracting officer shall inform the contractor of the unsatisfactory performance, allowing the contractor 10 days to correct and comply with the contract. The guarantee period service is subject to those provisions as set forth in the Payments and Default clauses.

852.236–84 Schedule of work progress.

As prescribed in 836.575, insert the following clause:

SCHEDULE OF WORK PROGRESS (NOV 1984)

(a) The contractor shall submit with the schedule of costs, a progress schedule that indicates the anticipated installation of work versus the elapsed contract time, for the approval of the contracting officer. The progress schedule time shall be represented in the form of a bar graph with the contract time plotted along the horizontal axis. The starting date of the schedule shall be the date the contractor receives the ''Notice to Proceed.'' The ending date shall be the original contract completion date. At a minimum, both dates shall be indicated on the progress schedule. The specific item of work, i.e., ''Excavation'', ''Floor Tile'', ''Finish Carpentry'', etc., should be plotted along the vertical axis and indicated by a line or bar at which time(s) during the contract this work is scheduled to take place. The schedule shall be submitted in triplicate and signed by the contractor.

(b) The actual percent completion will be based on the value of installed work divided by the current contract amount. The actual completion percentage will be indicated on the monthly progress report.

(c) The progress schedule will be revised when individual or cumulative time extensions of 15 calendar days or more are granted for any reason. The revised schedule should indicate the new contract completion date and should reflect any changes to the installation time(s) of the items of work affected.

(d) The revised progress schedule will be used for reporting future scheduled percentage completion.

(End of clause)

852.236–85 Supplementary labor standards provisions.

As prescribed in 836.576, insert the following clause:

SUPPLEMENTARY LABOR STANDARDS PROVISIONS (APR 1984)

(a) The wage determination decision of the Secretary of Labor is set forth in section GR, General Requirements, of this contract. It is the result of a study of wage conditions in the locality and establishes the minimum hourly rates of wages and fringe benefits for the described classes of labor in accordance with applicable law. No increase in the contract price will be allowed or authorized because of payment of wage rates in excess of those listed.

(b) The contractor shall submit the required copies of payrolls to the contracting officer through the resident engineer or engineer officer, when acting in that capacity. Department of Labor Form WH–347, Payroll, available from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, may be used for this purpose. If, however, the contractor or subcontractor elects to use an individually composed payroll form, it shall contain the same information shown on Form WH–347, and in addition be accompanied by Department of Labor Form WH–348, Statement of Compliance, or any other form containing the exact wording of this form.

(End of clause)

852.236–86 Workers' compensation.

As prescribed in 836.577, insert the following clause:

WORKERS' COMPENSATION (JAN 2008)

Public Law 107–217 (40 U.S.C. 3172) authorizes the constituted authority of States to apply their workers compensation laws to all lands and premises owned or held by the United States.

(End of clause)

852.236–87 Accident prevention.

As prescribed in 836.513, insert the following clause:

ACCIDENT PREVENTION (SEP 1993)

The Resident Engineer on all assigned construction projects, or other Department of Veterans Affairs employee if designated in writing by the Contracting Officer, shall serve as Safety Officer and as such has authority, on behalf of the Contracting Officer, to monitor and enforce Contractor compliance with FAR 52.236–13, Accident Prevention. However, only the Contracting Officer may issue an order to stop all or part of the work while requiring satisfactory or corrective action to be taken by the Contractor.

(End of clause)

852.236–88 Contract changes—supplement.

As prescribed in 836.578, insert the following clause:

CONTRACT CHANGES—SUPPLEMENT (JUL 2002)

The clauses entitled ''Changes'' in FAR 52.243–4 and ''Differing Site Conditions'' in FAR 52.236–2 are supplemented as follows:

(a) Paragraphs (a)(1) through (a)(4) apply to proposed contract changes costing over $500,000.

(1) When requested by the contracting officer, the contractor shall submit proposals for changes in work to the resident engineer. Proposals, to be submitted as expeditiously as possible but within 30 calendar days after receipt of request, shall be in legible form, original and two copies, with an itemized breakdown that will include material, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. (Labor costs are to be identified with specific material placed or operation performed.) The contractor must obtain and furnish with a proposal an itemized breakdown as described above, signed by each subcontractor participating in the change regardless of tier. When certified cost or pricing data are required under FAR Subpart 15.403, the cost or pricing data shall be submitted in accordance with FAR 15.403–5.

(2) When the necessity to proceed with a change does not allow sufficient time to negotiate a modification or because of failure to reach an agreement, the contracting officer may issue a change order instructing the contractor to proceed on the basis of a tentative price based on the best estimate available at the time, with the firm price to be determined later. Furthermore, when the change order is issued, the contractor shall submit a proposal, which includes the information required by paragraph (a)(1), for cost of changes in work within 30 calendar days.

(3) The contracting officer will consider issuing a settlement by determination to the contract if the contractor's proposal required by paragraphs (a)(1) or (a)(2) of this clause is not received within 30 calendar days or if agreement has not been reached.

(4) Bond premium adjustment, consequent upon changes ordered, will be made as elsewhere specified at the time of final settlement under the contract and will not be included in the individual change.

(b) Paragraphs (b)(1) through (b)(11) apply to proposed contract changes costing $500,000 or less:

(1) When requested by the contracting officer, the contractor shall submit proposals for changes in work to the resident engineer. Proposals, to be submitted as expeditiously as possible but within 30 calendar days after receipt of request, shall be in legible form, original and two copies, with an itemized breakdown that will include material, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. (Labor costs are to be identified with specific material placed or operation performed.) The contractor must obtain and furnish with a proposal an itemized breakdown as described above, signed by each subcontractor participating in the change regardless of tier. When certified cost or pricing data or information other than cost or pricing data are required under FAR 15.403, the data shall be submitted in accordance with FAR 15.403–5. No itemized breakdown will be required for proposals amounting to less than $1,000.

(2) When the necessity to proceed with a change does not allow sufficient time to negotiate a modification or because of failure to reach an agreement, the contracting officer may issue a change order instructing the contractor to proceed on the basis of a tentative price based on the best estimate available at the time, with the firm price to be determined later. Furthermore, when the change order is issued, the contractor shall submit within 30 calendar days, a proposal that includes the information required by paragraph (b)(1) for the cost of the changes in work.

(3) The contracting officer will consider issuing a settlement by determination to the contract if the contractor's proposal required by paragraphs (b)(1) or (b)(2) of this clause is not received within 30 calendar days, or if agreement has not been reached.

(4) Allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and use of construction equipment required to accomplish the change. As the value of the change increases, a declining scale will be used in negotiating the percentage of overhead and profit. Allowable percentages on changes will not exceed the following: 10 percent overhead and 10 percent profit on the first $20,000; 7–1/2 percent overhead and 7–1/2 percent profit on the next $30,000; 5 percent overhead and 5 percent profit on balance over $50,000. Profit shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs.

(5) The prime contractor's or upper-tier subcontractor's fee on work performed by lower-tier subcontractors will be based on the net increased cost to the prime contractor or upper-tier subcontractor, as applicable. Allowable fee on changes will not exceed the following: 10 percent fee on the first $20,000; 7–1/2 percent fee on the next $30,000; and 5 percent fee on balance over $50,000.

(6) Not more than four percentages, none of which exceed the percentages shown above, will be allowed regardless of the number of tiers of subcontractors.

(7) Where the contractor's or subcontractor's portion of a change involves credit items, such items must be deducted prior to adding overhead and profit for the party performing the work. The contractor's fee is limited to the net increase to contractor of subcontractors' portions cost computed in accordance herewith.

(8) Where a change involves credit items only, a proper measure of the amount of downward adjustment in the contract price is the reasonable cost to the contractor if he/she had performed the deleted work. A reasonable allowance for overhead and profit are properly includable as part of the downward adjustment for a deductive change. The amount of such allowance is subject to negotiation.

(9) Cost of Federal Old Age Benefit (Social Security) tax and of Worker's Compensation and Public Liability insurance appertaining to changes are allowable. While no percentage will be allowed thereon for overhead or profit, prime contractor's fee will be allowed on such items in subcontractors' proposals.

(10) Overhead and contractor's fee percentages shall be considered to include insurance other than mentioned herein, field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made therefore. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to be included in the contractor's overhead and/or fee percentage.

(11) Bond premium adjustment, consequent upon changes ordered, will be made as elsewhere specified at the time of final settlement under the contract and will not be included in the individual change.

(End of clause)

852.236–89 Buy American Act.

As prescribed in Table 825.1102, insert the following clause:

BUY AMERICAN ACT (JAN 2008)

(a) Reference is made to the clause entitled ''Buy American Act—Construction Materials,'' FAR 52.225–9.

(b) Notwithstanding a bidder's right to offer identifiable foreign construction material in its bid pursuant to FAR 52.225–9, VA does not anticipate accepting an offer that includes foreign construction material.

(c) If a bidder chooses to submit a bid that includes foreign construction material, that bidder must provide a listing of the specific foreign construction material he/she intends to use and a price for said material. Bidders must include bid prices for comparable domestic construction material. If VA determines not to accept foreign construction material and no comparable domestic construction material is provided, the entire bid will be rejected.

(d) Any foreign construction material proposed after award will be rejected unless the bidder proves to VA's satisfaction: (1) it was impossible to request the exemption prior to award, and (2) said domestic construction material is no longer available, or (3) where the price has escalated so dramatically after the contract has been awarded that it would be unconscionable to require performance at that price. The determinations required by (1), (2), and (3) of this paragraph shall be made in accordance with Subpart 825.2 and FAR 25.2.

(e) By signing this bid, the bidder declares that all articles, materials and supplies for use on the project shall be domestic unless specifically set forth on the Bid Form or addendum thereto.

(End of clause)

Alternate I (JAN 2008). As prescribed in Table 825.1102, substitute the following paragraphs for paragraphs (a) and (b) of the basic clause:

(a) Reference is made to the clause entitled ''Buy American Act—Construction Materials under Trade Agreements,'' FAR 52.225–11.

(b) The restrictions contained in this clause 852.236–89 are waived for designated country construction material as defined in FAR 52.225–11. Notwithstanding a bidder's right to offer identifiable foreign construction material in its bid pursuant to FAR 52.225–11, VA does not anticipate accepting an offer that includes foreign construction material, other than designated country construction material.

Alternate II (JAN 2008). As prescribed in Table 825.1102, substitute the following paragraphs for paragraphs (a) and (b) of the basic clause:

(a) Reference is made to the clause entitled ''Buy American Act—Construction Materials under Trade Agreements,'' FAR 52.225–11 and its Alternate I.

(b) The restrictions contained in this clause 852.236–89 are waived for World Trade Organization (WTO) Government Procurement Agreement (GPA) country, Australian, Chilean, or Moroccan, least developed country, or Caribbean Basin country construction material, as defined in FAR 52.225–11 and its Alternate I. Notwithstanding a bidder's right to offer identifiable foreign construction material in its bid pursuant to FAR 52.225–11, VA does not anticipate accepting an offer that includes foreign construction material, other than WTO GPA country, Australian, Chilean, or Moroccan, least developed country, or Caribbean Basin country construction material.

852.236–90 Restriction on submission and use of equal products.

As prescribed in 836.202(c), the following clause shall be included in the solicitation if it is determined that only one product will meet the Government's minimum needs and the Department of Veterans Affairs will not allow the submission of ''equal'' products:

RESTRICTION ON SUBMISSION AND USE OF EQUAL PRODUCTS (NOV 1986)

The clause applies to the following items:

_____

_____

_____

Notwithstanding the ''Material and Workmanship'' clause of this contract, FAR 52.236–5(a), nor any other contractual provision, ''equal'' products will not be considered by the Department of Veterans Affairs and may not be used.

(End of clause)

852.236–91 Special notes.

As prescribed in 836.579, insert the following clause:

SPECIAL NOTES (JUL 2002)

(a) Signing of the bid shall be deemed to be a representation by the bidder that:

(1) Bidder is a construction contractor who owns, operates, or maintains a place of business, regularly engaged in construction, alteration, or repair of buildings, structures, and communications facilities, or other engineering projects, including furnishing and installing of necessary equipment; or

(2) If newly entering into a construction activity, bidder has made all necessary arrangements for personnel, construction equipment, and required licenses to perform construction work; and

(3) Upon request, prior to award, bidder will promptly furnish to the Government a statement of facts in detail as to bidder's previous experience (including recent and current contracts), organization (including company officers), technical qualifications, financial resources and facilities available to perform the contemplated work.

(b) Unless otherwise provided in this contract, where the use of optional materials or construction is permitted, the same standard of workmanship, fabrication and installation shall be required irrespective of which option is selected. The contractor shall make any change or adjustment in connecting work or otherwise necessitated by the use of such optional material or construction, without additional cost to the Government.

(c) When approval is given for a system component having functional or physical characteristics different from those indicated or specified, it is the responsibility of the contractor to furnish and install related components with characteristics and capacities compatible with the approved substitute component as required for systems to function as noted on drawings and specifications. There shall be no additional cost to the Government.

(d) In some instances it may have been impracticable to detail all items in specifications or on drawings because of variances in manufacturers' methods of achieving specified results. In such instances the contractor will be required to furnish all labor, materials, drawings, services and connections necessary to produce systems or equipment which are completely installed, functional, and ready for operation by facility personnel in accordance with their intended use.

(e) Claims by the contractor for delay attributed to unusually severe weather must be supported by climatological data covering the period and the same period for the 10 preceding years. When the weather in question exceeds in intensity or frequency the 10-year average, the excess experienced shall be considered ''unusually severe.'' Comparison shall be on a monthly basis. Whether or not unusually severe weather in fact delays the work will depend upon the effect of weather on the branches of work being performed during the time under consideration.

(End of clause)

852.237–7 Indemnification and medical liability insurance.

As prescribed in 837.403, insert the following clause:

INDEMNIFICATION AND MEDICAL LIABILITY INSURANCE (JAN 2008)

(a) It is expressly agreed and understood that this is a non-personal services contract, as defined in Federal Acquisition Regulation (FAR) 37.101, under which the professional services rendered by the Contractor or its health-care providers are rendered in its capacity as an independent contractor. The Government may evaluate the quality of professional and administrative services provided but retains no control over professional aspects of the services rendered, including by example, the Contractor's or its health-care providers' professional medical judgment, diagnosis, or specific medical treatments. The Contractor and its health-care providers shall be liable for their liability-producing acts or omissions. The Contractor shall maintain or require all health-care providers performing under this contract to maintain, during the term of this contract, professional liability insurance issued by a responsible insurance carrier of not less than the following amount(s) per specialty per occurrence: [*Contracting Officer's Note: Insert the dollar amount value(s) of standard coverage(s) prevailing within the local community as to the specific medical specialty, or specialties, concerned, or such higher amount as the Contracting Officer deems necessary to protect the Government's interests.*] However, if the Contractor is an entity or a subdivision of a State that either provides for self-insurance or limits the liability or the amount of insurance purchased by State entities, then the insurance requirement of this contract shall be fulfilled by incorporating the provisions of the applicable State law.

(b) An apparently successful offeror, upon request of the Contracting Officer, shall, prior to contract award, furnish evidence of the insurability of the offeror and/or of all health-care providers who will perform under this contract. The submission shall provide evidence of insurability concerning the medical liability insurance required by paragraph (a) of this clause or the provisions of State law as to self-insurance, or limitations on liability or insurance.

(c) The Contractor shall, prior to commencement of services under the contract, provide to the Contracting Officer Certificates of Insurance or insurance policies evidencing the required insurance coverage and an endorsement stating that any cancellation or material change adversely affecting the Government's interest shall not be effective until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer. Certificates or policies shall be provided for the Contractor and/or each health-care provider who will perform under this contract.

(d) The Contractor shall notify the Contracting Officer if it, or any of the health-care providers performing under this contract, change insurance providers during the performance period of this contract. The notification shall provide evidence that the Contractor and/or health-care providers will

meet all the requirements of this clause, including those concerning liability insurance and endorsements. These requirements may be met either under the new policy, or a combination of old and new policies, if applicable.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts for health-care services under this contract. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraph (a) of this clause.

(End of clause)

852.237–70 Contractor responsibilities.

As prescribed in 837.110, insert the following clause:

CONTRACTOR RESPONSIBILITIES (APR 1984)

The contractor shall obtain all necessary licenses and/or permits required to perform this work. He/she shall take all reasonable precautions necessary to protect persons and property from injury or damage during the performance of this contract. He/she shall be responsible for any injury to himself/herself, his/her employees, as well as for any damage to personal or public property that occurs during the performance of this contract that is caused by his/her employees fault or negligence, and shall maintain personal liability and property damage insurance having coverage for a limit as required by the laws of the State of [ ]. Further, it is agreed that any negligence of the Government, its officers, agents, servants and employees, shall not be the responsibility of the contractor hereunder with the regard to any claims, loss, damage, injury, and liability resulting there from.

(End of clause)

852.246–70 Guarantee.

As prescribed in 846.302–70, insert the following clause:

GUARANTEE (JAN 2008)

The contractor guarantees the equipment against defective material, workmanship and performance for a period of [ ][1], said guarantee to run from date of acceptance of the equipment by the Government. The contractor agrees to furnish, without cost to the Government, replacement of all parts and material that are found to be defective during the guarantee period. Replacement of material and parts will be furnished to the Government at the point of installation, if installation is within the continental United States, or f.o.b. the continental U.S. port to be designated by the contracting officer if installation is outside of the continental United States. Cost of installation of replacement material and parts shall be borne by the contractor.[2]

(End of clause)

852.246–71 Inspection.

As prescribed in 846.302–71(a), insert the following clause:

INSPECTION (JAN 2008)

Rejected goods will be held subject to contractors order for not more than 15 days, after which the rejected merchandise will be returned to the contractor's address at his/her risk and expense. Expenses incident to the examination and testing of materials or supplies that have been rejected will be charged to the contractor's account.

(End of clause)

Alternate I (JAN 2008). As provided in 846.302–71(b), insert the following clause:

INSPECTION (JAN 2008)

The contractor shall remove rejected supplies within 48 hours after notice of rejection. Supplies determined to be unfit for human consumption will not be removed without permission of the local health authorities. Supplies not removed within the allowed time may be destroyed. The Department of Veterans Affairs will not be responsible for nor pay for products rejected. The contractor will be liable for costs incident to examination of rejected products.

(End of clause)

852.246–72 Frozen processed foods.

As prescribed in 846.302–72, insert the following clause:

FROZEN PROCESSED FOODS (JAN 2008)

The products delivered under this contract shall be in excellent condition, shall not show evidence of defrosting, refreezing, or freezer burn and shall be transported and delivered to the consignee at a temperature of 0 degrees Fahrenheit or lower.

[1] Normally, insert one year. If industry policy covers a shorter or longer period, i.e., 90 days or for the life of the equipment, insert such period.

[2] The above clause will be modified to conform to standards of the industry involved.

(End of clause)

852.246–73 Noncompliance with packaging, packing, and/or marking requirements.

As prescribed in 846.302–73, insert the following clause:

NONCOMPLIANCE WITH PACKAGING, PACKING AND/OR MARKING REQUIREMENTS (JAN 2008)

Failure to comply with the packaging, packing and/or marking requirements indicated herein, or incorporated herein by reference, may result in rejection of the merchandise and request for replacement or repackaging, repacking, and/or marking. The Government reserves the right, without obtaining authority from the contractor, to perform the required repackaging, repacking, and/or marking services and charge the contractor at the actual cost to the Government for the same or have the required repackaging, repacking, and/or marking services performed commercially under Government order and charge the contractor at the invoice rate. In connection with any discount offered, time will be computed from the date of completion of such repackaging, repacking and/or marking services.

(End of clause)

852.246–74 Special warranties.

As prescribed in 846.710–70, insert the following clause:

SPECIAL WARRANTIES (JAN 2008)

The clause entitled ''Warranty of Construction'' in FAR 52.246–21 is supplemented as follows:

Any special warranties that may be required under the contract shall be subject to the elections set forth in the FAR clause at 52.246–21, Warranty of Construction, unless otherwise provided for in such special warranties.

(End of clause)

852.246–75 Warranty for construction—guarantee period services.

As prescribed in 846.710–71, insert the following clause:

WARRANTY FOR CONSTRUCTION—GUARANTEE PERIOD SERVICES (JAN 2008)

The clause entitled ''Warranty of Construction'' in FAR 52.246–21 is supplemented as follows:

Should the contractor fail to prosecute the work or fail to proceed promptly to provide guarantee period services after notification by the contracting officer, the Government may, subject to the default clause contained at FAR 52.249–10, Default (Fixed-Price Construction), and after allowing the contractor 10 days to correct and comply with the contract, terminate the right to proceed with the work (or the separable part of the work) that has been delayed or unsatisfactorily performed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The contractor and its sureties shall be liable for any damages to the Government resulting from the contractor's refusal or failure to complete the work within this specified time, whether or not the contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(End of clause)

852.247–70 Determining transportation costs for bid evaluation.

As prescribed in 847.305–70, insert the following provision:

DETERMINING TRANSPORTATION COSTS FOR BID EVALUATION (APR 1984)

For the purpose of evaluating bids and for no other purpose, the delivered price per unit will be determined by adding the nationwide average transportation charge to the f.o.b. origin bid prices. The nationwide average transportation charge will be determined by applying the following formula: Multiply the guaranteed shipping weight by the freight, parcel post, or express rate, whichever is proper, to each destination shown below and then multiply the resulting transportation charges by the anticipated demand factor shown for each destination. Total the resulting weighted transportation charges for all destinations and divide the total by 20 to give the nationwide average transportation charge.

ANTICIPATED DEMAND

Area destination	Factor
Oakland, California	3
Dallas, Texas	2
Omaha, Nebraska	3
Fort Wayne, Indiana	4
Atlanta, Georgia	3
New York, New York	5
Total of factors	20

(End of provision)

852.252–70 Solicitation provisions or clauses incorporated by reference.

As prescribed in 852.102(a), insert the following provision:

SOLICITATION PROVISIONS OR CLAUSES INCOPORATED BY REFERENCE (JAN 2008)

The following provisions or clauses incorporated by reference in this solicitation must be completed by the offeror or prospective contractor and submitted with the quotation or offer. Copies of these provisions or clauses are available on the Internet at the Web sites provided in the provision at FAR 52.252–1, Solicitation Provisions Incorporated by Reference, or the clause at FAR 52.252–2, Clauses Incorporated by Reference. Copies may also be obtained from the contracting officer.

[*Contracting officer shall list all FAR and 48 CFR Chapter 8 (VAAR) provisions and clauses incorporated by reference that must be completed by the offeror or prospective contractor and submitted with the quotation or offer.*]

(End of provision)

852.270–1 Representatives of contracting officers.

As prescribed in 801.603–70(d), insert the following provision:

REPRESENTATIVES OF CONTRACTING OFFICERS (JAN 2008)

The contracting officer reserves the right to designate representatives to act for him/her in furnishing technical guidance and advice or generally monitor the work to be performed under this contract. Such designation will be in writing and will define the scope and limitation of the designee's authority. A copy of the designation shall be furnished to the contractor.

(End of provision)

852.270–2 Bread and bakery products—quantities.

As prescribed in 870.111–3, insert the following clause:

BREAD AND BAKERY PRODUCTS—QUANTITIES (JAN 2008)

The bidder agrees to furnish up to 25 percent more or 25 percent less than the quantities awarded when ordered by the Department of Veterans Affairs.

(End of clause)

852.270–3 Purchase of shellfish.

As prescribed in 870.111–3, insert the following clause:

PURCHASE OF SHELLFISH (APR 1984)

The bidder certifies that oysters, clams, and mussels will be furnished only from plants approved by and operated under the supervision of shellfish authorities of States whose certifications are endorsed currently by the U.S. Public Health Service, and the names and certificate numbers of those shellfish dealers must appear on current lists published by the U.S. Public Health Service. These items shall be packed and delivered in approved containers, sealed in such manner that tampering is easily discernible, and marked with packer's certificate number impressed or embossed on the side of such containers and preceded by the State abbreviation. Containers shall be tagged or labeled to show the name and address of the approved producer or shipper, the name of the State of origin, and the certificate number of the approved producer or shipper.

(End of clause)

852.271–70 Nondiscrimination in services provided to beneficiaries.

As prescribed in 837.110–70 and 871.212, insert the following provision:

NONDISCRIMINATION IN SERVICES PROVIDED TO BENEFICIARIES (JAN 2008)

The contractor agrees to provide all services specified in this contract for any person determined eligible by the Department of Veterans Affairs, regardless of the race, color, religion, sex, or national origin of the person for whom such services are ordered. The contractor further warrants that he/she will not resort to subcontracting as a means of circumventing this provision.

(End of provision)

852.271–71 [Reserved]

852.271–72 Time spent by counselee in counseling process.

As prescribed in 871.212, insert the following clause:

TIME SPENT BY COUNSELEE IN COUNSELING PROCESS (APR 1984)

The contractor agrees that no counselee referred under the provisions of this agreement will be required to give any extra time in connection with the counseling process to supply test results or other information for purposes other than those specified in this contract.

(End of clause)

852.271–73 Use and publication of counseling results.

As prescribed in 871.212, insert the following clause:

USE AND PUBLICATION OF COUNSELING RESULTS (JAN 2008)

The contractor agrees that none of the information or data gathered in connection with the services specified in this contract or studies or materials based thereon or relating thereto will be publicized without the prior approval of the Under Secretary for Benefits or his/her designee.

(End of clause)

852.271–74 Inspection.

As prescribed in 871.212, insert the following clause:

INSPECTION (JAN 2008)

The contractor will permit the duly authorized representative of the Department of Veterans Affairs to visit the place of instruction or the counseling and testing operations as may be necessary and examine the training facilities, the work of the veterans in training under this contract, and the records of these operations.

(End of clause)

852.271–75 Extension of contract period.

As prescribed in 871.212, insert the following clause:

EXTENSION OF CONTRACT PERIOD (APR 1984)

This contract may be extended from year to year if agreeable to both parties provided the agreement for extension is consummated 30 days prior to the expiration date, and further provided that there is no change in the provisions, terms, conditions, or rate of payment. Any extension made hereunder is subject to the availability of funds during the period covered by the extension.

(End of clause)

852.273–70 Late offers.

As prescribed in 873.110(a), insert the following provision:

LATE OFFERS (JAN 2003)

This provision replaces paragraph (f) of FAR provision 52.212–1. Offers or modifications of offers received after the time set forth in a request for quotations or request for proposals may be considered, at the discretion of the contracting officer, if determined to be in the best interest of the Government. Late bids submitted in response to an invitation for bid (IFB) will not be considered.

(End of provision)

852.273–71 Alternative negotiation techniques.

As prescribed in 873.110(b), insert the following provision:

ALTERNATIVE NEGOTIATION TECHNIQUES (JAN 2003)

The contracting officer may elect to use the alternative negotiation techniques described in section 873.111(e) of 48 Code of Federal Regulations Chapter 8 in conducting this procurement. If used, offerors may respond by maintaining offers as originally submitted, revising offers, or submitting an alternative offer. The Government may consider initial offers unless revised or withdrawn, revised offers, and alternative offers in making the award. Revising an offer does not guarantee an offeror an award.

(End of provision)

852.273–72 Alternative evaluation.

As prescribed in 873.110(c), insert the following provision:

ALTERNATIVE EVALUATION (JAN 2003)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror submitting the lowest priced offer that conforms to the solicitation. During the specified period for receipt of offers, the amount of the lowest offer will be posted and may be viewed by [*Contracting officer insert description of how the information may be viewed electronically or otherwise*]. Offerors may revise offers anytime during the specified period. At the end of the specified time period for receipt of offers, the responsible offeror submitting the lowest priced offer will be in line for award.

(b) Except when it is determined not to be in the Government's best interest, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are materially unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(End of provision)

852.273–73 Evaluation—health-care resources.

As prescribed in 873.110(d), in lieu of FAR provision 52.212–2, the contracting officer may insert a provision substantially as follows:

EVALUATION—HEALTH-CARE RESOURCES (JAN 2003)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Government, price and other factors considered. The following information or factors shall be used to evaluate offers: [*Contracting officer insert evaluation information or factors, such as technical capability to meet the Government's requirements, past performance, or such other evaluation information or factors as the contracting officer deems necessary to evaluate offers. Price must be evaluated in every acquisition. The contracting officer may include the evaluation information or factors in their relative order of importance, such as in descending order of importance. The relative importance of any evaluation information must be stated in the solicitation.*]

(b) Except when it is determined not to be in the Government's best interest, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are materially unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(c) If this solicitation is a request for proposals (RFP), a written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of provision)

852.273–74 Award without exchanges.

As prescribed in 873.110(e), insert the following provision:

AWARD WITHOUT EXCHANGES (JAN 2003)

The Government intends to evaluate proposals and award a contract without exchanges with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct exchanges if later determined by the contracting officer to be necessary.

(End of provision)

PART 853—FORMS

Sec.
853.000 Scope of part.

Subpart 853.1—General

853.107 Obtaining forms.

Subpart 853.2—Prescription of Forms

853.201 Federal acquisition system.
853.201–1 Contracting authority and responsibilities (SF 1402).
853.213 Simplified acquisition procedures (SF's 18, 30, 44, 1165, 1449, and OF's 336, 347, and 348).
853.215 Contracting by negotiation.
853.215–70 VA Form 10–1170, Application for Furnishing Nursing Home Care to Beneficiaries of VA.
853.236 Construction and architect-engineer contracts.
853.236–70 VA Form 10–6298, Architect-Engineer Fee Proposal.
853.271 Loan Guaranty, Education and Vocational Rehabilitation and Employment Programs.
853.271–1 Loan Guaranty Program (VA Forms 26–6724 and 26–1839).
853.271–2 Education Programs.

Subpart 853.3—Illustration of Forms

853.300 Scope of subpart.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

853.000 Scope of part.

This part prescribes VA forms for use in the acquisition of goods and services. It only identifies forms that are used between VA and its contractors or the general public. It does not identify forms for uses internal to VA or between VA and another Federal agency.

Subpart 853.1—General

853.107 Obtaining forms.

The VA forms may be obtained from any VA contracting office or by requesting such forms from the Deputy Assistant Secretary for Acquisition and Materiel Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

Subpart 853.2—Prescription of Forms

853.201 Federal acquisition system.

853.201–1 Contracting authority and responsibilities (SF 1402).

Standard Form (SF) 1402, Certificate of Appointment, is used in accordance with FAR 1.603–3, Appointment, to appoint VA contracting officers under VA's Contracting Officer Certification Program (see 801.690–6).

853.213 Simplified acquisition procedures (SF's 18, 30, 44, 1165, 1449, and OF's 336, 347, and 348).

The following forms are prescribed as stated in this section for use in simplified acquisition procedures, orders under existing contracts or agreements, orders from required sources of supplies and services, and orders for other supplies or services:

(a) VA Forms 90–2138, Order for Supplies or Services, or 90–2138–ADP, Purchase Order for Supplies or Service, shall be used as indicated in 813.307. They may be used in lieu of OF 347, Order of Supplies and Services, or Standard Form 1449, Solicitation/Contract/Order for Commercial Items.

(b) The following forms are for use for obtaining indicated medical and dental services within the limitations prescribed in 813.307:

(1) VA Form 10–7078, Authorization and Invoice for Medical and Hospital Services.

(2) VA Form 10–7079, Request for Outpatient Medical Services.

(3) VA Form 10–2570d, Dental Record Authorization and Invoice for Outpatient Service.

(c) VA Form 10–2511, Authority and Invoice for Travel by Ambulance or Other Hired Vehicle, will be used as prescribed in 813.307.

(d) VA Form 10–2421, Prosthetics Authorization and Items and Services, will be used for indicated procurements not to exceed $300 as prescribed in 813.307.

853.215 Contracting by negotiation.

853.215–70 VA Form 10–1170, Application for Furnishing Nursing Home Care to Beneficiaries of VA.

VA Form 10–1170, Application for Furnishing Nursing Home Care to Beneficiaries of VA, will be used for establishing contract nursing home care for VA beneficiaries.

853.236 Construction and architect-engineer contracts.

853.236–70 VA Form 10–6298, Architect-Engineer Fee Proposal.

VA Form 10–6298, Architect-Engineer Fee Proposal, shall be used as prescribed in 836.606–71.

853.271 Loan Guaranty, Education and Vocational Rehabilitation and Counseling Programs.

853.271–1 Loan Guaranty Program (VA Forms 26–6724 and 26–1839).

(a) VA Form 26–6724, Invitation, Bid, and/or Acceptance or Authorization, will be used in obtaining services specified in Subpart 871.1.

(b) VA Form 26–1839, Compliance Inspection Report, will be used for inspection of repairs for properties under the Loan Guaranty Program as specified in 846.472.

853.271–2 Education Programs.

To obtain education or rehabilitation services, contracting officers may use an individual written contract or VA Form 28–1905, Authorization and Certification of Entrance or Reentrance into Rehabilitation and Certification of Status.

Subpart 853.3—Illustration of Forms

853.300 Scope of subpart.

VA Forms will not be illustrated in this VAAR. Persons wishing to obtain copies of VA forms prescribed in the VAAR may do so in accordance with 853.107. VA forms may also be available on the Web at *http://www.va.gov/vaforms/*.

SUBCHAPTER I—DEPARTMENT SUPPLEMENTARY REGULATIONS

PART 870—SPECIAL PROCUREMENT CONTROLS

Subpart 870.1—Controls

Sec.
870.111 Subsistence.
870.111–3 Contract clauses.
870.111–5 Frozen processed food products.
870.112 Telecommunications equipment.
870–113 Paid use of conference facilities.
870.115 Food service equipment.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 870.1—Controls

870.111 Subsistence.

870.111–3 Contract clauses.

(a) The contracting officer shall include the clause at 852.270–2, Bread and bakery products—quantities, in solicitations and contracts for bread and bakery products.

(b) The contracting officer shall include the clause at 852.270–3, Purchase of shellfish, in solicitations and contracts for shellfish.

870.111–5 Frozen processed food products.

(a) The following frozen processed food products must have a label complying with the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.), which requires that all ingredients be listed according to the order of their predominance:

(1) Frozen processed food products that contain meat, poultry, or a significant proportion of eggs.

(2) Frozen processed food products that contain fish or fish products.

(3) Frozen bakery products.

(b) All procured frozen processed food products that contain meat, poultry or a significant proportion of eggs must meet the following requirements:

(1) The products must be processed or prepared in plants operating under the supervision of the Department of Agriculture (USDA).

(2) The product must be inspected and approved in accordance with USDA regulations governing meat, poultry, or egg inspection. A label or seal that indicates compliance with USDA regulations, affixed to the container, will be accepted as evidence of compliance.

(c) All procured frozen processed food products that contain fish or fish products must meet the following requirements:

(1) The product must be processed or prepared in plants operated under the supervision of the Department of Commerce (DOC). The products listed in DOC's publication ''Approved List of Sanitarily Inspected Fish Establishments'' are processed in plants under Federal inspection of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, DOC. The inspected products packed under various labels bearing the brand names are produced in accordance with current U.S. Grade Standards or official product specifications, packed under optimum hygienic conditions, and must meet Federal, State, and city sanitation and health regulations. Such brand label or DOC seal indicating compliance with DOC regulations, affixed to a container, will be accepted as evidence of compliance.

(2) If the condition in paragraph (c)(1) of this section was not met (no seal), the shipment may be lot-inspected by the DOC, and containers stamped to indicate acceptance or a Certification of Inspection issued to accompany the shipment.

(d) Producers of frozen bakery products that ship products in interstate commerce are required to comply with the Federal Food, Drug and Cosmetic Act. Therefore, the product must be verified as shipped interstate or that the producer ships products to other purchasers interstate.

870.112 Telecommunications equipment.

(a) The contracting officer must include the clause at 852.211–71, Special notice in solicitations, including those

for construction, that are based on detailed purchase descriptions or formal specifications for telecommunications equipment, as defined in VA manual MP–6, Part VIII (available at any VA facility).

(b) The Telecommunications Support Service must review and approve the descriptive literature required by the clause in 852.211–71, Special notice, furnished by the contractor after award, before delivery or installation by the contractor. Promptly upon receipt of the descriptive literature, contracting officers will forward it, together with a copy of the contract, the formal specification, or the detailed purchase description, to the DSPE.

(c) Solicitations, including those for construction, for telecommunications equipment based on ''brand name or equal'' purchase description are subject to the following:

(1) Before award, contracting officers will forward to the DSPE the abstract of bids, one copy of each offer received, including descriptive literature and pertinent letters, and the comments and recommendations of the contracting officer.

(2) No commitments are to be made to contractors before receiving Central Office's response.

(3) The solicitation must allow at least 30 calendar days for acceptance to allow sufficient time for the review required by this paragraph. (See FAR 52.214–16.)

870.113 Paid use of conference facilities.

When contracting for the use of conference facilities, contracting officers shall follow and comply with the Federal Travel Regulation, 41 CFR Part 301–74, Conference Planning, and shall document the contract file as specified therein, including documentation of efforts to locate Government-owned space and efforts to reduce costs.

870.115 Food service equipment.

(a) All new food service equipment purchased for Dietetic Service through other than Defense General Supply Center sources must meet requirements set forth by the National Sanitation Foundation.

(b) The contracting officer will accept an affixed National Sanitation Foundation label and/or documentation of the certification by the National Sanitation Foundation from the contractor as evidence that the subject equipment meets sanitation standards issued by the National Sanitation Foundation.

PART 871—LOAN GUARANTY AND VOCATIONAL REHABILITATION AND EMPLOYMENT PROGRAMS

Subpart 871.1—Loan Guaranty and Direct Loan Programs

Sec.

871.100 Scope of subpart.
871.101 Policy.
871.102 Authorization for repairs to properties.
871.104 Qualification of bidders.
871.106 Lien waivers.
871.107 Stipulations against liens.

Subpart 871.2—Vocational Rehabilitation and Employment Service

871.200 Scope of subpart.
871.201 General.
871.201–1 Requirements for the use of contracts.
871.201–2 Requirements when contracts are not required.
871.201–3 Medical services.
871.201–4 Letter contracts.
871.202 Marking and release of supplies.
871.203 Renewals or supplements to contracts.
871.204 Guaranteed payment.
871.205 Proration of charges.
871.206 Other fees and charges.
871.207 Payment of tuition or fees.
871.208 Rehabilitation facilities.
871.209 Records and reports.
871.210 Correspondence courses.
871.211 Information concerning correspondence courses.
871.212 Contract clauses.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 871.1—Loan Guaranty and Direct Loan Programs

871.100 Scope of subpart.

This subpart sets forth policy and procedures with respect to the loan guaranty and direct loan programs as

they pertain to property management, including the acquisition, management, and disposition of property, real, personal, or mixed, that were secured by loans guaranteed, insured, or made under Title 38, U.S.C.

871.101 Policy.

All acquisitions for the repair and maintenance of VA property acquired under 38 U.S.C. Chapter 37 must be made in accordance with FAR Parts 14, 15, and 16, Parts 814, 815, and 816 of this chapter, and this subpart.

871.102 Authorization for repairs to properties.

(a) Except as provided in this subpart, Directors, Loan Guaranty Officers, and Assistant Loan Guaranty Officers, VA Regional Offices, are authorized to approve a repair program for any VA property acquired under Chapter 37, Title 38, U.S.C., if the cost does not exceed $25,000. A repair program means the aggregate amount of the proposed contracts that are contemplated in a property analysis by the Loan Guaranty activity.

(b) In cases where the expenditure is known or estimated to exceed $25,000, the Loan Guaranty Officer, or his or her designee, must forward the request, together with the loan guaranty folder, to the Under Secretary for Benefits for approval.

(c) During the period when VA has assumed custody of the property from a holder and before its conveyance to VA under 38 CFR 36.4320, repairs not in excess of $3,500 are authorized, when appropriate to make the property ready for sale at an earlier date than would otherwise be possible if the repair program was delayed until VA acquired absolute title. In cases where the expenditure is known or estimated to exceed $3,500, the Loan Guaranty Officer, or his or her designee, must forward the request, together with the loan guarantee folder, to the Under Secretary for Benefits for approval.

(d) The holder must not make repairs to a property when it has continued custody, except for emergency repairs not in excess of $500, unless the holder gives adequate notice to the Director, Regional Office. Emergency repairs means immediate action to preserve the property from serious damage or to correct a situation imminently dangerous to life or limb, including the initial cleanup of the property to prevent the risk of damage by fire or vandalism.

(e) An approved management broker may be authorized, when the property is assigned, to incur expenses for fuel and utilities or other recurring items that VA is required to furnish to its tenants or are required to maintain the property if the following conditions are met:

(1) Advance blanket authorization to a management broker must be limited to repairs not in excess of $500 in any transaction.

(2) The management broker must either submit receipts with an invoice or maintain receipts for inspection.

(3) Expenditures in excess of $500 require prior approval of the Director, Regional Office, having jurisdiction of the property.

(4) The management broker must aggregate the costs of repairs when determining whether prior approval is required.

871.104 Qualification of bidders.

(a) Bidders must be qualified in accordance with procedures outlined in FAR Subpart 9.1 and Subpart 809.1 of this chapter.

(b) Management brokers are not acceptable bidders for a repair contract due to their close association on a fee basis with VA. This restriction also applies to any contracting firm in which the management broker has an interest and in which it could be presumed that the firm would have an advantage over the other bidders. This does not preclude the management broker from performing routine recurring maintenance or minor repairs. When seeking payment for maintenance or repairs, the management broker must establish that any charges are not in excess of the prevailing fees for similar services in the area.

871.106 Lien waivers.

(a) In a contract for $2,500 or more, the contracting officer must include the following requirements:

(1) The contractor must sign a formal release in full or a lien waiver before payment may be made.

(2) The contractor must notify the Director, Regional Office, of any subcontracts for services or materials in excess of $2,500. Each subcontractor must sign the release or waiver jointly with the prime contractor or exercise a release or waiver in the subcontractor's own name.

(b) The contracting officer must not pay the contractor unless the release or waiver accompanies the contractor's invoice.

(c) Before any authorized partial payment, the contractor must execute a release or waiver.

(d) Due to the variations of local law, no standard release or waiver is prescribed. Each release or waiver must be prepared in accordance with local law and must be in form acceptable to the District Counsel.

871.107 Stipulations against liens.

(a) In a contract for an amount less than $2,500, when determined necessary by the Director, Regional Office, the contracting officer may include the following:

The contractor expressly waives any and all rights to file or maintain any mechanics lien or claim against the aforesaid premises.

(b) In a contract for $2,500 or more when there is doubt that the final responsibility of the contractor will provide maximum protection to the Government, the contracting officer must include any requirements that are available under local law. The contracting officer must obtain advice and approval of any contract stipulation or legal stipulations against liens from the District Counsel.

Subpart 871.2—Vocational Rehabilitation and Employment Service

871.200 Scope of subpart.

This subpart establishes policy and procedures for the vocational rehabilitation and employment services as it pertains to the following:

(a) Contracts for training and rehabilitation services.

(b) Approval of institutions (including rehabilitation facilities), training establishments, and employers under 38 U.S.C. Chapter 31.

(c) Contracts for counseling services under 38 U.S.C. Chapters 30, 31, 32, 35, and 36 and 10 U.S.C. Chapters 106, 107, and 1606.

871.201 General.

871.201–1 Requirements for the use of contracts.

The VA negotiates contracts for tuition, fees, books, supplies, and other allowable expenses incurred by an institution, training establishment, or employer for the training and rehabilitation of eligible veterans under 38 U.S.C. Chapter 31 when the following services are provided:

(a) *Courses of instruction by correspondence* means a course of education or training conducted by mail consisting of regular lessons or reading assignments, the preparation of required written work that involves the application of principles studied in each lesson, the correction of assigned work with such suggestions or recommendation as may be necessary to instruct the student, the keeping of student achievement records, and issuance of a diploma, certificate, or other evidence to the student upon satisfactorily completing the requirements of the course.

(b) *Special services or special courses that are furnished at the request of the VA.* Special services or courses are those services or courses that VA requests that are over and above those the institution customarily provides for similarly circumstanced non-veterans and that the contracting officer considers to be necessary for the rehabilitation of the trainee.

871.201–2 Requirements when contracts are not required.

(a) For the purpose of this section a contract is not required when all tuition, fees, and charges for books, supplies, or services necessary to train or educate an eligible veteran under 38 U.S.C. Chapter 31 are published in the school catalog or other published document.

(b) When a contract is not required, the Vocational Rehabilitation and Employment Officer must obtain a signed statement of charges from the educational institution or training establishment for courses to be offered, including the rate of tuition, fees, and separate charges, if any, for books, supplies, and equipment handling charges, refund policy, and other provisions as are required to determine proper payment. The statement of charges may be in the form of a statement on VA Form 28–1905, Authorization and Certification of Entrance or Reentrance Into Rehabilitation and Certification Status, that charges will be in accordance with catalog or other published document (identify publication). The statement of charges may not exceed those charges nonveterans pay or that are published in the school catalog or other published document.

871.201–3 Medical services.

The medical services provided trainees under vocational rehabilitation and education contracts, agreements, or arrangements are separate and distinct from any other medical service under the jurisdiction of the Veterans Health Administration to which the veteran may be entitled. No certificate of eligibility is required from the Veterans Health Administration before the veteran may be provided such services.

871.201–4 Letter contracts.

Letter contracts are authorized for use in accordance with the provision of FAR 16.603 and in those cases in which it is not possible to complete a formal contract with an approved educational institution before the enrollment of eligible veterans for training.

871.202 Marking and release of supplies.

The educational institution or training establishment is not required to mark supplies to indicate ownership by the United States. Supplies are considered to be the property of the trainee at the time they are furnished.

871.203 Renewals or supplements to contracts.

Except for contracts for educational and vocational counseling, the contracting office may renew contracts from year to year by completing a renewal agreement no later than 30 days before the expiration of the contract. There must be no change in the schedule of provisions in the original contract.

(a) Supplements may be negotiated at any time during the contract period upon the completion of the supplemental agreement.

(b) Contracts for educational and vocational counseling may provide for automatic extension from year to year.

871.204 Guaranteed payment.

A contracting officer may not award a contract or agreement to any institution or training establishment that requires VA is to pay a minimum charge, or to enroll a minimum number of participants per quarter, semester, term, course, or other period.

871.205 Proration of charges.

A contract must include the exact formula agreed on for the proration of charges in the event that the veteran's program is interrupted or discontinued before the end of the term, semester, quarter, or other period, or the program is completed in less time than stated in the contract.

871.206 Other fees and charges.

VA may pay fees and other charges that are not prescribed by law but are required by nongovernmental organizations, such as initiation fees required to become a member of a labor union and the dues necessary to maintain membership incidental to training on the job or to obtaining employment during a period in which the veteran is a chapter 31 participant, provided there are no facilities feasibly available where the necessary training can be feasibly accomplished or employment obtained without paying such charges. Payment for such fees must be made in accordance with Part 813.

871.207 Payment of tuition or fees.

(a) Contracts, agreements, or arrangements requiring the payment of tuition or fees must provide either of the following:

(1) Payment for tuition or fees must be made in arrears and must be prorated in installments over the school year or the length of the course.

(2) An institution may be paid in accordance with paragraph (b) of this section, if the institution operates on a regular term, quarter, or semester basis and normally accepts students only at the beginning of the term, quarter, or semester and if the institution is one of the following:

(i) An institution of higher learning that uses a standard unit of credit recognized by accrediting associations. Such institutions include those that are members of recognized national or regional educational accrediting associations, and those that, although not members of such accrediting associations, grant standard units of credit acceptable at full value without examination by collegiate institutions that are members of national or regional accrediting associations.

(ii) A public tax-supported institution.

(iii) An institution operated and controlled by a State, county, or local board of education.

(b) An institution that meets the exceptions of paragraph (a)(2) of this section and that has a refund policy providing for a graduated scale of charges for purposes of determining refunds may be paid part or all such tuitions or fees for a term, quarter, or other period of enrollment immediately following the date on which the refund expires.

(c) Proration of charges does not apply to a fee for noncontinuing service, such as a registration fee, etc.

(d) The period for which payment of charges may be made is the period of actual enrollment and is subject to the following:

(1) The effective date is the date of the trainee's entrance into training status, except that payment may be made for an entire semester, quarter, or term in institutions operating on that basis if the trainee enters no later than the final date set by the institution for enrolling for full credit.

(2) In those cases where the institution has not set a final date for enrolling for full credit or does not set a date acceptable to VA, payment may be prorated on the basis of attendance, regardless of the refund policy.

(3) If an institution customarily charges for the amount of credit or number of hours of attendance for which a trainee enrolls, payment may be made on that basis when a trainee enrolls after the final date permitted for carrying full credit for the semester or term.

871.208 Rehabilitation facilities.

Charges by rehabilitation facilities for the rehabilitation services provided under 38 U.S.C. Chapter 31 are paid in the same manner as charges for educational and vocational services through contract, agreement, or other arrangement.

871.209 Records and reports.

Contracts, agreements, or arrangements must provide for the number and frequency of reports, adequate financial records to support payment for each trainee, and maintenance of attendance and progress records. Such records must be preserved for a period of three years.

871.210 Correspondence courses.

Contracts with institutions for correspondence courses must provide for the following:

(a) Major changes in courses or course material are not binding on the VA until a supplemental agreement to the contract is negotiated.

(b) Minor changes in course or course material not affecting the length of the course or number of lessons and not lowering the educational value of the course or the quality of the course material, such as revision of text, the substitution of a newer lesson for an older one, or the substitution of equipment of equal or greater value, are permitted without supplemental agreements. The institution must place such minor changes and revisions on file with the contracting officer at the time of the change or revision.

(c) Trainees must be provided with prompt and adequate lessons service and, unless otherwise specified in the contract, must be furnished the same texts, lessons service, diplomas, and other services as are normally provided

for regularly enrolled non-veteran students.

(d) All lessons must be adequately serviced on an individual basis. Grouping of lessons into units or partial servicing does not meet this requirement.

(e) Each lesson must have a separate examination that is adequate in terms of lesson content.

(f) The training of persons under a VA contract or the fact that the United States is using the facilities of the institution for training veterans must not be used in any way to advertise the institution. References in the advertising media or correspondence of the institution shall be limited to a list of courses under 38 U.S.C. Chapter 31 and must not be directed or pointed specifically to veterans.

(g) The rates, fees, and charges must not be in excess of those charged non-veterans.

(h) Payment must be made on a lesson-completed basis in areas for assignments sent in by trainees and serviced during a pay period as established by the contract.

(i) Payment must be made only once for each lesson even though it is necessary to service a lesson more than once.

871.211 Information concerning correspondence courses.

Specific questions on correspondence courses as to the content of courses, academic credit, and entrance requirements for courses included in VA contracts may be directed to the institutions offering the courses.

871.212 Contract clauses.

Contracting officers must use the following clauses, as appropriate, in solicitations and contracts for vocational rehabilitation and employment services as they pertain to training and rehabilitation services and contracts for counseling services:

(a) 852–271–70 Nondiscrimination in services provided to beneficiaries.

(b) 852.271–72 Time spent by counselee in counseling process.

(c) 852.271–73 Use and publication of counseling results.

(d) 852.271–74 Inspection.

(e) 852.271–75 Extension of contract period.

PART 872 [RESERVED]

PART 873—SIMPLIFIED ACQUISITION PROCEDURES FOR HEALTH-CARE RESOURCES

Sec.

873.101 Policy.
873.102 Definitions.
873.103 Priority sources.
873.104 Competition requirements.
873.105 Acquisition planning.
873.106 Presolicitation exchanges with industry.
873.107 Socioeconomic programs.
873.108 Publicizing contract actions.
873.109 General requirements for acquisition of health-care resources.
873.110 Solicitation provisions.
873.111 Acquisition strategies for health-care resources.
873.112 Evaluation information.
873.113 Exchanges with offerors.
873.114 Best value pool.
873.115 Proposal revisions.
873.116 Source selection decision.
873.117 Award to successful offeror.
873.118 Debriefings.

AUTHORITY: 38 U.S.C. 501 and 8151–8153; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

873.101 Policy.

The simplified acquisition procedures set forth in this Department of Veterans Affairs Acquisition Regulation (VAAR) part apply to the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space. These procedures shall be used in conjunction with the Federal Acquisition Regulation (FAR) and other parts of the VAAR. However, when a policy or procedure in the FAR or another part of the VAAR differs from the procedures contained in this part, this part shall apply. These procedures contain more flexibility than provided in the FAR or elsewhere in the VAAR. (38 U.S.C. 8153)

873.102 Definitions.

Commercial service means a service, except construction exceeding $2,000 and architect-engineer services, that is offered and sold competitively in the commercial marketplace, is performed under standard commercial terms and

conditions, and is procured using firm-fixed price contracts. (38 U.S.C. 8153)

Health-care providers include health-care plans and insurers and any organizations, institutions, or other entities or individuals who furnish health-care resources. (38 U.S.C. 8153)

Health-care resource includes hospital care and medical services (as those terms are defined in section 1701 of title 38 United States Code (U.S.C.)), any other health-care service, and any health-care support or administrative resource, including the use of medical equipment or space. (38 U.S.C. 8153)

873.103 Priority sources.

Without regard to FAR 8.002(a)(2), except for the acquisition of services available from the Committee for Purchase From People Who Are Blind or Severely Disabled, pursuant to the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) and FAR Subpart 8.7, there are no priority sources for the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space. (38 U.S.C. 8153)

873.104 Competition requirements.

(a) Without regard to FAR Part 6, if the health-care resource required is a commercial service, the use of medical equipment or space, or research, and is to be acquired from an institution affiliated with the Department in accordance with section 7302 of title 38 U.S.C., including medical practice groups and other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), or from blood banks, organ banks, or research centers, the resource may be acquired on a sole source basis. (38 U.S.C. 8153)

(b) Acquisition of health-care resources identified in paragraph (a) of this section are not required to be publicized as otherwise required by 873.108 or FAR 5.101. In addition, written justification, as otherwise set forth in section 303(f) of the Federal Property and Administration Services Act of 1949 (41 U.S.C. 253(f)) and FAR Part 6, is not required. (38 U.S.C. 8153)

(c) Without regard to FAR 6.101, if the health-care resource required is a commercial service or the use of medical equipment or space, and is to be acquired from an entity not described in paragraph (a) of this section, contracting officers must seek competition to the maximum extent practicable and must permit all responsible sources, as appropriate under the provisions of this part, to submit a bid, proposal or quotation (as appropriate) for the resources to be procured and provide for the consideration by the Department of bids, proposals, or quotations so submitted. (38 U.S.C. 8153)

(d) Without regard to FAR 5.101, acquisition of health-care resources identified in paragraph (c) of this section shall be publicized as otherwise required by 873.108. Moreover, for any such acquisition described in paragraph (c) of this section to be conducted on a sole source basis, the contracting officer must prepare a justification that includes the information and is approved at the levels prescribed in section 303(f) of the Federal Property and Administration Services Act of 1949 (41 U.S.C. 253(f)) and FAR Part 6. (38 U.S.C. 8153)

873.105 Acquisition planning.

(a) Acquisition planning is an indispensable component of the total acquisition process.

(b) For the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space, where the acquisition is expected to exceed the simplified acquisition threshold (SAT), an acquisition team must be assembled. The team shall be tailored by the contracting officer for each particular acquisition expected to exceed the SAT. The team should consist of a mix of staff, appropriate to the complexity of the acquisition, and may include contracting, fiscal, legal, administrative, and technical personnel, and such other expertise as necessary to assure a comprehensive acquisition plan. The team should include the small business advocate representing the contracting activity or a higher level designee and the SBA Procurement Center Representative (PRC), if available. As a minimum, the team must include the

contracting officer and a representative of the requesting service. (38 U.S.C. 8153)

(c) Prior to determining whether a requirement is suitable for acquisition using these simplified acquisition procedures, the contracting officer or the acquisition team, as appropriate, must conduct market research to identify interested businesses. It is the responsibility of the contracting officer to ensure the requirement is appropriately publicized and information about the procurement opportunity is adequately disseminated as set forth in 873.108. (38 U.S.C. 8153)

(d) In lieu of the requirements of FAR Part 7 addressing documentation of the acquisition plan, the contracting officer may conduct an acquisition strategy meeting with cognizant offices to seek approval for the proposed acquisition approach. If a meeting is conducted, briefing materials shall be presented to address the acquisition plan topics and structure in FAR 7.105. Formal written minutes—summarizing decisions, actions, and conclusions—shall be prepared and included in the contract file, along with a copy of the briefing materials. (38 U.S.C. 8153)

873.106 Presolicitation exchanges with industry.

(a) This section shall be used in lieu of FAR Part 10, except as provided in paragraph (b)(3) of this section. In conducting market research, exchange of information by all interested parties involved in an acquisition, from the earliest identification of a requirement through release of the solicitation, is encouraged. Interested parties include potential offerors, end users, Government acquisition and support personnel, and others involved in the conduct or outcome of the acquisition. The nature and extent of presolicitation exchanges between the Government and industry shall be a matter of the contracting officer's discretion (for acquisitions not exceeding the simplified acquisition threshold) or the acquisition team's discretion, as coordinated by the contracting officer. (38 U.S.C. 8153)

(b) Techniques to promote early exchange of information include—

(1) Industry or small business conferences;

(2) Public hearings;

(3) Market research in accordance with FAR 10.002(b), which shall be followed to the extent that the provisions therein would provide relevant information;

(4) One-on-one meetings with potential offerors;

(5) Presolicitation notices;

(6) Draft requests for proposals (RFPs);

(7) Requests for information (RFIs);

(8) Presolicitation or preproposal conferences;

(9) Site visits;

(10) Electronic notices (e.g., Internet); and

(11) Use of the Central Contractor Registration (CCR). (*http://www.bpn.gov/ccrinq/scripts/search.asp*) and the ''Advanced Search'' feature on VetBiz Vendor Information Pages (*http://vip.vetbiz.gov/general_user/search/default.asp*) to search for vendors. (38 U.S.C. 8153).

873.107 Socioeconomic programs.

(a) *Implementation.* This section provides additional authority, over and above that found at FAR 19.502, to waive small business set-asides. For acquisitions above the micro-purchase threshold, if, through market research, the contracting officer determines that there is reasonable expectation that reasonably priced bids, proposals, or quotations will be received from two or more responsible small businesses, a requirement for health-care resources must be reserved for small business participation. Without regard to FAR 13.003(b)(1), 19.502–2, and 19.502–3, the head of the contracting activity (HCA) may approve a waiver from the requirement for any set-aside for small business participation when a waiver is determined to be in the best interest of the Government. (38 U.S.C. 8153)

(b) *Rejecting Small Business Administration (SBA) recommendations.* (1) The contracting officer (or, if a waiver has been approved in accordance with paragraph (a) of this section, the HCA) must consider and respond to a recommendation from an SBA representative to set a procurement aside for small business within 5 working days. If the recommendation is rejected by the contracting officer (or, if a waiver

has been approved, by the HCA) and if SBA intends to appeal that determination, SBA must, within 2 working days after receipt of the determination, notify the contracting officer involved of SBA's intention to appeal.

(2) Upon receipt of the notification of SBA's intention to appeal and pending issuance of a final Department appeal decision to SBA, the contracting officer involved must suspend action on the acquisition unless the contracting officer makes a determination in writing that proceeding to contract award and performance is in the public interest. The contracting officer must promptly notify SBA of the determination to proceed with the solicitation and/or contract award and must provide a copy of the written determination to SBA.

(3) SBA shall be allowed 10 working days after receiving the rejection notice from the contracting officer (or the HCA, if a waiver has been approved) for acquisitions not exceeding $5 million, or 15 working days after receiving the rejection notice for acquisitions exceeding $5 million, to file an appeal. SBA must notify the contracting officer within this 10 or 15 day period whether an appeal has, in fact, been taken. If notification is not received by the contracting officer within the applicable period, it shall be deemed that an appeal was not taken.

(4) SBA shall submit appeals to the Secretary. Decisions shall be made by the DSPE, whose decisions shall be final. (38 U.S.C. 8153)

(c) *Contracting with the Small Business Administration (the 8(a) Program).* The procedures of FAR 19.8 shall be followed where a responsible 8(a) contractor has been identified.

(d) *Certificates of Competency and determinations of responsibility.* The Director, Office of Small and Disadvantaged Business Utilization (OSDBU), Department of Veterans Affairs (VA), and the Assistant Administrator, Office of Industrial Assistance, Small Business Administration (SBA), shall serve as ombudsmen to assist VA contracting officers on any issues relating to Certificates of Competency (COC). Copies of all COC referrals to SBA shall be submitted to the Director, OSDBU (00SB).

873.108 Publicizing contract actions.

(a) Without regard to FAR 5.101, all acquisitions under this part 873, except as provided in paragraph (b) of this section, for dollar amounts in excess of the simplified acquisition threshold (SAT), as set forth in FAR Part 13, shall be publicly announced utilizing a medium designed to obtain competition to the maximum extent practicable and to permit all responsible sources, as appropriate under the provisions of this part, to submit a bid, proposal, or quotation (as appropriate).

(1) The publication medium may include the Internet, including the Governmentwide point of entry (GPE), and local, regional or national publications or journals, as appropriate, at the discretion of the contracting officer, depending on the complexity of the acquisition.

(2) Without regard to FAR 5.203, notice shall be published for a reasonable time prior to issuance of a request for quotations (RFQ) or a solicitation, depending on the complexity or urgency of the acquisition, in order to afford potential offerors a reasonable opportunity to respond. If the notice includes a complete copy of the RFQ or solicitation, a prior notice is not required, and the RFQ or solicitation shall be considered to be announced and issued at the same time.

(3) The notice may include contractor qualification parameters, such as time for delivery of service, credentialing or medical certification requirements, small business or other socio-economic preferences, the appropriate small business size standard, and such other qualifications as the contracting officer deems necessary to meet the needs of the Government. (38 U.S.C. 8153)

(b) The requirement for public announcement does not apply to sole source acquisitions, described in 873.104(a), from institutions affiliated with the Department in accordance with section 7302 of title 38 U.S.C., including medical practice groups and other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), or from blood banks, organ banks, or

research centers. In addition, the requirement for public announcement does not apply to sole source acquisitions of hospital care and medical services (as those terms are defined in section 1701 of title 38 U.S.C.) or any other health-care services, including acquisitions for the mutual use or exchange of use of such services. However, as required by 38 U.S.C. 8153(a)(3)(D), acquisitions from non-affiliates, if conducted on a sole source basis, must still be justified and approved (see 873.104(d)). (38 U.S.C. 8153)

(c) For acquisitions below the SAT, a public announcement is optional. (38 U.S.C. 8153)

(d) Each solicitation issued under these procedures must prominently identify that the requirement is being solicited under the authority of 38 U.S.C. 8153 and part 873. (38 U.S.C. 8153)

873.109 General requirements for acquisition of health-care resources.

(a) *Source selection authority*. Contracting officers shall be the source selection authority for acquisitions of health-care resources, consisting of commercial services or the use of medical equipment or space, utilizing the guidance contained in this part 873. (38 U.S.C. 8153)

(b) *Statement of work/Specifications.* Statements of work or specifications must define the requirement and should, in most instances, include qualifications or limitations such as time limits for delivery of service, medical certification or credentialing restrictions, and small business or other socio-economic preferences. The contracting officer may include any other such terms as the contracting officer deems appropriate for each specific acquisition. (38 U.S.C. 8153)

(c) *Documentation*. Without regard to FAR 13.106–3(b), 13.501(b), or 15.406–3, the contract file must include:

(1) A brief written description of the procedures used in awarding the contract;

(2) The market research, including the determination that the acquisition involves health-care resources;

(3) The number of offers received; and

(4) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision. (38 U.S.C. 8153)

(d) *Time for receipt of quotations or offers.* (1) Without regard to FAR 5.203, contracting officers shall set a reasonable time for receipt of quotations or proposals in requests for quotations (RFQs) and solicitations.

(2) Without regard to FAR 15.208 or 52.212–1(f), quotations or proposals received after the time set forth in an RFQ or request for proposals (RFP) may be considered at the discretion of the contracting officer if determined to be in the best interest of the Government. Contracting officers must document the rationale for accepting quotations or proposals received after the time specified in the RFQ or RFP. This paragraph (d)(2) shall not apply to RFQs or RFPs if alternative evaluation techniques described in 873.111(e)(1)(ii) are used. This paragraph (d)(2) does not apply to invitations for bid (IFBs). (38 U.S.C. 8153)

(e) *Cancellation of procurements.* Without regard to FAR 14.404–1, any acquisition may be canceled by the contracting officer at any time during the acquisition process if cancellation is determined to be in the best interest of the Government. (38 U.S.C. 8153)

873.110 Solicitation provisions.

(a) As provided in 873.109(d), contracting officers shall insert the provision at 852.273–70, Late offers, in all requests for quotations (RFQs) and requests for proposals (RFPs) exceeding the micro-purchase threshold. (38 U.S.C. 8153)

(b) The contracting officer shall insert a provision in RFQs and solicitations, substantially the same as the provision at 852.273–71, Alternative negotiation techniques, when either of the alternative negotiation techniques described in 873.111(e)(1) will be used. (38 U.S.C. 8153)

(c) The contracting officer shall insert the provision at 852.273–72, Alternative evaluation, in lieu of the provision at 52.212–2, Evaluation—Commercial Items, when the alternative negotiation technique described in 873.111(e)(1)(ii) will be used. (38 U.S.C. 8153)

(d) When evaluation information, as described in 873.112, is to be used to select a contractor under an RFQ or RFP for health-care resources consisting of commercial services or the use of medical equipment or space, the contracting officer may insert the provision at 852.273–73, Evaluation—health-care resources, in the RFQ or RFP in lieu of FAR provision 52.212–2. (38 U.S.C. 8153)

(e) As provided at 873.113(f), if award may be made without exchange with vendors, the contracting officer shall include the provision at 852.273–74, Award without exchanges, in the RFQ or RFP. (38 U.S.C. 8153)

(f) The contracting officer shall insert the FAR clause at 52.207–3, Right of First Refusal of Employment, and the clause at 852.207–70, Report of employment under commercial activities, in all RFQs, solicitations, and contracts issued under the authority of 38 U.S.C. 8151–8153 which may result in a conversion, from in-house performance to contract performance, of work currently being performed by Department of Veterans Affairs employees. (38 U.S.C. 8153)

873.111 Acquisition strategies for health-care resources.

Without regard to FAR 13.003 or 13.500(a), the following acquisition processes and techniques may be used, singly or in combination with others, as appropriate, to design acquisition strategies suitable for the complexity of the requirement and the amount of resources available to conduct the acquisition. These strategies should be considered during acquisition planning. The contracting officer shall select the process most appropriate to the particular acquisition. There is no preference for sealed bid acquisitions. (38 U.S.C. 8153)

(a) *Request for quotations.* (1) Without regard to FAR 6.1 or 6.2, contracting officers must solicit a sufficient number of sources to promote competition to the maximum extent practicable and to ensure that the purchase is advantageous to the Government, based, as appropriate, on either price alone or price and other factors (e.g., past performance and quality). RFQs must notify vendors of the basis upon which the award is to be made.

(2) For acquisitions in excess of the SAT, the procedures set forth in FAR Part 13 concerning RFQs may be utilized without regard to the dollar thresholds contained therein. (38 U.S.C. 8153)

(b) *Sealed bidding.* FAR Part 14 provides procedures for sealed bidding.

(c) *Negotiated acquisitions.* If the procedures of FAR Parts 12, 13, and 15 differ from the procedures of this Part, the procedures of this Part shall take precedence. (38 U.S.C. 8153)

(d) *Multiphase acquisition technique.* (1) *General.* Without regard to FAR 15.202, multiphase acquisitions may be appropriate when the submission of full proposals at the beginning of an acquisition would be burdensome for offerors to prepare and for Government personnel to evaluate. Using multiphase techniques, the Government may seek limited information initially, make one or more down-selects, and request a full proposal from an individual offeror or limited number of offerors. Provided that the notice notifies offerors, the contracting officer may limit the number of proposals during any phase to the number that will permit an efficient competition among proposals offering the greatest likelihood of award. The contracting officer may indicate in the notice an estimate of the greatest number of proposals that will be included in the down-select phase. The contracting officer may down-select to a single offeror.

(2) *First phase notice.* In the first phase, the Government shall publish a notice (see 873.108) that solicits responses and that may provide, as appropriate, a general description of the scope or purpose of the acquisition and the criteria that will be used to make the initial down-select decision. The notice may also inform offerors of the evaluation criteria or process that will be used in subsequent down-select decisions. The notice must contain sufficient information to allow potential offerors to make an informed decision about whether to participate in the acquisition. The notice must advise offerors that failure to participate in the first phase will make them ineligible to participate in subsequent

phases. The notice may be in the form of a synopsis in the Governmentwide point of entry (GPE) or a narrative letter or other appropriate method that contains the information required by this paragraph.

(3) *First phase responses.* Offerors shall submit the information requested in the notice described in paragraph (d)(2) of this section. Information sought in the first phase may be limited to a statement of qualifications and other appropriate information (e.g., proposed technical concept, past performance information, limited pricing information).

(4) *First phase evaluation and down-select.* The Government shall evaluate all offerors' submissions in accordance with the notice and make a down-select decision.

(5) *Subsequent phases.* Additional information shall be sought in the second phase so that a down-select can be performed or an award made without exchanges, if necessary. The contracting officer may conduct exchanges with remaining offeror(s), request proposal revisions, or request best and final offers, as determined necessary by the contracting officer, in order to make an award decision.

(6) *Debriefing.* Without regard to FAR 15.505, contracting officers must debrief offerors as required by 873.118 when they have been excluded from the competition. (38 U.S.C. 8153)

(e) *Alternative negotiation techniques.* (1) Contracting officers may utilize alternative negotiation techniques for the acquisition of health-care resources. Alternative negotiation techniques may be used when award will be based on either price or price and other factors. Alternative negotiation techniques include but are not limited to:

(i) Indicating to offerors a price, contract term or condition, commercially available feature, and/or requirement (beyond any requirement or target specified in the solicitation) that offerors will have to improve upon or meet, as appropriate, in order to remain competitive.

(ii) Posting offered prices electronically or otherwise (without disclosing the identity of the offerors) and permitting revisions of offers based on this information.

(2) Except as otherwise permitted by law, contracting officers shall not conduct acquisitions under this section in a manner that reveals the identities of offerors, releases proprietary information, or otherwise gives any offeror a competitive advantage (see FAR 3.104). (38 U.S.C. 8153)

873.112 Evaluation information.

(a) Without regard to FAR 15.304 (except for 15.304(c)(1) and (c)(3), which do apply to acquisitions under this authority), the criteria, factors, or other evaluation information that apply to an acquisition, and their relative importance, are within the broad discretion of agency acquisition officials as long as the evaluation information is determined to be in the best interest of the Government. (38 U.S.C. 8153)

(b) Price or cost to the Government must be evaluated in every source selection. Past performance shall be evaluated in source selections for negotiated competitive acquisitions exceeding the SAT unless the contracting officer documents that past performance is not an appropriate evaluation factor for the acquisition. (38 U.S.C. 8153)

(c) The quality of the product or service may be addressed in source selection through consideration of information such as past compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience. The information required from quoters, bidders, or offerors shall be included in notices or solicitations, as appropriate. (38 U.S.C. 8153)

(d) The relative importance of any evaluation information included in a solicitation must be set forth therein. (38 U.S.C. 8153)

873.113 Exchanges with offerors.

(a) Without regard to FAR 15.201 or 15.306, negotiated acquisitions generally involve exchanges between the Government and competing offerors. Open exchanges support the goal of efficiency in Government by providing the Government with relevant information (in addition to that submitted in the offeror's initial proposal) needed to understand and evaluate the offeror's proposal. The nature and extent of exchanges between the Government and

offerors is a matter of contracting officer judgment. Clarifications, communications, and discussions, as provided for in the FAR, are concepts not applicable to acquisitions under this part 873. (38 U.S.C. 8153)

(b) Exchanges with potential offerors may take place throughout the source selection process. Exchanges may start in the planning stages and continue through contract award. Exchanges should occur most often with offerors determined to be in the best value pool (see 873.114). The purpose of exchanges is to ensure there is mutual understanding between the Government and the offerors on all aspects of the acquisition, including offerors' submittals/proposals. Information disclosed as a result of oral or written exchanges with an offeror may be considered in the evaluation of an offeror's proposal. (38 U.S.C. 8153)

(c) Exchanges may be conducted, in part, to obtain information that explains or resolves ambiguities or other concerns (e.g., perceived errors, perceived omissions, or perceived deficiencies) in an offeror's proposal. (38 U.S.C. 8153)

(d) Exchanges shall only be initiated if authorized by the contracting officer and need not be conducted with all offerors. (38 U.S.C. 8153)

(e) Except for acquisitions based on alternative negotiation techniques contained in 873.111(e)(1), the contracting officer and other Government personnel involved in the acquisition shall not disclose information regarding one offeror's proposal to other offerors without consent of the offeror in accordance with FAR Parts 3 and 24. (38 U.S.C. 8153)

(f) Award may be made on initial proposals without exchanges if the solicitation states that the Government intends to evaluate proposals and make award without exchanges, unless the contracting officer determines that exchanges are considered necessary. (38 U.S.C. 8153)

873.114 Best value pool.

(a) Without regard to FAR 15.306(c), the contracting officer may determine the most highly rated proposals having the greatest likelihood of award based on the information or factors and subfactors in the solicitation. These vendors constitute the best value pool. This determination is within the sole discretion of the contracting officer. Competitive range determinations, as provided for in the FAR, are not applicable to acquisitions under this part 873. (38 U.S.C. 8153)

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the best value pool is expected to exceed the number at which an efficient, timely, and economical competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar services, and the resources available to conduct the source selection. Provided the solicitation notifies offerors that the best value pool can be limited for purposes of making an efficient, timely, and economical award, the contracting officer may limit the number of proposals in the best value pool to the greatest number that will permit an efficient competition among the proposals offering the greatest likelihood of award. The contracting officer may indicate in the solicitation the estimate of the greatest number of proposals that will be included in the best value pool. The contracting officer may limit the best value pool to a single offeror. (38 U.S.C. 8153)

(c) If the contracting officer determines that an offeror's proposal is no longer in the best value pool, the proposal shall no longer be considered for award. Written notice of this decision must be provided to unsuccessful offerors at the earliest practicable time. (38 U.S.C. 8153)

873.115 Proposal revisions.

(a) Without regard to FAR 15.307, the contracting officer may request proposal revisions as often as needed during the proposal evaluation process at any time prior to award from vendors remaining in the best value pool. Proposal revisions shall be submitted in writing. The contracting officer may establish a common cutoff date for receipt of proposal revisions. Contracting

officers may request best and final offers. In any case, contracting officers and acquisition team members must safeguard proposals, and revisions thereto, to avoid unfair dissemination of an offeror's proposal. (38 U.S.C. 8153)

(b) If an offeror initially included in the best value pool is no longer considered to be among those most likely to receive award after submission of proposal revisions and subsequent evaluation thereof, the offeror may be eliminated from the best value pool without being afforded an opportunity to submit further proposal revisions. (38 U.S.C. 8153)

(c) Requesting and/or receiving proposal revisions does not necessarily conclude exchanges. However, requests for proposal revisions should advise offerors that the Government may make award without obtaining further revisions. (38 U.S.C. 8153)

873.116 Source selection decision.

(a) An integrated comparative assessment of proposals should be performed before source selection is made. The contracting officer shall independently determine which proposal(s) represents the best value, consistent with the evaluation information or factors and subfactors in the solicitation, and that the prices are fair and reasonable. The contracting officer may determine that all proposals should be rejected if it is in the best interest of the Government. (38 U.S.C. 8153)

(b) The source selection team, or advisory boards or panels, may conduct comparative analysis(es) of proposals and make award recommendations, if the contracting officer requests such assistance. (38 U.S.C. 8153)

(c) The source selection decision must be documented in accordance with FAR 15.308.

873.117 Award to successful offeror.

(a) The contracting officer shall award a contract to the successful offeror by furnishing the contract or other notice of the award to that offeror. (38 U.S.C. 8153)

(b) If a request for proposal (RFP) process was used for the solicitation and if award is to be made without exchanges, the contracting officer may award a contract without obtaining the offeror's signature a second time. The offeror's signature on the offer constitutes the offeror's agreement to be bound by the offer. If a request for quotation (RFQ) process was used for the solicitation, and if the contracting officer determines there is a need to establish a binding contract prior to commencement of work, the contracting officer should obtain the offeror's acceptance signature on the contract to ensure formation of a binding contract. (38 U.S.C. 8153)

(c) If the award document includes information that is different than the latest signed offer, both the offeror and the contracting officer must sign the contract award. (38 U.S.C. 8153)

(d) When an award is made to an offeror for less than all of the items that may be awarded and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the offer acceptance period. (38 U.S.C. 8153)

873.118 Debriefings.

Offerors excluded from a request for proposals (RFP) may submit a written request for a debriefing to the contracting officer. Without regard to FAR 15.505, preaward debriefings may be conducted by the contracting officer when determined to be in the best interest of the Government. Post-award debriefings shall be conducted in accordance with FAR 15.506. (38 U.S.C. 8153)

CHAPTER 9—DEPARTMENT OF ENERGY

(Parts 900 to 999)

SUBCHAPTER A—GENERAL

Part		*Page*
901	Federal Acquisition Regulations System	281
902	Definitions of words and terms	282
903	Improper business practices and personal conflicts of interest	282
904	Administrative matters	285

SUBCHAPTER B—ACQUISITION PLANNING

905	Publicizing contract actions	292
906	Competition requirements	292
907	Acquisition planning	293
908	Required sources of supplies and services	293
909	Contractor qualifications	299
911	Describing agency needs	304
912	Acquisition of commercial items	305

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

913	Simplified acquisition procedures	306
914	Sealed bidding	306
915	Contracting by negotiation	307
916	Types of contracts	321
917	Special contracting methods	323

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

919	Small business programs	327
922	Application of labor laws to Government acquisition	331
923	Environment, conservation, occupational safety, and drug free workplace	334
925	Foreign acquisition	338
926	Other socioeconomic programs	340

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

927	Patents, data, and copyrights	344

Part		Page
928	Bonds and insurance	352
931	Contract cost principles and procedures	353
932	Contract financing	355
933	Protests, disputes, and appeals	359
	SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING	
935	Research and development contracting	361
936	Construction and architect-engineer contracts	361
937	Service contracting	363
939	Acquisition of information technology	364
941	Acquisition of utility services	364
	SUBCHAPTER G—CONTRACT MANAGEMENT	
942	Contract administration	366
945	Government property	368
947	Transportation	372
949	Termination of contracts	373
950	Extraordinary contractual actions	373
951	Use of Government sources by contractors	376
	SUBCHAPTER H—CLAUSES AND FORMS	
952	Solicitation provisions and contract clauses	378
	SUBCHAPTER I—AGENCY SUPPLEMENTARY REGULATIONS	
970	DOE management and operating contracts	420

SUBCHAPTER A—GENERAL

PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM

Subpart 901.1—Purpose, Authority, Issuance

Sec.
901.101 Purpose.
901.102 Authority.
901.103 Applicability.
901.104 Issuance.
901.104–1 Publication and code arrangement.
901.104–2 Arrangement of regulations.
901.104–3 Copies.
901.105 OMB control numbers.

Subpart 901.3—Agency Acquisition Regulations

901.301–70 Other issuances related to acquisition.

Subpart 901.6—Contracting Authority and Responsibilities

901.601 General.
901.602–3 Ratification of unauthorized commitments.

AUTHORITY: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101, *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401, *et seq.*

SOURCE: 61 FR 41704, Aug. 9, 1996, unless otherwise noted.

Subpart 901.1—Purpose, Authority, Issuance

901.101 Purpose.

The Department of Energy Acquisition Regulation (DEAR) in this chapter establishes uniform acquisition policies which implement and supplement the Federal Acquisition Regulation (FAR).

901.102 Authority.

The DEAR and amendments thereto are issued by the Procurement Executive pursuant to a delegation from the Secretary in accordance with the authority of section 644 of the Department of Energy Organization Act (42 U.S.C. 7254), section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 486(c)), and other applicable law.

901.103 Applicability.

The FAR and DEAR apply to all DOE acquisitions of supplies and services which obligate appropriated funds unless otherwise specified in this chapter.

901.104 Issuance.

901.104–1 Publication and code arrangement.

(a) The DEAR and its subsequent changes are published in the FEDERAL REGISTER, cumulative form in the Code of Federal Regulations, and a separate loose-leaf edition.

(b) The DEAR is issued as chapter 9 of Title 48 of the Code of Federal Regulations.

901.104–2 Arrangement of regulations.

(a) General. The DEAR is divided into the same parts, subparts, sections, subsections and paragraphs as is the FAR.

(b) Numbering. The numbering illustrations at (FAR) 48 CFR 1.104–2(b) apply to the DEAR, but the DEAR numbering will be preceded with a 9 or a 90. Material which supplements the FAR will be assigned the numbers 70 and up.

901.104–3 Copies.

Copies of the DEAR published in the FEDERAL REGISTER or Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

901.105 OMB control numbers.

The Paperwork Reduction Act of 1980, Public Law 98–511, and the Office of Management and Budget's implementing regulations at 5 CFR part 1320, require that reporting and record keeping requirements affecting 10 or more members of the public be cleared by that Office. The OMB control number for the collection of information under 48 CFR chapter 9 is 1910–4100 except for

Reporting and Recordkeeping Requirements for Safety Management (see 48 CFR 970.5223–1) which is 1910–5103.

[61 FR 41704, Aug. 9, 1996, as amended at 62 FR 34861, June 27, 1997; 65 FR 81005, Dec. 22, 2000; 71 FR 16243, Mar. 31, 2006]

Subpart 901.3—Agency Acquisition Regulations

901.301–70 Other issuances related to acquisition.

In addition to the FAR and DEAR, there are other issuances which deal with acquisition. Among these are the Federal Property Management Regulations, the DOE Property Management Regulations, and DOE Directives.

Subpart 901.6—Contracting Authority and Responsibilities

901.601 General.

(a) Contracting authority vests in the Secretary of Energy. The Secretary has delegated this authority to the Procurement Executive. The Procurement Executive has redelegated this authority to the Heads of Contracting Activities (HCA). These delegations are formal written delegations containing dollar limitations and conditions. Each HCA in turn makes formal contracting officer appointments within the contracting activity.

(b) The Procurement Executive has been authorized, without power of redelegation, to perform the functions set forth at 48 CFR 1.601(b) regarding the assignment of contracting functions and responsibilities to another agency, and the creation of joint or combined offices with another agency to exercise acquisition functions and responsibilities.

[61 FR 41704, Aug. 9, 1996, as amended at 62 FR 53756, Oct. 16, 1997]

901.602–3 Ratification of unauthorized commitments. (DOE coverage—paragraph (b))

(b) (2) The Procurement Executive is authorized to ratify an unauthorized commitment.

(3) The ratification authority of the Procurement Executive in paragraph (b)(2) of this section is delegated to the Head of the Contracting Activity (HCA) for individual unauthorized commitments of $25,000 or under. The ratification authority of the HCA is nondelegable.

PART 902—DEFINITIONS OF WORDS AND TERMS

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

Subpart 902.2—Definitions Clause

902.200 Definitions clause.

As prescribed by FAR subpart 2.2, insert the clause at FAR 52.202–1, Definitions, but modify it to limit the definition at paragraph (a) of the clause, to encompass only the Secretary, Deputy Secretary, or the Under Secretaries of the Department of Energy, and the Chairman, Federal Energy Regulatory Commission. The contracting officer shall also add paragraphs (h) and (i) or (g) and (h) if Alternate I of the FAR clause is used. Paragraph (h) defines ''DOE'' as meaning the United States Department of Energy, ''FERC'' as meaning the Federal Energy Regulatory Commission, and ''NNSA'' as meaning the National Nuclear Security Administration. Paragraph (i) identifies the Senior Procurement Executive, DOE, as the Director, Office of Procurement and Assistance Management; the Senior Procurement Executive, NNSA, as the Administrator for Nuclear Security, NNSA; and the Senior Procurement Executive, FERC, as the Chairman, Federal Energy Regulatory Commission.

[67 FR 14870, Mar. 28, 2002]

PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 903.1—Safeguards

Sec.

903.101 Standards of conduct.
903.101–3 Agency regulations.
903.104–3 Definitions.
903.104–10 Violations or possible violations (DOE coverage—paragraph (a)).

Subpart 903.2—Contractor Gratuities to Government Personnel

903.203 Reporting suspected violations of the Gratuities clause.
903.204 Treatment of violations.

Subpart 903.3—Reports of Suspected Antitrust Violations

903.303 Reporting suspected antitrust violations.

Subpart 903.4—Contingent Fees

903.408–1 Responsibilities.

Subpart 903.5—Other Improper Business Practices

903.502 Subcontractor kickbacks.

Subpart 903.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

903.603 Responsibilities of the contracting officer.

Subpart 903.9—Whistleblower Protection for Contractor Employees

903.901 Scope.
903.902 Definition.
903.903 Applicability.
903.970 Remedies.
903.971 Contract clause.

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

SOURCE: 49 FR 11940, Mar. 28, 1984, unless otherwise noted.

Subpart 903.1—Safeguards

903.101 Standards of conduct.

903.101–3 Agency regulations.

Detailed rules applicable to the conduct of DOE employees are set forth in 10 CFR part 1010.

[49 FR 11940, Mar. 28, 1984, as amended at 60 FR 47307, Sept. 12, 1995]

903.104–3 Definitions.

As used in this section and for the purposes of the post-employment restrictions at 48 CFR (FAR) 3.104–4(d)—

Deputy program manager means the individual within DOE who normally acts as the program manager in the absence of the program manager, and does not mean an individual who occasionally acts for the program manager or the deputy program manager.

Program manager means the individual within DOE who:

(1) Exercises authority on a day-to-day basis to manage an acquisition program—

(i) For a system attained through the acquisition process; and

(ii) With one or more contracts, at least one of which has a value exceeding $10,000,000; and

(2) Is generally the person at the lowest organizational level who has authority to make technical and budgetary decisions on behalf of DOE.

System means a combination of elements that function together to produce the capabilities required to fulfill a mission need, including, but not limited to hardware, equipment, software, or any combination thereof.

[63 FR 56851, Oct. 23, 1998]

903.104–10 Violations or possible violations (DOE coverage—paragraph (a)).

(a) Except for Headquarters activities, the individual within DOE responsible for fulfilling the requirements of 48 CFR 3.104–10(a) (1) and (2) relative to contracting officer conclusions on the impact of a violation or possible violation of subsections 27 (a), (b), (c) or (d) of the Office of Federal Procurement Policy Act shall be the legal counsel assigned direct responsibility for providing legal advice to the contracting office making the award or selecting the source. The legal counsel is the Chief Counsel for the Operations Offices or the Federal Energy Technology Center; the Counsel, or the Chief Counsel, for the Support Offices or the Naval Reactors Offices; and the General Counsel for the Power Administrations. For Headquarters activities, the individual designated to perform the responsibilities in 48 CFR 3.104–10(a) (1) and (2) regarding questions of disclosure of proprietary or source selection information is the Assistant General Counsel for Procurement and Financial Assistance. The designated individual for other questions regarding 48 CFR 3.104–10(a) (1) and (2) for Headquarters activities is the Agency Ethics Official (Designated Agency Ethics Official).

[62 FR 53756, Oct. 16, 1997]

Subpart 903.2—Contractor Gratuities to Government Personnel

903.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause shall be reported to the Head of the Contracting Activity (HCA) in writing detailing the circumstances. The HCA will evaluate the report and, if the report appears to substantiate the allegations, the matter will be referred to the Procurement Executive for disposition.

[49 FR 11940, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

903.204 Treatment of violations.

Apparent violations will be processed in accordance with the debarment and suspension rules set forth at Title 10, part 1035, of the Code of Federal Regulations.

Subpart 903.3—Reports of Suspected Antitrust Violations

903.303 Reporting suspected antitrust violations.

(a) Potential anti-competitive practices, such as described in FAR 3.301, and antitrust law violations as described in FAR 3.303, evidenced in bids or proposals, shall be reported to the Office of General Counsel through the Head of the Contracting Activity with a copy to the Procurement Executive. The Office of General Counsel will provide reports to the Attorney General, as appropriate.

[50 FR 12183, Mar. 27, 1985, as amended at 59 FR 9104, Feb. 25, 1994]

Subpart 903.4—Contingent Fees

903.408–1 Responsibilities.

(b) Each Standard Form 119 completed in connection with a DOE contract, together with other relevant information, shall be reviewed by Counsel prior to the initiation of appropriate action.

Subpart 903.5—Other Improper Business Practices

903.502 Subcontractor kickbacks.

(b) Contracting officers shall report suspected violations of the Anti-Kickback Act through the Head of the Contracting Activity, or designee, to the Office of General Counsel.

Subpart 903.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

903.603 Responsibilities of the contracting officer.

(a) When the needs of the Government cannot be reasonably supplied by sources other than employees of the Government or sources which are substantially owned or controlled by Government employees, the contracting officer, in accordance with FAR 48 CFR 3.602, may submit, through the HCA, a request to the Procurement Executive, with appropriate justification, for approval of an exception to the prohibitions contained in FAR 3.601.

[49 FR 11940, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

Subpart 903.9—Whistleblower Protection for Contractor Employees

SOURCE: 81005, Dec. 22, 2000, unless otherwise noted.

903.901 Scope.

This subpart implements the DOE Contractor Employee Protection Program as set forth at 10 CFR part 708. Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees of employer reprisal resulting from employee disclosure of information to DOE, to Members of Congress, or to the contractor; employee participation in proceedings before Congress or pursuant to this subpart; or employee refusal to engage in illegal or dangerous activities, when such disclosure, participation, or refusal pertains to employer practices

which the employee believes to be unsafe; to violate laws, rules, or regulations; or to involve fraud, mismanagement, waste, or abuse.

903.902 Definition.

Contractor, as used in this subpart, has the meaning contained in 10 CFR 708.2.

903.903 Applicability.

10 CFR part 708 is applicable to complaints of retaliation filed by employees of contractors, and subcontractors, performing work on behalf of DOE directly related to DOE-owned or leased facilities, if the complaint stems from a disclosure, participation, or refusal described in 10 CFR 708.5.

903.970 Remedies.

(a) Contractors found to have retaliated against an employee in reprisal for such disclosure, participation or refusal are required to provide relief in accordance with decisions issued under 10 CFR part 708.

(b) 10 CFR part 708 provides that for the purposes of the Contract Disputes Act (41 U.S.C. 605 and 606), a final decision issued pursuant to 10 CFR part 708 shall not be considered to be a claim by the Government against a contractor or a decision by the contracting officer subject to appeal. However, a contractor's disagreement and refusal to comply with a final decision could result in a contracting officer's decision to disallow certain costs or to terminate the contract for default. In such case, the contractor could file a claim under the Disputes clause of the contract regarding the disallowance of cost or the termination of the contract.

903.971 Contract clause.

The contracting officer shall insert the clause at 952.203–70, Whistleblower Protection for Contractor Employees, in contracts that involve work to be done on behalf of DOE directly related to activities at DOE-owned or leased sites.

PART 904—ADMINISTRATIVE MATTERS

Subpart 904.4—Safeguarding Classified Information Within Industry

Sec.
904.401 Definitions.
904.402 General.
904.404 Solicitation provision and contract clause. [DOE Coverage—Paragraph (d)]

Subpart 904.6 [Reserved]

Subpart 904.7—Contractor Records Retention

904.702 Applicability.

Subpart 904.8—Contract Files

904.803 Contents of contract files.
904.804–1 Closeout by the office administering the contract (DOE Coverage—paragraphs (a) and (b)).
904.805 Disposal of contract files.

Subpart 904.70—Facility Clearance

904.7000 Purpose.
904.7001 Applicability.
904.7002 Definitions.
904.7003 Disclosure of foreign ownership, control, or influence.
904.7004 Findings, determination, and contract award or termination.

Subpart 904.71—Prohibition on Contracting (National Security Program Contracts)

904.7100 Scope of subpart.
904.7101 Definitions.
904.7102 Waiver by the Secretary.
904.7103 Solicitation provision and contract clause.

Subpart 904.72—Public Affairs

904.7200 Purpose.
904.7201 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11941, Mar. 28, 1984, unless otherwise noted.

Subpart 904.4—Safeguarding Classified Information Within Industry

904.401 Definitions.

Access Authorization means an administrative determination that an individual is eligible for access to classified information or is eligible for access to,

or control over, special nuclear material.

Classified Information means information that is classified as Restricted Data or Formerly Restricted Data under the Atomic Energy Act of 1954, as amended, or information determined to require protection against unauthorized disclosure under Executive Order 12958, or prior Executive Orders, which is identified as National Security Information.

Facility Clearance means an administrative determination that a facility is eligible to access, produce, use or store classified information, or special nuclear material.

Restricted Data means all data concerning the design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but does not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2162).

[67 FR 14875, Mar. 28, 2002]

904.402 General.

(a) The basis of DOE's industrial security requirements is the Atomic Energy Act of 1954, as amended, and Executive Orders 12958 and 12829.

(b) DOE security regulations concerning restricted data are codified at 10 CFR part 1045.

(c)(1) Section 234B of the Atomic Energy Act (42 U.S.C. 2282b) requires that DOE contracts include a clause that provides for an appropriate reduction in the fees or amounts paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause is required for all DOE prime contracts that involve any possibility of contractor access to Restricted Data or other classified information. The clause is required to specify various degrees of violations and the amount of the reduction attributable to each degree of violation. The clause prescribed at 48 CFR 904.404(d)(6) (Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information) or the clause prescribed at 48 CFR 923.7002(f) (Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health) shall be used for this purpose unless the clause prescribed at 48 CFR 970.1504–5(c) (Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts) is used.

(2) The clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information'' and the clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' provide for reductions of fee or profit that is earned by the contractor depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to the safeguarding of Restricted Data or other classified information. When reviewing performance failures that would otherwise warrant a reduction of earned fee, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are specified in the clause.

(3) The contracting officer must obtain the concurrence of the Head of the Contracting Activity:

(i) Prior to effecting any reduction of fee or amounts otherwise payable to the contractor in accordance with the terms and conditions of the clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information'' or of the clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health;'' and

(ii) For determinations that no reduction of fee is warranted for a particular performance failure(s) that would otherwise warrant a reduction.

[67 FR 14876, Mar. 28, 2002, as amended at 68 FR 68776, Dec. 10, 2003]

904.404 Solicitation provision and contract clause. [DOE Coverage—Paragraph (d)]

(d) The security clauses to be used in DOE contracts are found at 952.204. They are:

(1) Security, 952.204–2. This clause is required in contracts and subcontracts, the performance of which involves or is likely to involve classified information. DOE utilizes the National Industrial Security Program but DOE's security authority is derived from the Atomic Energy Act which contains specific language not found in other agencies' authorities. For this reason, DOE contracts must contain the clause at 952.204–2 rather than the clause at FAR 52.204–2.

(2) Classification/Declassification, 952.204–70. This clause is to be used in all contracts which involve classified information.

(3) *Sensitive foreign nation controls, 952.204–71.* This clause is required in unclassified research contracts which may involve making unclassified information about nuclear technology available to certain sensitive foreign nations. The contractor shall be provided at the time of award the listing of nations referenced in DOE N 142.1. (The attachment referred to in the clause shall set forth the applicable requirements of the DOE regulations on dissemination of unclassified published and unpublished technical information to foreign nations.)

(4) *Disclosure of information, 952.204–72.* This clause may be used in place of the clauses entitled ''Security'' and ''Classification'' in contracts with educational institutions for research work performed in their own institute facilities that are not likely to produce classified information.

(5) Facility Clearance, 952.204–73. This solicitation provision should be used in solicitations expected to result in contracts and subcontracts that require employees to possess access authorizations.

(6) Except as prescribed in 48 CFR 970.1504–5(c), the contracting officer shall insert the clause at 48 CFR 952.204–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, in all contracts that contain the clause at 48 CFR 952.204–2, Security, but that do not contain the clause at 48 CFR 952.250–70, Nuclear hazards indemnity agreement.

(7) Computer Security, 952.204–77. This clause is required in contracts in which the contractor may have access to computers owned, leased or operated on behalf of the Department of Energy.

[49 FR 11941, Mar. 28, 1984; 49 FR 38949, Oct. 2, 1984, as amended at 54 FR 27646, June 30, 1989; 59 FR 24358, May 11, 1994; 67 FR 14871, Mar. 28, 2002; 67 FR 14876, Mar. 28, 2002; 68 FR 68777, Dec. 10, 2003; 71 FR 40885, July 19, 2006]

Subpart 904.6 [Reserved]

Subpart 904.7—Contractor Records Retention

904.702 Applicability.

(b) Contracts containing the Safety and Health clause at 952.223–71, the Radiation Protection and Nuclear Criticality clause at 952.223–72, or the Nuclear Safety clause at 952.223–74 must also include the Preservation of Individual Occupational Radiation Exposure Records clause at 952.223–75 which will necessitate retention of records in accordance with schedules contained in applicable DOE Directives in the records management series, rather than those found at FAR 4.7.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 60 FR 47307, Sept. 12, 1995; 62 FR 2312, Jan. 16, 1997]

Subpart 904.8—Contract Files

904.803 Contents of contract files.

(a) (29) The record copy of the Individual Procurement Action Report shall be included in the file section containing procurement management reports.

904.804–1 Closeout by the office administering the contract (DOE Coverage—paragraphs (a) and (b)).

(a) The Head of the Contracting Activity shall ensure that necessary procedures and milestone schedules are established to meet the requirements of FAR 4.804–1, and that resources are applied to effect the earliest practicable deobligation of excess funds and the timely closeout of all contract files

which are physically completed or otherwise eligible for closeout action.

(b) Quick closeout procedures for cost reimbursable and other than firm fixed price type contracts are covered under 48 CFR 42.708.

[49 FR 11941, Mar. 28, 1984, as amended at 62 FR 53757, Oct. 16, 1997]

904.805 Disposal of contract files.

Contract files shall be disposed of in accordance with applicable DOE Order 1324.2. (See current version.)

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

Subpart 904.70—Facility Clearance

904.7000 Purpose.

This subpart sets forth the Department of Energy policies and procedures regarding Facility Clearances for contractors and subcontractors that require access to classified information or special nuclear material. A Facility Clearance is based upon a determination that satisfactory safeguards and security measures are carried out for classified activities being performed at the facility and upon a favorable foreign ownership, control, or influence (FOCI) determination.

[67 FR 14876, Mar. 28, 2002]

904.7001 Applicability.

The provisions of this subpart shall apply to all offeror(s), contractors, and subcontractors who will or do have access to classified information or a significant quantity of special nuclear material as defined in 10 CFR part 710. In this subpart, the term ''contractor'' shall also mean subcontractor at any tier, the term ''contract'' shall also mean subcontract at any tier, and the term ''special nuclear material'' shall also mean significant quantity of special nuclear material as defined in 10 CFR part 710.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

904.7002 Definitions.

Contracting officer means the DOE contracting officer.

Facility Clearance means an administrative determination that a facility is eligible to access, produce, use, or store classified information, or special nuclear material.

Foreign interest means any of the following:

(1) Foreign government or foreign government agency or instrumentality thereof;

(2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;

(3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S. which is owned, controlled, or influenced by a foreign government, agency, firm, corporation, or person, or

(4) Any person who is not a U.S. citizen.

Foreign ownership, control, or influence means the situation where the degree of ownership, control, or influence over an offeror(s) or a contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 67 FR 14876, Mar. 28, 2002]

904.7003 Disclosure of foreign ownership, control, or influence.

(a) If a contract requires a contractor to have a Facility Clearance, DOE must determine whether the contractor is or may be subject to foreign ownership, control or influence before a contract can be awarded.

(b) If, during the performance of a contract, the contractor comes under FOCI, then the DOE must determine whether a continuation of the Facility Clearance may pose an undue risk to the common defense and security through the possible compromise of that information or material. If the DOE determines that such a threat or potential threat exists, the contracting officer shall consider the alternatives of negotiating an acceptable method of isolating the foreign interest which owns, controls, or influences the contractor or terminating the contract.

(c) It is essential for the DOE to obtain information about FOCI which is sufficient to help the Department determine whether award of a contract to a person or firm, or the continued performance of a contract by a person or firm, may pose undue risk to the common defense and security. Therefore, the provision specified at 952.204–73 shall be included in solicitations that involve offeror(s) or contractors that are subject to 904.7001.

(d) The contracting officer shall not award or extend any contract subject to this subpart, exercise any options under a contract, modify any contracts subject to this subpart, or approve or consent to a subcontract subject to this subpart unless:

(1) The contractor provides the information required by the solicitation provision at 48 CFR 952.204–73, and

(2) The contracting officer has made a positive determination in accordance with 48 CFR 904.7004.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 62 FR 42073, Aug. 5, 1997; 67 FR 14876, Mar. 28, 2002]

904.7004 Findings, determination, and contract award or termination.

(a) Based on the information disclosed by the offeror(s) or contractor, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror(s) or continued performance of a contract by a contractor will not pose an undue risk to the common defense and security. The contracting officer need not prepare a separate finding and determination addressing FOCI; however, the memorandum of negotiation shall include a discussion of the applicability of this subpart and the resulting determination.

(b) In those cases where FOCI does exist, and the DOE determines that an undue risk to the common defense and security may exist, the offeror(s) or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

(c) The types of plans that a contractor can propose are: measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; assignment of specific security duties and responsibilities to board members or special executive level committees; or any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis. If the offeror(s) or contractor and the DOE cannot negotiate a plan of action that isolates the offeror(s) or contractor from FOCI satisfactory to the DOE, then the offeror(s) shall not be considered for contract award and affected existing contracts with a contractor shall be terminated.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

Subpart 904.71—Prohibition on Contracting (National Security Program Contracts)

SOURCE: 58 FR 59684, Nov. 10, 1993, unless otherwise noted.

904.7100 Scope of subpart.

This subpart implements section 836 of the Fiscal Year 1993 Defense Authorization Act (Pub. L. 102–484) which prohibits the award of a Department of Energy contract under the national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract.

[58 FR 59684, Nov. 10, 1993, as amended at 67 FR 14876, Mar. 28, 2002]

904.7101 Definitions.

Effectively owned or controlled means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or

a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law.

Entity controlled by a foreign government means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. See 925.7 for a statement of the prohibition.

Foreign government means any governing body organized and existing under the laws of any country other than the United States and its possessions and trust territories and any agent or instrumentality of that government.

Proscribed information means—

(1) Top Secret information;

(2) Communications Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIIs);

(3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended;

(4) Special Access Program (SAP) information; or,

(5) Sensitive Compartmented Information (SCI).

904.7102 Waiver by the Secretary.

(a) 10 U.S.C. 2536(b)(1)(A) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) if the Secretary determines that a waiver is essential to the national security interests of the United States. Any request for a waiver regarding award of a contract or execution of a novation agreement shall address:

(1) Identification of the proposed awardee and description of the control by a foreign government;

(2) Description of the procurement and performance requirements;

(3) Description of why a waiver is essential to the national security interests of the United States;

(4) The availability of other entities to perform the work; and

(5) A description of alternate means available to satisfy the requirement.

(b) 10 U.S.C. 2536(b)(1)(B) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) for environmental restoration, remediation or waste management contracts at a DOE facility if the Secretary determines that a waiver will advance the environmental restoration, remediation or waste management objectives of DOE; will not harm the national security interests of the United States; and may be authorized because the entity to which the contract is to be awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)). Any request for such a waiver regarding award of a contract or execution of a novation agreement shall address:

(1) Identification of the proposed awardee and description of the control by a foreign government;

(2) Description of the procurement and performance requirements;

(3) A description of how the Department's environmental restoration, remediation, or waste management objectives will be advanced;

(4) A description of why a waiver will not harm the national security interests of the United States;

(5) The availability of other entities to perform the work;

(6) A description of alternate means available to satisfy the requirement; and

(7) Evidence that the entity to which a contract is to be awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)).

(c) Any request for a waiver under paragraph (a) or (b) of this section shall be forwarded by the Head of the Contracting Activity to the Office of Contract Management within the Headquarters procurement organization.

(d) If the Secretary decides to grant a waiver for an environmental restoration, remediation, or waste management contract, the Secretary shall notify Congress of this decision. The contract may be awarded or the novation agreement executed only after the end of the 45-day period beginning on the date notification is received by the Senate Committee on Armed Services

and the House Committee on National Security.

(e) Any request for a waiver under this subpart shall be accompanied by the information required by DEAR 952.204–73 that has been developed by the Safeguards and Security Lead Responsible Office at the contracting activity.

[67 FR 14876, Mar. 28, 2002]

904.7103 Solicitation provision and contract clause.

(a) Any solicitation, including those under simplified acquisition procedures, for a contract under the national security program which will require acess to proscribed information shall include the provision at 48 CFR 952.204–73.

(b) Any contract, including those awarded under simplified acquisition procedures, under the national security program which require access to proscribed information to enable performance, shall include the clause at 48 CFR 952.204–2.

[58 FR 59684, Nov. 10, 1993, as amended at 61 FR 21976, May 13, 1996; 62 FR 42074, Aug. 5, 1997; 67 FR 14877, Mar. 28, 2002]

Subpart 904.72—Public Affairs

SOURCE: 65 FR 81006, Dec. 22, 2000, unless otherwise noted.

904.7200 Purpose.

It is the policy of the Department of Energy to provide to the public and the news media, accurate and timely unclassified information on Departmental policies, programs, and activities. The Department's contractors share the responsibility for releasing unclassified information related to efforts under their contracts and must coordinate the release of unclassified information with the cognizant contracting officer and appropriate DOE Public Affairs personnel.

904.7201 Contract clause.

The contracting officer shall insert the clause at 952.204–75 in solicitations and contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities.

SUBCHAPTER B—ACQUISITION PLANNING

PART 905—PUBLICIZING CONTRACT ACTIONS

Subpart 905.5—Paid Advertisements

Sec.
905.502 Authority.

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

Subpart 905.5—Paid Advertisements

905.502 Authority.

(a) *Newspapers.* When it is deemed necessary to use paid advertisements in newspapers and trade journals, written authority for such publication shall be obtained from the Head of the Contracting Activity or designee.

[49 FR 11943, Mar. 28, 1984]

PART 906—COMPETITION REQUIREMENTS

Subpart 906.1—Full and Open Competition

Sec.
906.102 Use of competitive procedures.

Subpart 906.2—Full and Open Competition After Exclusion of Sources

906.202 Establishing or maintaining alternative sources.

Subpart 906.3—Other Than Full and Open Competition

906.304 Approval of the justification.

Subpart 906.5—Competition Advocates

906.501 Requirement.

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

SOURCE: 50 FR 12183, Mar. 27, 1985, unless otherwise noted.

Subpart 906.1—Full and Open Competition

906.102 Use of competitive procedures.

(d) Other competitive procedures.

(1) Professional architect-engineer services shall be negotiated in accordance with subpart 936.6 and FAR Subpart 36.6.

(4) Competitive selection of research proposals for award received in response to a Program Research and Development Announcement (See subpart 917.73 and part 935).

(5) Competitive selection for award of proposals offered in response to program opportunity notices (See subpart 917.72).

Subpart 906.2—Full and Open Competition After Exclusion of Sources

906.202 Establishing or maintaining alternative sources.

(b)(1) Every proposed contract action under the authority of FAR 6.202(a) shall be supported by a determination and finding (D&F) signed by the Procurement Executive.

Subpart 906.3—Other Than Full and Open Competition

906.304 Approval of the justification.

(c) Class justifications within the delegated authority of a Head of the Contracting Activity may be approved for:

(1) Contracts for electric power or energy, gas (natural or manufactured), water, or other utility services when such services are available from only one source;

(2) Contracts under the authority cited in FAR 6.302–4 or 6.302–5; or

(3) Contracts for educational services from nonprofit institutions. Class justifications for classes of actions that may exceed $10,000,000 require the approval of the Procurement Executive.

Subpart 906.5—Competition Advocates

906.501 Requirement.

The Secretary of Energy has delegated the authority for appointment of the agency and contracting activity competition advocates to the Procurement Executive. The Procurement Executive has delegated authority to the Head of the Contracting Activity to appoint contracting activity competition

advocates. Procedural guidance is provided in internal DOE Directives.

PART 907—ACQUISITION PLANNING

Subpart 907.3—Contractor Versus Government Performance

Sec.
907.307 Appeals.

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

SOURCE: 49 FR 11944, Mar. 28, 1984, unless otherwise noted.

Subpart 907.3—Contractor Versus Government Performance

907.307 Appeals.

An appeal of a decision to convert to contract or to continue in-house performance may be made by an affected party. Appeals shall be made in writing, be based only on specific alleged material deviation (or deviations),from OMB Circular A–76, and be supported by appropriate documentation. Appeals must be delivered within 15 working days of the announced decision, to the contracting officer. The contracting officer shall process any such appeal in accordance with internal Departmental procedures.

PART 908—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 908.8—Acquisition of Printing and Related Supplies

Sec.
908.802 Policy.

Subpart 908.11—Leasing of Motor Vehicles

908.1102 Presolicitation requirements.
908.1104 Contract clauses.
908.1170 Leasing of fuel-efficient vehicles.

Subpart 908.71—Acquisition of Special Items

908.7100 Scope of subpart.
908.7101 Motor vehicles.
908.7101–1 Scope of section.
908.7101–2 Consolidated acquisition of new vehicles by General Services Administration.
908.7101–3 Direct acquisition.
908.7101–4 Replacement of motor vehicles.
908.7101–5 Used vehicles.
908.7101–6 Acquisition of fuel-efficient vehicles.
908.7101–7 Government license tags.
908.7102 Aircraft.
908.7103 Office machines.
908.7104 Office furniture and furnishings.
908.7105 Filing cabinets.
908.7106 Security cabinets.
908.7107 Alcohol.
908.7108 Helium.
908.7109 Fuels and packaged petroleum products.
908.7110 Coal.
908.7111 Arms and ammunition.
908.7112 Materials handling equipment replacement standards.
908.7113 Calibration services.
908.7114 Wiretapping and eavesdropping equipment.
908.7115 Forms.
908.7116 Electronic data processing tape.
908.7117 Tabulating machine cards.
908.7118 Rental of post office boxes.
908.7119–908.7120 [Reserved]
908.7121 Special materials.

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

SOURCE: 49 FR 11945, Mar. 28, 1984, unless otherwise noted.

Subpart 908.8—Acquisition of Printing and Related Supplies

908.802 Policy. (DOE coverage—paragraph (b))

(b) Inclusion of printing requirements (limited exceptions are set forth in paragraphs 35–2 through 35–4 of the Government Printing and Binding Regulations) in contracts for supplies and services is prohibited unless specifically approved by the Director, Office of Administrative Services, Headquarters. Contracting officers shall insert the clause at 48 CFR 952.208–70.

[61 FR 41705, Aug. 9, 1996]

Subpart 908.11—Leasing of Motor Vehicles

SOURCE: 61 FR 41705, Aug. 9, 1996, unless otherwise noted.

908.1102 Presolicitation requirements. (DOE coverage—paragraph (a))

(a)(4) Commercial vehicle lease sources may be used only when the General Services Administration (GSA) has advised that it cannot furnish the vehicle(s) through the Interagency

Motor Pool System and it has been determined that the vehicle(s) are not available through the GSA Consolidated Leasing Program.

908.1104 Contract clauses. (DOE coverage—paragraph (e))

(e) The clause at 48 CFR 952.208–7, Tagging of Leased Vehicles, shall be inserted whenever a vehicle(s) is to be leased over 60 days, except for those vehicles exempted by (FPMR) 41 CFR 101–38.6.

908.1170 Leasing of fuel-efficient vehicles.

(a) All sedans and station wagons and certain types of light trucks, as specified by GSA, that are acquired by lease for 60 continuous days or more for official use by DOE or its authorized contractors, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 and of Executive Order 12003 and subsequent implementing regulations.

(b) Leased vehicles will meet the miles-per-gallon criteria of, and be incorporated in, the approved plan of the fiscal year in which leases are initiated, reviewed, extended, or increased in scope. Vehicle leases will specify the vehicle model type to be provided.

Subpart 908.71—Acquisition of Special Items

908.7100 Scope of subpart.

This subpart sets forth requirements and procedures for the acquisition of special items by DOE and contractors authorized to use special sources of supply to the extent indicated herein.

908.7101 Motor vehicles.

908.7101–1 Scope of section.

Acquisitions by purchase of motor vehicles shall be in accordance with this section.

908.7101–2 Consolidated acquisition of new vehicles by General Services Administration.

(a) New vehicles shall be procured in accordance with FPMR 41 CFR 101–25.304, 101–26.501, and 101–38.13, and DOE-PMR 41 CFR 109–25.304, 109–38.13, and 109–38.51.

(b) Orders for all motor vehicles shall be submitted on GSA Form 1781, Motor Vehicle Requisition—Delivery Order—Invoice, in accordance with FPMR 41 CFR 101–26.501. Requisitions for sedans, station wagons, and certain light trucks as specified by GSA, should contain a certification that the acquisition is in conformance with Pub. L. 94–163, and Executive Order 12003 and 12375 and subsequent implementations.

(c) The schedule of dates for submission of orders is contained in FPMR 41 CFR 101–26.501–4. The Heads of Contracting Activities shall consolidate and submit their requirements for passenger automobiles early in the fiscal year. Requisitions for sedans, station wagons and certain types of light trucks shall be submitted through Headquarters as outlined in 908.7101–6. Requisitions for all other types of vehicles shall be submitted directly to GSA.

[49 FR 11945, Mar. 28, 1984; 49 FR 38949, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

908.7101–3 Direct acquisition.

Vehicles may be acquired by DOE activities directly rather than through GSA when a waiver has been granted by GSA. A copy of the activity's request to GSA for a waiver shall be forwarded to the Director, Office of Property Management, within the Headquarters procurement organization. In those cases involving general purpose vehicles where GSA refuses to grant a waiver and where it is believed that acquisition through GSA would adversely affect or otherwise impair the program, authority for direct acquisition shall be obtained from the above-mentioned Headquarters official, prior to acquisition. In the acquisition of special purpose vehicles for use by DOE and its authorized contractors, the Head of the Contracting Activity may authorize direct purchases. The purchase price for sedans and station wagons, shall not exceed any statutory limitation in effect at the time the acquisition is

made. (See DOE-PMR 41 CFR 109–38.5102–4).

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

908.7101–4 Replacement of motor vehicles.

(a) The replacement of motor vehicles shall be in accordance with the replacement standards prescribed in FPMR 41 CFR 101–38.9 and DOE-PMR 41 CFR 109–38.9.

(b) The Heads of Contracting Activities may arrange to sell, as exchange sales, used motor vehicles being replaced and to apply the proceeds to the purchase of similar new vehicles. However, in the event personnel are not available to make such sales, or it is in the best interest of the DOE office, GSA may be requested to sell the used vehicles.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

908.7101–5 Used vehicles.

Normally, DOE does not purchase or authorize contractors to purchase used vehicles. However, the Heads of Contracting Activities may authorize the purchase of used vehicles where justified by special circumstances; e.g., when new vehicles are in short supply, the vehicles are to be used for experimental or test purposes, or the vehicles are acquired from exchange sale. In accordance with DOE-PMR 41 CFR 109–38.5102, the statutory passenger vehicle allocation requirements for DOE shall apply to any purchase of used vehicles except in the case of vehicles to be used exclusively for experimental or test purposes.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

908.7101–6 Acquisition of fuel-efficient vehicles.

(a) All purchases of sedans and station wagons, and certain types of light trucks as specified by GSA, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), Pub. L. 94–163, and of Executive Orders 12003 and 12375 and subsequent implementing regulations. Accordingly, the Director of Administration and the Heads of Contracting Activities will submit annually to the Director, Office of Property Management, within the Headquarters procurement organization, for approval, a forecast of plans for the purchase of such vehicles during the fiscal year. Such forecast shall be submitted so as to arrive at Headquarters on or before December 1 of each year. Additionally, the original and 2 copies of requisitions (GSA form 1781) for purchase of such vehicles shall also be forwarded to the above official for review and certification/approval prior to submission to GSA. All such documentation will be reviewed by this official and a determination made as to conformance with applicable annual forecasts and pertinent public laws and their implementations. (See DOE-PMR 41 CFR 109–38.13.)

(b) Sedans, station wagons, and light trucks requisitioned according to an approved forecast, but not contracted for by GSA until the subsequent fiscal year, will be included in the acquisition plan for the miles-per-gallon criteria of the year in which GSA signs the purchase contract along with the new vehicles planned for acquisition that year.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

908.7101–7 Government license tags.

(a) Government license tags shall be procured and assignments recorded by DOE offices in accordance with FPMR 41 CFR 101–38.303.

(b) The letter ''E'' has been designated as the prefix symbol for all DOE official license tags. Assignments of specific ''blocks'' of tag numbers and the maintenance of tag assignment records, are performed by the Director, Office of Property Management, within the Headquarters procurement organization. Assignments of additional ''blocks'' of tag numbers will be made upon receipt of written requests from field offices.

(c) Special license tags for security purposes shall be purchased in accordance with state and local laws, regulations, and procedures.

(d) In the District of Columbia, official Government tags shall be obtained

from the Department of Transportation, Motor Vehicles Services Branch, District of Columbia, for all motor vehicles (except vehicles exempt for security purposes) based or housed in the District.

(e) See DOE-PMR 41 CFR 109–38.3 and 109–38.6 for additional guidance.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

908.7102 Aircraft.

Acquisition of aircraft shall be in accordance with DOE-PMR 41 CFR 109–38.5205.

908.7103 Office machines.

Acquisitions of office machines by DOE offices and its authorized contractors shall be in accordance with FPMR 41 CFR 101–25.104, 101–25.302, 101–25.302–3, 101–25.302–4, and 101–25.302–6, and 101–25.403, and DOE-PMR 41 CFR 109–25.302, 109–25.302–3, and 109–25.4.

908.7104 Office furniture and furnishings.

Acquisitions of office furniture and furnishings by DOE offices shall be in accordance with FPMR 41 CFR 101–25.104, 101–25.302, 101–25.302–1, 101–25.302–5, 101–25.302–7, and 101–25.302–8, 101–25.404 and 101–26.505, and DOE-PMR 41 CFR 109–25.302, 109–25.302–1, and 109–25.350.

908.7105 Filing cabinets.

Acquisitions of filing cabinets shall be in accordance with FPMR 41 CFR 101–26.308 and 101–25.302–2 and DOE-PMR 41 CFR 109–25.302–2.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984]

908.7106 Security cabinets.

(a) Acquisitions of security cabinets shall be in accordance with FPMR 41 CFR 101–26.507 and the ''prerequisites to ordering'' criteria contained in FPMR 41 CFR 101–25.302–2 and DOE-PMR 41 CFR 109–25.302–2.

(b) Fixed-price prime contractors and lower tier subcontractors may use GSA acquisition sources for security cabinets in accordance with FPMR 41 CFR 101–26.407 and FAR 51.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984]

908.7107 Alcohol.

(a) This section covers (1) Bureau of Alcohol, Tobacco and Firearms, (ATF), Treasury Department, alcohol regulations applicable to DOE, (2) delegations of authority to submit applications to purchase tax-free alcohol or specially denatured alcohol, and (3) purchases of alcohol by DOE or authorized contractors. To the fullest extent practicable, alcohol for use by DOE or its cost-type contractors shall be procured on a tax-free basis.

(b) ATF regulations relating to the acquisition and use of alcohol free of tax, by Government agencies, are set forth in 26 CFR 213.141–213.146. Copies of excerpts from these regulations may be secured from the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, Washington, DC 20226. These regulations shall be followed in the acquisition of alcohol.

(c) ATF Form 1444/1486, ''Tax Free Spirits or Specially Denatured Spirits for Use of United States,'' shall be used for acquisitions of specially denatured alcohol and ethyl alcohol. Section I of the form is the application for permission to acquire and Section II is the permit. If acquisition from more than one warehouse is desirable, separate applications must be made for withdrawal from each warehouse. When permits are no longer required, they should be forwarded to the Bureau of Alcohol, Tobacco and Firearms for cancellation. Alcohol procured by use of the ATF form referred to in this subsection shall be used exclusively on DOE work.

(d) The Procurement Executive has been authorized to sign and delegate to others authority to sign applications under Bureau of Alcohol, Tobacco and Firearms regulations relating to the acquisition and use of alcohol free of tax. Specific DOE personnel have been delegated authority to execute Part I of Form 1444/1486 by letters to the Director, Bureau of Alcohol, Tobacco and Firearms without power of redelegation. Copies of such letters have been

furnished to field offices. Only the individuals so authorized shall execute Section I of these forms. Requests by field offices for new authorizations or changes to existing authorizations shall be submitted by letter to the Procurement Executive.

(e) Applications on the ATF Form 1444/1486 shall be executed in duplicate by an authorized DOE official and mailed directly to the address on the application. Only one permit will be provided to each field organization. Due to the numerous locations managed by field operations offices, the exact shipping address need not be shown in block 3 of the form. Shipments, however, must be addressed to the ''Department of Energy at various locations within the United States''. The ATF will assign the application a permit number and return it to the requestor. Distribution of certified copies shall be controlled and each holder of a certified copy recorded.

(f) Annually, the Bureau of Alcohol, Tobacco and Firearms publishes printed lists of Distilled Spirits Plants, Bonded Warehouses and Denaturing Plants Authorized to Operate. Copies of these lists and supplies of Form 1444/1486 may be secured by written request to the Director, Bureau of Alcohol, Tobacco and Firearms, Special Operations Branch, Washington, DC 20226.

(g) A signed copy of the permit shall accompany the original purchase order issued to the plant or warehouse, where it shall be retained or returned with the shipment. Subsequent orders shall refer to the permit on file in the plant or warehouse if it was retained.

(h) When alcohol is shipped, the shipper prepares the required form as specified by Bureau of Alcohol, Tobacco and Firearms regulations and forwards them to the consignee. Upon receipt of the receiving report covering the shipment, the officer who signed the purchase order shall execute the certificate of receipt and forward it to the appropriate Regional Director, Bureau of Alcohol, Tobacco and Firearms. The carrier transporting the alcohol shall also be given a receipt as specified by Bureau of Alcohol, Tobacco and Firearms regulations.

(i) Abandoned and forfeited alcohol which has come into the custody or control of a Federal agency may be obtained by following the procedure set forth in FPMR 41 CFR 101–48.1

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

908.7108 Helium.

(a) Acquisitions of helium by DOE and its authorized contractors shall be in accordance with this section.

(b) The Helium Act (Pub. L. 86–777, as amended (50 U.S.C. 167(d)) provides that, to the extent that supplies are readily available, whether in gaseous or liquid form, DOE shall purchase all major requirements of helium from the Secretary of Interior, Bureau of Mines, or from the Bureau of Mines distribution contractors eligible to sell Bureau of Mines helium to Federal agencies and their users in accordance with 30 CFR part 602.

(c)(1) Purchases may be made directly from the Bureau of Mines by forwarding a purchase order in duplicate to: Bureau of Mines, Division of Helium Operations, 1100 South Fillmore Street, Amarillo, Texas 79101.

(2) Purchases may be made from those commercial firms listed in the Bureau of Mines as eligible to sell helium to Federal users.

(i) The purchase document shall contain the following statement: ''Helium furnished under this contract shall be Bureau of Mines Helium.''

(ii) A copy of each acquisition document shall be furnished to the address in paragraph (c)(1) of this section.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

908.7109 Fuels and packaged petroleum products.

Acquisitions of fuel and packaged petroleum products by DOE offices shall be in accordance with FPMR 41 CFR 101–26.602. When contractors are authorized, consistent with 951, to acquire such products from Defense sources, they shall do so in accordance with FPMR 41 CFR 101–26.602.

908.7110 Coal.

DOE offices and authorized contractors may participate in the Defense Fuel Supply Center (DFSC) coal contracting program for carload or larger

lots. If participation is desired, estimates shall be submitted to DFSC in accordance with FPMR 41 CFR 101–26.602.

908.7111 Arms and ammunition.

Pursuant to 10 U.S.C. 4655, the Secretary of the Army is authorized to furnish arms, suitable accouterments for use therewith, and ammunition for the protection of public money and property.

(a) The Department of the Army has granted clearance for Federal agencies to procure, without further reference to or clearance from that Department, all arms and ammunition of types which are not peculiar to the military services, and which are readily procurable in the civilian market.

(b) Acquisition of arms and ammunition readily procurable in the civilian market shall be made in accordance with regular acquisition procedures.

(c) Acquisition of arms and ammunition which are peculiar to the military services shall be made by submission of order form to the Commanding General, Headquarters, U.S. Army Material Development and Readiness Command, 5001 Eisenhower Avenue, Alexandria, VA 22333.

[49 FR 11945, Mar. 28, 1984, as amended at 49 FR 38950, Oct. 2, 1984]

908.7112 Materials handling equipment replacement standards.

Materials handling equipment shall be purchased for replacement purposes in accordance with the standards in FPMR 41 CFR 101–25.405 and DOE-PMR 41 CFR 109–25.4. The Heads of Contracting Activities are authorized to replace an item earlier than the date specified in such standards under unusual circumstances. A written justification shall be placed in the purchase file.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

908.7113 Calibration services.

Orders for calibration services may be placed with the National Bureau of Standards, Washington, DC 20234, by either DOE acquisition offices or its authorized contractors. Copies of the letters authorizing contractors to order calibration services on behalf of DOE shall be sent to the Bureau of Standards, Attention: ''Administrative Services Division.''

908.7114 Wiretapping and eavesdropping equipment.

Acquisition by DOE offices and contractors of devices primarily designed to be used surreptitiously to overhear or record conversations is prohibited.

908.7115 Forms.

(a) DOE forms shall be obtained by DOE offices in accordance with DOE Order 1322.2, (See current version.). Cost-type contractors shall obtain DOE forms through the DOE contracting officer.

(b) Standard, optional, and certain other agency forms as listed in the GSA Supply Catalog will be obtained by DOE offices in accordance with FPMR 41 CFR 101–26.302.

(c) Marginally punched continuous forms shall be obtained in accordance with FPMR 41 CFR 101–26.703.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

908.7116 Electronic data processing tape.

(a) Acquisitions of electronic data processing tape by DOE offices shall be in accordance with FPMR 41 CFR 101–26.508.

(b) Acquisitions of electronic data processing tape by authorized contractors shall be in accordance with FPMR 41 CFR 101–26.508–1. However, if adequate justification exists, the Heads of Contracting Activities may authorize contractors to obtain their tape from other sources. When such an authorization is granted, a copy of the authorization and justification shall be retained in the contract file.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

908.7117 Tabulating machine cards.

DOE offices shall acquire tabulating machine cards in accordance with FPMR 41 CFR 101–26.509.

908.7118 Rental of post office boxes.

DOE offices and authorized contractors may rent post office boxes on an

annual basis, or for shorter periods by quarters, where necessary. Payments for annual rentals are to be made in advance at the beginning of the fiscal year, and for periods of less than a year, either in advance for the whole period or at the beginning of each quarter in which the box is to be used.

908.7119–908.7120 [Reserved]

908.7121 Special materials.

This section covers the purchase of materials peculiar to the DOE program. While purchases of these materials are unclassified, the specific quantities, destination or use may be classified. See appropriate sections of the Classification Guide. Contracting activities shall require authorized contractors to obtain the special materials identified in the following subsections in accordance with the procedures stated therein.

(a) *Heavy water.* The Senior Program Official or designee controls the acquisition and production of heavy water for a given program. Request for orders shall be placed directly with the cognizant Senior Program Official or designee.

(b) *Precious metals.* The DOE Oak Ridge Operations Office is responsible for maintaining the DOE supply of precious metals. These metals are platinum, palladium, iridium, osmium, rhodium, ruthenium, gold and silver. The DOE Oak Ridge Operations Office has assigned management of these metals to Martin Marietta Energy Systems, Inc., MS8207, P.O. Box 2009, Oak Ridge, TN 37831. DOE offices and authorized contractors shall coordinate with the operating contractor regarding the availability of the above metals prior to the purchase of these metals on the open market.

(c) *Lithium.* Lithium is available at no cost other than normal packing, handling, and shipping charges from Oak Ridge. The excess quantities at Oak Ridge are to be considered as the first source of supply prior to procurement of lithium compounds from any other source.

[54 FR 27646, June 30, 1989, as amended at 59 FR 9105, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

PART 909—CONTRACTOR QUALIFICATIONS

Subpart 909.1—Responsible Prospective Contractors

Sec.
909.104–1 General Standards.
909.104–3 Application of standards.

Subpart 909.4—Debarment, Suspension, and Ineligibility

909.400 Scope of subpart.
909.401 Applicability.
909.403 Definitions.
909.405 Effect of listing.
909.406 Debarment.
909.406–2 Causes for debarment.
909.406–3 Procedures.
909.406–6 Requests for reconsideration of debarment.
909.407–2 Causes for suspension.
909.407–3 Procedures.

Subpart 909.5—Organizational and Consultant Conflicts of Interest

909.503 Waiver.
909.504 Contracting Officer's Responsibility.
909.507 Solicitation provisions and contract clause.
909.507–1 Solicitation provisions.
909.507–2 Contract Clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11949, Mar. 28, 1984, unless otherwise noted.

Subpart 909.1—Responsible Prospective Contractors

909.104–1 General Standards.

(h) For solicitations for contract work subject to the provisions of 10 CFR part 707, Workplace Substance Abuse Programs at DOE sites, the prospective contractor must agree, in accordancewith 48 CFR 970.5223–3., Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, to provide the contracting officer with its written workplace substance abuse program in order to be determined responsible and, thus, eligible to receive the contract award.

[57 FR 32675, July 22, 1992, as amended at 62 FR 42074, Aug. 5, 1997; 65 FR 81006, Dec. 22, 2000]

909.104–3 Application of standards. (DOE coverage-paragraph (e))

(e) DOE may select an entity which was newly created to perform the prospective contract, including, but not limited to, a joint venture or other similarly binding corporate partnership. In such instances when making the determination of responsibility pursuant to 48 CFR 9.103, the contracting officer may evaluate the financial resources of other entities only to the extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

[64 FR 16651, Apr. 6, 1999]

Subpart 909.4—Debarment, Suspension, and Ineligibility

SOURCE: 61 FR 39857, July 31, 1996, unless otherwise noted.

909.400 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures governing the debarment and suspension of organizations and individuals from participating in Department of Energy (DOE) contracts, procurement sales contracts, and real property purchase agreements, and from participating in DOE approved subcontracts and subagreements.

(b) Sets forth the causes, procedures, and requirements for determining the scope, duration, and effect of DOE debarment and suspension actions; and

(c) Implements and supplements FAR subpart 9.4 with respect to the exclusion of organizations and individuals from procurement contracting and Government approved subcontracting.

909.401 Applicability.

The provisions of this subpart apply to all procurement debarment and suspension actions initiated by DOE on or after the effective date of this subpart. Nonprocurement debarment and suspension rules are codified in 10 CFR part 1036.

909.403 Definitions.

In addition to the definitions set forth at FAR 9.403, the following definitions apply to this subpart:

Debarring Official. The Debarring Official for DOE contracts is the Director, Office of Procurement and Assistance Management, DOE, or designee. The Debarring Official for NNSA contracts is the Director, Office of Acquisition and Supply Management, NNSA, or designee.

Suspending Official. The Suspending Official for DOE contracts is the Director, Office of Procurement and Assistance Management, DOE, or designee. The Suspending Official for NNSA contracts is the Director, Office of Acquisition and Supply Management, NNSA, or designee.

[69 FR 75003, Dec. 15, 2004]

909.406 Debarment.

909.406–2 Causes for debarment. (DOE coverage—paragraphs (c) and (d))

(c) The Debarring Official may debar a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a DOE contractor. Such cause may include but is not limited to:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a private contract or subcontract; and

(2) Inexcusable, prolonged, or repeated failure to pay a debt (including disallowed costs and overpayments) owed to DOE, provided the contractor has been notified of the determination of indebtedness, and further provided that the time for initiating any administrative or legal action to oppose or appeal the determination of indebtedness has expired or that such action, if initiated, has been concluded.

(d) The Debarring Official may debar a contractor:

(1) On the basis that an individual or organization is an affiliate of a debarred contractor, subject to the requirements of FAR 9.406–1(b) and 9.406–3(c);

(2) For failure to observe the material provisions of a voluntary exclusion (see 10 CFR 1036.315 for discussion of voluntary exclusion).

909.406–3 Procedures. (DOE coverage—paragraphs (a), (b) and (d))

(a) *Investigation and referral.* (1) Offices responsible for the award and administration of contracts are responsible for reporting to both the Deputy Assistant Secretary for Procurement and Assistance Management and the DOE Inspector General information about possible fraud, waste, abuse, or other wrongdoing which may constitute or contribute to a cause(s) for debarment under this subpart. Circumstances that involve possible criminal or fraudulent activities must be reported to the Office of the Inspector General in accordance with 10 CFR part 1010, Conduct of Employees, §1010.217(b), Cooperation with the Inspector General.

(2) At a minimum, referrals for consideration of debarment action should be in writing and should include the following information:

(i) The recommendation and rationale for the referral;

(ii) A statement of facts;

(iii) Copies of documentary evidence and a list of all witnesses, including addresses and telephone numbers, together with a statement concerning their availability to appear at a fact-finding proceeding and the subject matter of their testimony;

(iv) A list of parties including the contractor, principals, and affiliates (including last known home and business addresses, zip codes and DUNS Number);

(v) DOE's acquisition history with the contractor, including recent experience under contracts and copies of pertinent contracts;

(vi) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Board of Contract Appeals; and

(vii) A statement regarding the impact of the debarment action on DOE programs. This statement is not required for referrals by the Inspector General.

(3) Referrals may be returned to the originator for further information or development.

(b) *Decisionmaking process.* Contractors proposed for debarment shall be afforded an opportunity to submit information and argument in opposition to the proposed debarment.

(1) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Debarring Official shall make a decision on the basis of all the information in the administrative record, including any submissions made by the contractor. If the respondent fails to submit a timely written response to a notice of proposed debarment, the Debarring Official shall notify the respondent in accordance with FAR 9.406–3(e) that the contractor is debarred.

(2) In actions not based upon a conviction or civil judgment, the contractor may request a fact-finding hearing to resolve a genuine dispute of material fact. In its request, the contractor must identify the material facts in dispute and the basis for disputing the facts. If the Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official shall refer the matter to the Energy Board of Contract Appeals for a fact-finding conference.

(3) *Meeting.* Upon receipt of a timely request therefor from a contractor proposed for debarment, the Debarring Official shall schedule a meeting between the Debarring Official and the respondent, to be held no later than 30 days from the date the request is received. The Debarring Official may postpone the date of the meeting if the respondent requests a postponement in writing. At the meeting, the respondent, appearing personally or through an attorney or other authorized representative, may present and explain evidence that causes for debarment do not exist, evidence of any mitigating factors, and arguments concerning the imposition, scope, or duration of a proposed debarment or debarment.

(4) *Fact-finding conference.* The purpose of a fact-finding conference under this section is to provide the respondent an opportunity to dispute material facts through the submission of oral and written evidence; resolve facts in

dispute; and provide the Debarring Official with findings of fact based, as applicable, on adequate evidence or on a preponderance of the evidence. The fact-finding conference shall be conducted in accordance with rules consistent with FAR 9.406–3(b) promulgated by the Energy Board of Contract Appeals. The Energy Board of Contract Appeals will notify the affected parties of the schedule for the hearing. The Energy Board of Contract Appeals shall deliver written findings of fact to the Debarring Official (together with a transcription of the proceeding, if made) within a certain time period after the hearing record closes, as specified in the Energy Board of Contract Appeals Rules. The findings shall resolve any disputes over material facts based upon a preponderance of the evidence, if the case involves a proposal to debar, or on adequate evidence, if the case involves a suspension. Since convictions or civil judgments generally establish the cause for debarment by a preponderance of the evidence, there usually is no genuine dispute over a material fact that would warrant a fact-finding conference for those proposed debarments based on convictions or civil judgments.

(d) *Debarring Official's decision.* (4) The Debarring Official's final decision shall be based on the administrative record. In those actions where additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared and included in the final decision. In those cases where the contractor has requested and received a fact-finding conference, the written findings of fact shall be those findings prepared by the Energy Board of Contract Appeals. Findings of fact shall be final and conclusive unless within 15 days of receipt of the findings, the Department or the respondent requests reconsideration, as provided in the Board's Rules, or unless set aside by a court of competent jurisdiction. The Energy Board of Contract Appeals shall be provided a copy of the Debarring Official's final decision.

909.406–6 Requests for reconsideration of debarment.

(a) At any time during a period of debarment, a respondent may submit to the Debarring or Suspending Official a written request for reconsideration of the scope, duration, or effects of the suspension/debarment action because of new information or changed circumstances, as discussed at FAR 9.406–4(c).

(b) In reviewing a request for reconsideration, the Debarring or Suspending Official may, in his or her discretion, utilize any of the procedures (meeting and fact-finding) set forth in 48 CFR (DEAR) 909.406–3 and 909.407–3. The Debarring or Suspending Official's final disposition of the reconsideration request shall be in writing and shall set forth the reasons why the request has been granted or denied. A notice transmitting a copy of the disposition of the request for reconsideration shall be sent to the respondent and, if a fact-finding conference under 48 CFR (DEAR) 909.406–3(b)(4) is pending (as in the case of a request for reconsideration of a suspension, where the proposed debarment is the subject of a fact-finding conference), a copy of the disposition shall be transmitted to the Energy Board of Contract Appeals.

909.407–2 Causes for suspension. (DOE coverage—paragraph (d))

(d) The Suspending Official may suspend an organization or individual:

(1) Indicted for or suspected, upon adequate evidence, of the causes described in 48 CFR (DEAR) 909.406–2(c)(1).

(2) On the basis of the causes set forth in 48 CFR (DEAR) 909.406–2(d)(2).

(3) On the basis that an organization or individual is an affiliate of a suspended or debarred contractor.

909.407–3 Procedures. (DOE coverage—paragraphs (b) and (e))

(b) *Decisionmaking process.* (1) In actions based on an indictment, the Suspending Official shall make a decision based upon the administrative record, which shall include submissions made by the contractor in accordance with 48 CFR (DEAR) 909.406–3(b)(1) and 909.406–3(b)(3).

(2) For actions not based on an indictment, the procedures in 48 CFR (DEAR) 909.406–3(b)(2) and FAR 9.407–3(b)(2) apply.

(3) Coordination with Department of Justice. Whenever a meeting or fact-finding conference is requested, the Suspending Official's legal representative shall obtain the advice of appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such Department of Justice official requests in writing that evidence needed to establish the existence of a cause for suspension not be disclosed to the respondent, the Suspending Official shall:

(i) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(ii) Deny the request for a meeting or fact-finding and base the suspension decision solely upon the information in the administrative record, including any submission made by the respondent.

(e) Notice of suspending official's decision. In actions in which additional proceedings have been held, following such proceedings, the Suspending Official shall notify respondent, as applicable, in accordance with paragraphs (e)(1) or (e)(2) of this section.

(1) Upon deciding to sustain a suspension, the Suspending Official shall promptly send each affected respondent a notice containing the following information:

(i) A reference to the notice of suspension, the meeting and the fact-finding conference;

(ii) The Suspending Official's findings of fact and conclusions of law;

(iii) The reasons for sustaining a suspension;

(iv) A reference to the Suspending Official's waiver authority under 48 CFR (DEAR) 909.405;

(v) A statement that the suspension is effective throughout the Executive Branch as provided in FAR 9.407–1(d);

(vi) Modifications, if any, of the initial terms of the suspension;

(vii) A statement that a copy of the suspension notice was sent to GSA and that the respondent's name and address will be added to the GSA List; and

(viii) If less than an entire organization is suspended, specification of the organizational element(s) or individual(s) included within the scope of the suspension.

(2) If the Suspending Official decides to terminate a suspension, the Suspending Official shall promptly send, by certified mail, return receipt requested, each affected respondent a copy of the final decision required under this section.

[61 FR 39857, July 31, 1996; 61 FR 41684, Aug. 9, 1996]

Subpart 909.5—Organizational and Consultant Conflicts of Interest

SOURCE: 62 FR 40751, July 30, 1997, unless otherwise noted.

909.503 Waiver.

Heads of Contracting Activities are delegated the authorities in 48 CFR (FAR) 9.503 regarding the waiver of OCI requirements.

909.504 Contracting Officer's Responsibility. (DOE coverage-paragraphs (d) and (e)).

(d) The contracting officer shall evaluate the statement by the apparent successful offeror or, where individual contracts are negotiated with all firms in the competitive range, all such firms for interests relating to a potential organizational conflict of interest in the performance of the proposed contract. Using that information and any other credible information, the contracting officer shall make written determination of whether those interests create an actual or significant potential organizational conflict of interest and identify any actions that may be taken to avoid, neutralize, or mitigate such conflict. In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that

cannot be avoided, neutralized, or mitigated. Before determining to withold award based on organizational conflict of interest considerations, the contracting officer shall notify the offeror, provide the reasons therefor, and allow the offeror a reasonable opportunity to respond. If the conflict of interest cannot be avoided, neutralized, or mitigated to the contracting officer's satisfaction, the contracting officer may disqualify the offeror from award and undertake the disclosure, evaluation, and determination process with the firm next in line for award. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 48 CFR 909.503. The waiver request and decisions shall be included in the contract file.

909.507 Solicitation provisions and contract clause.

909.507–1 Solicitation provisions. (DOE coverage-paragraph (e)).

(e) The contracting officer shall insert the provision at 48 CFR 952.209–8, Organizational Conflicts of Interest Disclosure-Advisory and Assistance Services, in solicitations for advisory and assistance services expected to exceed the simplified acquisition threshold. In individual procurements, the Head of the Contracting Activity may increase the period subject to disclosure in 952.209–8 (c)(1) up to 36 months.

909.507–2 Contract Clause.

(a)(1) The contracting officer shall insert the clause at 48 CFR 952.209–72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services expected to exceed the simplified acquisition threshold.

(2) Contracting officers may make appropriate modifications where necessary to address the potential for organizational conflicts of interest in individual contracts. Contracting officers shall determine the appropriate term of the bar of paragraph (b)(1)(i) of the clause at 48 CFR 952.209–72 and enter that term in the blank provided. In the usual case of a contract for advisory and assistance services a period of three, four, or five years is appropriate; however, in individual cases the contracting officer may insert a term of greater or lesser duration.

(3) The contracting officer shall include Alternate I with the clause in instances in which a meaningful amount of subcontracting for advisory and assistance services is expected.

(b) Contracts, which are not subject to part 970 but provide for the operation of a DOE site or facility or environmental remediation of a specific DOE site or sites, shall contain the organizational conflict of interest clause at 48 CFR 952.209–72. The organizational conflicts of interest clause in such contracts shall include Alternate I to that clause.

PART 911—DESCRIBING AGENCY NEEDS

Subpart 911.6—Priorities and Allocations

Sec.

911.600 Scope of subpart.
911.602 General.
911.604 Solicitation provision and contract clause.

AUTHORITY: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

Subpart 911.6—Priorities and Allocations

911.600 Scope of subpart.

This subpart implements and supplements FAR Subpart 11.6, Priorities and Allocations, and implements the regulations and procedures of the Defense Priorities and Allocations System (DPAS) in solicitations and contracts in support of authorized national defense programs. (See 15 CFR part 700).

[52 FR 38422, Oct. 16, 1987, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated and amended at 61 FR 21976, May 13, 1996; 61 FR 30823, June 18, 1996; 73 FR 10985, Feb. 29, 2008]

911.602 General.

(e) The Heads of Contracting Activities shall ensure that members of their staffs and contractors under their jurisdiction are advised of the provisions of the DPAS regulation and that the

related procedures are followed to ensure adherence to the regulation throughout the industrial supply chain. Under DPAS, it is mandatory that the priority rating be extended through the industrial chain from supplier to supplier.

[52 FR 38422, Oct. 16, 1987, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated at 61 FR 21976, May 13, 1996, as amended at 73 FR 10985, Feb. 29, 2008]

911.604 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 952.211–70, Priorities and Allocations (Atomic Energy), in solicitations that will result in the placement of rated orders for authorized DOE atomic energy programs.

(b) The contracting officer shall insert the clause at 952.211–71, Priorities and Allocations (Atomic Energy) in contracts that are placed in support of authorized DOE atomic energy programs.

(c) The use of the provisions at 952.211–70 and the clause at 952.211–71 is optional for industrial delivery orders of $5,000 or less.

[52 FR 38422, Oct. 16, 1987, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated and amended at 61 FR 21976, May 13, 1996; 65 FR 81006, Dec. 22, 2000; 73 FR 10985, Feb. 29, 2008]

PART 912—ACQUISITION OF COMMERCIAL ITEMS

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

Subpart 912.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

912.302 Tailoring of provisions and clauses for the acquisition of commercial items. (DOE coverage—paragraph (c))

(c) The waiver required by 48 CFR 12.302(c) shall be in writing and approved by the contracting officer.

[62 FR 53757, Oct. 16, 1997]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 913—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 913.3—Simplified Acquisition Methods

Sec.
913.307 Forms

Subpart 913.4 [Reserved]

AUTHORITY: 42 U.S.C. 7101 *et seq.*, 41 U.S.C. 418(b); 50 U.S.C. 2401 *et seq.*

SOURCE: 67 FR 14871, Mar. 28, 2002, unless otherwise noted.

Subpart 913.3—Simplified Acquisition Methods

913.307 Forms. (DOE coverage paragraph (b))

(b) Optional Forms 347 and 348, or DOE F 4250.3, may be used for purchase orders using simplified acquisition procedures. These forms shall not be used as the contractor's invoice. See 48 CFR 12.204 regarding the use of SF–1449 for the acquisition of commercial items using simplified acquisition procedures.

Subpart 913.4 [Reserved]

PART 914—SEALED BIDDING

Subpart 914.4—Opening of Bids and Award of Contract

Sec.
914.404–1 Cancellation of invitations after opening.
914.407 Mistakes in bids.
914.407–3 Other mistakes disclosed before award.
914.407–4 Mistakes after award.
914.408–2 Award of classified contracts.

Subpart 914.5—Two-Step Sealed Bidding

914.502 Conditions for use.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11954, Mar. 28, 1984, unless otherwise noted.

Subpart 914.4—Opening of Bids and Award of Contract

914.404–1 Cancellation of invitations after opening.

(c) The Procurement Executive has been delegated authority to make the determination under FAR 14.404–1(c) and (e) and has redelegated this authority to the Heads of Contracting Activities without power of redelegation.

[50 FR 12184, Mar. 27, 1985]

914.407 Mistakes in bids.

914.407–3 Other mistakes disclosed before award.

(e) Pursuant to FAR 14.407–3(e), the Procurement Executive, has been delegated authority by the Secretary to make the determinations under FAR 14.407–3. In the case of mistakes in bids alleged after opening of bids and before award, the Procurement Executive has redelegated this authority to the Heads of Contracting Activities without power of redelegation and to make administrative determinations regarding withdrawal of bids as provided for in FAR 14.407–3, providing that each such determination shall be approved by Legal Counsel.

[49 FR 11954, Mar. 28, 1984, as amended at 56 FR 41964, Aug. 26, 1991; 59 FR 9105, Feb. 25, 1994. Redesignated and amended at 67 FR 14871, Mar. 28, 2002q]

914.407–4 Mistakes after award.

The Procurement Executive has been delegated authority to make the determinations under FAR 14.407–4. Mistakes in bids after award, together with the data set forth in FAR 14.407–4(e), shall be submitted to the Procurement Executive for decision.

[49 FR 11954, Mar. 28, 1984. Redesignated and amended at 67 FR 14871, Mar. 28, 2002]

914.408–2 Award of classified contracts.

DOE regulations regarding the safeguarding of restricted data and procedures for its destruction are contained at 10 CFR part 1016.

[49 FR 11954, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

Subpart 914.5—Two-Step Sealed Bidding

914.502 Conditions for use.

(c) Use of the two-step sealed bidding method shall be approved by the Head of the Contracting Activity. The contracting officer shall submit a written request for approval justifying its use in accordance with FAR 14.502.

[50 FR 12184, Mar. 27, 1985]

PART 915—CONTRACTING BY NEGOTIATION

Subpart 915.2—Solicitation and Receipt of Proposals and Information

Sec.
915.200 Scope of subpart.
915.201 Exchanges with industry before receipt of proposals.
915.207–70 Handling of proposals during evaluation.

Subpart 915.3—Source Selection

915.305 Proposal evaluation.

Subpart 915.4—Contract Pricing

915.404–2 Information to support proposal analysis.
915.404–2–70 Audit as an aid in proposal analysis.
915.404–4 Profit.
915.404–4–70 DOE structured profit and fee system.
915.404–4–70–1 General.
915.404–70–2 Weighted guidelines system.
915.404–4–70–3 Documentation.
915.404–4–70–4 Exceptions.
915.404–4–70–5 Special considerations—contracts with nonprofit organizations (other than educational institutions).
915.404–4–70–6 Contracts with educational institutions.
915.404–4–70–7 Alternative techniques.
915.404–4–70–8 Weighted guidelines application considerations.
915.404–4–71 Profit and fee-system for construction and construction management contracts.
915.404–4–71–1 General.
915.404–4–71–2 Limitations.
915.404–4–71–3 Factors for determining fees.
915.404–4–71–4 Considerations affecting fee amounts.
915.404–4–71–5 Fee schedules.
915.404–4–71–6 Fee base.
915.404–4–72 Special considerations for cost-plus-award-fee contracts.
915.408–70 Solicitation provision and contract clause.

Subpart 915.6—Unsolicited Proposals

915.602 Policy.
915.603 General.
915.605 Content of unsolicited proposals.
915.606 Agency procedures.
915.607 Criteria for acceptance of an unsolicited proposal.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 63 FR 56851, Oct. 23, 1998, unless otherwise noted.

Subpart 915.2—Solicitation and Receipt of Proposals and Information

915.200 Scope of subpart.

FAR 15.2 is not applicable to Program Opportunity Notices (See 48 CFR 917.72) or Program Research and Development Announcements (See 48 CFR 917.73).

915.201 Exchanges with industry before receipt of proposals. (DOE coverage—paragraph (e)).

(e) Approval for the use of solicitations for information or planning purposes shall be obtained from the Head of the Contracting Activity.

915.207–70 Handling of proposals during evaluation.

(a) Proposals furnished to the Government are to be used for evaluation purposes only. Disclosure outside the Government for evaluation is permitted only to the extent authorized by, and in accordance with, the procedures in this subsection.

(b) While the Government's limited use of proposals does not require that the proposal bear a restrictive notice, proposers should, if they desire to maximize protection of their trade secrets or confidential or privileged commercial and financial information contained in them, apply the restrictive

notice prescribed in paragraph (e) of the provision at 48 CFR 52.215–1 to such information. In any event, information contained in proposals will be protected to the extent permitted by law, but the Government assumes no liability for the use or disclosure of information (data) not made subject to such notice in accordance with paragraph (e) of the provision at 48 CFR 52.215–1.

(c) If proposals are received with more restrictive conditions than those in paragraph (e) of the provision at 48 CFR 52.215–1, the contracting officer or coordinating officer shall inquire whether the submitter is willing to accept the conditions of paragraph (e). If the submitter does not, the contracting officer or coordinating officer shall, after consultation with counsel, either return the proposal or accept it as marked. Contracting officers shall not exclude from consideration any proposals merely because they contain an authorized or agreed to notice, nor shall they be prejudiced by such notice.

(d) Release of proposal information (data) before decision as to the award of a contract, or the transfer of valuable and sensitive information between competing offerors during the competitive phase of the acquisition process, would seriously disrupt the Government's decision-making process and undermine the integrity of the competitive acquisition process, thus adversely affecting the Government's ability to solicit competitive proposals and award a contract which would best meet the Government's needs and serve the public interest. Therefore, to the extent permitted by law, none of the information (data) contained in proposals, except as authorized in this subsection, is to be disclosed outside the Government before the Government's decision as to the award of a contract. In the event an outside evaluation is to be obtained, it shall be only to the extent authorized by, and in accordance with the procedures of, this subsection.

(e)(1) In order to maintain the integrity of the procurement process and to assure that the propriety of proposals will be respected, contracting officers shall assure that the following notice is affixed to each solicited proposal prior to distribution for evaluation:

GOVERNMENT NOTICE FOR HANDLING PROPOSALS

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, the procedures in DEAR subsection 915.207–70.

(End of notice)

(2) The notice at FAR 15.609(d) for unsolicited proposals shall be affixed to a cover sheet attached to each such proposal upon receipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

(f)(1) Normally, evaluations of proposals shall be performed only by employees of the Department of Energy. As used in this section, ''proposals'' includes the offers in response to requests for proposals, sealed bids, program opportunity announcements, program research and development announcements, or any other method of solicitation where the review of proposals or bids is to be performed by other than peer review. In certain cases, in order to gain necessary expertise, employees of other agencies may be used in instances in which they will be available and committed during the period of evaluation. Evaluators or advisors who are not Federal employees, including employees of DOE management and operating contractors, may be used where necessary. Where such non-Federal employees are used as evaluators, they may only participate as members of technical evaluation committees. They may not serve as members of the Source Evaluation Board or equivalent board or committee.

(2)(i) Pursuant to section 6002 of Pub. L. 103–355, a determination is required for every competitive procurement as to whether sufficient DOE personnel with the necessary training and capabilities are available to evaluate the proposals that will be received. This determination, discussed at FAR 37.204,

shall be made in the memorandum appointing the technical evaluation committee by the Source Selection Official, in the case of Source Evaluation Board procurements, or by the Contracting Officer in all other procurements.

(ii) Where it is determined such qualified personnel are not available within DOE but are available from other Federal agencies, a determination to that effect shall be made by the same officials in the same memorandum. Should such qualified personnel not be available, a determination to use non-Federal evaluators or advisors must be made in accordance with paragraph (f)(3) of this subsection.

(3) The decision to employ non-Federal evaluators or advisors, including employees of DOE management and operating contractors, in Source Evaluation Board procurements must be made by the Source Selection Official with the concurrence of the Head of the Contracting Activity. In all other procurements, the decision shall be made by the senior program official or designee with the concurrence of the Head of the Contracting Activity. In a case where multiple solicitations are part of a single program and would call for the same resources for evaluation, a class determination to use non-Federal evaluators may be made by the DOE Procurement Executive.

(4) Where such non-Federal evaluators or advisors are to be used, the solicitation shall contain a provision informing prospective offerors that non-Federal personnel may be used in the evaluation of proposals.

(5) The nondisclosure agreement as it appears in paragraph (f)(6) of this subsection shall be signed before DOE furnishes a copy of the proposal to non-Federal evaluators or advisors, and care should be taken that the required handling notice described in paragraph (e) of this subsection is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator or advisor. In all instances, such persons will be required to comply with nondisclosure of information requirements and requirements involving Procurement Integrity, see FAR 3.104; with requirements to prevent the potential for personal conflicts of interest; or, where a non-Federal evaluator or advisor is acquired under a contract with an entity other than the individual, with requirements to prevent the potential for organizational conflicts of interest.

(6) Non-Federal evaluators or advisors shall be required to sign the following agreement prior to having access to any proposal:

NONDISCLOSURE AGREEMENT

Whenever DOE furnishes a proposal for evaluation, I, the recipient, agree to use the information contained in the proposal only for DOE evaluation purposes and to treat the information obtained in confidence. This requirement for confidential treatment does not apply to information obtained from any source, including the proposer, without restriction. Any notice or restriction placed on the proposal by either DOE or the originator of the proposal shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of the evaluation, it is agreed all copies of the proposal and abstracts, if any, shall be returned to the DOE office which initially furnished the proposal for evaluation. Unless authorized by the Contracting Officer, I agree that I shall not contact the originator of the proposal concerning any aspect of its elements.

Recipient: _____

Date: _____

(End of agreement)

(g) The submitter of any proposal shall be provided notice adequate to afford an opportunity to take appropriate action before release of any information (data) contained therein pursuant to a request under the Freedom of Information Act (5 U.S.C. 552); and, time permitting, the submitter should be consulted to obtain assistance in determining the eligibility of the information (data) in question as an exemption under the Act. (See also 48 CFR 24.2, Freedom of Information Act.)

Subpart 915.3—Source Selection

915.305 Proposal evaluation. (DOE coverage—paragraph (d))

(d) Personnel from DOE, other Government agencies, consultants, and contractors, including those who manage or operate Government-owned facilities, may be used in the evaluation process as evaluators or advisors when

their services are necessary and available. When personnel outside the Government, including those of contractors who operate or manage Government-owned facilities, are to be used as evaluators or advisors, approval and nondisclosure procedures as required by 48 CFR (DEAR) 915.207–70 shall be followed and a notice of the use of non-Federal evaluators shall be included in the solicitation. In all instances, such personnel will be required to comply with DOE conflict of interest and nondisclosure requirements.

Subpart 915.4—Contract Pricing

915.404–2 Information to support proposal analysis. (DOE coverage—paragraphs (a), (c) and (e))

(a)(1) Field pricing assistance as discussed in FAR 15.404–2(a) is not required for the negotiation of DOE contract prices or modifications thereof. The term ''field pricing assistance'' refers to the Department of Defense (DOD) system for obtaining a price and/or cost analysis report from a cognizant DOD field level contract management office wherein requests for the review of a proposal submitted by an offeror are initiated and the recommendations made by the various specialists of the management office are consolidated into a single report that is forwarded to the office making the contract award for use in conducting negotiations. In the DOE, such review activities, except for reviews performed by professional auditors, are expected to be accomplished by pricing support personnel located in DOE Contracting Activities. The DOE contracting officer shall formally request the assistance of appropriate pricing support personnel, other than auditors, for the review of any proposal that exceeds $500,000, unless the contracting officer has sufficient data to determine the reasonableness of the proposed cost or price. Such pricing support may be requested for proposals below $500,000, if considered necessary for the establishment of a reasonable pricing arrangement. Contracting officers, however, are not precluded by this section from requesting pricing assistance from a cognizant DOD contract management office, provided an appropriate cross-servicing arrangement for pricing support services exists between the DOE and the servicing agency.

(c)(1) When an audit is required pursuant to 48 CFR 915.404–2–70, ''Audit as an aid in proposal analysis,'' the request for audit shall be sent directly to the Federal audit office assigned cognizance of the offeror or prospective contractor. When the cognizant agency is other than the Defense Contract Audit Agency or the Department of Health and Human Services, and an appropriate interagency agreement has not been established, the need for audit assistance shall be coordinated with the Office of Policy, within the Headquarters procurement organization.

(2) The request for audit shall establish the due date for receipt of the auditor's report and in so doing shall allow as much time as possible for the auditor's review.

(e)(6) Copies of technical analysis reports prepared by DOE technical or other pricing support personnel shall not normally be provided to the auditor. The contracting officer or the supporting price, cost, or financial analyst at the contracting activity shall determine the monetary impact of the technical findings.

915.404–2–70 Audit as an aid in proposal analysis.

(a) When a contract price will be based on cost or pricing data submitted by the offerors, the DOE contracting officer or authorized representative shall request a review by the cognizant Federal audit activity prior to the negotiation of any contract or modification including modifications under advertised contracts in excess of:

(1) $500,000 for a firm fixed-price contract or a fixed-price contract with economic price adjustment provisions; or adjustment provisions; or

(2) $1,000,000 for all other contract types, including initial prices, estimated costs of cost-reimbursement contracts, interim and final price redeterminations, and target and settlement of incentive contracts.

(b) The requirement for auditor reviews of proposals which exceed the thresholds specified in paragraph (a) of this section may be waived at a level above the contracting officer when the

reasonableness of the negotiated contract price can be determined from information already available. The contract file shall be documented to reflect the reason for any such waiver, provided, however, that independent Government estimates of cost or price shall not be used as the sole justification for any such waiver.

915.404–4 Profit. (DOE coverage—paragraphs (c) and (d))

(c)(4)(i) *Contracting officer responsibilities.* The statutory limitations on profit and fees as set forth in FAR 15.404–4(c)(4)(i) shall be followed, except as exempted for DOE architect-engineer contracts covering Atomic Energy Commission (AEC) and Bonneville Power Administration (BPA) functions. Pursuant to section 602(d) (13) and (20) of the Federal Property and Administration Services Act of 1949, as amended, those former AEC functions, as well as those of the BPA, now being performed by DOE are exempt from the 6 percent of cost restriction on contracts for architect-engineer services. The estimated costs on which the maximum fee is computed shall include facilities capital cost of money when this cost is included in cost estimates.

(c)(6) In cases where a change or modification calls for substantially different work than the basic contract, the contractor's effort may be radically changed and a detailed analysis of the profit factors would be a necessity. Also, if the dollar amount of the change or contract modification is very significant in comparison to the contract dollar amount, a detailed analysis should be made.

(d) *Profit-analysis factors.* A profit/fee analysis technique designed for a systematic application of the profit factors in FAR 15.404–4(d) provides contracting officers with an approach that will ensure consistent consideration of the relative value of the various factors in the establishment of a profit objective and the conduct of negotiations for a contract award. It also provides a basis for documentation of this objective, including an explanation of any significant departure from it in reaching a final agreement. The contracting officer's analysis of these prescribed factors is based on information available prior to negotiations. Such information is furnished in proposals, audit data, performance reports, preaward surveys and the like.

915.404–4–70 DOE structured profit and fee system.

This section implements FAR 15.404–4(b) and (d).

915.404–4–70–1 General.

(a) *Objective.* It is the intent of DOE to remunerate contractors for financial and other risks which they may assume, resources they use, and organization, performance and management capabilities they employ. Profit or fee shall be negotiated for this purpose; however, when profit or fee is determined as a separate element of the contract price, the aim of negotiation should be to fit it to the acquisition, giving due weight to effort, risk, facilities investment, and special factors as set forth in this subpart.

(b) *Commercial (profit) organization.* Profit or fee prenegotiation objectives for contracts with commercial (profit) organizations shall be determined as provided in this subpart.

(c) *Nonprofit organizations.* It is DOE's general policy to pay fees in contracts with nonprofit organizations other than educational institutions and governmental bodies; however, it is a matter of negotiation whether a fee will be paid in a given case. In making this decision, the DOE negotiating official should consider whether the contractor is ordinarily paid fees for the type of work involved. The profit objective should be reasonable in relation to the task to be performed and the requirements placed on the contractor.

(d) *Educational institutions.* It is DOE policy not to pay fees under contracts with educational institutions.

(e) *State, local and Indian tribal governments.* Profit or fee shall not be paid under contracts with State, local, and Indian tribal Governments.

915.404–70–2 Weighted guidelines system.

(a) To properly reflect differences among contracts and the circumstances relating thereto and to select an appropriate relative profit/fee in consideration of these differences

and circumstances, weightings have been developed for application by the contracting officer to standard measurement bases representative of the prescribed profit factors cited in FAR 15.404–4(d) and paragraph (d) of this section. This is a structured system, referred to as weighted guidelines. Each profit factor or subfactor, or component thereof, has been assigned weights relative to their value to the contract's overall effort. The range of weights to be applied to each profit factor is also set forth in paragraph (d) of this section. Guidance on how to apply the weighted guidelines is set forth in 48 CFR 915.404–4–70–8.

(b) Except as set forth in 48 CFR 915.404–4–70–4, the weighted guidelines shall be used in establishing the profit objective for negotiation of contracts where cost analysis is performed.

(c) The negotiation process does not contemplate or require agreement on either estimated cost elements or profit elements. Accordingly, although the details of analysis and evaluation may be discussed in the fact-finding phase of the negotiation process in order to develop a mutual understanding of the logic of the respective positions, specific agreement on the exact weights of values of the individual profit factors is not required and need not be attempted.

(d) The factors set forth in the following table are to be used in determining DOE profit objectives. The factors and weight ranges for each factor shall be used in all instances where the weighted guidelines are applied.

Profit factors	Weight ranges (percent)
I. Contractor Effort (Weights applied to cost):	
A. Material acquisitions:	
1. Purchased parts	1 to 3.
2. Subcontracted items	1 to 4.
3. Other materials	1 to 3.
B. Labor skills:	
1. Technical and managerial:.	
a. Scientific	10 to 20.
b. Project management/administration	8 to 20.
c. Engineering	8 to 14.
2. Manufacturing	4 to 8.
3. Support services	4 to 14.
C. Overhead:	
1. Technical and managerial	5 to 8.
2. Manufacturing	3 to 6.
3. Support services	3 to 7.
D. Other direct costs	3 to 8.
E. G&A (General Management) expenses	5 to 7.
II. Contract Risk (type of contract-weights applied to total cost of items IA thru E)	0 to 8.
III. Capital Investment (Weights applied to the net book value of allocable facilities)	5 to 20.
IV. Independent Research and Development:	
A. Investment in IR&D program (Weights applied to allocable IR&D costs)	5 to 7.
B. Developed items employed (Weights applied to total of profit $ for items IA thru E)	0 to 20.
V. Special Program Participation (Weights applied to total of Profit $ for items IA thru E)	−5 to +5.
VI. Other Considerations (Weights applied to total of Profits $ for items 1A thru E)	−5 to +5.
VII. Productivity/Performance (special computation)	(N/A).

915.404–4–70–3 Documentation.

Determination of the profit or fee objective, in accordance with this subpart shall be fully documented. Since the profit objective is the contracting officer's pre-negotiation evaluation of a total profit allowance for the proposed contract, the amounts developed for each category of cost will probably change in the course of negotiation. Furthermore, the negotiated amounts will probably vary from the objective and from the pre-negotiation detailed application of the weighted guidelines technique to each element of the contractor's input to total performance. Since the profit objective is viewed as a whole rather than as its component parts, insignificant variations from the pre-negotiation profit objective, as a result of changes to the contractor's input to total performance, need not be

documented in detail. Conversely, significant deviations from the profit objective necessary to reach a final agreement on profit or fee shall be explained in the price negotiation memorandum prepared in accordance with FAR 15.406–3.

915.404–4–70–4 Exceptions.

(a) For contracts not expected to exceed $500,000, the weighted guidelines need not be used; however, the contracting officer may use the weighted guidelines for contracts below this amount if he or she elects to do so.

(b) For the following classes of contracts, the weighted guidelines shall not be used:

(1) Commercialization and demonstration type contracts;

(2) Management and operating contracts;

(3) Construction contracts;

(4) Construction management contracts;

(5) Contracts primarily requiring delivery of material supplied by subcontractors;

(6) Termination settlements; and

(7) Contracts with educational institutions.

(c) In addition to paragraphs (a) and (b) of this section, the contracting officer need not use the weighted guidelines in unusual pricing situations where the weighted guidelines method has been determined by the DOE negotiating official to be unsuitable. Such exceptions shall be justified in writing and shall be authorized by the Head of the Contracting Activity. The contract file shall include this documentation and any other information that may support the exception.

(d) If the contracting officer makes a written determination that the pricing situation meets any of the circumstances set forth in this section, other methods for establishing the profit objective may be used. For contracts other than those subject to 48 CFR 917.6, the selected method shall be supported in a manner similar to that used in the weighted guidelines (profit factor breakdown and documentation of profit objectives); however, investment or other factors that would not be applicable to the contract shall be excluded from the profit objective determination. It is intended that the methods will result in profit objectives for noncapital intensive contracts that are below those generally developed for capital intensive contracts.

915.404–4–70–5 Special considerations—contracts with nonprofit organizations (other than educational institutions).

(a) For purposes of identification, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from Federal income taxation under section 501 of the Internal Revenue Code.

(b) In computing the amount of profit or fee to be paid, the DOE negotiating official shall take into account the tax benefits received by a nonprofit organization. While it is difficult to establish the degree to which a remuneration under any given contract contributes to an organization's overall net profit, the DOE negotiating official should assume that there is an element of profit in any amount to be paid.

(c) In order to assure consideration of the tax posture of nonprofit organizations during a profit or fee negotiation, the DOE negotiating official shall calculate the fee as for a contract with a commercial concern and then reduce it at least 25 percent. However, depending on the circumstances, the contracting officer may pay profit or fees somewhere between this amount and the appropriate profit or fee as if it were a commercial concern. When this is the case, the contract file shall be documented to specifically state the reason or reasons.

(d) Where a contract with a nonprofit organization is for the operation of Government-owned facilities, the fee should be calculated using the procedures and schedules applicable to operating contracts as set forth in 48 CFR part 970.

915.404–4–70–6 Contracts with educational institutions.

In certain situations the DOE may contract with a university to manage or operate Government-owned laboratories. These efforts are generally apart from, and not in conjunction with, their other activities, and the complexity and magnitude of the work are not normally found in standard university research or study contracts. Such operating contracts are subject to the applicable provisions set forth in 48 CFR part 970.

915.404–4–70–7 Alternative techniques.

(a) Profit or fees to be paid on construction contracts and construction management contracts shall be determined in accordance with the applicable profit/fee technique for such contracts set forth in 48 CFR 915.404–4–71.

(b) Profit and fee to be paid on contracts under $500,000, not using the weighted guidelines, shall be judgmentally developed by the contracting officer by assigning individual dollar amounts to the factors appropriate to DOE profit considerations discussed in 48 CFR 915.404–4–70–2(d).

(c) Contracts which require only delivery or furnishing of goods or services supplied by subcontractors shall include a fee or profit which, in the best judgment of the contracting officer, is appropriate. It would be expected that there would be a declining relationship of profit/fee dollars in relation to total costs. The higher the cost of subcontracts, for example, the lower the profit/fee ratio to these costs.

(d) Profit/Fee considerations in termination settlements are often a question of equity. They are a matter of negotiation. They should not, however, exceed what would have otherwise been payable under weighted guidelines had the termination not occurred.

915.404–4–70–8 Weighted guidelines application considerations.

The Department has developed internal procedures to aid the contracting officer in the application of weighted guidelines and to assure a reasonable degree of uniformity across the Department.

915.404–4–71 Profit and fee-system for construction and construction management contracts.

915.404–4–71–1 General.

(a) Business concerns awarded a DOE construction or construction management contract shall be paid a profit or fee if requested or solicited. The profit or fee objective for a construction or construction management contract shall be an amount appropriate for the type of effort contained therein. It is the intent of DOE to

(1) Reward contractors based on the complexity of work,

(2) Reward contractors who demonstrate and establish excellent records of performance and

(3) Reward contractors who contribute their own resources, including facilities and investment of capital.

(b) Standard fees or across-the-board agreements will not be used or made. Profit or fee objectives are to be determined for each contract according to the effort or task contracted for thereunder.

(c) Profit or fee payable on fixed-price and cost-reimbursable construction or construction management contracts shall be established in accordance with the appropriate procedures and schedules set forth in this subpart.

915.404–4–71–2 Limitations.

Amounts payable under construction and construction management contracts shall not exceed amounts derived from the schedules established for this purpose. Requests to pay fees in excess of these levels shall be forwarded to the Procurement Executive for review and approval.

915.404–4–71–3 Factors for determining fees.

(a) The profit policy stated in 48 CFR 915.404–4–71–1(a) reflects, in a broad sense, recognition that profit is compensation to contractors for the entrepreneurial function of organizing and managing resources (including capital resources), and the assumption of risk that all costs of performance (operating and capital) may not be reimbursable.

(b) The best approach calls for a structure that allows judgmental evaluation and determination of fee dollars for prescribed factors which impact the need for, and the rewards associated with, fee or profit, as follows.

(1) Management risk relating to performance, including the

(i) Quality and diversity of principal work tasks required to do the job,

(ii) Labor intensity of the job,

(iii) Special control problems, and

(iv) Advance planning, forecasting and other such requirements;

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

(3) The relative difficulty of work, including consideration of technical and administrative knowledge, skill, experience and clarity of technical specifications;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, including the extent to which the contractor contributes plant, equipment, computers, or working capital (labor, etc.);

(5) Duration of project;

(6) Size of operation;

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

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

(c) The total fee objective and amount for a particular negotiation is established by judgmental considerations of the factors in paragraph (b) of this section, assigning fee values as deemed appropriate for each factor and totaling the resulting amounts.

(d) In recognition of the complexities of this process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, fee schedules have been developed which set forth maximum fee amounts that contracting activities are allowed to negotiate for a particular transaction without obtaining prior approval of the Procurement Executive. In addition, the fee negotiation objective established in accordance with 48 CFR 915.404–4–71–3(a), (b), and (c) shall not exceed the applicable fee schedule amounts without prior approval of the Procurement Executive. To facilitate application to a contract, the fee amounts are related to the total cost base which is defined as total operating and capital costs.

915.404–4–71–4 Considerations affecting fee amounts.

(a) In selecting final fee amounts for the various factors in 48 CFR 915.404–4–71–3 of this section, the DOE negotiating official will have to make several judgments as discussed in this subsection.

(b) Complexity of a construction project shall be considered by analysis of its major parts. For a project which includes items of work of different degrees of complexity, a single average classification should be considered, or the work should be divided into separate classifications. The following class identifications are appropriate for proper fee determinations.

(1) *Class A*—Manufacturing plants involving operations requiring a high degree of design layout or process control; nuclear reactors; atomic particle accelerators; complex laboratories or industrial units especially designed for handling radioactive materials.

(2) *Class B*—Normal manufacturing processes and assembly operations such as ore dressing, metal working plant and simple processing plants; power plants and accessory switching and transformer stations; water treatment plants; sewage disposal plants; hospitals; and ordinary laboratories.

(3) *Class C*—Permanent administrative and general service buildings, permanent housing, roads, railroads, grading, sewers, storm drains, and water and power distribution systems.

(4) *Class D*—Construction camps and facilities and other construction of a temporary nature.

(c) Normal management elements of principal tasks relating to a construction contract cover several categories

of tasks with differing rates of application throughout the construction period. The principal elements of management effort are outlined in this paragraph. Although each project has a total management value equal to 100% for all elements, the distribution of effort among the various elements will be different for each project due to differences in project character or size. The basic management elements and the normal range of efforts expected to apply for a normal sized project are as follows. When the normally expected effort will not be performed by a contractor, this fact should be considered in arriving at appropriate fee amounts.

Management elements	Effort range	
	Minimum	Maximum
I. *Broad project planning.* Overall project planning and scheduling, establishment of key project organization and consultation with the A-E and DOE. Performed by highest level of contractor's officers, technical personnel and project manager	15	25
II. *Field planning.* Mobilization and demobilization of top field organization from the contractor's existing organization and from other sources as necessary. Detailed project planning and scheduling for construction of facilities. Performed by the project manager and top field professional staff	18	28
III. *Labor supervision.* Direct supervision of manual employees. Performed by contractor's subprofessional staff, such as superintendents and foremen (some salaried and some hourly rate). This includes the contractor's personnel to coordinate and expedite the work of Subcontractors	12	16
IV. *Acquisition and subcontracting.* Acquisition of other than special equipment. Selection of subcontractors and execution and administration of subcontracts. Performed by contractor's staff under supervision and direction of elements I and II	12	16
V. *Labor relations and recruitment (manual).* Performed by the contractor's staff under supervision and direction of elements I, II and III. This includes demobilization of work forces	7	11
VI. *Recruitment of supervisory staff.* Staffing required to supplement the organization under elements I and II, and demobilization during completion of the project. Performed by contractor's permanent staff and recruitment personnel under supervision and direction of management elements I and II	4	6
VII. *Expediting.* Expediting contracting performed by contractor's staff and by subcontractors. Performed by contractor's staff under supervision and direction of elements I and II	4	6
VIII. *Construction equipment operations.* This includes mobilization and demobilization. Performed by contractor's staff under supervision, direction and coordination of elements I, II, and IV	4	6
IX. *Other services.* Timekeeping, cost accounting, estimating, reporting, security, etc., by the contractor's staff under supervision and direction of elements I and II	4	6

(d) Fee considerations dealing with the duration of a project are usually provided by the consideration given to the degree of complexity and magnitude of the work. In only very unusual circumstances should it be necessary to separately weight, positively or negatively, for the period of services or length of time involved in the project when determining fee levels.

(e) The size of the operation is to a considerable degree a continuation of the complexity factor, and the degree and amount of work required to be performed by and with the contractor's own resources. Generally, no separate weighting, positively or negatively, is required for consideration of those factors.

(f) The degree and amount of work required to be performed by and with the contractor's own resources affect the level of fees. Reasonable fees should be based on expectations of complete construction services normally associated with a construction or construction management contract. In the case of a construction contract, reduced services can be in the form of excessive subcontracting or supporting acquisition actions and labor relations interfaces being made by the government. If an unusual amount of such work is performed by other than the contractor, it will be necessary to make downward adjustments in the fee levels to provide for the reduction in services required.

(g) The type of contract to be negotiated and the anticipated contractor

cost risk shall be considered in establishing the appropriate fee objective for the contract.

(h) When a contract calls for the contractor to use its own resources, including facilities and equipment, and to make its own cost investment (i.e., when there is no letter-of-credit financing), a positive impact on the fee amount shall be reflected.

915.404–4–71–5 Fee schedules.

(a) The schedules included in this paragraph, adjusted in accordance with provisions of this section and 48 CFR 915.404–4–71–6, provide maximum fee levels for construction and construction management contracts. The fees are related to the estimated cost (fee base) for the construction work and services to be performed. The schedule in paragraph (d) of this section sets forth the basic fee schedule for construction contracts. The schedule in paragraph (f) of this section sets forth the basic fee schedule for construction management contracts. A separate schedule in paragraph (h) of this section has been developed for determining the fee applicable to special equipment purchases and to reflect a differing level of fee consideration associated with the subcontractor effort under construction management contracts. (See 48 CFR 915.404–4–71–6(c) and 915.404–4–71–6(d)).

(b) The schedules cited in paragraph (a) of this section provide the maximum fee amount for a CPFF contract arrangement. If a fixed-price type contract is to be awarded, the fee amount set forth in the fee schedules shall be increased by an amount not to exceed 4 percent of the fee base.

(c) The fee schedule shown in paragraphs (d) and (f) of this section assumes a letter of credit financing arrangement. If a contract provides for or requires the contractor to make their own cost investment for contract performance (i.e., when there is no letter-of-credit financing), the fee amounts set forth in the fee schedules shall be increased by an amount equal to 5 percent of the fee amount as determined from the schedules.

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

CONSTRUCTION CONTRACTS SCHEDULE

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

(e) When using the Construction Contracts Schedule for establishing maximum payable basic fees, the following adjustments shall be made to the Schedule fee amounts for complexity levels, excessive subcontracting, normal contractor services performed by the government or another contractor:

(1) The target fee amounts, set forth in the fee schedule, shall not be adjusted for a Class A project, which is maximum complexity. A Class B project requires a 10 percent reduction in amounts. Class C and D projects require a 20 percent and 30 percent reduction, respectively. The various classes are defined in 48 CFR 915.404–4–71–4(b).

(2) The target fee schedule provides for 45 percent of the contract work to be subcontracted for such things as electrical and other specialties. Excessive subcontracting results when such efforts exceed 45 percent of the total contract work. To establish appropriate fee reductions for excessive subcontracting, the negotiating official should first determine the amount of subcontracting as a percentage of the total contract work. Next, the negotiating official should determine a percentage by which the prime contractor's normal requirement (based on a requirement for doing work with its own forces) is reduced due to the excessive subcontracting and, finally, multiply the two percentages to determine a fee reduction factor.

(3) If acquisition or other services normally expected of the contractor (see 48 CFR 915.404–4–71–4(c)) are performed by the government, or another

DOE prime or operating contractor, a fee reduction may also be required. The negotiating official should first determine what percentage of the total procurement or other required services is performed by others. Then the negotiating official should apply this percentage reduction to the normally assigned weightings for the management services or effort as discussed in 48 CFR 915.404–4–71–4(c) to arrive at the appropriate reduction factor.

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

CONSTRUCTION MANAGEMENT CONTRACTS SCHEDULE

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

(g) When applying the basic Construction Management Contracts Schedule for determining maximum payable fees, no adjustments are necessary to such payable fees for contractor Force account labor used for work which should otherwise be subcontracted until such Force account work exceeds, in the aggregate, 20 percent of the base. Excessive use of Force account work results when such effort exceeds 20 percent of the fee base; and, when this occurs, appropriate fee reductions for such excessive Force account labor shall be computed as follows:

(1) Determine the percentage amount of Force account work to total contractor effort.

(2) Determine the percentage amount of subcontract work reduced due to the use of Force account work.

(3) Multiply the two percentages to determine the fee reduction factor. It is not expected that reductions in the Construction Management Contracts Schedule fee amounts will be made for complexity, reduced requirements and similar adjustments as made for construction contracts.

(h) The schedule of fees for consideration of special equipment purchases and for consideration of the subcontract program under a construction management contract is as follows:

SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million	.....	.....	1.64
1,000,000	16,410	1.64	1.09
2,000,000	27,350	1.37	0.93
4,000,000	45,948	1.15	0.77
6,000,000	61,264	1.02	0.71
8,000,000	75,486	0.94	0.66
10,000,000	88,614	0.89	0.61
15,000,000	119,246	0.79	0.53
25,000,000	171,758	0.69	0.47
40,000,000	242,868	0.61	0.43
60,000,000	329,294	0.55	0.39
80,000,000	406,968	0.51	0.37
100,000,000	480,266	0.48	0.28
150,000,000	619,204	0.41	0.23
200,000,000	732,980	0.37	0.13
300,000,000	867,542	0.29	.....
Over $300 Million	867,542	.....	013

[63 FR 56851, Oct. 23, 1998, as amended at 64 FR 12227, Mar. 11, 1999]

915.404–4–71–6 Fee base.

(a) The fee base shown in the Construction Contracts Schedule and Construction Management Contracts Schedule represents that estimate of cost to which a percentage factor is applied to determine maximum fee allowances. The fee base is the estimated necessary allowable cost of the construction work or other services which are to be performed. It shall include the estimated cost for, but is not limited to, the following as they may apply in the case of a construction or construction management contract:

(1) Site preparation and utilities.

(2) Construction (labor-materials-supplies) of buildings and auxiliary facilities.

(3) Construction (labor-materials-supplies) to complete/construct temporary buildings.

(4) Design services to support the foregoing.

(5) General management and job planning cost.

(6) Labor supervision.

(7) Procurement and acquisition administration.

(8) Construction performed by subcontractors.

(9) Installation of government furnished or contractor acquired special equipment and other equipment.

(10) Equipment (other than special equipment) which is to become Government property (including a component of Government property).

(b) The fee base for the basic fee determination for a construction contract and construction management contract shall include all necessary and allowable costs cited in paragraph (a) of this section as appropriate to the type of contract; except, any home office G&A expense paid as a contract cost per cost principle guidance and procedures shall be excluded from the fee base. The fee base shall exclude:

(1) Cost of land.

(2) Cost of engineering (A&E work).

(3) Contingency estimate.

(4) Equipment rentals or use charges. (See 48 CFR 936.70.)

(5) Cost of government furnished equipment or materials.

(6) Special equipment as defined in 48 CFR 936.7201.

(c) A separate fee base shall be established for special equipment for use in applying the Special Equipment Purchases or Subcontract Work Schedule (see 48 CFR 915.404–4–71–5(h)). The fee base for determination of applicable fees on special equipment shall be based on the estimated purchase price of the equipment.

(d) The fee base under the Construction Management Contracts Schedule for a maximum basic fee determination for a construction management contract shall be comprised of only the costs of the construction manager's own efforts. However, it is recognized that in the case of construction management contracts, the actual construction work will be performed by subcontractors. In most cases the subcontract awards for the construction work will be made by the construction management contractor. Occasionally the contract may involve management of construction performed under a contract awarded by the Department or by one of the Department's operating contractors. In these cases, the actual cost of the subcontracted construction work shall be excluded from the fee base used to determine the maximum basic fee (under the Construction Management Contracts Schedule) applicable to a construction management contract. A separate fee base for additional allowances (using the Special Equipment Purchases or Subcontract Work Schedule) shall be established, which shall be comprised of those subcontract construction costs, special equipment purchases, and other items' costs that are contracted for or purchased by the construction manager.

915.404–4–72 Special considerations for cost-plus-award-fee contracts.

(a) When a contract is to be awarded on a cost-plus-award-fee basis several special considerations are appropriate. Fee objectives for management and operating contracts or other contracts as determined by the Procurement Executive, including those using the Construction, Construction Management, or Special Equipment Purchases/Subcontract Work schedules from 48 CFR 915.404–4–71–5, shall be developed pursuant to the procedures set forth in 48 CFR 970.15404–4–8. Fee objectives for other cost-plus-award-fee contracts shall be in accordance with 48 CFR 916.404–2 and be developed as follows:

(1) The base fee portion of the fee objective of an award fee contract may range from 0% up to the 50% level of the fee amount for a Cost-Plus-Fixed-Fee (CPFF) contract, arrived at by using the weighted guidelines or other techniques (such as those provided in 48 CFR 915.404–4–71 for construction and construction management contracts). However, the base amount should not normally exceed 50% of the otherwise applicable fixed fee. In the event this 50% limit is exceeded, appropriate documentation shall be entered into the contract file. In no event shall the base fee exceed 60% of the fixed fee amount.

(2) The base fee plus the amount included in the award fee pool should normally not exceed the fixed fee (as subjectively determined or as developed from the fee schedule) by more than 50%. However, in the event the

base fee is to be less than 50% of the fixed fee, the maximum potential award fee may be increased proportionately with the decreases in base fee amounts.

(3) The following maximum potential award fees shall apply in award fee contracts: (percent is stated as percent of fee schedule amounts).

Base fee percent	Award fee percent	Maximum total percentage
50	100	150
40	120	160
30	140	170
20	160	180
10	180	190
0	200	200

(b) Prior approval of the Procurement Executive, is required for total fee (base plus award fee pool) exceeding the guidelines in 48 CFR 915.404–4–72(a)(3).

[63 FR 56851, Oct. 23, 1998, as amended at 64 FR 12229, Mar. 11, 1999]

915.408–70 Solicitation provision and contract clause.

The contracting officer (after deleting ''under the clause at 48 CFR 970.5203–3, Contractor's Organization'' from paragraph (a) if not a management and operating contract) shall insert the clause at 48 CFR 952.215–70, Key Personnel, in contracts under which performance is largely dependent on the expertise of specific key personnel.

[65 FR 81006, Dec. 22, 2000]

Subpart 915.6—Unsolicited Proposals

915.602 Policy.

(a) Present and future needs demand the involvement of all resources in exploring alternative energy sources and technologies. To achieve this objective, it is DOE policy to encourage external sources of unique and innovative methods, approaches, and ideas by stressing submission of unsolicited proposals for government support. In furtherance of this policy and to ensure the integrity of the acquisition process through application of reasonable controls, the DOE:

(1) Disseminates information on areas of broad technical concern whose solutions are considered relevant to the accomplishment of DOE's assigned mission areas;

(2) Encourages potential proposers to consult with program personnel before expending resources in the development of written unsolicited proposals;

(3) Endeavors to distribute unsolicited proposals to all interested organizations within DOE;

(4) Processes unsolicited proposals in an expeditious manner and, where practicable, keeps proposers advised as discrete decisions are made;

(5) Assures that each proposal is evaluated in a fair and objective manner; and, (6) Assures that each proposal will be used only for its intended purpose and the information, subject to applicable laws and regulations, contained therein will not be divulged without prior permission of the proposer.

(b) Extensions of contract work resulting from unsolicited proposals shall be processed in accordance with the procedures at 48 CFR 943.170.

915.603 General. (DOE coverage—paragraph (e)).

(e) Unsolicited proposals for the performance of support services are, except as discussed in this paragraph, unacceptable as the performance of such services is unlikely to necessitate innovative and unique concepts. There may be rare instances in which an unsolicited proposal offers an innovative and unique approach to the accomplishment of a support service. If such a proposal offers a previously unknown or an alternative approach to generally recognized techniques for the accomplishment of a specific service(s) and such approach will provide significantly greater economy or enhanced quality, it may be considered for acceptance. Such acceptance shall, however, require approval of the acquisition of support services in accordance with applicable DOE Directives and be processed as a deviation to the prohibition in this paragraph.

915.605 Content of unsolicited proposals. (DOE coverage—paragraph (b)).

(b)(5) Unsolicited proposals for nonnuclear energy demonstration activities not covered by existing formal competitive solicitations or program opportunity notices may include a request for federal assistance or participation, and shall be subject to the cost sharing provisions of 48 CFR 917.70.

915.606 Agency procedures. (DOE coverage-paragraph (b)).

(b) Unless otherwise specified in a notice of program interest, all unsolicited proposals should be submitted to the Unsolicited Proposal Coordinator, U.S. Department of Energy, National Energy Technology Laboratory (PGH), Pittsburgh, PA 15236–0940. If the proposer has ascertained the cognizant program office through preliminary contacts with program staff, the proposal may be submitted directly to that office. In such instances, the proposer should separately send a copy of the proposal cover letter to the unsolicited proposal coordinator to assure that the proposal is logged in the Department's automated tracking system for unsolicited proposals.

[63 FR 56851, Oct. 23, 1998, as amended at 67 FR 14871, Mar. 28, 2002]

915.607 Criteria for acceptance of an unsolicited proposal. (DOE coverage—paragraph (c)).

(c) DOE's cost participation policy, at 48 CFR 917.70, shall be followed in determining the extent to which the DOE will participate in the cost for the proposed effort.

PART 916—TYPES OF CONTRACTS

Subpart 916.2—Fixed-Price Contracts

Sec.

916.203 Fixed-price contracts with economic price adjustments.
916.203–4 Contract clauses.

Subpart 916.3—Cost-Reimbursement Contracts

916.306 Cost-plus-fixed-fee contracts.
916.307 Contract clauses.

Subpart 916.4—Incentive Contracts

916.404–2 Cost-plus-award-fee contracts.

Subpart 916.5—Indefinite-Delivery Contracts

916.504 Indefinite-quantity contracts.
916.505 Ordering.

Subpart 916.6—Time and Materials, Labor Hour, and Letter Contracts

916.601 Time and Materials (DOE coverage (c)).

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11972, Mar. 28, 1984, unless otherwise noted.

Subpart 916.2—Fixed-Price Contracts

916.203 Fixed-price contracts with economic price adjustments.

916.203–4 Contract clauses.

(d)(2) The Head of the Contracting Activity, or designee, for contracts estimated to be within the limits of their delegated authority, may approve the use of an economic price adjustment clause when appropriate in accordance with (FAR) 48 CFR 16.203–4.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

Subpart 916.3—Cost-Reimbursement Contracts

916.306 Cost-plus-fixed-fee contracts.

(c)(2) The Head of the Contracting Activity, or designee, for contracts estimated to be within their delegated authority, may approve (sign) the determination and findings establishing the basis for application of the statutory price or fee limitations.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

916.307 Contract clauses.

(j) The contracting officer shall insert the clause at FAR 52.216–15, Predetermined Indirect Cost Rates, modified as specified in 952.216–15 in solicitations and contracts when a cost-reimbursement research and development

contract with a State or local government is contemplated and predetermined indirect cost rates are to be used.

Subpart 916.4—Incentive Contracts

916.404–2 Cost-plus-award-fee contracts.

(d) *Fee Determination Plans.* Award fee arrangements limited to technical performance considerations are prohibited because they may increase cost disproportionately to any benefits gained. Instead, the award fee arrangement shall include both technical performance (including scheduling as appropriate) and business management considerations tailored to the needs of the particular situation. In addition, in a situation where cost estimating reliability and other factors are such that the negotiation of a separate predetermined incentive sharing arrangement applicable to cost performance is determined both feasible and advantageous, cost incentives may be added. The resulting contract would then be identified as a cost-plus-incentive-fee/award-fee combination type. The goals and evaluation criteria should be results-oriented. The award fee should be concentrated on the end product of the contract, that is, output, be it hardware, research and development, demonstration or services, together with business management considerations. However, input criteria such as equal employment opportunity, small business programs, functional management areas, such as safety, security, etc., should not be disregarded and may be appropriate criteria upon which to base some part of the award fee. Specific goals or objectives shall be established in relation to each performance evaluation criterion against which contractor performance is measured.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

Subpart 916.5—Indefinite-Delivery Contracts

916.504 Indefinite-quantity contracts. (DOE coverage—paragraph (c))

(c) The contracting officer shall establish minimum ordering guarantees with each awardee for all indefinite-quantity, multiple award contracts to ensure that adequate consideration exists to contractually bind each awardee to participate in the ordering process throughout the term of the multiple award contract. Minimum ordering guarantees should be equal among all awardees, and shall be determined on a case-by-case basis for each acquisition commensurate with the size, scope and complexity of the contract requirements.

[62 FR 53757, Oct. 16, 1997]

916.505 Ordering. (DOE coverage—paragraph (b))

(b) (4) The Director, Office of Management Systems, Office of Procurement and Assistance Management, is designated as the DOE Ombudsman for task and delivery order contracts in accordance with 48 CFR 16.505(b)(4).

(5) The Heads of Contracting Activities shall designate a senior manager to serve as the Contracting Activity Ombudsman for task and delivery order contracts. If, for any reason, the Contracting Activity Ombudsman is unable to execute the duties of the position, the Head of the Contracting Activity shall designate an Acting Contracting Activity Ombudsman.

(6) The Contracting Activity Ombudsman shall:

(i) Be independent of the contracting officer who awarded and/or is administering the contract under which a complaint is submitted;

(ii) Not assume any duties and responsibilities pertaining to the evaluation or selection of an awardee for the issuance of an order under a multiple award, task or delivery order contract;

(iii) Review complaints from contractors awarded a task or delivery order contract;

(iv) Collect all facts from the cognizant organizations or individuals that are relevant to a complaint submitted to ensure that the complainant

and all contractors were afforded a fair opportunity to be considered for the order issued in accordance with the procedures set forth in each awardees' contract;

(v) Maintain a written log to track each complaint submitted from receipt through disposition;

(vi) Ensure that no information is released which is determined to be proprietary or is designated as source selection information; and

(vii) Resolve complaints at the contracting activity for which they have cognizance.

(7) If, upon review of all relevant information, the Contracting Activity Ombudsman determines that corrective action should be taken, the Contracting Activity Ombudsman shall report the determination to the cognizant contracting officer. Issues which cannot be so resolved should be forwarded to the DOE Ombudsman.

[62 FR 53757, Oct. 16, 1997]

Subpart 916.6—Time and Materials, Labor Hour, and Letter Contracts

916.601 Time and Materials (DOE coverage (c)).

(c) Limitations. The Contracting Officer is not required to execute a separate Determination and Findings as required by FAR 16.601 3(c) if other file documentation adequately justifies contract actions.

[67 FR 14871, Mar. 28, 2002]

PART 917—SPECIAL CONTRACTING METHODS

Subpart 917.6—Management and Operating Contracts

Sec.
917.600 Scope of subpart.
917.601 Definitions.
917.602 Policy.

Subpart 917.70—Cost Participation

917.7000 Scope of subpart.
917.7001 Policy.

Subpart 917.72—Program Opportunity Notices for Commercial Demonstrations

917.7200 Scope of subpart.
917.7201 Policy.
917.7201–1 General.

Subpart 917.73—Program Research and Development Announcements

917.7300 Scope of subpart.
917.7301 Policy.
917.7301–1 General.

Subpart 917.74—Acquisition, Use, and Disposal of Real Estate

917.7401 General.
917.7402 Policy.
917.7403 Application.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11974, Mar. 28, 1984, unless otherwise noted.

Subpart 917.6—Management and Operating Contracts

917.600 Scope of subpart.

(a) This subpart implements 48 CFR subpart 17.6, Management and Operating Contracts. Departmental policies, procedures, provisions and clauses to be used in the award and administration of management and operating contracts that either implement or supplement the Federal Acquisition Regulation and parts 901 through 952 of this chapter are contained in 48 CFR part 970.

(b) 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 917.601. References in this subpart to ''management and operating contracts'' include performance-based management contracts.

[65 FR 81006, Dec. 22, 2000]

917.601 Definitions.

Performance-based contracting has the meaning contained in 48 CFR 37.101.

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.

[62 FR 34861, June 27, 1997, as amended at 65 FR 81006, Dec. 22, 2000]

917.602 Policy.

(a) The use of a management and operating contract must be authorized by the Secretary, Deputy Secretary or Under Secretary.

(b) It is the policy of the Department of Energy to provide for full and open competition in the award of management and operating contracts, including performance-based management contracts.

(c) A management and operating contract may be awarded or extended at the completion of its term without providing for full and open competition only when such award or extension is justified under one of the statutory authorities identified in 48 CFR 6.302 and only when authorized by the Secretary. Documentation and processing requirements for justifications for the use of other that full and open competition shall be accomplished in accordance with internal agency procedures

[65 FR 81006, Dec. 22, 2000, as amended at 67 FR 14871, Mar. 28, 2002]

Subpart 917.70—Cost Participation

SOURCE: 61 FR 41706, Aug. 9, 1996, unless otherwise noted.

917.7000 Scope of subpart.

(a) This subpart sets forth the DOE policy on cost participation by organizations performing research, development, and/or demonstration projects under DOE prime contracts. This subpart does not cover efforts and projects performed for DOE by other Federal agencies.

(b) Cost participation is a generic term denoting any situation where the Government does not fully reimburse the performer for all allowable costs necessary to accomplish the project or effort under the contract. The term encompasses cost sharing, cost matching, cost limitation (direct or indirect), participation in kind, and similar concepts.

917.7001 Policy.

(a) When DOE supports performer research, development, and/or demonstration efforts, where the principal purpose is ultimate commercialization and utilization of the technologies by the private sector, and when there are reasonable expectations that the performer will receive present or future economic benefits beyond the instant contract as a result of performance of the effort, it is DOE policy to obtain cost participation. Full funding may be provided for early phases of development programs when the technological problems are still great.

(b) In making the determination to obtain cost participation, and evaluating present and future economic benefits to the performer, DOE will consider the technical feasibility, projected economic viability, societal and political acceptability of commercial application, as well as possible effects of other DOE-supported projects in competing technologies.

(c) The propriety, manner, and amount of cost participation must be decided on a case-by-case basis.

(d) Cost participation is required for demonstration projects unless exempted by the Under Secretary. Demonstration projects, pursuant to this subpart, include demonstrations of technological advances and field demonstrations of new methods and procedures, and demonstrations of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of energy resources.

Subpart 917.72—Program Opportunity Notices for Commercial Demonstrations

SOURCE: 61 FR 41706, Aug. 9, 1996, unless otherwise noted.

917.7200 Scope of subpart.

(a) This subpart discusses the policy for the use of a program opportunity notice solicitation approach to accelerate the demonstration of the technical feasibility and commercial application of all potentially beneficial nonnuclear energy sources and utilization technologies.

(b) This subpart applies to demonstrations performed by individuals, educational institutions, commercial or industrial organizations, or other private entities, public entities, including State and local governments, but not other Federal agencies. For purposes of this subpart, commercial demonstration projects include demonstrations of technological advances, field demonstrations of new methods and procedures, and demonstration of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of non-nuclear energy resources.

917.7201 Policy.

917.7201–1 General.

(a) It is DOE's intent to encourage the submission of proposals to accelerate the demonstration of the technical, operational, economic, and commercial feasibility and environmental acceptability of particular energy technologies, systems, subsystems, and components. Program opportunity notices will be used to provide information concerning scientific and technological areas encompassed by DOE's programs. DOE shall, from time to time, issue program opportunity notices for proposals for demonstrations of various forms of non-nuclear energy and technology utilization.

(b) Each program opportunity notice shall as a minimum describe: the goal of the intended demonstration effort; the time schedule for award; evaluation criteria; program policy factors; the amount of cost detail required; and proposal submission information. Program policy factors are those factors which, while not appropriate indicators of a proposal's individual merit (i.e., technical excellence, proposer's ability, cost, etc.), are relevant and essential to the process of choosing which of the proposals received will, taken together, best achieve the program objectives. All such factors shall be predetermined and specified in the notice so as to notify proposers that factors which are essentially beyond their control will affect the selection process.

Subpart 917.73—Program Research and Development Announcements

SOURCE: 61 FR 41707, Aug. 9, 1996, unless otherwise noted.

917.7300 Scope of subpart.

(a) This subpart discusses the policy for the use of a program research and development announcement (PRDA) solicitation approach to obtain and select proposals from the private sector for the conduct of research, development, and related activities in the energy field.

917.7301 Policy.

917.7301–1 General.

(a) PRDAs shall be used to provide potential proposers with information concerning DOE's interest in entering into arrangements for research, development, and related projects in specified areas of interest. It is DOE's intent to solicit the submission of ideas which will serve as a basis for research, development, and related activities in the energy field. It is DOE's desire to encourage the involvement of small business concerns, small disadvantage business concerns, and women-owned small business concerns in research and development undertaken pursuant to PRDAs.

(b) The PRDA should not replace existing acquisition procedures where a requirement can be sufficiently defined for solicitation under standard advertised or negotiated acquisition procedures. Similarly, it should not inhibit or curtail the submission of unsolicited proposals. However, a proposal which is submitted as though it were unsolicited but is in fact germane to an existing PRDA shall be treated as though submitted in response to the announcement or returned without action to the proposer, at the proposer's option. Further, the PRDA is not to be used in a competitive situation where it is appropriate to negotiate a study contract to obtain analysis and recommendations to be incorporated in the subsequent request for proposals.

(c) The PRDA is to be used only where:

(1) Research and development is required in support of a specific project area within an energy program with the objective of advancing the general scientific and technological base, and this objective is best achieved through:

(i) A diversity of possible approaches, within the current state of the art, available for solving the problems;

(ii) The involvement of a broad spectrum of organizations in seeking out solutions to the problems posed;

(iii) The application of the unique qualifications or specialized capabilities of many individual proposers which will enable them to perform portions of the research project (without necessarily possessing the qualifications to perform the entire project) so that the overall support may be broken into segments which cannot be ascertained in advance; and,

(iv) The fostering of new and creative solutions.

(2) Consistent with paragraph (c)(1) of this section, it is anticipated that choices will have to be made among dissimilar concepts, ideas, or approaches; and

(3) It is determined that a broad range of organizations exist that would be capable of contributing towards the overall research and development goals identified in paragraph (c)(1) of this section.

(d) Each PRDA shall as a minimum describe: the area(s) of program interest; time schedule for award; proposal submittal information; evaluation criteria; and program policy factors. The PRDA should clearly emphasize to proposers that program policy factors are essentially beyond their control and will affect the selection process. The PRDA should also state that DOE reserves the right to select for award or support any, all, or none of the proposals received in response to an announcement.

Subpart 917.74—Acquisition, Use, and Disposal of Real Estate

SOURCE: 61 FR 41707, Aug. 9, 1996, unless otherwise noted.

917.7401 General.

Special circumstances and situations may arise under cost-type contracts when, in the performance of the contract or subcontract, the performer shall be required, or otherwise find it necessary, to acquire real estate or interests therein by:

(a) Purchase, on DOE's behalf or in its own name, with title eventually vesting in the Government.

(b) Lease, and DOE assumes liability for, or otherwise will pay for the obligation under the lease.

(c) Acquisition of temporary interest through easement, license or permit, and DOE funds the cost of the temporary interest.

917.7402 Policy.

It is the policy of the Department of Energy that, when real estate acquisitions are made, the following policies and procedures shall be applied to such acquisitions:

(a) Real estate acquisitions shall be mission essential; effectively, economically, and efficiently managed and utilized; and disposed of promptly, when not needed;

(b) Acquisitions shall be justified, with documentation which describes the need for the acquisitions, general requirements, cost, acquisition method to be used, site investigation reports, site recommended for selection, and property appraisal reports; and

(c) Acquisition by lease, in addition to the requirements in paragraphs (a) and (b) of this section:

(1) Shall not exceed a one-year term if funded by one-year appropriations.

(2) May exceed a one-year term, when the lease is for special purpose space funded by no-year appropriations and approved by the Department.

(3) Shall contain an appropriate cancellation clause which limits the Government's obligation to no more than the amount of rent to the earliest cancellation date plus a reasonable cancellation payment.

(4) Shall be consistent with Government laws and regulations applicable to real estate management.

917.7403 Application.

The clause at 48 CFR 952.217–70 shall be included in contracts or modifications where contractor acquisitions are expected to be made.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 919—SMALL BUSINESS PROGRAMS

Subpart 919.2—Policies

Sec.
919.201 General policy.

Subpart 919.5—Set-Asides for Small Business

919.501 General.
919.502–2 Total set-asides.
919.503 Setting aside a class of acquisitions.

Subpart 919.6—Certificates of Competency and Determinations of Eligibility

919.602–1 Referral.

Subpart 919.7—Subcontracting With Small Business, Small Disadvantaged Business, and Women-Owned Small Business Concerns

919.705–6 Postaward responsibilities of the contracting officer.

Subpart 919.8—Contracting With the Small Business Administration (The 8(a) Program)

919.805–2 Procedures.

Subpart 919.70—The Department of Energy Mentor-Protege Program

919.7001 Scope of subpart.
919.7002 Definitions.
919.7003 General policy.
919.7004 General prohibitions.
919.7005 Eligibility to be a Mentor.
919.7006 Incentives for DOE contractor participation.
919.7007 Eligibility to be a Protege.
919.7008 Selection of Proteges.
919.7009 Process for participation in the program.
919.7010 Contents of Mentor-Protege Agreement.
919.7011 Developmental assistance.
919.7012 Review and approval process of agreement by OSDBU.
919.7013 Reports.
919.7014 Solicitation provision.

AUTHORITY: 40 U.S.C. 486 (c); 42 U.S.C. 7101, *et seq.*; 42 U.S.C. 2201; 50 U.S.C. 2401, *et seq.*

SOURCE: 49 FR 11997, Mar. 28, 1984, unless otherwise noted.

Subpart 919.2—Policies

919.201 General policy.

(c) The Director, Office of Small and Disadvantaged Business Utilization, Headquarters, is responsible for the administration of the DOE small, small disadvantaged, and women-owned small business programs. The Executive Director, Federal Energy Regulatory Commission, is responsible for the administration of the Commission's small, small disadvantaged, and women-owned small business programs. This includes responsibility for developing, implementing, executing, and managing these programs, providing advice on these programs, and representing DOE before other Government agencies on matters primarily affecting small, small disadvantaged, and women-owned small businesses. The Heads of Contracting Activities (HCAs) shall appoint a small business specialist.

[50 FR 12185, Mar. 27, 1985, as amended at 59 FR 9106, Feb. 25, 1994; 61 FR 21976, May 13, 1996]

Subpart 919.5—Set-Asides for Small Business

919.501 General.

(c) The Department has established an internal comprehensive review and screening process for acquisitions exceeding the simplified acquisition threshold. The review is intended to enhance the prospect of participation by small business, small disadvantaged business, and women-owned small business concerns.

(g) The policy prescribed by FAR 19.501(g), which requires that a product or service acquired by a successful small business set-aside shall continue to be acquired on a set-aside basis, is applicable to DOE on a contracting activity-wide basis. The small and disadvantaged business specialist at a contracting activity shall maintain a

list of such small business set-aside awards.

[52 FR 38425, Oct. 16, 1987, as amended at 59 FR 9106, Feb. 25, 1994; 61 FR 21977, May 13, 1996]

919.502–2 Total set-asides.

In considering set-asides in the area of architect engineer contracts, contracting personnel must first consider the special procedures required by the Brooks Act, Pub. L. 92–582 pertaining to this type acquisition.

919.503 Setting aside a class of acquisitions.

By agreement with SBA, the DOE has established a class set-aside for construction acquisitions not exceeding $3 million, including new construction and repair and alteration of structures. Lists of other class set-asides shall be maintained by all DOE contracting offices. These lists shall be updated at least annually.

Subpart 919.6—Certificates of Competency and Determinations of Eligibility

919.602–1 Referral.

(a)(2) The contracting officer shall coordinate with the small business specialist and the SBA procurement center representative prior to referring a determination of nonresponsibility of a small business to the SBA Area Office.

[52 FR 38425, Oct. 16, 1987, as amended at 61 FR 21977, May 13, 1996; 63 FR 56860, Oct. 23, 1998]

Subpart 919.7—Subcontracting With Small Business, Small Disadvantaged Business, and Women-Owned Small Business Concerns

919.705–6 Postaward responsibilities of the contracting officer.

A copy of the notification to the SBA of awards of contracts, amendments or modifications that contain subcontracting plans, as required by FAR 19.705–6(a), shall be provided to the Office of Small and Disadvantaged Business Utilization.

[49 FR 11997, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

Subpart 919.8—Contracting With the Small Business Administration (The 8(a) Program)

919.805–2 Procedures.

Acquisitions involving section 8(a) competition must comply with source selection procedures set forth in the FAR in accordance with 13 CFR 124.311(e)(1).

[63 FR 56860, Oct. 23, 1998]

Subpart 919.70—The Department of Energy Mentor-Protege Program

SOURCE: 65 FR 21369, Apr. 21, 2000, unless otherwise noted.

919.7001 Scope of subpart.

The Department of Energy (DOE) Mentor-Protege Program is designed to encourage DOE prime contractors to assist small disadvantaged firms certified by the Small Business Administration (SBA) under Section 8(a) of the Small Business Act (8(a)), other small disadvantaged businesses, women-owned small businesses, Historically Black Colleges and Universities, and other minority institutions of higher learning, and small business concerns owned and controlled by service disabled veterans in enhancing their capabilities to perform contracts and subcontracts for DOE and other Federal agencies. The program seeks to foster long-term business relationships between these small business entities and DOE prime contractors, and to increase the overall number of these small business entities that receive DOE contract and subcontract awards.

919.7002 Definitions.

Historically Black Colleges and Universities (HBCUs) means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2.

Other minority institutions of higher learning means an institution determined by the Secretary of Education to meet the requirements of 20 U.S.C. 1067k.

Small business concern owned and controlled by service-disabled veterans means a small business concern as defined in Public Law 106–50, Veterans Entrepreneurship and Small Business Development Act of 1999.

Small disadvantaged business means a small business concern owned and controlled by socially and economically disadvantaged individuals that meets the requirements of 13 CFR part 124, subpart B.

Women-owned small business means a small business concern that meets the requirements of 15 U.S.C. 637(d)(3)(D).

919.7003 General policy.

(a) DOE contractors eligible under 48 CFR 919.7005 may enter into agreements with businesses certified by the SBA in the 8(a) Program, other small disadvantaged businesses, women-owned small businesses, HBCUs, other minority institutions of higher learning, and small business concerns owned and controlled by service disabled veterans to provide those firms appropriate developmental assistance to enhance the capabilities of Proteges.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in 919.7011, are allowable only to the extent that they are incurred in performance of a contract identified in the Mentor-Protege Agreement and are otherwise allowable in accordance with the cost principles applicable to that contract.

(c) Headquarters Office of Small and Disadvantaged Business Utilization (OSDBU) is the DOE Program Manager for the Mentor-Protege Program.

919.7004 General prohibitions.

DOE will not reimburse the costs of a Mentor in providing any form of developmental assistance to a Protege except as provided in 919.7003(b).

919.7005 Eligibility to be a Mentor.

To be eligible for recognition by DOE as a Mentor, an entity must be performing at least one contract for DOE.

919.7006 Incentives for DOE contractor participation.

(a) Under cost-plus-award fee contracts, approved Mentor firms may earn award fees associated with their performance as a Mentor. The award fee plan may include provision for the evaluation of the contractor's utilization of 8(a) firms, other small disadvantaged businesses, women-owned small businesses, HBCUs, other minority institutions of higher learning and small business concerns owned and controlled by service disabled veterans. DOE may evaluate the Mentor's performance in the DOE Mentor-Protege Program under any Mentor-Protege Agreement(s) as a separate element of the award fee plan.

(b) Mentors shall receive credit for subcontracts awarded pursuant to their Mentor-Protege Agreements toward subcontracting goals contained in their subcontracting plan.

919.7007 Eligibility to be a Protege.

(a) To be eligible for selection as a Protege, a firm must:

(1) Be a small business certified under Section 8(a) of the Small Business Act by SBA, other small disadvantaged business, a women-owned small business, HBCU, or any other minority institution of higher learning, or a small business concern owned and controlled by service disabled veterans;

(2) Be eligible for receipt of government contracts;

(3) Have been in business for at least two (2) years prior to application for enrollment into the Mentor-Protege Program; and

(4) Be able to certify as a small business according to the Standard Industrial Code for the services or supplies to be provided by the Protege under its subcontract with the Mentor.

(b) A prospective Mentor may rely in good faith on written representations by a prospective Protege that the Protege meets the requirements in paragraph (a) of this section.

919.7008 Selection of Proteges.

(a) A Mentor firm is solely responsible for selecting one or more Protege entities from firms eligible under 48 CFR 919.7007.

(b) A Mentor may have more than one Protege; however, a Protege may have only one Mentor.

(c) The selection of Protege firms by Mentor firms may not be protested, except as provided in paragraph (d) of this section.

(d) Only protests regarding the small business size status of a firm to be a Protege will be considered and shall be submitted to the DOE Office of Small and Disadvantaged Business Utilization for resolution. If that office is unable to resolve a protest, it will refer the matter to the Small Business Administration for resolution in accordance with 13 CFR part 121.

919.7009 Process for participation in the program.

A prospective Mentor must submit the following to the DOE Mentor-Protege Program Manager.

(a) A statement that it is eligible, as of the date of application, for the award of Federal contracts;

(b) A statement that it is currently performing at least one contract for DOE;

(c) The DOE contract number, type of contract, period of performance (including options), title of technical program effort, name of DOE technical program manager (including contact information) and the DOE contracting activity; and

(d) An original and two copies of the Mentor-Protege Agreement signed by the chief executive officer or designee of the Mentor firm and the chief executive officer of the Protege firm.

919.7010 Contents of Mentor-Protege Agreement.

The proposed Mentor-Protege Agreement must contain:

(a) Names, addresses and telephone numbers of Mentor and Protege firms and a point of contact within each firm who will oversee the Agreement;

(b) Requirements for the Mentor firm or the Protege firm to notify the other entity, DOE Headquarters OSDBU, and the contracting officer in writing at least 30 days in advance of the Mentor firm's or the Protege firm's intent to voluntarily terminate or withdraw from the Mentor-Protege Agreement (such termination would not terminate any existing subcontract between the Mentor and the Protege);

(c) A description of the form of developmental assistance program that will be provided by the Mentor to the Protege firm, including a description of any subcontract work, and a schedule for providing the assistance and the criteria for evaluation of the Protege's developmental success (48 CFR 919.7011);

(d) A listing of the number and types and estimated amount of subcontracts to be awarded to the Protege firm;

(e) Term of the Agreement;

(f) Procedures to be invoked should DOE terminate its recognition of the Agreement for good cause (such termination of DOE recognition would not constitute a termination of the subcontract between the Mentor and the Protege);

(g) Provision for the Mentor firm to submit to the DOE Mentor-Protege Program Manager a ''lessons learned'' evaluation developed by the Mentor at the conclusion of the Mentor-Protege Agreement;

(h) Provision for the submission by the Protege firm of a ''lessons learned'' evaluation to the DOE Mentor-Protege Program Manager at the conclusion of the Mentor-Protege Agreement;

(i) Description of how the development assistance will potentially increase subcontracting opportunities for the Protege firm;

(j) Provision for the Mentor firm to brief the DOE Mentor-Protege Program Manager, the technical program manager(s), and the contracting officer at the conclusion of each year in the Mentor-Protege Program regarding program accomplishments as pertains to the approved Agreement (where possible, this review may be incorporated into the normal program review for the Mentor's contract);

(k) Recognition that costs incurred by a Mentor to provide developmental assistance, as described in 48 CFR 919.7011, are allowable only to the extent that they are incurred in performance of a contract identified in the Mentor-Protege Agreement and are otherwise allowable in accordance with the cost principles applicable to that contract (the DOE Mentor-Protege

Program has no appropriation for paying for developmental assistance); and

(l) Other terms and conditions, as appropriate.

919.7011 Developmental assistance.

(a) The forms of developmental assistance a Mentor may provide to a Protege include, but are not limited to:

(1) Management guidance relating to:

(i) Financial management,

(ii) Organizational management,

(iii) Overall business management planning,

(iv) Business development, and

(v) Marketing assistance;

(2) Engineering and other technical assistance;

(3) Noncompetitive award of subcontracts under DOE or other Federal contracts where otherwise authorized;

(4) Award of subcontracts in the Mentor's commercial activities;

(5) Progress payments based on costs;

(6) Rent-free use of facilities and/or equipment owned or leased by Mentor; and

(7) Temporary assignment of Mentor personnel to the Protege for purposes of training.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in paragraph (a) of this section, are allowable only to the extent provided at 48 CFR 919.7003(b).

919.7012 Review and approval process of agreement by OSDBU.

(a) OSDBU will review the proposed Mentor-Protege Agreement under 48 CFR 919.7010 and will complete its review and assessment no later than 30 days after receipt. OSDBU will provide a copy of its assessment to the cognizant DOE technical program manager and contracting officer for review and concurrence.

(b) If OSDBU approves the Agreement, the Mentor may implement the developmental assistance program.

(c) Upon finding deficiencies that DOE considers correctable, the OSDBU will notify the Mentor and request information to be provided within 30 days that may correct the deficiencies. The Mentor may then provide additional information for reconsideration. The review of any supplemental material will be completed within 30 days after receipt by the OSDBU and the Agreement either approved or disapproved.

919.7013 Reports.

(a) Prior to performing an evaluation of a Mentor's performance under its Mentor-Protege Agreement for use in award fee evaluations, the Mentor-Protege Program Manager must consult with the cognizant DOE technical program manager and must provide a copy of the performance evaluation comments regarding the technical effort and Mentor-Protege development to the contracting officer.

(b) The DOE Mentor-Protege Program Manager must submit semi-annual reports to the cognizant contracting officer regarding the participating Mentor's performance in the Program for use in the award fee determination process.

(c) The Mentor firm must submit progress reports to the DOE Mentor-Protege Program Manager semi-annually.

919.7014 Solicitation provision.

The cognizant contracting officer must insert the provision at 952.219–70, DOE Mentor-Protege Program, in all solicitations with an estimated value in excess of the simplified acquisition threshold.

PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

Subpart 922.1—Basic Labor Policies

Sec.

922.103 Overtime.
922.103–4 Approvals.
922.103–5 Contract clauses.

Subpart 922.6—Walsh-Healey Public Contracts Act

922.608–3 Protests against eligibility.
922.608–4 Award pending final determination.
922.608–5 Award.
922.608–6 Postaward.

Subpart 922.8—Equal Employment Opportunity

922.800 Scope of subpart.
922.802 General.
922.803 Responsibilities.
922.804 Affirmative action programs.

922.804–1 Nonconstruction.
922.804–2 Construction.
922.807 Exemptions.

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

SOURCE: 49 FR 11998, Mar. 28, 1984, unless otherwise noted.

Subpart 922.1—Basic Labor Policies

922.103 Overtime.

922.103–4 Approvals.

(d) *Approvals.* (1) Where the cost to the Government may be affected, approval of hours of work in excess of the normal workweek is justified only in those instances and for those employees where it can be shown that overtime would provide needed and demonstrable impetus to the accomplishment of DOE objectives and that all other means of meeting these objectives have been considered and found inadequate or not feasible. Accordingly, the Heads of Contracting Activities shall:

(i) Establish controls to prevent excess casual overtime and to assure that such overtime work is in the best interest of the Government. Casual overtime means (A) work in excess of the normal workweek (or in excess of an authorized extended workweek) which cannot be regularly scheduled in advance, or (B) regularly scheduled work in excess of the normal workweek for a period of four consecutive weeks or less; and

(ii) Establish controls to assure that any use of any extended workweek schedule is in the best interest of the Government. Extended workweek means a workweek regularly scheduled and established in excess of the normal workweek for a period in excess of four consecutive weeks.

[49 FR 11998, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

922.103–5 Contract clauses.

In accordance with FAR 22.101–1(e) and FAR 22.103–5, the contracting officer shall insert the clause at FAR 52.222–1, Notice to the Government of Labor Disputes, in all solicitations and contracts for protective services at DOE owned facilities requiring continuity of services for public safety and national security reasons. The contracting officer may insert this clause in other solicitations and contracts where a significant need for continuity in contract performance exists. See 937.70, Protective Services Contracting, for additional policy guidance regarding protective services.

[58 FR 36151, July 6, 1993]

Subpart 922.6—Walsh-Healey Public Contracts Act

922.608–3 Protests against eligibility.

When an eligibility determination made by the contracting officer is challenged, this protest shall be handled in accordance with procedures for agency protests against award, except the matter shall be submitted to the Department of Labor for final determination. However, if the eligibility determination challenged pertains to a small business, the protest shall be forwarded to the Small Business Administration for determination.

922.608–4 Award pending final determination.

(a) Award, as contemplated by FAR 22.608–4, may be made only with the approval of the Head of the Contracting Activity.

922.608–5 Award.

The notice required by (FAR) 48 CFR 22.608–5 is to be sent to the appropriate Department of Labor Regional Office in which the contractors place of business is located. Regional Office locations are specified at FAR 22.609.

[49 FR 11998, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

922.608–6 Postaward.

(c) Any postaward actions of the type discussed at FAR 22.608–6 should be coordinated in advance with the Office of Industrial Relations, Headquarters.

Subpart 922.8—Equal Employment Opportunity

922.800 Scope of subpart.

This subpart implements (FAR) 48 CFR part 22, subpart 22.8. It applies to all DOE contracts and subcontracts.

[49 FR 11998, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

922.802 General.

922.803 Responsibilities.

(a) The Director, Office of Federal Contract Compliance Programs of the Department of Labor has been delegated authority and responsibility for carrying out the requirements of Executive Order 11246, as amended. In conjunction with the delegation, contracting officers shall be familiar with existing and any updated provisions of 41 CFR Ch. 60, and assist the Department of Labor in its compliance responsibilities. DOE contracting officers will include the applicable Equal Employment Opportunity (EEO)) and Affirmative Action Program (AAP) requirements in their solicitations and obtain the applicable reports of compliance from the Office of Federal Contract Compliance Programs (OFCCP) (when required) prior to awarding of contracts. The provisions of 41 CFR Ch. 60, are applicable to all DOE contracts.

(d) The OFCCP requires that requests for pre-award clearances be directed to the OFCCP Regional Office in which the contractor's facility is (to be) located. If OFCCP finds the contractor in compliance, the contracting officer will be notified. Findings of non-compliance can be communicated to the contracting officer by the OFCCP or Headquarters Director or his designee. The appropriate Regional Office will provide the appropriate contact point in cases of non-compliance. The Director, Office of Civil Rights (DOE HQ), when requested, will provide assistance to contracting officers resolving noncompliance issues by providing assistance in obtaining a final decision from the OFCCP.

[49 FR 11998, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 58 FR 36365, July 7, 1993]

922.804 Affirmative action programs.

922.804–1 Nonconstruction.

In the event a prospective contractor or subcontractor is entering into its first contract containing the Equal Opportunity clause, the contracting officer shall determine that the prospective contractor understands and appears able to conform to the requirements of the EEO clause.

922.804–2 Construction.

(a) Construction contracts, including cost-sharing contracts, are subject to OFCCP orders applicable in particular areas.

(1) When a proposed nonexempt construction contract is within a geographic area where construction is subject to the provisions of Federal EEO Bid Conditions, Part I or Part II, the solicitation shall contain those bid conditions. The contracting officer shall include in such solicitation a provision that ''the offeror shall adhere to the affirmative action plan (bid conditions) set forth in this solicitation.''

(2) Lists of areas for which OFCCP has designated specific affirmative action requirements are available through the Procurement Executive. Contracting officers should assure that this list and copies of pertinent orders are made available to all concerned DOE offices and to DOE contractors and construction subcontractors for work to be performed in the specified geographical areas.

(b) *Other nonexempt construction contracts.* (1) When a proposed nonexempt construction contract is not in a ''plan area'' and is in the amount of $10,000 or more, offerors must agree to comply with the Equal Employment Opportunity clause.

(2) When proposed nonexempt contracts of $1,000,000 or over are not in plan areas and have not been designated as high impact, offerors also must submit to the contracting officer details regarding specific affirmative action steps to be taken by the offeror in connection with all work under the contract. Such details shall include estimates of the percentage of minority group persons expected to be employed

in each craft involved in the performance of the contract work. All solicitations for construction contracts shall reference the affirmative action requirements and the offeror's obligation to make good faith efforts to employ women in craft positions.

(3) Pursuant to the OFCCP order dated August 30, 1976, agencies shall develop ''Special Bid Conditions'' for use on high impact projects in non-plan areas. These special bid conditions will include mandatory goals and timetables for the utilization of minorities. The Procurement Executive using the criteria issued by OFCCP will determine those projects that are ''high impact.'' The contracting officer is responsible for compliance with policies and procedures contained in the OFCCP ''Construction Compliance Program Operations Manual.'' Language for inclusion in solicitations or contracts contained in the manual may be modified, provided all of the requirements are retained. The contracting officer shall develop the goals and timetables and shall confer with the appropriate OFCCP regional office. The Office of Civil Rights will provide assistance as necessary, when requested. Special bid conditions will be submitted by the contracting officer to the appropriate OFCCP regional office for approval unless otherwise directed by the Procurement Executive. When special bid conditions are applicable, adequate presolicitation lead time should be allowed for submission of the special bid conditions to OFCCP national and regional offices.

(c) An attempt to limit in any major respect the equal opportunity requirements included in an invitation for bids or request for proposals for a construction contract shall constitute grounds for a determination that the offeror does not qualify as a responsible offeror and for rejection of the bid or proposal. In the case of construction acquisition by DOE prime contractors, this determination shall be made only with the approval of the DOE contracting officer.

[49 FR 11998, Mar. 28, 1984, as amended at 56 FR 41965, Aug. 26, 1991, 58 FR 36365, July 7, 1993; 59 FR 9106, Feb. 25, 1994]

922.807 Exemptions.

(c) Contracting officer requests for exemption from E.O. 11246 should be directed to the Procurement Executive for submission to the Director, OFCCP.

PART 923—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG FREE WORKPLACE

Subpart 923.4—Use of Recovered Materials

Sec.

923.405 Procedures [DOE supplemental coverage—paragraph (e)].
923.471 [Reserved]

Subpart 923.5—Workplace Substance Abuse Programs

923.570 Workplace substance abuse programs at DOE sites.
923.570–1 Applicability.
923.570–2 Solicitation provision and contract clause.
923.570–3 Suspension of payments, termination of contract, and debarment and suspension actions.

Subpart 923.7—Contracting for Environmentally Preferable and Energy-efficient Products and Services

923.703 Policy.

Subpart 923.70—Environmental, Conservation, and Occupational Safety Programs

923.7001 Nuclear safety.
923.7002 Worker Safety and Health.
923.7003 Contract clauses.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

Subpart 923.4—Use of Recovered Materials

923.405 Procedures [DOE supplemental coverage—paragraph (e)].

(e) When acquiring items designated in the EPA Comprehensive Procurement Guidelines, the EPA recommended percentage of recovered/recycled content or range of content contained in the Recovered Materials Advisory Notice (RMAN) shall be specified in the solicitation and contract as the minimum percentage of recovered/recycled content or range of content. Acquisition of a product with recycled

content exceeding the RMAN recommended content or range of content is encouraged if the product performs acceptably.

[68 FR 6358, Feb. 7, 2003]

923.471 [Reserved]

Subpart 923.5—Workplace Substance Abuse Programs

SOURCE: 57 FR 32676, July 22, 1992, unless otherwise noted.

923.570 Workplace substance abuse programs at DOE sites.

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

923.570–1 Applicability.

(a) The policies, criteria, and procedure specified in 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, apply to contracts for work performed at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, where such work:

(1) Has a value of $25,000 or more, and;

(2) Has been determined by DOE to involve:

(i) Access to or handling of classified information or special nuclear materials;

(ii) High risk of danger to life, the environment, public health and safety or national security; or

(iii) The transportation of hazardous materials to or from a DOE site.

(b) Except as otherwise provided for in this subpart, contracts subject to the requirements of 10 CFR part 707 and this subpart shall not be subject to FAR 23.5, Drug Free Workplace.

[57 FR 32676, July 22, 1992; 57 FR 41974, Sept. 14, 1992]

923.570–2 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 48 CFR 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 48 CFR 923.570–1, Applicability.

(b) The contracting officer shall insert the clause at 48 CFR 970.5223–4, Workplace Substance Abuse Programs at DOE Sites, in contracts where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 923.570–1, Applicability.

[57 FR 32676, July 22, 1992, as amended at 62 FR 42074, Aug. 5, 1997; 65 FR 81007, Dec. 22, 2000]

923.570–3 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer shall comply with the procedures of FAR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with 48 CFR 970.5223, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are:

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with the terms of the provision at 48 CFR 970.5204–57; or

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace.

[57 FR 32676, July 22, 1992, as amended at 62 FR 42074, Aug. 5, 1997; 65 FR 81007, Dec. 22, 2000]

Subpart 923.7—Contracting for Environmentally Preferable and Energy-efficient Products and Services

923.703 Policy.

Executive Order 13149, dated April 21, 2000, entitled *Greening the Government Through Federal Fleet and Transportation Efficiency,* provides that the Federal Government exercise leadership in the reduction of petroleum consumption through improvements in its motor fleet fuel efficiency and increases in its use of alternative fuel vehicles and alternative fuels. The specific provisions affecting the Department's acquisition program are as follows. Part 2 of the Executive Order establishes goals for the reduction of petroleum consumption in the motor vehicle fleet and requires the development of strategies for the increased use of alternative fuel vehicles, increased use of alternative fuels accompanied by improved alternative fuel infrastructure, and the acquisition of higher fuel economy vehicles. Procurement personnel involved in the acquisition of motor vehicles, including lease, and motor vehicle products should familiarize themselves with these requirements and assist their fleet management personnel in acquiring vehicles and products which comply with the requirements of the Executive Order and the Department's compliance strategy. In addition, section 403 of the Executive Order provides for the acquisition of environmentally preferable motor vehicle products, including the use of biobased motor vehicle products. Environmentally preferable motor vehicle products include re-refined motor vehicle lubricating oils, retread tires, recycled engine coolants, and bio-based motor vehicle products. Use of these products is addressed by the Department's Affirmative Procurement Program required by 48 CFR (FAR) 23.404, Agency affirmative procurement programs, as implemented by 48 CFR (DEAR) 923.405, Procedures [DOE supplemental coverage—paragraph (e)]. Environmentally preferable motor vehicle products are among the items designated in the Comprehensive Procurement Guidelines, which lists products with recovered content that Federal agencies and their contractors are to buy. That list is published by the Environmental Protection Agency pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6962, and regulations published at 40 CFR part 247.

[68 FR 52131, Sept. 2, 2003]

Subpart 923.70—Environmental, Conservation, and Occupational Safety Programs

923.7001 Nuclear safety.

(a) The DOE regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The DOE also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

[49 FR 12003, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

923.7002 Worker Safety and Health.

(a)(1) Except when the clause prescribed at 48 CFR 970.1504–5(c) is used, the clauses entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' and ''Conditional Payment of Fee or Profit—Protection of Worker Safety and Health'' implement the requirements of section 234C of the Atomic Energy Act for the use of a contract clause that provides for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of

worker safety and health concerns. The clauses, in part, provide for reductions in the amount of fee, profit, or share of cost savings that is otherwise earned by the contractor for performance failures relating to worker safety and health violations under the Department's regulations.

(2) The clauses provide for reductions of fee or profit that is earned by the contractor depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to worker safety and health concerns. When reviewing performance failures that would otherwise warrant a reduction of earned fee, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clauses. Some of the mitigating factors that must be considered are specified in the clauses.

(3) The contracting officer must obtain the concurrence of the Head of the Contracting Activity—

(i) Prior to effecting any reduction of fee or amounts otherwise payable to the contractor in accordance with the terms and conditions of the clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' or of the clause entitled ''Conditional Payment of Fee or Profit—Protection of Worker Safety and Health''; and

(ii) For determinations that no reduction of fee is warranted for a particular performance failure(s) that would otherwise warrant a reduction.

(4) Section 234C of the Atomic Energy Act provides that DOE shall either pursue civil penalties (implemented at 10 CFR part 851) for a violation under section 234C of the Atomic Energy Act (42 U.S.C. 2282c) or a contract fee reduction, but not both.

(5) The contracting officer must coordinate with the Office of Price Anderson Enforcement within the Office of the Assistant Secretary for Environment, Safety and Health (or with any designated successor office) before pursuing a contract fee reduction in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker health and safety concerns.

[68 FR 68777, Dec. 10, 2003]

923.7003 Contract clauses.

(a) A decision to include or not include environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in consultation with appropriate environmental, safety and health program management personnel.

(b) When work is to be performed at a facility where the DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 952.223–71 shall be used in such contract or subcontract if conditions (b) (1) through (3), are satisfied:

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(c) In facilities not meeting the requirements of 923.7002(b) above and which are a production or utilization facility where there is use or possession of source, special nuclear, or byproduct materials, DOE policy is not to enforce radiological safety and health standards pursuant to the contract or subcontract but rather to rely upon Nuclear Regulatory Commission (NRC) licensing requirements (including agreements with states under section 274 of the Atomic Energy Act). Pursuant to this policy, neither the clause found at 952.223–71 nor 952.223–72 is to be incorporated in the contracts or subcontracts for work at such facilities. Notwithstanding this general policy with respect to facilities not meeting the requirements of paragraph (b) above, the Secretary or his designee may determine in special cases, that DOE needs to enforce radiological safety and health standards pursuant to the contract or subcontract (see paragraph (d) below). When such a determination is made, the clause found at

952.223–72 shall be included in the contract or subcontract.

(d) In facilities not meeting the requirements of either 923.7002(b) or 923.7002(c) of this section and where there is a machine capable of producing ionizing radiation, it is DOE policy not to regulate such activity where it is adequately regulated by a state or other Federal agency. In such cases, neither clause 952.223–71 nor 952.223–72 shall be incorporated in the contract. Where the contracting officer, with appropriate environmental, safety and health advice determines that no state or other Federal agency exists to adequately regulate the operation and/or use of such machines, the clause found at 952.223–72 shall be included in the contract. The Assistant Secretary for Environment, Safety and Health (or designee) shall be consulted to determine if a non-agreement (NRC) state or a facility located in a non-agreement state has been reviewed by any other DOE office to establish that the state agency has the essential authority and resources for enforcing the radiation protection standards. This is to assure reasonable consistency in the assessment of radiation protection in non-agreement states and subsequent use of 952.223–72.

(e) In a situation where the contractor or subcontractor is performing DOE work at more than one location, inclusion of either, or both, 952.223–71 and 952.223–72 may be appropriate. In such cases, the contract or subcontract must include language to specify the extent of applicability of each clause used. For example, with a parenthetical: (Applicable only to work performed at a contractor site which has 952.223–71 or 952.223–72 clause in its contract or subcontract).

(f) Except as prescribed in 48 CFR 970.1504–5(c), the contracting officer shall insert the clause at 48 CFR 952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health, in all contracts that contain both the clause at 48 CFR 952.204–2, Security, and the clause at 48 CFR 952.250–70, Nuclear hazards indemnity agreement.

(g) Except as prescribed in 48 CFR 970.1504–5(c), the contracting officer shall insert the clause at 48 CFR 952.223–77, Conditional Payment of Fee or Profit—Protection of Worker Safety and Health, in all contracts that do not contain the clause at 48 CFR 952.204–2, Security, but that do contain the clause at 48 CFR 952.250–70, Nuclear hazards indemnity agreement.

[49 FR 12003, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997. Redesignated and amended at 68 FR 68777, Dec. 10, 2003]

PART 925—FOREIGN ACQUISITION

Subpart 925.1—Buy American Act—Supplies

Sec.
925.102 Policy.
925.105 Evaluating offers.
925.108 Excepted articles, materials, and supplies.

Subpart 925.2—Buy American Act—Construction Materials

925.202 Policy.
925.204 Violations.

Subpart 925.7—Restrictions on Certain Foreign Purchases

925.702 Restrictions.

Subpart 925.9—Additional Foreign Acquisition Clauses

925.901 Omission of the audit clause.

Subpart 925.70—Acquisition of Nuclear Hot Cell Services

925.7000 Scope of subpart.
925.7001 Definitions.
925.7002 Policy.
925.7003 Requirements.
925.7004 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12003, Mar. 28, 1984, unless otherwise noted.

Subpart 925.1—Buy American Act—Supplies

925.102 Policy

(b) Contracting officers may make the determination required by FAR 25.102(a), provided such determination

is factually supported in writing. If the contract is estimated to exceed $1 million, the Head of the Contracting Activity shall approve the determination.

[49 FR 12003, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984]

925.105 Evaluating offers.

(c) Proposed awards shall be submitted (in triplicate) through the Procurement Executive, to the Head of the Agency for decisions required by FAR 25.105(c).

925.108 Excepted articles, materials, and supplies.

(b) Suggestions for changes and additions to the (FAR) 48 CFR 25.108(d)(1) list, with appropriate justifications, shall be submitted to the Procurement Executive.

[49 FR 12003, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

Subpart 925.2—Buy American Act—Construction Materials

925.202 Policy.

(b) Contracting officers may make the determination required by FAR 25.202(a)(3). If the cost of the materials is expected to exceed $100,000, the Head of the Contracting Activity shall approve the determination.

925.204 Violations.

Contracting officers shall make a complete written report (in triplicate) to the Secretary through the Procurement Executive of each violation of the Buy American Act—Construction Materials clause at 52.225–5.

[49 FR 12003, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

Subpart 925.7—Restrictions on Certain Foreign Purchases

925.702 Restrictions.

No contract may be awarded to a company owned by an entity controlled by a foreign government if performance of the contract will require access to proscribed information. See 904.71 for additional guidance.

[58 FR 59684, Nov. 10, 1993]

Subpart 925.9—Additional Foreign Acquisition Clauses

925.901 Omission of the audit clause.

(c) Conditions for omission.

Any proposed determinations and any reports mentioned at (FAR) 48 CFR 25.901 shall be forwarded to the Director, Office of Contract Management, within the Headquarters procurement organization.

[59 FR 9106, Feb. 25, 1994, as amended at 61 FR 21977, May 13, 1996; 67 FR 14871, Mar. 28, 2002]

Subpart 925.70—Acquisition of Nuclear Hot Cell Services

SOURCE: 58 FR 8910, Feb. 18, 1993, unless otherwise noted.

925.7000 Scope of subpart.

This subpart prescribes policies for selection for contract award of nuclear hot cell services when one of the competitors is a foreign company. This subpart does not apply to the acquisition and use of nuclear hot cell facilities on-site at a DOE-owned or -leased facility.

925.7001 Definitions.

Costs related to the decommissioning of nuclear facilities, as used in this subpart, means any cost associated with the compliance with regulatory requirements governing the decommissioning of nuclear facilities licensed by the Nuclear Regulatory Commission. Such costs for foreign facilities and for Department of Energy facilities are costs of decommissioning associated with the compliance with foreign regulatory requirements or the Department's own requirements.

Costs related to the storage and disposal of nuclear waste, as used in this subpart, means any costs, whether required by regulation or incurred as a matter of prudent business practice, associated with the storage or disposal of nuclear waste.

Foreign company, as used in this subpart, means a company which offers to perform nuclear hot cell services at a facility which is not subject to the laws and regulations of the United

States, its agencies, and its political subdivisions.

Nuclear hot cell services, as used in this subpart, means services related to the examination of, or performance of various operations on, nuclear fuel rods, control assemblies, or other components that are emitting large quantities of ionizing radiation, after discharge from nuclear reactors, which are performed in specialized facilities located away from commercial nuclear power plants, generally referred to in the industry as ''hot cells.''

Nuclear waste, as used in this subpart, means any radioactive waste material subject to regulation by the Nuclear Regulatory Commission or the Department of Energy, or in the case of foreign offers, by comparable foreign organizations.

United States company, as used in this subpart, means a company which offers to perform nuclear hot cell services at a facility subject to the laws and regulations of the United States, its agencies, and its political subdivisions.

925.7002 Policy.

In selecting offer(s) for award of contracts for nuclear hot cell services, costs related to the decommissioning of nuclear facilities and storage and disposal of nuclear waste are to be considered in a way which affords United States and foreign companies an equal competition in accordance with 925.7003. Upon determining that no offer from a foreign firm has a reasonable chance of being selected for award, the requirements of this subpart will not apply.

925.7003 Requirements.

(a) For the acquisition of nuclear hot cell services under the conditions in paragraph (b) of this section, the selection official in evaluating competitive offers for selection purposes only shall:

(1) Consider neither costs related to the decommissioning of nuclear waste facilities nor costs related to the storage and disposal of nuclear waste, or

(2) Add these costs to offers of foreign companies.

(b) The requirements of this section apply under the following circumstances:

(1) One or more of the offers is submitted by a United States company and includes costs related to the decommissioning of nuclear facilities and costs related to the storage and disposal of nuclear waste because it is subject to such costs; and

(2) One or more of the offers is submitted by a foreign company and does not include these types of costs. (A foreign company might not be subject to such costs or might not have to include these types of costs in its offer if the firm is subsidized in decommissioning activity or storage and disposal of nuclear waste, or a foreign government is performing the activities below the actual cost of the activity.)

925.7004 Contract clause.

The contracting officer shall insert the clause at 952.225–70, Subcontracting for Nuclear Hot Cell Services, in solicitations and contracts involving nuclear hot cell services. This clause does not flow down to second-tier subcontracts.

PART 926—OTHER SOCIOECONOMIC PROGRAMS

Subpart 926.70—Implementation of Section 3021 of the Energy Policy Act of 1992

Sec.

926.7001 Policy.
926.7002 Responsibilities.
926.7003 Review of the procurement request.
926.7004 Size standard for Energy Policy Act procurements.
926.7005 Preferences under the Energy Policy Act.
926.7006 Goal measurement and reporting requirements.
926.7007 Solicitation provisions and contract clauses.

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

926.7101 Policy.
926.7102 Definition.
926.7103 Requirements.
926.7104 Contract clause.

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

SOURCE: 60 FR 22300, May 5, 1995, unless otherwise noted.

Subpart 926.70—Implementation of Section 3021 of the Energy Policy Act of 1992

926.7001 Policy.

(a) Section 3021(a) of the Energy Policy Act of 1992 (Pub. L. 102–486) specifies that the Department of Energy shall, to the extent practicable, provide that not less than 10 percent of the total combined amounts obligated for competitively awarded contracts and subcontracts under the Energy Policy Act be expended with—

(1) Small business concerns controlled by socially and economically disadvantaged individuals or by women;

(2) Historically Black colleges and universities; or

(3) Colleges and universities having a student body in which more than 20 percent of the students are Hispanic Americans or Native Americans.

(b) These three groups are collectively referred to in this section as ''Energy Policy Act target groups.''

(c) Awards of Energy Policy Act procurements should be in the following descending order of preference:

(1) Competitive awards pursuant to a set-aside for small disadvantaged business;

(2) Competitive awards to small businesses owned and controlled by socially and economically disadvantaged individuals and by women for Energy Policy Act requirements under the Small Business Administration's section 8(a) program; and

(3) Competitive awards that provide an evaluation preference in accordance with 926.7006 to offerors from the Energy Policy Act target groups.

(d) The DOE implementation of Section 3021 requirements with regard to the award of subcontracts under Energy Policy Act procurements is discussed at 926.7006.

(e) Competitive procedures, for purposes of Energy Policy Act implementation, consist of awards under set-asides to small disadvantaged business and firms certified as 8(a) Small Business Administration and competitive procedures in accordance with (FAR) 48 CFR 15.6 and (DEAR) 48 CFR 915.6.

926.7002 Responsibilities.

Offices initiating procurement requests have primary responsibility to identify potential contract requirements falling within the scope of section 3021 of the Energy Policy Act. Identification shall occur at the earliest possible point in time in the acquisition cycle, but not later than the submission of the procurement request to the contracting officer. For purposes of Section 3021, a contract requirement is any award that directly satisfies an Energy Policy Act program or requirement.

926.7003 Review of the procurement request.

Any Energy Policy Act procurement, including basic research contracts with educational institutions, shall be reviewed in accordance with the Small Business and 8(a) Program Review Procedures in order to ensure that full consideration is given to the potential for making Energy Policy Act awards.

[60 FR 22300, May 5, 1995, as amended at 61 FR 21977, May 13, 1996]

926.7004 Size standard for Energy Policy Act procurements.

The size standard for Energy Policy Act engineering services procurements (SIC 8711) shall be the size standard specified for military and aerospace equipment and military weapons.

926.7005 Preferences under the Energy Policy Act.

(a) *Prime contracts.* Solicitations for all competitive Energy Policy Act procurements not for 8(a) firms and in excess of the simplified acquisition threshold shall provide for an evaluation preference for offers received from entities from among the Energy Policy Act target groups. The evaluation criteria shall provide that in instances in which two or more proposals being considered for final selection are ranked as essentially equal after consideration of all technical and cost evaluation factors, and if one of these proposals is from an offeror from among an Energy Policy Act target group that offeror will be selected for award.

(b) *Subcontracts.* (1) The contracting officer shall assure that all competitive Energy Policy Act solicitations over the simplified acquisition threshold contain:

(i) A solicitation provision providing for consideration of the extent to which the offerors have provided for subcontracting opportunities to entities from among the Energy Policy Act target groups; and

(ii) A clause providing for the maximum utilization of entities from among Energy Policy Act target groups in the performance of Energy Policy Act contracts.

(2) In addition, the contracting officer shall assure that all competitive Energy Policy Act procurements expected to exceed $500,000 ($1,000,000 for construction) include a clause for reporting after award as part of the Small Business and Small Disadvantaged Business Subcontracting Plan process.

926.7006 Goal measurement and reporting requirements.

(a) *General.* The following types of contract awards for Energy Policy Act procurements shall be counted toward achievement by DOE of the 10 percent goal:

(1) Any award set-aside for small disadvantaged business;

(2) Any competitive section 8(a) award;

(3) Any competitive award to one of the three target groups under an unrestricted procurement;

(4) Any award to one of the three target groups conducted under simplified acquisition procedures in excess of the micro-purchase threshold; and,

(5) Any competitively awarded subcontract to one of the three target groups under a prime award.

(b) *Prime contract awards.* Award values and dollars obligated under prime contracts and modifications to prime contracts for Energy Policy Act requirements shall be reported through the Department of Energy Procurement and Assistance Data System.

(c) *Subcontract awards.* The contractor shall be required to report, on an annual Federal Government fiscal year basis, its progress against Section 3021 goals by providing the actual dollar value of subcontract payments and the relationship of those payments to the incurred contract cost. If the contract includes reporting requirements under (FAR) 48 CFR 52.219–9, Small Business and Small Disadvantaged Business Subcontracting Plan, the contractor's progress against the Section 3021 goals shall be included as an addendum to Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, as applicable, for the period that corresponds to the end of the Federal Government fiscal year.

926.7007 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 952.226–70, Subcontracting Goals under Section 3021(a) of the Energy Policy Act of 1992 (Pub. L. 102–486) (Energy Policy Act), in solicitations for Energy Policy Act procurements.

(b) The contracting officer shall insert the clause at 952.226–71, Utilization of Energy Policy Act Target Entities, in contracts for the Energy Policy Act requirements with an award value in excess of the simplified acquisition threshold.

(c) The contracting officer shall insert the clause at 952.226–72, Energy Policy Act Subcontracting Goals and Reporting Requirements, in contracts for Energy Policy Act requirements with an award value in excess of $500,000 ($1,000,000 in the case of construction).

(d) The contracting officer shall insert the provision at 48 CFR 952.226–73, Energy Policy Act Target Group Representation, in solicitations for Energy Policy Act procurements.

(e) The contracting officer shall insert the clause at (FAR) 48 CFR 52.219–14, Limitation on Subcontracting, in contracts for Energy Policy Act requirements with an entity from among the Energy Policy Act target groups.

[60 FR 22300, May 5, 1995, as amended at 62 FR 42074, Aug. 5, 1997]

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

SOURCE: 62 FR 34861, June 27, 1997, unless otherwise noted.

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.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 927—PATENTS, DATA, AND COPYRIGHTS

Subpart 927.2—Patents

Sec.
927.200 Scope of subpart.
927.201 Authorization and consent.
927.201–1 General.
927.206 Refund of royalties.
927.206–1 General.
927.206–2 Clause for refund of royalties.
927.207 Classified contracts.
927.207–1 General.

Subpart 927.3—Patent Rights Under Government Contracts

927.300 General.
927.302 Policy.
927.303 Contract clauses.
927.304 Procedures.
927.370 [Reserved]

Subpart 927.4—Technical Data and Copyrights

927.400 Scope of subpart.
927.402 Acquisition and use of technical data.
927.402–1 General.
927.402–2 Policy.
927.403 Negotiations and deviations.
927.404 Rights in technical data in subcontracts.
927.404–70 Statutory programs.
927.408 Cosponsored research and development activities.
927.409 Solicitation provisions and contract clauses.

Subpart 927.70 [Reserved]

AUTHORITY: Atomic Energy Act of 1954, as amended (42 U.S.C. 2168, 2182, 2201); Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1987 (42 U.S.C. 7261a.); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); National Nuclear Security Administration Act (50 U.S.C. 4201 *et seq.*)

SOURCE: 49 FR 12004, Mar. 28, 1984, unless otherwise noted.

Subpart 927.2—Patents

SOURCE: 60 FR 11815, Mar. 2, 1995, unless otherwise noted.

927.200 Scope of subpart.

When consulting 48 CFR part 27, subpart 27.2 of the FAR, consider ''research, development, and demonstration'' to replace the phrase ''research and development'' or ''R&D,'' for the purposes of DOE actions.

927.201 Authorization and consent.

927.201–1 General.

In certain contracting situations, such as those involving research, development, or demonstration projects, consideration should be given to the impact of third party-owned patents covering technology that may be incorporated in the project which patents may ultimately affect widespread commercial use of the project results. In such situations, Patent Counsel shall be consulted to determine what modifications, if any, are to be made to the utilization of the Authorization and Consent and Patent Indemnity provisions or what other action might be deemed appropriate.

927.206 Refund of royalties.

927.206–1 General.

The clause at 952.227–9, Refund of Royalties, obligates the contractor to inform DOE of the payment of royalties pertaining to the use of intellectual property, either patent or data related, in the performance of the contract. This information may result in identification of instances in which the Government already has a license for itself or others acting in its behalf or the right to sublicense others. Also, there may be pending antitrust actions or challenges to the validity of a patent or the proprietary nature of the data, or the contractor may be able to gain unrestricted access to the same data through other sources. In such situations the contractor may avoid the payment of a royalty in its entirety or may be charged a reduced royalty.

927.206–2 Clause for refund of royalties.

The contracting officer shall insert the clause at 952.227–9, Refund of Royalties, in solicitations and contracts for experimental, research, developmental, or demonstration work or other solicitations and contracts in which the contracting officer believes royalties will have to be paid by the contractor or a subcontractor of any tier.

927.207 Classified contracts.

927.207–1 General.

Unauthorized disclosure of classified subject matter, whether in a patent application or resulting from the issuance of a patent, may be a violation of the Atomic Energy Act of 1954, as amended, other laws relating to espionage and national security, and provisions of the proposed contract pertaining to disclosure of information.

Subpart 927.3—Patent Rights Under Government Contracts

927.300 General.

(a) One of the primary missions of the Department of Energy is the use of its procurement process to ensure the conduct of research, development, and demonstration leading to the ultimate commercialization of efficient sources of energy. To accomplish its mission, DOE must work in cooperation with industry in the development of new energy sources and in achieving the ultimate goal of widespread commercial use of those energy sources. To this end, Congress has provided DOE with the authority to invoke an array of incentives to secure the commercialization of new technologies developed for DOE. One such important incentive is provided by the patent system.

(b) Pursuant to 42 U.S.C. 2182 and 42 U.S.C. 5908, DOE takes title to all inventions conceived or first actually reduced to practice in the course of or under contracts with large, for-profit companies, foreign organizations, and others not beneficiaries of Pub. L. 96–517. Regulations dealing with Department's authority to waive its title to subject inventions, including the relevant statutory objectives, exist at 10 CFR part 784. Pursuant to that section, DOE may waive the Government's patent rights in appropriate situations at the time of contracting to encourage industrial participation, foster commercial utilization and competition, and make the benefits of DOE activities widely available to the public. In addition to considering the waiver of patent rights at the time of contracting, DOE will also consider the incentive of a waiver of patent rights upon the reporting of an identified invention when requested by such entities or by the employee-inventor with the permission of the contractor. These requests can be made whether or not a waiver request was made at the time of contracting. Waivers for identified inventions will be granted where it is determined that the patent waiver will be a meaningful incentive to achieving the development and ultimate commercial utilization of inventions. Where DOE grants a waiver of the Government's patent rights, either at the time of contracting or after an invention is made, certain minimum rights and obligations will be required by DOE to protect the public interest.

(c) Another major DOE mission is to manage the nation's nuclear weapons and other classified programs, where research and development procurements are directed toward processes and equipment not available to the public. To accomplish DOE programs for bringing private industry into these and other special programs to the maximum extent permitted by national security and policy considerations, it is desirable that the technology developed in these programs be made available on a selected basis for use in the particular fields of interest and under controlled conditions by properly cleared industrial and scientific research institutions. To ensure such availability and control, the grant of waivers in these programs may necessarily be more limited, either by the imposition of field of use restrictions or national security measures, than in other DOE programs.

[60 FR 11815, Mar. 2, 1995, as amended at 63 FR 10505, Mar. 4, 1998]

927.302 Policy.

(a) Except for contracts with organizations that are beneficiaries of Public Law 96–517, the United States, as represented by DOE, shall normally acquire title in and to any invention or discovery conceived or first actually reduced to practice in the course of or under the contract, allowing the contractor to retain a nonexclusive, revocable, paid-up license in the invention and the right to request permission to file an application for a patent and retain title to any ensuing patent in any foreign country in which DOE does not elect to secure patent rights. DOE may approve the request if it determines that such approval would be in the national interest. The contractor's nonexclusive license may be revoked or modified by DOE only to the extent necessary to achieve expeditious practical application of the invention pursuant to any application for and the grant of an exclusive license in the invention to another party.

(b) In contracts having as a purpose the conduct of research, development, or demonstration work and in certain other contracts, DOE may need to require those contractors that are not the beneficiaries of Public Law 96–517 to license background patents to ensure reasonable public availability and accessibility necessary to practice the subject of the contract in the fields of technology specifically contemplated in the contract effort. That need may arise where the contractor is not attempting to take the technology resulting from the contract to the commercial marketplace, or is not meeting market demands. The need for background patent rights and the particular rights that should be obtained for either the Government or the public will depend upon the type, purpose, and scope of the contract effort, impact on the DOE program, and the cost to the Government of obtaining such rights.

(c) Provisions to deal specifically with DOE background patent rights are contained in paragraph (k) of the clause at 952.227–13. That paragraph may be modified with the concurrence of Patent Counsel in order to reflect the equities of the parties in particular contracting situations. Paragraph (k) should normally be deleted for contracts with an estimated cost and fee or price of $250,000 or less and may not be appropriate for certain types of study contracts; for planning contracts; for contracts with educational institutions; for contracts for specialized equipment for in-house Government use, not involving use by the public; and for contracts the work products of which will not be the subject of future procurements by the Government or its contractors.

(d) The Assistant General Counsel for Technology Transfer and Intellectual Property shall:

(1) Make the determination that whether reported inventions are subject inventions under the patent rights clause of the contract;

(2) Determine whether and where patent protection will be obtained on inventions;

(3) Represent DOE before domestic and foreign patent offices;

(4) Accept assignments and instruments confirmatory of the Government's rights to inventions; and

(5) Represent DOE in patent, technical data, and copyright matters not specifically reserved to the Head of the Agency or designee.

[60 FR 11816, Mar. 2, 1995]

927.303 Contract clauses.

(a) In solicitations and contracts for experimental, research, developmental, or demonstration work (but see (FAR) 48 CFR 27.304–3 regarding contracts for construction work or architect-engineer services), the contracting officer shall include the clause:

(1) At 952.227–13, Patent Rights Acquisition by the Government, in all such contracts other than those described in paragraphs (a)(2) and (a)(3) of this section;

(2) At 952.227–11, Patent Rights by the Contractor (Short Form), in contracts in which the contractor is a domestic small business or nonprofit organization as defined at (FAR) 48 CFR 27.301, except where the work of the contract is subject to an Exceptional Circumstances Determination by DOE; and

(3) At 970.5227–10, 970.5227–11, or 970.5227–12, as discussed in 970.27, Patent, Data, and Copyrights, in contracts for the management and operation of

DOE laboratories and production facilities.

(b) DOE shall not use the clause at (FAR) 48 CFR 52.227–12 except in situations where patent counsel grants a request for advance waiver pursuant to 10 CFR part 784 and supplies the contracting officer with that clause with appropriate modifications. Otherwise, in instances in which DOE grants an advance waiver or waives its rights in an identified invention pursuant to 10 CFR part 784, contracting officers shall consult with patent counsel for the appropriate clause.

(c) Any contract that has as a purpose the design, construction, operation, or management integration of a collection of contracts for the same purpose, of a Government-owned research, development, demonstration or production facility must accord the Government certain rights with respect to further use of the facility by or on behalf of the Government upon termination of the contract. The patent rights clause in such contracts must include the following facilities license paragraph:

[Insert appropriate paragraph no.] *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, title to, any rights or patents herein licensed.

(End of paragraph)

[60 FR 11816, Mar. 2, 1995, as amended at 63 FR 10505, Mar. 4, 1998; 65 FR 68935, Nov. 15, 2000; 65 FR 81007, Dec. 22, 2000]

927.304 Procedures.

Where the contract contains the clause at 952.227–11 and the contractor does not elect to retain title to a subject invention, DOE may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor subject to the provisions of 35 U.S.C. 200 *et seq.* This statement is in lieu of (FAR) 48 CFR 27.304–1(c).

[60 FR 11816, Mar. 2, 1995]

927.370 [Reserved]

Subpart 927.4—Technical Data and Copyrights

927.400 Scope of subpart.

This subpart sets forth DOE's policy, procedures, and instructions for contract clauses with respect to the acquisition and use of technical data and copyrights in contracts or subcontracts entered into, with or for the benefit of the Government.

927.402 Acquisition and use of technical data.

927.402–1 General.

(a) The provisions herein pertain to research, development, demonstration and supply contracts. Special considerations for contracts for the operation, design, or construction of Government-owned facilities are covered by subpart 970.27. Under DOE's broad charter to perform research, development, and demonstration work, in both nuclear and nonnuclear fields, and to meet the objectives stated in 927.402–2, DOE has extensive needs for technical data. The satisfaction of these needs and the achievement of DOE's objectives through a sound data policy are found in the balancing of the needs and equities of the Government, its contractors, and the general public.

(b) It is important to keep a clear distinction between contract requirements for the delivery of technical data and rights in technical data. The legal rights which the Government acquires in technical data in DOE contracts, other than management and operating contracts (see 48 CFR 970.2704)

and other contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, are set forth in Rights in Data—General clause at 48 CFR 52.227–14 as modified in accordance with 927.409 of this subpart. In those contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, after consultation with Patent Counsel the clause at 48 CFR 970.5227–1 shall be used. However, those clauses do not obtain for the Government delivery of any data whatsoever. Rather, known requirements for the technical data to be delivered by the contractor shall be set forth as part of the contract. The Additional Technical Data Requirements clause at 48 CFR 52.227–16 may be used along with the Rights in Data—General clause to enable the contracting officer to require the contractor to furnish additional technical data, the requirement for which was not known at the time of contracting. There is, however, a built-in limitation on the kind of technical data which a contractor may be required to deliver under either the contract or the Additional Technical Data Requirements clause. This limitation is found in the withholding provision of paragraph (g) of the Rights in Data—General clause at 48 CFR 52.227–14, as amended at 48 CFR 927.409(a), which provides that the Contractor need not furnish limited rights data or restricted computer software. Unless Alternate II or III to the Rights in Data—General clause is used, it is specifically intended that the contractor may withhold limited rights data or restricted computer software even though a requirement for technical data specified in the contract or called for delivery pursuant to the Additional Technical Data Requirements clause would otherwise require the delivery of such data.

(c) In contracts involving access to certain categories of DOE-owned restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. Accordingly, in contracts where access to such restricted data is to be provided to contractors, the following parenthetical phrase shall be inserted after ''contract data'' in paragraph (b)(2)(ii) of the clause at 952.227–75, after ''technical data'' in paragraph (b)(2) of the clause at 952.227–77, or after ''technical data'' in paragraph (b)(2)(ii) of the clause at 952.227–78 as appropriate: ''(except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology).'' In addition, there are other types of contract situations (e.g., no cost contracts for studies or evaluation) wherein the contractor is given access to restricted data. In such contract situations, limitations on the use of such data may be appropriate.

[49 FR 12004, Mar. 28, 1984, as amended at 63 FR 10505, Mar. 4, 1998; 65 FR 81007, Dec. 22, 2000]

927.402–2 Policy.

The technical data policy is directed toward achieving the following objectives:

(a) Making the benefits of the energy research, development and demonstration programs of DOE widely available to the public in the shortest practicable time;

(b) Promoting the commercial utilization of the technology developed under DOE programs;

(c) Encouraging participation by private persons in DOE energy research, development, and demonstration programs; and

(d) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

927.403 Negotiations and deviations.

Contracting officers shall contact Patent Counsel assisting their contracting activity or the Assistant General Counsel for Technology Transfer and Intellectual Property for assistance in selecting, negotiating, or approving appropriate data and copyright clauses in accordance with the procedures set forth in this subpart and 48 CFR part 27.4. In particular, contracting officers shall seek the prompt

and timely advice of Patent Counsel regarding any situation not in conformance with this subpart and prescribed clauses, including the inclusion or modification of alternate paragraphs of the Rights in Data clause at 48 CFR 52.227–14, as amended at 48 CFR 927.409(a), the exclusion of specific items from said clause, the exclusion of the Additional Technical Data Requirements clause at 48 CFR 52.227–16, and the inclusion of any special provisions in a particular contract.

[63 FR 10505, Mar. 4, 1998]

927.404 Rights in technical data in subcontracts. (DOE coverage—paragraphs (g), (k), (l), and (m))

(g)(4) Contractors are required by paragraph (d)(3) of the clause at FAR 52.227–14, as modified pursuant to 48 CFR 927.409(a)(1), to acquire permission from DOE to assert copyright in any computer software first produced in the performance of the contract. This requirement reflects DOE's established software distribution program, recognized at FAR 27.404(g)(2), and the Department's statutory dissemination obligations. When a contractor requests permission to assert copyright in accordance with paragraph (d)(3) of the Rights in Data—General clause as prescribed for use at 48 CFR 927.409(a)(1), Patent Counsel shall predicate its decision on the considerations reflected in paragraph (e) of the clause at 48 CFR 970.5227–2 Rights in Data—Technology Transfer.

(k) *Subcontracts.* (1)(i) It is the responsibility of prime contractors and higher tier subcontractors, in meeting their obligations with respect to contract data, to obtain from their subcontractor the rights in, access to, and delivery of such data on behalf of the Government. Accordingly, subject to the policy set forth in this subpart, and subject to the approval of the contracting officer, where required, selection of appropriate technical data provisions for subcontracts is the responsibility of the prime contractors or higher-tier subcontractors. In many, but not all instances, use of the Rights in Technical Data clause of FAR 52.227–14, as modified pursuant to 48 CFR 927.409(a)(1), in a subcontract will provide for sufficient Government rights in and access to technical data. The inspection rights afforded in Alternate V of that clause normally should be obtained only in first-tier subcontracts having as a purpose the conduct of research, development, or demonstration work or the furnishing of supplies for which there are substantial technical data requirements as reflected in the prime contract.

(ii) If a subcontractor refuses to accept technical data provisions affording rights in and access to technical data on behalf of the Government, the contractor shall so inform the contracting officer in writing and not proceed with the award of the subcontract without written authorization of the contracting officer.

(iii) In prime contracts (or higher-tier subcontracts) which contain the Additional Technical Data Requirements clause at FAR 52.227–16, it is the further responsibility of the contractor (or higher-tier subcontractor) to determine whether inclusion of such clause in a subcontract is required to satisfy technical data requirements of the prime contract (or higher-tier subcontract).

(2) As is the case for DOE in its determination of technical data requirements, the Additional Technical Data Requirements clause at FAR 52.227–16 should not be used at any subcontracting tier where the technical data requirements are fully known. Normally, the clause will be used only in subcontracts having as a purpose the conduct of research, development, or demonstration work. Prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the subcontractor's limited rights data or restricted computer software for their private use, and they shall not acquire rights to limited rights data or restricted computer software on behalf of the Government for standard commercial items without the prior approval of Patent Counsel.

(l) *Contractor licensing.* In many contracting situations the achievement of DOE's objectives would be frustrated if the Government, at the time of contracting, did not obtain on behalf of responsible third parties and itself limited license rights in and to limited

rights data or restricted computer software or both necessary for the practice of subject inventions or data first produced or delivered in the performance of the contract. Where the purpose of the contract is research, development, or demonstration, contracting officers should consult with program officials and Patent Counsel to consider whether such rights should be acquired. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of the small business or non-profit organization have been authorized in accordance with 35 U.S.C. 202(f). In all cases when the contractor has agreed to include a provision assuring commercial availability of background patents, consideration should be given to securing for the Government and responsible third parties at reasonable royalties and under appropriate restrictions, co-extensive license rights for data which are limited rights data and restricted computer software. When such license rights are deemed necessary, the Rights in Data-General clause at FAR 52.227–14 should be supplemented by the addition of Alternate VI as provided at 48 CFR 952.227–14. Alternate VI will normally be sufficient to cover limited rights data and restricted computer software for items and processes that were used in the contract and are necessary in order to insure widespread commercial use or practical utilization of a subject of the contract. The expression ''subject of the contract'' is intended to limit the licensing required in Alternate VI to the fields of technology specifically contemplated in the contract effort and may be replaced by a more specific statement of the fields of technology intended to be covered in the manner described in the patent clause at 48 CFR 952.227–13 pertaining to ''Background Patents.'' Where, however, limited rights data and restricted computer software cover the main purpose or basic technology of the research, development, or demonstration effort of the contract, rather than subcomponents, products, or processes which are ancillary to the contract effort, the limitations set forth in subparagraphs (k)(1) through (k)(4) of Alternate VI of 48 CFR 952.227–14 should be modified or deleted. Paragraph (k) of 48 CFR 952.227–14 further provides that limited rights data or restricted computer software may be specified in the contract as being excluded from or not subject to the licensing requirements thereof. This exclusion can be implemented by limiting the applicability of the provisions of paragraph (k) of 48 CFR 952.227–14 to only those classes or categories of limited rights data and restricted computer software determined as being essential for licensing. Although contractor licensing may be required under paragraph (k) of 48 CFR 952.227–14, the final resolution of questions regarding the scope of such licenses and the terms thereof, including provisions for confidentiality, and reasonable royalties, is then left to the negotiation of the parties.

(m) *Access to restricted data.* In contracts involving access to certain categories of DOE-owned Category C–24 restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. Accordingly, in contracts where access to such restricted data is to be provided to contractors, Alternate VII shall be incorporated into the rights in technical data clause of the contract. In addition, in any other types of contracting situations in which the contractor may be given access to restricted data, appropriate limitations on the use of such data must be specified.

[63 FR 10505, Mar. 4, 1998, as amended at 65 FR 81007, Dec. 22, 2000]

927.404–70 Statutory programs.

Occasionally, Congress enacts legislation that authorizes or requires the Department to protect from public disclosure specific data first produced in the performance of the contract. Examples of such programs are ''the Metals Initiative'' and section 3001(d) of the Energy Policy Act. In such cases DOE Patent Counsel is responsible for providing the appropriate contractual provisions for protecting the data in accordance with the statute. Generally, such clauses will be based upon the Rights in Data-General clause prescribed for use at 48 CFR 927.409(a) with

appropriate modifications to define and protect the ''protected data'' in accordance with the applicable statute. When contracts under such statutes are to be awarded, contracting officers must acquire from Patent Counsel the appropriate contractual provisions. Additionally, the contracting officer must consult with DOE program personnel and Patent Counsel to identify data first produced in the performance of the contract that will be recognized by the parties as protected data and what data will be made available to the public notwithstanding the statutory authority to withhold the data from public dissemination.

[63 FR 10506, Mar. 4, 1998]

927.408 Cosponsored research and development activities.

Because of the Department of Energy's statutory duties to disseminate data first produced under its contracts for research, development, and demonstration, the provisions of FAR 27.408 do not apply to cosponsored or cost shared contracts.

[63 FR 10506, Mar. 4, 1998]

927.409 Solicitation provisions and contract clauses. (DOE coverage-paragraphs (a), (h), (s), and (t))

(a)(1) The contracting officer shall insert the clause at FAR 52.227–14, Rights in Data-General, substituting the following paragraph (a) and including the following paragraph (d)(3) and Alternate V in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract; except contracting officers are authorized to use Alternate IV rather than paragraph (d)(3) in contracts for basic or applied research with educational institutions except where software is specified for delivery or except where other special circumstances exist:

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. For the purposes of this clause, the term does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Form, fit, and function data,* as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

(5) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (g)(2) of this section if included in this clause.

(6) *Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of subparagraph (g)(3) of this section if included in this clause.

(7) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(8) *Unlimited rights,* as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform

publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(d)(3) The Contractor agrees not to assert copyright in computer software first produced in the performance of this contract without prior written permission of the DOE Patent Counsel assisting the contracting activity. When such permission is granted, the Patent Counsel shall specify appropriate terms, conditions, and submission requirements to assure utilization, dissemination, and commercialization of the data. The Contractor, when requested, shall promptly deliver to Patent Counsel a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled.

(2) However, rights in data in these specific situations will be treated as described, where the contract is—

(i) For the production of special works of the type set forth in FAR 27.405(a), but the clause at FAR 52.227–14, Rights in Data-General, shall be included in the contract and made applicable to data other than special works, as appropriate (See paragraph (i) of FAR 27.409);

(ii) For the acquisition of existing data works, as described in FAR 27.405(b) (See paragraph (j) of FAR 27.409);

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case agencies may prescribe different clauses (See paragraph (n) of FAR 27.409);

(iv) For architect-engineer services or construction work, in which case contracting officers shall utilize the clause at FAR 52.227–17, Rights in Data-Special Works;

(v) A Small Business Innovation Research contract (See paragraph (l) of FAR 27.409);

(vi) For management and operation of a DOE facility (see 48 CFR 970.2704) or other contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, after consultation with Patent Counsel (See 927.402–1(b)); or

(vii) Awarded pursuant to a statute expressly providing authority for the protection of data first produced thereunder from disclosure or dissemination. (See 927.404–70).

(h) The contracting officer shall insert the clause at FAR 52.227–16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. See FAR 27.406(b). This clause may also be used in other contracts when considered appropriate.

* * * * *

(s) Contracting officers shall incorporate the solicitation provision at FAR 52.227–23, Rights to Proposal Data (Technical), in all requests for proposals.

(t) Contracting officers shall include the solicitation provision at 952.227–84 in all solicitations involving research, developmental, or demonstration work.

[63 FR 10506, Mar. 4, 1998, as amended at 65 FR 81007, Dec. 22, 2000]

Subpart 927.70 [Reserved]

PART 928—BONDS AND INSURANCE

Subpart 928.1—Bonds

Sec.
928.101–1 Policy on use.
928.103–3 Payment bonds.
928.103–70 Review of performance and payment bonds for other than construction.

Subpart 928.3—Insurance

928.301 Policy.
928.370 Service-type insurance policies.

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

SOURCE: 49 FR 12010, Mar. 28, 1984, unless otherwise noted.

Subpart 928.1—Bonds

SOURCE: 61 FR 41708, Aug. 9, 1996, unless otherwise noted.

928.101–1 Policy on use.

In addition to the restriction on use of bid guarantees in FAR 28.101–1(a), a bid guarantee may be required only for

fixed price or unit price contracts entered into as a result of sealed bidding. They may not be required for negotiated contracts.

928.103–3 Payment bonds.

A determination that is in the best interest of the Government to require payment bonds in connection with other than construction contracts may be made by the contracting officer on individual acquisitions.

928.103–70 Review of performance and payment bonds for other than construction.

A performance or payment bond, other than an annual bond, shall not antedate the contract to which it pertains.

Subpart 928.3—Insurance

928.301 Policy.

The DOE policies and procedures for indemnification of DOE contractors are set forth in FAR Part 50 and 950.

928.370 Service-type insurance policies.

(a) Service-type insurance policies are cost-reimbursement type contracts or subcontracts in which the insurer provides claim and loss adjustment services on a cost reimbursement basis, which satisfies state and Federal insurance requirements.

(b) Service-type insurance policies may be used with contracting officer approval, when one or more of the following conditions are present:

(1) Pure risk commercial insurance is not available or, if available, cost is not considered reasonable;

(2) Inherent risks in the contract are new and a part of the process of commercialization;

(3) The service-type insurance is needed to implement jointly funded projects; or

(4) The service-type insurance arrangement is considered in the Government's best interest.

PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 931.1—Applicability

Sec.

931.102 Fixed-price contracts.

Subpart 931.2—Contracts With Commercial Organizations

931.205–18 Independent research and development (IR&D) and bid and proposal (B&P) costs.
931.205–19 Insurance and Indemnification. (Department coverage-paragraph (h)).
931.205–32 Precontract costs.
931.205–33 Professional and consultant service costs. (Department coverage-paragraph (g)).
931.205–47 Costs related to legal and other proceedings.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

Subpart 931.1—Applicability

931.102 Fixed-price contracts.

The intent of the first sentence of FAR 31.102 is that applicable subparts of FAR Part 31 shall be used by the Government in (a) pricing fixed-price prime contracts and modifications, (b) evaluating the reasonableness of a prime contractor's (or prospective prime contractor's) proposed subcontract (or subcontract modification) prices, and (c) determining the allowability of contractor payments to subcontractors in accordance with the provisions of FAR 31.204(b).

[49 FR 12011, Mar. 28, 1984]

Subpart 931.2—Contracts With Commercial Organizations

931.205–18 Independent research and development (IR&D) and bid and proposal (B&P) costs.

(c)(2) IR&D costs are recoverable under DOE contracts to the extent they are reasonable, allocable, not otherwise unallowable, and have potential benefit or relationship to the DOE program. The term ''DOE program'' encompasses the DOE total mission and its objectives. B&P costs are recoverable under DOE contracts to the extent

they are reasonable, allocable, and not otherwise unallowable.

[60 FR 30004, June 7, 1995]

931.205–19 Insurance and Indemnification. (Department coverage-paragraph (h)).

(h) The contracting officer shall insert the clause at 48 CFR 952.231–71 in non-management and operating cost reimbursement contracts involving work performed at facilities owned or leased by the Department exceeding $100,000,000.

[66 FR 4627, Jan. 18, 2001, as amended at 67 FR 14871, Mar. 28, 2002]

931.205–32 Precontract costs.

(a) To the extent practical, known expenditures of precontract costs under DOE contracts should be governed by establishing advance understandings as contemplated by FAR 31.109. Contracts that include authorized precontract costs shall include the ''Date of Incurrence of Cost'' clause specified at 952.231–70.

(b) The following limitations apply to establishment of advance understandings relative to precontract costs:

(1) Precontract cost authorizations shall not be used to cover a period in excess of 15 days, unless a longer period is approved by the HCA based upon a written finding that such an allowance is reasonable, and shall not be extended or renewed. A copy of the findings shall be forwarded to the Procurement Executive at the time of approval. If prolonged coverage is necessary, a letter contract shall be issued.

(2) All precontract cost authorizations shall be reviewed and approved at a management level above the contracting officer.

(3) Retroactive precontract cost authorization and the predating of contractual agreements shall not be used.

(4) Precontract cost authorizations shall not authorize the delivery or furnishing of any goods or services from a contractor until after the contract is executed.

[49 FR 12011, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984]

931.205–33 Professional and consultant service costs. (Department coverage-paragraph (g)).

(g)(1) Reasonable litigation and other legal expenses are allowable when incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements, if not otherwise made unallowable by law or provisions of the contract.

(2)(A) Cost reimbursement contracts involving work performed at facilities owned or leased by the Department for an amount exceeding $100,000,000 are covered by this cost principle and 10 CFR part 719.

(B) This cost principle and 10 CFR part 719 are applicable to legal counsel retained by the Department itself for litigation and other legal services where the legal costs over the life of the matter for which counsel has been retained are expected to exceed $100,000.

(3) Contractors described in paragraph (g)(2)(A) of this section are required to submit a Legal Management Plan within 60 days of execution of a contract.

[66 FR 4627, Jan. 18, 2001]

931.205–47 Costs related to legal and other proceedings. (DOE coverage-paragraph (h)).

(h) Costs Associated with Whistleblower Actions.

(1) Definitions for purposes of this paragraph (h):

Covered contractors and subcontractors means those contractors and subcontractors with contracts exceeding $5,000,000.

Employee whistleblower action means any action filed by an employee in Federal or state court for redress of a retaliatory act by a contractor and any administrative procedure initiated by an employee under 29 CFR Part 24, 48 CFR subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239.

Retaliatory act means a discharge, demotion, reduction in pay, coercion, restraint, threat, intimidation or other similar negative action taken against an employee by a contractor as a result of an employee's activity protected as a whistleblower activity by a Federal or state statute or regulation.

Settlement and award costs means defense costs and costs arising from judicial orders, negotiated agreements, arbitration, or an order from a Federal agency or board and includes compensatory damages, underpayment for work performed, and reimbursement for a complainant employee's legal counsel.

(2) For costs associated with employee whistleblower actions where a retaliatory act is alleged against a covered contractor or subcontractor, the contracting officer:

(i) May authorize reimbursement of costs on a provisional basis, in appropriate cases;

(ii) Must consult with the Office of General Counsel whistleblower costs point of contact, who will consult with other Headquarters points of contact as appropriate, before making a final allowability determination; and

(iii) Must determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action.

(3) Covered contractors and subcontractors must segregate legal costs, including costs of in-house counsel, incurred in the defense of an employee whistleblower action so that the costs are separately identifiable.

(4) If a contracting officer provisionally disallows costs associated with an employee whistleblower action for a covered contractor or subcontractor, funds advanced by the Department may not be used to finance costs connected with the defense, settlement and award of an employee whistleblower action.

(5) Contractor defense, settlement and award costs incurred in connection with the defense of suits brought by employees under section 2 of the Major Fraud Act of 1988 are excluded from coverage of this section.

[65 FR 62301, Oct. 18, 2000]

PART 932—CONTRACT FINANCING

Sec.

932.006–4 Procedures.

Subpart 932.1—General

932.102 Description of contract financing methods.

Subpart 932.3—Loan Guarantees for Defense Production

932.304–2 Certificate of eligibility.

Subpart 932.4—Advance Payments for Non-Commercial Items

932.402 General.
932.407 Interest.

Subpart 932.5—Progress Payments Based on Costs

932.501–2 Unusual progress payments.

Subpart 932.6—Contract Debts

932.605 Responsibilities and cooperation among Government officials.

Subpart 932.8—Assignment of Claims

932.803 Policies.

Subpart 932.9—Prompt Payment

932.970 Implementing DOE policies and procedures.

Subpart 932.70—DOE Loan Guarantee Authority

932.7002 Authority.
932.7003 Policies.
932.7004 Procedures.
932.7004–1 Guaranteed loans for civilian programs.
932.7004–2 Criteria.
932.7004–3 Eligibility.

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

SOURCE: 49 FR 12011, Mar. 28, 1984, unless otherwise noted.

932.006–4 Procedures.

(a) The remedy coordination official shall follow the procedures identified in FAR 32.006–4.

(b) [Reserved]

[63 FR 5273, Feb. 2, 1998]

Subpart 932.1—General

932.102 Description of contract financing methods. (DOE coverage—paragraph (e))

(e)(2) Progress payments based on a percentage or stage of completion may be authorized by the Head of the Contracting Activity when a determination is made that progress payments based on costs cannot be practically employed and that there are adequate safeguards provided for the administration of progress payments based on a percentage or stage of completion.

[61 FR 41708, Aug. 9, 1996]

Subpart 932.3—Loan Guarantees for Defense Production

932.304–2 Certificate of eligibility.

(h) Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Bank only by the Secretary or designee specified for that purpose.

Subpart 932.4—Advance Payments for Non-Commercial Items

932.402 General.

(e)(1) The Head of the Contracting Activity or designee shall have the responsibility and authority for making findings and determinations, and for approval of contract terms concerning advance payments.

(2) Before authorizing any advance payment arrangements, the approving official shall obtain the advice, and other inputs of the servicing finance office.

932.407 Interest.

(d)(4) Advance payments may be made without interest under cost-reimbursement contracts for construction or engineering services.

Subpart 932.5—Progress Payments Based on Costs

932.501–2 Unusual progress payments.

(a)(3) The Head of the Contracting Activity shall forward all requests which are considered favorable, with supporting information, to the Chief Financial Officer, Headquarters, will approve or deny the request.

(d) Requests for unusual progress payments will not be considered as a handicap or adverse factor in the award of a contract; provided the bid or proposal is not conditioned on approval of such request.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

Subpart 932.6—Contract Debts

932.605 Responsibilities and cooperation among Government officials.

(b) The DOE contracting officer has primary responsibility for determining the amount of contract debt and notifying the cognizant finance office of such debt due the Government. The servicing DOE finance office making payments under the contract has primary responsibility for debt collection.

Subpart 932.8—Assignment of Claims

932.803 Policies.

(d) In the case of prime contracts, when it has been determined that the financing of contracts will be facilitated in the interest of DOE programs, it is the policy of DOE that such contracts provide, or be amended without consideration (see Assignment of Claims Act of 1940) to provide, in conformance with FAR 32.804, that payments to be made to an assignee shall not be subject to reduction or setoff. In the case of subcontracts, when loans are made for the purpose of financing performance of subcontracts under DOE prime contracts, financing institutions or the Government as guarantor in those instances in which such loans are guaranteed should not be required to incur risks of loss by reason of possible diversion of assigned subcontracts proceeds for payment of other claims of the prime contractor against the borrower, otherwise unrelated to the assigned subcontracts. The Head of the Contracting Activity shall require the adoption of these policies and practices by DOE prime contractors with respect to DOE subcontract

work. The Head of the Contracting Activity should inform the Chief Financial Officer, Headquarters of each DOE contractor who is unwilling to adopt policies consistent with this paragraph and the reasons given in support of the contractor's position.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

Subpart 932.9—Prompt Payment

932.970 Implementing DOE policies and procedures.

(a) *Invoice payments*—(1) *Contract Settlement Date.* For purposes of determining any interest penalties under cost-type contracts, the effective date of contract settlement shall be the effective date of the final contract modification issued to acknowledge contract settlement and to close out the contract.

(2) *Constructive acceptance periods.* Where the contracting officer determines, in writing, on a case-by-case basis, that it is not reasonable or feasible for DOE to perform the acceptance or approval function within the standard period, the contracting officer should specify a longer constructive acceptance or approval period, as appropriate. Considerations include, but are not limited to, the nature of supplies or services involved, geographical site location, inspection and testing requirements, shipping and acceptance terms, and available DOE resources.

(b) *Contract financing payments.* Contracting officers may specify payment due dates that are less than the standard 30 days when a determination is made, in writing, on a case-by-case basis, that a shorter contract financing payment cycle will be required to finance contract work. In such cases, the contracting officer should coordinate with the finance and program officials that will be involved in the payment process to ensure that the contract payment terms to be specified in solicitations and resulting contract awards can be reasonably met. Consideration should be given to geographical separation, workload, contractor ability to submit a proper request, and other factors that could affect timing of payment. However, payment due dates that are less than 7 days for progress payments or less than 14 days for interim payments on cost-type contracts are not authorized.

[61 FR 41708, Aug. 9, 1996]

Subpart 932.70—DOE Loan Guarantee Authority

932.7002 Authority.

Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Board only by the Secretary, or designee specified for that purpose, and only when made pursuant to enabling legislation or other authority; e.g., by executive order or regulation.

932.7003 Policies.

The following policies governing the exercise of its loan guarantee authority have been established by DOE:

(a) The use of the loan guarantee authority is not restricted to contracts or subcontracts of any particular type or class. Each case is to be evaluated on its own merits and under the particular circumstances applicable thereto.

(b) The fact that a contract has been awarded as a result of competitive bidding should not, of itself, render the loan ineligible for guarantee by DOE if the contractor is financially responsible and its need for working capital is the result of the impact of a defense program or any other DOE program for which guaranteed loans are authorized.

(c) The guarantee authority should, in general, not be used in connection with loans to contractors required to furnish performance bonds, except in those cases in which the time likely to be required for the surety or DOE to take over in the event of default will result in delays which cannot be tolerated by the particular program concerned. When performance bonds have been furnished, the surety shall be required to subordinate its rights in favor of the guaranteed loan.

(d) The criterion that the materials or services to be provided cannot readily be acquired from alternative sources does not require the finding that the materials or services are absolutely unobtainable elsewhere. The criterion should be so applied as to permit guarantees of loans when, although the

materials or services can be obtained elsewhere, such factors as the urgency of supply schedules, technical capacity of the contractor, comparative prices, and time and expense involved in reissuing the contract, including termination payment, establish that it is to the Government's advantage not to resort to alternative sources merely because the contractor or subcontractor may require a guaranteed loan.

(e) If it is known at the time the contract is to be awarded that the low offeror who is technically qualified and competent to furnish the required materials and services will require a guaranteed loan, the contracting officer should obtain appropriate advice and in reaching a decision should consider at least the following:

(1) The savings to be realized by awarding the contract to the low offeror;

(2) The risk to the Government in guaranteeing a loan; and

(3) The likelihood, if award is made to the second low offeror, of that offeror's applying for a guaranteed loan at a later date.

Extreme care should be exercised in rejecting a low bid or proposal simply because the low offeror requires a guaranteed loan.

(f) The amount of the loan should bear reasonable relationship to such factors as the value and terms of the contract, the probable investment required to be made by the contractor in payrolls and inventories, the frequency with which contract payments are to be made, and the borrower's current working capital position.

(g) Borrowings for working capital purposes under guaranteed loans shall be limited to the amount necessary to perform the contract for which the loan is sought. In order that the contractor will also use its own funds in the performance of the contracts, amounts outstanding under the loan or line-of-credit shall be limited to an amount not to exceed 90 percent of the borrower's investment in its contracts, regardless of the total amount of the loan or line of credit authorized. The borrower's investment includes all items for which the borrower would be entitled to payment on performance or termination of contracts, but does not include any items for which no work has been done nor expenditures made.

(h) Unless there are exceptional circumstances, the loan should mature not later than 30 days after the estimated date of final payment under the contract.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

932.7004 Procedures.

932.7004–1 Guaranteed loans for civilian programs.

The procedures for authorizing a guaranteed loan under legislation other than section 301 of the Defense Production Act of 1950 (50 U.S.C. App. 2091) shall be essentially the same as those set forth in FAR 32.304, Procedures, FAR 32.305, Loan Guarantees for Terminated Contracts, and FAR 32.306 Loan Guarantee for Subcontacts; except that any contrary provisions required by enabling legislation authorizing the loan shall govern.

932.7004–2 Criteria.

(a) The materials or services to be furnished by the contractor are necessary to the Government interest.

(b) The materials or services cannot as a practical matter be obtained from alternate sources without delay or impeding the Government's interest, except that no small business concern shall be held ineligible for the issuance of such guarantee by reason of alternative sources of supply.

(c) The contractor has demonstrated its inability to obtain the necessary financing in conventional credit channels without the guarantee.

(d) There is reasonable assurance that the loan can be repaid.

(e) The contractor is competent to perform the contract.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

932.7004–3 Eligibility.

The applicant's eligibility for a guaranteed loan will be based on:

(a) Contracting officer determinations and findings regarding items (a), (b) and (e) in 932.7004–2 as incorporated in a Certificate of Eligibility (FAR 32.304–2); and

(b) The Chief Financial Officer's determination for items (c) and (d) in 932.7004–2 based on information contained in the application, the Federal Reserve Bank's report, and information furnished by the contracting activity concerned.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

PART 933—PROTESTS, DISPUTES, AND APPEALS

Subpart 933.1—Protests

Sec.
933.102 General.
933.103 Protests to the agency.
933.104 Protests to GAO.
933.106 Solicitation provisions.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 51 FR 31336, Sept. 3, 1986, unless otherwise noted.

Subpart 933.1—Protests

SOURCE: 61 FR 41708, Aug. 9, 1996, unless otherwise noted.

933.102 General. (DOE coverage—paragraph (b))

(b) The Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, provide corrective relief in response to a protest in accordance with 48 CFR 33.102(b).

[63 FR 53758, Oct. 16, 1997]

933.103 Protests to the agency. (DOE coverage—paragraphs (f), (i), (j), and (k))

(f) If FAR 33.103(f) requires that award be withheld or performance be suspended or the awarded contract be terminated pending resolution of an agency protest, authority to award and/or continue performance of the protested contract may be requested by the Head of the Contracting Activity (HCA), concurred in by counsel, and approved by the Procurement Executive.

(i)(1) Protests filed with the contracting officer before or after award shall be decided by the Head of the Contracting Activity except for the following cases, which shall be decided by the Procurement Executive:

(i) The protester requests that the protest be decided by the Procurement Executive.

(ii) The HCA is the contracting officer of record at the time the protest is filed, having signed either the solicitation where the award has not been made, or the contract, where the award or nomination of the apparent successful offeror has been made.

(iii) The HCA concludes that one or more of the issues raised in the protest have the potential for significant impact on DOE acquisition policy.

(2) Upon receipt of a protest requesting a decision by the Procurement Executive, the contracting activity shall immediately provide a copy of the protest to the Office of Contract Management.

(j) The Department of Energy encourages direct negotiations between an offeror and the contracting officer in an attempt to resolve protests. In those situations where the parties are not able to achieve resolution, the Department favors the use of alternative dispute resolution (ADR) techniques to resolve protests. A protest requesting a decision at the Headquarters level shall state whether the protester is willing to utilize ADR techniques such as mediation or nonbinding evaluation of the protest by a neutral. Upon receipt of a protest requesting a decision at the Headquarters level, the Office of Contract Management will explore with the protester whether the use of ADR techniques would be appropriate to resolve the protest. Both parties must agree that the use of such techniques is appropriate. If the parties do not mutually agree to utilize ADR to resolve the protest, the protest will be processed in accordance with the procedures set forth in paragraph (k).

(k) Upon receipt of a protest lodged with the Department, the contracting officer shall prepare a report similar to that discussed in FAR 33.104(a)(3)(iii). In the case of a protest filed at the Headquarters level, the report shall be forwarded to the Office of Contract Management within 21 calendar days of being notified of such a protest with a proposed response to the protest. The Procurement Executive (for protests at

the Headquarters level or those specific HCA protests cited in paragraph (i)(1) of this section) or an HCA (for protests at the contracting activity level) will render a decision on a protest within 35 calendar days, unless a longer period of time is determined to be needed.

[51 FR 31336, Sept. 3, 1986, as amended at 67 FR 14871, Mar. 28, 2002]

933.104 Protests to GAO. (DOE coverage—paragraphs (a), (b), (c), and (g))

(a)(2) The contracting officer shall provide the notice of protest.

(b) *Protests before award.* (1) When the Department has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded until the matter is resolved, unless authorized by the Head of the Contracting Activity in accordance with FAR 33.104(b). Before the Head of the Contracting Activity authorizes the award, the required finding shall be concurred in by the DOE counsel handling the protest, endorsed by the Senior Program Official, and approved by the Procurement Executive. The finding shall address the likelihood that the protest will be sustained by the GAO.

(c) *Protests after award.* Before the Head of the Contracting Activity authorizes performance, the finding required by FAR 33.104(c)(2) shall be concurred in by the DOE counsel handling the protest, endorsed by the Senior Program Official, and approved by the Procurement Executive.

(g) *Notice to GAO.* (1) The report to the GAO regarding a decision not to comply with the GAO's recommendation, discussed at FAR 33.104(f), shall be provided by the HCA making the award, after approval of the Procurement Executive. If a DOE-wide policy issue is involved, the report shall be provided by the Procurement Executive.

(2) It is the policy of the Department to comply promptly with recommendations set forth in Comptroller General Decisions except for compelling reasons.

(3) The GAO does not have jurisdiction to consider subcontractor protests. 933.106 Solicitation provisions.

933.106 Solicitation provisions.

(a) The contracting officer shall supplement the provision at FAR 52.233–2, Service of Protest, in solicitations for other than simplified acquisitions by adding the provision at 48 CFR 952.233–2.

(b) The contracting officer shall include the provision at 48 CFR 952.233–4 in solicitations for purchases above the simplified acquisition threshold.

(c) The contracting officer shall include the provision at 48 CFR 952.233–5 in solicitations for purchases above the simplified acquisition threshold.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 935—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
935.010 Scientific and technical reports.
935.070 Research misconduct.
935.071 Contract clause.

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

SOURCE: 49 FR 12016, Mar. 28, 1984, unless otherwise noted.

935.010 Scientific and technical reports.

(c) All research and development contracts which require submission of scientific and technical reports, shall include an instruction requiring the contractor to submit all scientific and technical reports, and any other notices or reports relating thereto, to the following address: U.S. Department of Energy, Office of Scientific and Technical Information, P.O. Box 62, Oak Ridge, TN 37831. The phrase ''any other notices or reports relating thereto'' does not include notices or reports concerning administrative matters such as contract cost or financial data and information.

(d) Contractors shall be required to submit with each report a completed DOE Form 1332.15, ''DOE and Major Contractor Recommendations for Announcement and Distribution of Documents,'' except when the contract is with an educational institution, in which case the contractor shall be required to submit with each report a completed DOE Form 1332.16, ''University Contractor, Grantee and Cooperative Agreement Recommendations for Announcement and Distribution of Documents.''

[56 FR 41965, Aug. 26, 1991]

935.070 Research misconduct.

(a) *Applicability*. The DOE research misconduct policy set forth at 10 CFR part 733 addresses research misconduct by individuals who propose, perform or review research of any kind for the Department of Energy pursuant to a contract. The regulation applies regardless of where the research or other activity is conducted or by whom.

(b) *Definition*. Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or differences of opinion. A finding of research misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred, including a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

[70 FR 37015, June 28, 2005]

935.071 Contract clause.

The contracting officer must insert the clause at 952.235–71, Research Misconduct, in contracts, including management and operating contracts, that involve research.

[70 FR 37015, June 28, 2005]

PART 936—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 936.2—Special Aspects of Contracting for Construction

Sec.
936.202 Specifications.

Subpart 936.6—Architect-Engineer Services

936.602–70 DOE selection criteria.
936.609–3 Work oversight in architect-engineer contracts.

Subpart 936.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition or Removal of Improvements

936.702 Forms for use in contracting for architect-engineer services.

Subpart 936.71—Inspection and Acceptance

936.7100 Scope of subpart.
936.7101 Construction contracts.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12016, Mar. 28, 1984, unless otherwise noted.

Subpart 936.2—Special Aspects of Contracting for Construction

936.202 Specifications.

(a) To support all invitations for bids, plans and specifications will be available on request to all prospective bidders, including general contractors, subcontractors, and material and equipment suppliers. Where the cost of reproduction is $10 or more, the charge shall be a minimum of $10 and subject to a maximum of $500, depending upon the size of the project and the number of drawings and the volume of specifications involved. Where the cost of reproduction is less than $10, the contracting officer has authority to make distribution at cost of reproduction, or free of charge, as a particular situation dictates.

(b) No refund for the return of plans and specifications will be made except when the invitation is canceled. Under such circumstances, refund of payments will be made upon return of the plans and specifications in good condition to the issuing office.

(c) Plans and specifications will be issued without charge to such organizations as The Associated General Contractors of America, American Road Builders' Association, Dodge Reports, Blue Reports, Brown's Letters, Inc., builders and contractors exchanges in the locality in which the project is to be constructed, and others that maintain public plan display rooms.

(d) Payments received for plans and specifications shall be handled in accordance with the regulations prescribed by the General Accounting Office in sections 3020–10 and 3030 of Title 7 of GAO Manual for Guidance of Federal Agencies.

(e) If the contracting officer desires to have the architect-engineer or construction manager handle the furnishing of plans and specifications and payments therefor, the invitations for bids should so state, and the architect-engineer or construction management contract shall provide the manner in which the receipts are to be handled, generally as a credit to the contract.

(f) No charge will be made to original receivers of plans and specifications for revised sheets of drawings and revised pages of specifications which are issued by amendments to invitations.

(g) Plans and specifications may be issued in complete sets only, or in complete sets and parts of sets, as the Head of the Contracting Activity determines to be best. If less than complete sets of plans and specifications are issued, the distribution should be based on an applicant's request for specific pages and drawing sheets.

(h) When a non-refundable fee is to be charged, a provision substantially the same as 952.236–72 shall be included in the solicitation.

[49 FR 12016, Mar. 28, 1984, as amended at 60 FR 47308, Sept. 12, 1995]

Subpart 936.6—Architect-Engineer Services

936.602–70 DOE selection criteria.

Contracting officers or architect-engineer evaluation boards shall apply the evaluation criteria contained in this subsection, as appropriate, and any special criteria developed for individual selections. When special and additional criteria are to be used, they shall be set forth in the public announcement required by 936.601, and a written justification for their use shall be placed in the DOE file maintained for the project.

(a) *General qualifications, including:*

(1) Reputation and standing of the firm and its principal members;

(2) Experience and technical competence of the firm in comparable work;

(3) Past record in performing work for DOE, other Government agencies, and private industry, including projects or contracts implemented with no overruns; performance from the standpoint of cost including cost overruns (last 5 years); the nature, extent, and effectiveness of contractor's cost reduction program; quality of work; and ability to meet schedules including schedule overruns (last 5 years) (where applicable);

(4) The volume of past and present workloads;

(5) Interest of company management in the project and expected participation and contribution of top officials;

(6) Adequacy of central or branch office facilities for the proposed work, including facilities for any special services that may be required;

(7) Geographic location of the home office and familiarity with the locality in which the project is located:

(8) In addition to these requirements, consider the Architect-Engineer firm's experience in energy efficiency, pollution prevention, waste reduction, and the use of recovered and environmentally preferable materials and other criteria at FAR 36.602–1.

(b) *Personnel and organizations.* (1) Specific experience and qualifications of personnel proposed for assignment to the project, including, as required for various phases of the work:

(i) Technical skills and abilities in planning, organizing, executing, and controlling;

(ii) Abilities in overall project coordination and management; and

(iii) Experience in working together as a team;

(2) Proposed project organization, delegations of responsibility, and assignments of authority;

(3) Availability of additional competent, regular employees for support of the project, and the depth and size of the organization so that any necessary expansion or acceleration could be handled adequately;

(4) Experience and qualifications of proposed consultants and subcontractors; and

(5) Ability to assign adequate qualified personnel from the proposed organization (firms own organization, joint-venture organizations, consulting firms etc.) including key personnel and a competent supervising representative.

(c) Additional (or special) criteria developed for the specific project shall be considered and evaluated as may be appropriate.

[49 FR 12016, Mar. 28, 1984, as amended at 68 FR 6358, Feb. 7, 2003]

936.609–3 Work oversight in architect-engineer contracts.

In addition to the clause at FAR 52.236–24, the contracting officer shall insert the clause at 952.236–71 in architect-engineer contracts.

Subpart 936.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition or Removal of Improvements

936.702 Forms for use in contracting for architect-engineer services.

(a) The contracting officer shall also include the additional terms at 952.236–70 in Standard Form 252 item 6.

Subpart 936.71—Inspection and Acceptance

936.7100 Scope of subpart.

This subpart implements and supplements FAR Part 36 by prescribing the policies and requirements for inspection and acceptance under construction contracts.

936.7101 Construction contracts.

(a) Inspection services may be performed by the architect-engineer responsible for the design. Inspection services may not be procured from a construction contractor with respect to its own work.

(b) When one contractor is to inspect the work of another, the inspection contractor will be given written instructions defining its responsibilities and stating that it is not authorized to modify the terms and conditions of the contract, to direct additional work, to waive any requirements of the contract, or to settle any claim or dispute. Copies of the instructions will be given to the contractor who is to be inspected, with a request to acknowledge receipt on a copy to be returned to the contracting officer. In this manner, both contractors are on express notice of the authority and limitations of the authority of the inspecting contractor.

PART 937—SERVICE CONTRACTING

Subpart 937.70—Protective Services Contracting

Sec.

937.7040 Contract clauses.

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

Subpart 937.70—Protective Services Contracting

SOURCE: 58 FR 36151, July 6, 1993, unless otherwise noted.

937.7040 Contract clauses.

The contracting officer shall insert the clause at 952.237–70 entitled ''Collective bargaining agreements—protective services'' in all protective services solicitations and contracts involving DOE-owned facilities requiring continuity of services for public safety and national defense reasons. See also, 922.103–5, Contract clauses, which prescribes use of the clause at FAR 52.222–1, Notice to the Government of Labor Disputes.

PART 939—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 939.70—Implementing DOE Policies and Procedures

Sec.
939.7000 Scope.
939.7001 Outdated information technology equipment.
939.7002 Contractor acquisition of information technology.

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

SOURCE: 62 FR 53758, Oct. 16, 1997, unless otherwise noted.

Subpart 939.70—Implementing DOE Policies and Procedures

939.7000 Scope.

This part sets forth the policies and procedures that apply to the acquisition of information technology by the Department of Energy (DOE).

939.7001 Outdated information technology equipment.

Solicitations and contracts for, or using, outdated information technology equipment shall be submitted to the Office of Management Systems, Office of Procurement and Assistance Management for review and approval. The Office of Information Management shall review these documents and make the decision whether to allow the acquisition or use of outdated information technology equipment.

939.7002 Contractor acquisition of information technology.

(a) *Management and operating (M&O) contracts.* Except as provided in paragraph (c) of this section, M&O contractors and their subcontractors shall not be used to acquire information technology unrelated to the mission of the M&O contract either for sole use by DOE employees or employees of other DOE contractors, or for use by other Federal agencies or their contractors.

(b) *Other than M&O contracts.* Where it has been determined that a contractor (other than an M&O contractor or its subcontractor) will acquire information technology either for sole use by DOE employees or for the furnishing of the information technology as government-furnished property under another contract, and after receiving written authorization from their cognizant DOE contracting office pursuant to 48 CFR part 51, DOE contractors working under cost-reimbursement-type contracts may place orders against authorized contracts. All authorizations to contractors shall expressly and specifically reference the restriction regarding contractor use of the items acquired, cited at 48 CFR 951.102(e)(4)(iii).

(c) *Consolidated contractor acquisitions.* When common information technology requirements in support of DOE programs have been identified and it is anticipated that the consolidation of such requirements will promote cost or other efficiencies, the Designated Senior Official for Information Management may authorize an M&O contractor to acquire information technology for use by the following:

(1) One or more other contractor(s) performing on-site at the same DOE-owned or -leased facility as the M&O contractor, or

(2) Other M&O contractors.

PART 941—ACQUISITION OF UTILITY SERVICES

Subpart 941.2—Acquiring Utility Services

Sec.
941.201–70 DOE Directives.
941.201–71 Use of subcontracts.

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

SOURCE: 61 FR 41710, Aug. 9, 1996, unless otherwise noted.

Subpart 941.2—Acquiring Utility Services

941.201–70 DOE Directives.

Utility services (defined at FAR 41.101) shall be acquired in accordance with FAR part 41 and DOE Directives in subseries 4540 (Public Services).

941.201–71 Use of subcontracts.

Utility services for the furnishing of electricity, gas (natural or manufactured), steam, water and/or sewerage at facilities owned or leased by DOE shall not be acquired under a subcontract arrangement, except as provided for at 48 CFR 970.4102–1 or if the prime contract is with a utility company.

[61 FR 41710, Aug. 9, 1996, as amended at 65 FR 81007, Dec. 22, 2000]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 942—CONTRACT ADMINISTRATION

Subpart 942.2—Contract Administration Services

Sec.
942.270–1 Contracting Officer's Representatives
942.270–2 Contract Clause

Subpart 942.7—Indirect Cost Rates

942.704 Billing rates.
942.705–1 Contracting officer determination procedure.
942.705–3 Educational institutions.
942.705–4 State and local governments.
942.705–5 Nonprofit organizations other than educational and state and local governments.

Subpart 942.8—Disallowance of Costs

942.803 Disallowing costs after incurrence.

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

SOURCE: 49 FR 12026, Mar. 28, 1984, unless otherwise noted.

Subpart 942.2—Contract Administration Services

SOURCE: 65 FR 81007, Dec. 22, 2000, unless otherwise noted.

942.270–1 Contracting Officer's Representatives.

In accordance with internal agency procedures, a contracting officer may designate other qualified personnel to be the Contracting Officer's Representative (COR) for the purpose of performing certain technical functions in administering a contract. These functions include, but are not limited to, technical monitoring, inspection, approval of shop drawings, testing, and approval of samples. The COR acts solely as a technical representative of the contracting officer and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract. COR designations must be made in writing by the contracting officer, and shall identify the responsibilities and limitations of the designation. A copy of the COR designation must be furnished to the contractor and the contract administration office.

942.270–2 Contract Clause.

The clause at 952.242–70, or a clause substantially the same, may be inserted in solicitations and contracts when a designated Contracting Officer's Representative will issue technical direction to the contractor under the contract.

Subpart 942.7—Indirect Cost Rates

942.704 Billing rates.

(b) When the contracting officer or auditor responsible for establishing billing rates, in accordance with FAR 42.704, has not established such rates or such rates are not current for the performance periods (contractor FY) under contract, the DOE contracting officer responsible for administration of the contract shall establish an appropriate rate(s) for billing purposes. If the contractor holds more than one DOE contract covering that period of performance, the DOE office with the largest unliquidated obligations as of the beginning of that performance period shall take the lead in establishing the required billing rate for use on DOE contracts. Once appropriate billing rates are established by the responsible contracting officer designated by FAR 42.704, such rates shall be adopted by the contracting officer and all billings and payments shall be retroactively revised to reflect the agreed upon rate(s).

942.705–1 Contracting officer determination procedure. (DOE coverage—paragraphs (a) and (b))

(a)(3) The Department of Energy shall use the contracting officer determination procedure for all business units for which it shall be required to negotiate final indirect cost rates. A list of such business units is maintained by the Office of Policy, within the Headquarters procurement organization.

(b)(1) Pursuant to FAR 52.216–7, Allowable Cost and Payment, contractors shall be requested to submit their final indirect cost rate proposals reflecting actual cost experience during the covered period to the cognizant contracting officer responsible for negotiating their final rates.

The DOE negotiating official shall request all needed audit service in accordance with internal procedures.

[61 FR 41710, Aug. 9, 1996]

942.705–3 Educational institutions. (DOE coverage—paragraph (a))

(a)(2) The negotiated rates established for the institutions cited in OMB Circular No. A–88 are distributed to the Cognizant DOE Office (CDO) assigned lead office responsibility for all DOE indirect cost matters relating to a particular contractor by the Office of Policy, within the Headquarters procurement organization.

[61 FR 41710, Aug. 9, 1996]

942.705–4 State and local governments.

A list of cognizant agencies for State/local government organizations is periodically published in the FEDERAL REGISTER by the Office of Management and Budget (OMB). The responsible agencies are notified of such assignments. The current negotiated rates for State/local government activities is distributed to each CDO by the Office of Policy, within the Headquarters procurement organization.

[61 FR 41710, Aug. 9, 1996]

942.705–5 Nonprofit organizations other than educational and state and local governments.

OMB Circular A–122 establishes the rules for assigning cognizant agencies for the negotiation and approval of indirect cost rates. The Federal agency with the largest dollar value of awards (contracts plus federal financial assistance dollars) will be designated as the cognizant agency. There is no published list of assigned agencies. The Office of Policy, within the Headquarters procurement organization, distributes to each CDO the rates established by the cognizant agency.

[61 FR 41710, Aug. 9, 1996]

Subpart 942.8—Disallowance of Costs

942.803 Disallowing costs after incurrence.

(a) Contracting officer receipt of vouchers. Vouchers and invoices submitted to DOE shall be submitted to the contracting officer or designee for review and approval for payment. If the examination of a voucher or invoice raises a question regarding the allowability of a cost submitted therein, the contracting officer, shall:

(1) Hold informal discussion with the contractor as appropriate.

(2) Issue a notice (letter, memo, etc.) to the contractor advising of cost disallowed or to be disallowed and advising the contractor that it may:

(i) Submit a written claim as to why the cost should be reimbursed—if in disagreement with the disallowance.

(ii) File a claim under the disputes clause, which will be processed in accordance with disputes procedures in the event disagreements cannot be settled.

(3) Process the voucher or invoice for payment and advise the finance office to deduct the disallowed cost when scheduling the voucher for payment.

(c) *Auditor reports and other sources of questioned costs.* (1) From time to time reports are received from professional auditors that may question the allowability of an incurred cost. Such reports are received as the result of auditors, in their independent role under OMB Circular A–73 or their own charters, scheduling and conducting financial or compliance audits of government contracts or as the result of an independent request for auditor service, as discussed in 942.70 Audit Services.

(2) When auditor reports or other notifications question cost or consider them unallowable, the contracting officer shall follow up such reports and resolve all such cost issues promptly by determining, through discussions with the contractor and/or auditor within six months of the audit report date, or date of receipt if a non-Federal audit. One of the following courses of action shall be pursued:

(i) Accept and implement audit recommendations as submitted.

(ii) Accept the principle of the audit recommendation but reject the cost questioned amount.

(iii) Reject audit findings and recommendations.

(3) When implementing the accepted course of action, the contracting officer shall—

(i) Hold discussions with the auditor and contractor as appropriate.

(ii) Issue a notice in writing advising the contractor of the government's intent to disallow the cost questioned, if the contracting officer agrees with the auditor concerning the questioned costs.

(iii) Negotiate a mutual settlement of questioned costs if they are agreed with in principle but there is a difference of opinion as to a proper amount.

(iv) Negotiate a mutual settlement of questioned costs if the auditor recommendations are acceptable to the contracting officer but the contractor does not accept the finding or disallowance.

(v) Issue a final decision of the contracting officer disallowing the questionable cost where differences cannot be resolved, advising of the contractor's right to appeal the decision, and advising the procedure to be followed if it is decided to make such an appeal.

(vi) Initiate immediate recoupment actions for all disallowed cost owed the government by:

(A) Requesting the contractor to provide a credit adjustment (offset) against amounts billed the government on the next or future invoice(s) if such shall be submitted under a contract for which the disallowed cost applies.

(B) Deducting (offset) the disallowed cost from the next or future invoice(s) submitted under the contract; if the contractor provides no adjustment under the contract for which the disallowed cost applies; provided such reduction is deemed appropriate.

(C) Advising the contractor that a refund shall be directly payable to the government in situations where there are insufficient payments owed by the government to effect recovery via (A) or (B) above or an offset is otherwise inappropriate.

(vii) Promptly notify the appropriate finance office of refunds directly payable to the government to ensure proper billing and follow-up action for collection.

[49 FR 12026, Mar. 28, 1984, as amended at 59 FR 9107, Feb. 25, 1994]

PART 945—GOVERNMENT PROPERTY

Sec.

945.000 Scope of part.

Subpart 945.1—General

945.101 Definitions.
945.102–70 Reporting of contractor-held property.
945.102–71 Maintenance of records.

Subpart 945.3—Providing Government Property to Contractors

945.303–1 Policy.

Subpart 945.4—Contractor Use and Rental of Government Property

945.407 Non-Government use of plant equipment.

Subpart 945.5—Management of Government Property in the Possession of Contractors

945.505–11 Records of transportation and installation costs of plant equipment.
945.506 Identification.
945.570–2 Acquisition of motor vehicles.
945.570–7 Disposition of motor vehicles.
945.570–8 Reporting motor vehicle data.

Subpart 945.6—Reporting, Redistribution, and Disposal of Contractor Inventory

945.601 Definitions.
945.603 Disposal methods.
945.603–70 Plant clearance function.
945.603–71 Disposal of radioactively contaminated personal property.
945.607–2 Recovering precious metals.
945.608–2 Standard screening.
945.608–3 Agency screening.
945.608–4 Limited screening.
945.608–5 Special items screening.
945.608–6 Waiver of screening requirements.
945.610–4 Contractor inventory in foreign countries.

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

SOURCE: 49 FR 12032, Mar. 28, 1984, unless otherwise noted.

945.000 Scope of part.

This part and FAR Part 45 are not applicable to the management of property by operating and management contractors. In addition, the policies and procedures contained in FAR Part 45 governing the management, control, reporting, and disposal of special test equipment and special tooling are not followed by the DOE.

Subpart 945.1—General

945.101 Definitions.

Personal property, as used in this part, means property of any kind or interest therein, except real property; records of the Federal Government; and nuclear and special source materials, atomic weapons, and by-product materials.

Capital equipment, as used in this part, means personal property items having a unit acquisition cost of $5,000 or more and an anticipated service life in excess of two years, regardless of type of funding, and having the potential for maintaining their integrity as capital items; i.e., not expendable due to use.

[54 FR 27647, June 30, 1989]

945.102–70 Reporting of contractor-held property.

Within 30 days after the end of each fiscal year, the Head of the Contracting Activity shall report the following information to the Director, Office of Property Management, within the Headquarters procurement organization.

(a) Name and address of each contractor with DOE property in their possession, or in the possession of their subcontractors (do not include grantees, cooperative agreements, interagency agreements, or agreements with state or local governments).

(b) Contract number of each DOE contract with Government property.

(c) Date contractor's property management system was approved and by whom (DOE office, Defense Contract Management Command, or the Office of Naval Research).

(d) Date of most current appraisal of contractor's property management system, who conducted the appraisal, and status of the system (satisfactory or unsatisfactory).

(e) Total dollar value of DOE property as reported on last semiannual asset report (including date of report), for each DOE contract administered by the contracting activity.

[49 FR 12032, Mar. 28, 1984, as amended at 59 FR 9107, Feb. 25, 1994]

945.102–71 Maintenance of records.

The contracting activity shall maintain records of approvals and reviews of contractors' property management systems, the dollar value of DOE property as reported on the most recent semiannual financial report, and records on property administration delegations to other Government agencies.

Subpart 945.3—Providing Government Property to Contractors

945.303–1 Policy.

The DOE has established specific policies concerning special nuclear material requirements needed under DOE contracts for fabricating end items using special nuclear material, and for conversion or scrap recovery of special nuclear material. *Special nuclear material* means uranium enriched in the isotopes U233, and U235, and/or plutonium other than PU238. The policies to be followed are:

(a) Special nuclear material will be furnished by the DOE for fixed-price contracts and subcontracts, at any tier, which call for the production of special nuclear products, including fabrication and conversion, for Government use. (The contractor or subcontractor must have the appropriate license or licenses to receive the special nuclear material. The Nuclear Regulatory Commission is the licensing agency.)

(b) Contracts and subcontracts for fabrication of end items using special nuclear material generally shall be of the fixed-price type. Cost-type contracts or subcontracts for fabrication shall be used only with the approval of the Head of the Contracting Activity. This approval authority shall not be further delegated.

(c) Contracts and subcontracts for conversion or scrap recovery of special

nuclear material shall be of a fixed-price type, except as otherwise approved by the Head of the Contracting Activity.

[49 FR 12032, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994]

Subpart 945.4—Contractor Use and Rental of Government Property

945.407 Non-Government use of plant equipment.

The type of plant equipment and dollar threshold for non-Government use of DOE plant equipment will be determined by the Head of the Contracting Activity which awarded the contract. Approval of the Head of the Contracting Activity is required to authorize non-Government use exceeding 25% of operational use.

Subpart 945.5—Management of Government Property in the Possession of Contractors

945.505–11 Records of transportation and installation costs of plant equipment.

The requirements of FAR 45.505–11 apply to plant equipment having a unit cost of $1,000 or more.

945.506 Identification.

The requirements of FAR 45.506 apply to Government property having a unit cost of $1,000 or more.

945.570–2 Acquisition of motor vehicles.

(a) The GSA Interagency Fleet Management System (GSA-IFMS) is the first source of supply for providing motor vehicles to contractors; however, contracting officer approval is required for contractors to utilize this service.

(b) Prior approval of GSA must be obtained before—

(1) Fixed-price contractors can use the GSA-IFMS;

(2) DOE-owned motor vehicles can be furnished to any contractor in an area served by a GSA-IFMS; and

(3) A contractor can commercially lease a motor vehicle for more than 60 days.

(c) GSA has the responsibility for acquisition of motor vehicles for Government agencies. All requisitions (GSA Form 1781) shall be processed in accordance with 41 CFR 101–26.501.

(d) Contractors shall submit all motor vehicle requirements to the contracting officer for approval.

(e) The acquisition of sedans and station wagons is limited to small, subcompact, and compact vehicles which meet Government fuel economy standards. The acquisition of light trucks is limited to those vehicles which meet the current fuel economy standards set by Executive Orders 12003 and 12375.

(f) Cost reimbursement contractors may be authorized by the contracting officer to utilize GSA Federal Supply Schedule 751, Motor Vehicle Rental, for short term rentals not to exceed 60 days, and are required to utilize available GSA consolidated leasing programs for long term (60 continuous days or longer) commercial leasing of passenger vehicles and light trucks.

(g) The Office of Property Management, within the Headquarters procurement organization, shall certify all requisitions prior to submittal to GSA for the following:

(1) The acquisition of sedans and station wagons.

(2) The lease (60 continuous days or longer) of any passenger automobile.

(3) The acquisition or lease (60 continuous days or longer) of light trucks less than 8,500 GVWR.

(h) Purchase requisitions for other motor vehicles may be submitted directly to GSA when approved by the contracting officer.

(i) Contractors shall thoroughly examine motor vehicles acquired under a GSA contract for defects. Any defect shall be reported promptly to GSA, and repairs shall be made under terms of the warranty.

[49 FR 12032, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994]

945.570–7 Disposition of motor vehicles.

(a) The contractor shall dispose of DOE-owned motor vehicles as directed by the contracting officer.

(b) DOE-owned motor vehicles may be disposed of as exchange/sale items

when directed by the contracting officer; however, a designated DOE official must execute the Title Transfer forms.

945.570–8 Reporting motor vehicle data.

(a) Contractors conducting motor vehicle operations shall forward annually (on or before December 1) to the contracting officer their plan for acquisition of motor vehicles for the next fiscal year for review, approval and submittal to DOE Headquarters. This plan shall conform to the fuel efficiency standards for motor vehicles for the applicable fiscal year, as established by Executive Orders 12003 and 12375 and as implemented by GSA and current DOE directives. Additional guidance for the preparation of the plan will be issued by the contracting officer, as required.

(b) Contractors operating DOE-owned and/or commercially leased (for 60 continuous days or longer) motor vehicles shall prepare and submit the following annual year-end reports to the contracting officer:

(1) DOE Report of Motor Vehicle Data (passenger vehicles).

(2) DOE Report of Truck Data.

[49 FR 12032, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984]

Subpart 945.6—Reporting, Redistribution, and Disposal of Contractor Inventory

945.601 Definitions.

Personal property (See 945.101).

945.603 Disposal methods.

945.603–70 Plant clearance function.

If the plant clearance function has not been formally delegated to another Federal agency, the contracting officer shall assume all responsibilities of the plant clearance officer identified in FAR Subpart 45.6.

945.603–71 Disposal of radioactively contaminated personal property.

Special procedures regarding the disposal of radioactively contaminated property may be found at 41 CFR 109–45.50.

945.607–2 Recovering precious metals.

(b) Contractors generating contractor inventory containing precious metals shall identify and promptly report such items to the contracting officer for review, approval and reporting to the DOE precious metals pool. This includes all precious metals in any form, including shapes, scrap or radioactively contaminated, except for silver. Only high grade nonradioactively contaminated silver should be reported to the precious metals pool. The Oak Ridge Operations Office is responsible for maintaining the DOE pool. Precious metals scrap will be reported to the DOE precious metals pool, operated by Martin Marietta Energy Systems, M.S. 8207, P.O. Box 2009, Oak Ridge, TN 37831.

[54 FR 27648, June 30, 1989, as amended at 59 FR 9108, Feb. 25, 1994]

945.608–2 Standard screening.

(b)(1) Prior to reporting excess property to GSA, all reportable property, as identified in Federal Property Management Regulations 41 CFR 101–43.4801, shall be reported to the contracting office. The contracting office shall transmit this information via terminal processing or hard copy to DOE Headquarters for centralized screening in the DOE Reportable Excess Automated Property System (REAPS). Agency screening will begin when the item is first included in the REAPS monthly catalog and will end upon the issuance of the following monthly catalog.

(i) REAPS requires the inclusion of a five character address code which identifies the reporting contractor. The address code will be assigned by DOE Headquarters upon receipt of a completed Address Notification form for the contractor or DOE office reporting the property as excess.

(ii) Excess screening documents and Address Notification forms shall be submitted to the Office of Contractor Management and Administration, within the Headquarters procurement organization.

[49 FR 12032, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

945.608–3 Agency screening.

Items shall be reported to the contracting office and should be screened informally within the contracting office's complex of contractors and with other known users of the property at other DOE locations.

945.608–4 Limited screening.

(a) Prior to reporting to GSA, all nonreportable property, excluding scrap and salvage, shall be reported to the contracting office for a 15 day informal screening within the contracting office's complex of contractors and other appropriate DOE field locations.

945.608–5 Special items screening.

Prior to reporting to GSA, that property in FAR 45.608–5 (a), (b), and (d) shall be reported and screened within DOE in accordance with 945.608–2 and 945.608–3.

(c) *Printing equipment.* All printing equipment excess to requirements shall be reported to the Office of Administrative Services, Headquarters.

945.608–6 Waiver of screening requirements.

(a) The Director Office of Property Management, within the Headquarters procurement organization, is the designee who may authorize exceptions from screening requirements in accordance with the provisions of FAR 45.608–6.

(b) A request to the Director of the Office of Property Management, within the Headquarters procurement organization for the waiver of screening requirements must be submitted by the HCA with a justification setting forth the compelling circumstances warranting the exception.

[54 FR 27648, June 30, 1989, as amended at 59 FR 9108, Feb. 25, 1994]

945.610–4 Contractor inventory in foreign countries.

Contractor inventory located in foreign countries will be utilized and disposed of in accordance with DOE-PMR 41 CFR 109–43.5, and 45.51.

[49 FR 12032, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984]

PART 947—TRANSPORTATION

Subpart 947.5—Ocean Transportation by U.S. Flag Vessels

947.506 Procedures.

Subpart 947.70—Foreign Travel

Sec.
947.7000 [Reserved]
947.7001 Policy.
947.7002 Contract clause.

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

SOURCE: 49 FR 12038, Mar. 28, 1984, unless otherwise noted.

Subpart 947.5—Ocean Transportation by U.S. Flag Vessels

947.506 Procedures.

For contract awards involving foreign suppliers which will necessitate ocean transportation, a copy of the award document is to be furnished to the Maritime Administration at the following address: Inter-Agency Liaison, Division of National Cargo, Office of Market Development, Maritime Administration, 400 7th Street, SW., Washington, DC 20590

Subpart 947.70—Foreign Travel

SOURCE: 65 FR 81007, Dec. 22, 2000, unless otherwise noted.

947.7000 [Reserved]

947.7001 Policy.

Contractor foreign travel shall be conducted pursuant to the requirements contained in DOE Order 551.1, Official Foreign Travel, or any subsequent version of the order in effect at the time of award.

947.7002 Contract clause.

When foreign travel may be required under the contract, the contracting officer shall insert the clause at 48 CFR 952.247–70, Foreign Travel.

PART 949—TERMINATION OF CONTRACTS

Subpart 949.1—General Principles

Sec.
949.101 Authorities and responsibilities.
949.106 Fraud or other criminal conduct.
949.111 Review of proposed settlements.

Subpart 949.5—Contract Termination Clauses

949.501 General.
949.505 Other termination clauses.

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

SOURCE: 49 FR 12038, Mar. 28, 1984, unless otherwise noted.

Subpart 949.1—General Principles

949.101 Authorities and responsibilities.

The Procurement Executive shall be notified prior to taking any action to terminate (a) contracts for the operation of Government-owned facilities, (b) any prime contract or subcontract in excess of $10 million, and (c) any contract the termination of which is likely to provoke unusual interest.

949.106 Fraud or other criminal conduct.

Any evidence of fraud or other criminal conduct in connection with the settlement of a contract termination shall be reported in accordance with 909.406.

949.111 Review of proposed settlements.

(a) The Heads of Contracting Activities shall establish settlement review boards for the review of each termination settlement or determination of amount due under the termination clause of a contract or approval or ratification of a subcontract settlement when the action involves $50,000 or more.

(b) Settlement review boards may be established for actions below $50,000 when considered desirable by the Head of the Contracting Activity or when specifically requested by the contracting officer.

(c) Proposed settlement agreements or determinations in excess of contractual authority of the Heads of Contracting Activities will be transmitted to the Procurement Executive for review and approval.

(d) Contracting officers shall not conclude proposed settlement or determinations until the approvals required by this subsection have been obtained.

[49 FR 12038, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994]

Subpart 949.5—Contract Termination Clauses

949.501 General.

The standard clauses set forth in FAR Subpart 49.5 are applicable as prescribed subject to the cost principles referenced in the various termination articles shall be in accordance with part 931.

[49 FR 12038, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994]

949.505 Other termination clauses.

(f) The clause at 952.249–70 is suggested for use in cost-plus-fixed-fee Architect-Engineer contracts.

PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS

Subpart 950.70—Nuclear Indemnification of DOE Contractors

Sec.
950.7000 Scope of subpart.
950.7001 General policy.
950.7002 Definitions.
950.7003 Nuclear hazards indemnity.
950.7004–950.7005 [Reserved]
950.7006 Statutory nuclear hazards indemnity agreement.
950.7007–950.7008 [Reserved]
950.7009 Fees.
950.7010 Financial protection requirements.

Subpart 950.71—General Contract Authority Indemnity

950.7101 Applicability.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12039, Mar. 28, 1984, unless otherwise noted.

Subpart 950.70—Nuclear Indemnification of DOE Contractors

§ 950.7000 Scope of subpart.

This subpart describes the established policies concerning indemnification of DOE contractors against public liability for a nuclear incident arising out of or in connection with the contract activity.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 57827, Nov. 14, 1991]

§ 950.7001 Applicability

The policies and procedures of this subpart shall govern DOE's entering into agreements of indemnification with recipients of a contract whose work under the contract involves the risk of public liability for a nuclear incident or precautionary evacuation.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 57827, Nov. 14, 1991]

950.7002 Definitions.

DOE contractor means any DOE prime contractor, including any agency of the Federal Government with which DOE has entered into an interagency agreement.

Nuclear incident means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. The term includes any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States.

Person indemnified means:

(1) With respect to a nuclear incident occurring within the United States or outside the United States as the term is defined above and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability; or

(2) With respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 170d. of the Atomic Energy Act of 1954, as amended, has been extended or under any subcontract, purchase order, or other agreement, or any tier under any such contract or project.

Public liability means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or precautionary evacuation), except: (1) Claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (2) claims arising out of an act of war; and (3) whenever used in subsections a., c., and k. of section 170 of the Atomic Energy Act of 1954, as amended, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. *Public liability* also includes damage to property of persons indemnified: Provided, that such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

[49 FR 12039, Mar. 28, 1984, as amended at 50 FR 12185, Mar. 27, 1985; 56 FR 57827, Nov. 14, 1991]

950.7003 Nuclear hazards indemnity.

(a) Section 170d. of the Atomic Energy Act, as amended, requires DOE ''to enter into agreements of indemnification with any person who may conduct activities under a contract with (DOE) that involve the risk of

public liability * * *.'' However, DOE contractors whose activities are already subject to indemnification by the Nuclear Regulatory Commission are not eligible for such statutory indemnity. See 950.7006 below.

(b) The Heads of Contracting Activities shall assure that contracts subject to this requirement contain the appropriate nuclear hazards indemnity provisions.

[56 FR 57828, Nov. 14, 1991, as amended at 59 FR 9108, Feb. 25, 1994]

950.7004–950.7005 [Reserved]

950.7006 Statutory nuclear hazards indemnity agreement.

(a) The contract clause contained in 952.250–70 shall be incorporated in all contracts in which the contractor is under risk of public liability for a nuclear incident or precautionary evacuation arising out of or in connection with the contract work, including such events caused by a product delivered to a DOE-owned facility for use by DOE or its contractors. The clause at 952.250–70 shall be included in contracts with architect-engineer contractors for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(b) However, this clause shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for activities to be performed under the contract.

[56 FR 57828, Nov. 14, 1991, as amended at 59 FR 9108, Feb. 25, 1994]

950.7007–950.7008 [Reserved]

950.7009 Fees.

No fee will be charged a DOE contractor for a statutory nuclear hazards indemnity agreement.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 57828, Nov. 14, 1991]

950.7010 Financial protection requirements.

DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents. However, if authorized by the DOE Headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be (a) permitted to furnish financial protection to themselves or (b) permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

[56 FR 57828, Nov. 14, 1991]

Subpart 950.71—General Contract Authority Indemnity

950.7101 Applicability.

(a) The DOE also has general contract authority to enter into indemnity agreements with its contractors. Under such authority a certain measure of protection is extended to the DOE contractor against risk of liability, but the assumption of liability by DOE will be expressly subject to the availability of appropriated funds. Prior to enactment of section 170 of the Atomic Energy Act 1954, as amended, this authority was exercised in a number of Atomic Energy Commission contracts and this type of indemnification remains in some DOE contracts.

(b) It is the policy of the DOE, subsequent to the enactment of section 170, to restrict indemnity agreements with DOE contractors, with respect to protection against public liability for a nuclear incident, to the statutory indemnity provided under section 170. However, it is recognized that circumstances may exist under which a DOE contractor may be exposed to a risk of public liability for a nuclear occurrence which would not be covered by the statutory indemnity.

(c) While it is normally DOE policy to require its non-management and operating contractors to obtain insurance coverage against public liability for nonnuclear risks, there may be circumstances in which a contractual indemnity may be warranted to protect a DOE non-management and operating

contractor against liability for uninsured nonnuclear risks.

(d) If circumstances as mentioned in paragraph (b) or (c) of this section do arise, it shall be the responsibility of the Heads of Contracting Activities to submit to the Head of the Agency or designee for review and decision, all pertinent information concerning the need for, or desirability of, providing a general authority indemnity to a DOE contractor.

(e) Where the indemnified risk is nonnuclear, the amount of general authority indemnity extended to a fixed-price contractor should normally have a maximum obligation equivalent to the amount of insurance that the contractor usually carries to cover such risks in its other commercial operations or, if the risk involved is dissimilar to those normally encountered by the contractor, the amount that it otherwise would have reasonably procured to insure this contract risk.

(f) In the event that a DOE contractor has been extended both a statutory indemnity and a general authority indemnity, the general authority indemnity will not apply to the extent that the statutory indemnity applies.

(g) The provisions of this subsection do not restrict or affect the policy of DOE to pay its cost-reimbursement type contractors for the allowable cost of losses and expenses incurred in the performance of the contact work, within the maximum amount of the contract obligation.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 28102, June 19, 1991. Redesignated and amended at 56 FR 57828, Nov. 14, 1991; 59 FR 9108, Feb. 25, 1994; 61 FR 21977, May 13, 1996; 62 FR 34861, June 27, 1997]

PART 951—USE OF GOVERNMENT SOURCES BY CONTRACTORS

Subpart 951.1—Contractor Use of Government Supply Sources

Sec.

951.101 Policy.
951.102 Authorization to use Government supply sources.
951.103 Ordering from Government supply sources.

Subpart 951.70—Contractor Employee Travel Discounts

951.7002 Responsibilities.

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

SOURCE: 49 FR 12042, Mar. 28, 1984, unless otherwise noted.

Subpart 951.1—Contractor Use of Government Supply Sources

951.101 Policy.

(a) It is DOE policy that contractors performing under cost-reimbursement contracts should meet their requirements from Government sources of supply when these sources are available to them, and if it is economically advantageous or otherwise in the best interest of the Government.

951.102 Authorization to use Government supply sources.

(a) The Head of the Contracting Activity may authorize contractors performing under cost-reimbursement contracts and subcontractors performing under cost-reimbursement subcontracts, where all higher tier contracts and subcontracts are cost-type, to use Government supply sources in accordance with the requirements and procedures in FAR Part 51, DOE PMR 41 CFR 109–26, and any necessary approval from the agency involved. This authority may be redelegated to the level of contracting officer. Direct acquisition by the DOE, rather than by a contractor under cost-reimbursement contracts, shall be required where deemed necessary by the Head of the Contracting Activity in order to carry out special requirements of appropriation acts or other applicable laws relating to particular items.

(c)(1) The DOE central point of contact for the assignment, correction, or deletion of FEDSTRIP activity address codes is the Office of Property Management, within the Headquarters procurement organization.

(e)(4)(iii) Materials, supplies, and equipment acquired from Government sources of supply under the procedures described herein must be used exclusively in connection with Government work, except as otherwise authorized

by the Head of the Contracting Activity.

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994]

951.103 Ordering from Government supply sources.

(b) The Procurement Executive shall be informed of instances in which GSA sources of supply are not used because of the quality of the items available from GSA or when a Federal Supply Schedule contractor refuses to honor an order.

Subpart 951.70—Contractor Employee Travel Discounts

951.7002 Responsibilities.

The contracting officer shall insert the clause at 952.251–70, Contractor employee travel discounts, in all cost-reimbursable solicitations and contracts when significant costs for rail travel, car rental, or lodging will be required to perform the contract. The contracting officer may furnish the contractor with appropriate identification letters.

[65 FR 81007, Dec. 22, 2000]

SUBCHAPTER H—CLAUSES AND FORMS

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 952.0—General

Sec.
952.000 Scope of part.
952.001 General policy.

Subpart 952.2—Text of Provisions and Clauses

952.202 Clauses related to definitions.
952.202–1 Definitions.
952.203–1 Whistleblower protection for contractor employees.
952.204 Clauses related to administrative matters.
952.204–2 Security requirements.
952.204–70 Classification/Declassification.
952.204–71 Sensitive foreign nations controls.
952.204–72 Disclosure of information.
952.204–73 Facility clearance.
952.204–75 Public Affairs.
952.204–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information.
952.204–77 Computer security.
952.208 Clauses related to required sources of supply.
952.208–7 Tagging of leased vehicles.
952.208–70 Printing.
952.209 Clauses related to contractor's qualifications.
952.209–8 Organizational Conflicts of Interest-Disclosure.
952.209–71 [Reserved]
952.209–72 Organizational conflicts of interest.
952.211 Clauses related to contract delivery or performance.
952.211–70 Priorities and allocations for energy programs (solicitations).
952.211–71 Priorities and allocations for energy programs (contracts).
952.211–72—952.211–73 [Reserved]
952.215–70 Key personnel.
952.216 Clauses related to types of contracts.
952.216–7 Allowable cost and payment.
952.216–15 Predetermined indirect cost rates.
952.217–70 Acquisition of real property.
952.219–70 DOE Mentor-Protege program.
952.223 Clauses related to environment, conservation, and occupational safety.
952.223–71 Integration of environment, safety, and health into work planning and execution.
952.223–72 Radiation protection and nuclear criticality.
952.223–73—952.223–74 [Reserved]
952.223–75 Preservation of individual occupational radiation exposure records.
952.223–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information and protection of worker safety and health.
952.223–77 Conditional payment of fee or profit—protection of worker safety and health.
952.224–70 Paperwork Reduction Act.
952.225–70 Subcontracting for nuclear hot cell services.
952.226–70 Subcontracting goals under section 3021(a) of the Energy Policy Act of 1992.
952.226–71 Utilization of Energy Policy Act target entities.
952.226–72 Energy Policy Act subcontracting goals and reporting requirements.
952.226–73 Energy Policy Act target group certification.
952.226–74 Displaced employee hiring preference.
952.227 Provisions and clauses related to patents, technical data and copyrights.
952.227–9 Refund of royalties.
952.227–11 Patent rights—retention by the contractor (short form).
952.227–13 Patent rights—acquisition by the Government.
952.227–14 Rights in data-general.
952.227–70—952.227–72 [Reserved]
952.227–74 [Reserved]
952.227–82 Rights to proposal data.
952.227–84 Notice of right to request patent waiver.
952.231–70 Date of incurrence of cost.
952.231–71 Insurance-litigation and claims.
952.233–2 Service of protest.
952.233–4 Notice of protest file availability.
952.233–5 Agency protest review.
952.235–70 Key personnel.
952.235–71 Research misconduct.
952.236 Construction and architect-engineer contracts.
952.236–71 Inspection in architect-engineer contracts.
952.236–72 Nonrefundable fee for plans and specifications.
952.237–70 Collective bargaining agreements—protective services.
952.242–70 Technical direction.
952.245 Clauses related to Government property.
952.245–2 Government property (fixed-price contracts).
952.245–5 Government property (cost-reimbursement, time-and-materials, or labor-hour contracts).
952.247–70 Foreign travel.
952.249 Clauses related to termination.

952.250 Clauses related to indemnification of contractors.
952.250–70 Nuclear hazards indemnity agreement.
952.250–71—952.250–72 [Reserved]
952.251–70 Contractor employee travel discounts.

AUTHORITY: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12042, Mar. 28, 1984, unless otherwise noted.

Subpart 952.0—General

952.000 Scope of part.

This part implements FAR part 52 which sets forth contract clauses for use in connection with the acquisition of personal property and nonpersonal services (including construction), and supplements, as well as modifies, FAR part 52 by prescribing certain modifications to be made to FAR clauses when used in DOE contracts and specifying certain DOE contract clauses to be used in addition to or in place of such FAR clauses.

952.001 General policy.

It is DOE policy to use the prescribed FAR and DOE contract clauses wherever practicable. Uniformity in the use of contract clauses helps to ensure impartial treatment of all contractors, expedites negotiation and contract review, and facilitates contract administration.

Subpart 952.2—Text of Provisions and Clauses

952.202 Clauses related to definitions.

952.202–1 Definitions.

(a) As prescribed in 902.200, insert the clause at FAR 52.202–1 in all contracts. The contracting officer shall substitute the following for paragraph (a) of the clause.

(a) *Head of Agency* means: (i) The Secretary; (ii) Deputy Secretary; (iii) Under Secretaries of the Department of Energy and (iiii) the Chairman, Federal Energy Regulatory Commission.

(b) The following shall be added as paragraphs (h) and (i) except that they will be designated paragraphs (g) and (h) if Alternate I of the FAR clause is used.

(h) The term DOE means the Department of Energy, FERC means the Federal Energy Regulatory Commission, and NNSA means the National Nuclear Security Administration.

(i) The term Senior Procurement Executive means, for DOE:

Department of Energy—Director, Office of Procurement and Assistance Management, DOE;

National Nuclear Security Administration—Administrator for Nuclear Security, NNSA; and

Federal Energy Regulatory Commission—Chairman, FERC.

[67 FR 14871, Mar. 28, 2002]

952.203–70 Whistleblower Protection for Contractor Employees.

As prescribed in 48 CFR 903.971, insert the following clause:

WHISTLEBLOWER PROTECTION FOR CONTRACTOR EMPLOYEES (DEC 2000)

(a) The contractor shall comply with the requirements of ''DOE Contractor Employee Protection Program'' at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

(b) The contractor shall insert or have inserted the substance of this clause, including this paragraph (b), in subcontracts at all tiers, for subcontracts involving work performed on behalf of DOE directly related to activities at DOE-owned or leased sites.

(End of clause)

[65 FR 81008, Dec. 22, 2000]

952.204 Clauses related to administrative matters.

952.204–2 Security requirements.

As prescribed in 904.404(d)(1) the following clause shall be included in contracts entered into under section 31 (research assistance) or 41 (ownership and operation of production facilities) of the Atomic Energy Act of 1954, as amended, and in other contracts and subcontracts, which involve or are likely to involve classified information.

SECURITY (MAY 2002)

(a) *Responsibility*. It is the contractor's duty to safeguard all classified information, special nuclear material, and other DOE

property. The contractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding all classified information and protecting against sabotage, espionage, loss or theft of the classified documents and material in the contractor's posession in connection with the performance of work under this contract. Except as otherwise provided in this contract, the contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter in the posession of the contractor or any person under the contractor's control in connection with performance of this contract. If retention by the contractor of any classified matter is required after the completion or termination of the contract, the contractor shall identify the items and types or categories of matter proposed for retention, the reasons for the retention of the matter, and the proposed period of retention. If the retention is approved by the contracting officer, the security provisions of the contract shall continue to be applicable to the matter retained. Special nuclear material shall not be retained after the completion or termination of the contract.

(b) *Regulations.* The contractor agrees to comply with all security regulations and requirements of DOE in effect on the date of award.

(c) *Definition of classified information.* The term *classified information* means Restricted Data, Formerly Restricted Data, or National Security Information.

(d) *Definition of restricted data.* The term *Restricted Data* means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.

(e) *Definition of formerly restricted data.* The term *Formerly Restricted Data* means all data removed from the Restricted Data category under section 142 d. of the Atomic Energy Act of 1954, as amended.

(f) *Definition of National Security Information.* The term *National Security Information* means any information or material, regardless of its physical form or characteristics, that is owned by, produced for or by, or is under the control of the United States Government, that has been determined pursuant to Executive Order 12356 or prior Orders to require protection against unauthorized disclosure, and which is so designated.

(g) *Definition of Special Nuclear Material (SNM). SNM* means: (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, as amended, has been determined to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(h) *Security clearance of personnel.* The contractor shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12356, and the DOE's regulations or requirements applicable to the particular level and category of classified information to which access is required.

(i) *Criminal liability.* It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any classified information that may come to the contractor or any person under the contractor's control in connection with work under this contract, may subject the contractor, its agents, employees, or subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.;* 18 U.S.C. 793 and 794; and E.O. 12356.)

(j) Foreign Ownership, Control or Influence.

(1) The Contractor shall immediately provide the cognizant security office written notice of any change in the extent and nature of foreign ownership, control or influence over the Contractor which would affect any answer to the questions presented in the Certificate Pertaining to Foreign Interests, Standard Form 328 or the Foreign Ownership, Control or Influence questionnaire executed by the Contractor prior to the award of this contract. In addition, any notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the Contracting Officer.

(2) If a Contractor has changes involving foreign ownership, control or influence, DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, DOE will consider proposals made by the Contractor to avoid or mitigate foreign influences.

(3) If the cognizant security office at any time determines that the Contractor is, or is potentially, subject to foreign ownership, control or influence, the Contractor shall comply with such instructions as the Contracting Officer shall provide in writing to safeguard any classified information or special nuclear material.

(4) The Contractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph, in all subcontracts under this contract that

will require subcontractor employees to possess access authorizations. Additionally, the Contractor must require subcontractors to have an existing DOD or DOE Facility Clearance or submit a completed Certificate Pertaining to Foreign Interests, Standard Form 328, required in DEAR 952.204–73 prior to award of a subcontract. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the Contracting Officer. For purposes of this clause, subcontractor means any subcontractor at any tier and the term ''Contracting Officer'' means the DOE Contracting Officer. When this clause is included in a subcontract, the term ''Contractor'' shall mean Subcontractor and the term ''contract'' shall mean subcontract.

(5) The Contracting Officer may terminate this contract for default either if the Contractor fails to meet obligations imposed by this clause or if the Contractor creates a FOCI situation in order to avoid performance or a termination for default. The Contracting Officer may terminate this contract for convenience if the Contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem.

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 52 FR 38425, Oct. 16, 1987; 59 FR 9108, Feb. 25, 1994; 62 FR 42074, Aug 5, 1997; 67 FR 14877, Mar. 28, 2002]

952.204–70 Classification/Declassification.

As prescribed in 904.404(d)(2), the following clause shall be included in all contracts which involve classified information.

CLASSIFICATION/DECLASSIFICATION (SEP 1997)

In the performance of work under this contract, the contractor or subcontractor shall comply with all provisions of the Department of Energy's regulations and mandatory DOE directives which apply to work involving the classification and declassification of information, documents, or material. In this section, ''information'' means facts, data, or knowledge itself; ''document'' means the physical medium on or in which information is recorded; and ''material'' means a product or substance which contains or reveals information, regardless of its physical form or characteristics. Classified information is ''Restricted Data'' and ''Formerly Restricted Data'' (classified under the Atomic Energy Act of 1954, as amended) and ''National Security Information'' (classified under Executive Order 12958 or prior Executive Orders).

The original decision to classify or declassify information is considered an inherently Governmental function. For this reason, only Government personnel may serve as original classifiers, i.e., Federal Government Original Classifiers. Other personnel (Government or contractor) may serve as derivative classifiers which involves making classification decisions based upon classification guidance which reflect decisions made by Federal Government Original Classifiers.

The contractor or subcontractor shall ensure that any document or material that may contain classified information is reviewed by either a Federal Government or a Contractor Derivative Classifier in accordance with classification regulations including mandatory DOE directives and classification/declassification guidance furnished to the contractor by the Department of Energy to determine whether it contains classified information prior to dissemination. For information which is not addressed in classification/declassification guidance, but whose sensitivity appears to warrant classification, the contractor or subcontractor shall ensure that such information is reviewed by a Federal Government Original Classifier.

In addition, the contractor or subcontractor shall ensure that existing classified documents (containing either Restricted Data or Formerly Restricted Data or National Security Information) which are in its possession or under its control are periodically reviewed by a Federal Government or Contractor Derivative Declassifier in accordance with classification regulations, mandatory DOE directives and classification/declassification guidance furnished to the contractor by the Department of Energy to determine if the documents are no longer appropriately classified. Priorities for declassification review of classified documents shall be based on the degree of public and researcher interest and the likelihood of declassification upon review. Documents which no longer contain classified information are to be declassified. Declassified documents then shall be reviewed to determine if they are publicly releasable. Documents which are declassified and determined to be publicly releasable are to be made available to the public in order to maximize the public's access to as much Government information as possible while minimizing security costs.

The contractor or subcontractor shall insert this clause in any subcontract which involves or may involve access to classified information.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 62 FR 51802, Oct. 3, 1997]

952.204–71 Sensitive foreign nations controls.

In accordance with 904.404(d)(3), the contracting officer shall include the following clause.

SENSITIVE FOREIGN NATIONS CONTROLS (APR 1994)

(a) In connection with any activities in the performance of this contract, the contractor agrees to comply with the ''Sensitive Foreign Nations Controls'' requirements attached to this contract, relating to those countries, which may from time to time, be identified to the contractor by written notice as sensitive foreign nations. The contractor shall have the right to terminate its performance under this contract upon at least 60 days' prior written notice to the contracting officer if the contractor determines that it is unable, without substantially interfering with its polices or without adversely impacting its performance to continue performance of the work under this contract as a result of such notification. If the contractor elects to terminate performance, the provisions of this contract regarding termination for the convenience of the Government shall apply.

(b) The provisions of this clause shall be included in any subcontracts.

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.204–72 Disclosure of information.

As prescribed in 904.404(d)(4) this clause may be used in place of the clauses entitled ''Security,'' 952.204–2, and ''Classification,'' 952.204–70, in contracts with educational institutions for research involving nuclear technology which could but is not expected to produce classified information or restricted data.

DISCLOSURE OF INFORMATION (APR 1994)

(a) It is mutually expected that the activities under this contract will not involve classified information. It is understood, however, that if in the opinion of either party, this expectation changes prior to the expiration or terminating of all activities under this contract, said party shall notify the other party accordingly in writing without delay. In any event, the contractor shall classify, safeguard, and otherwise act with respect to all classified information in accordance with applicable law and the requirements of DOE, and shall promptly inform DOE in writing if and when classified information becomes involved, or in the mutual judgment of the parties it appears likely that classified information or material may become involved. The contractor shall have the right to terminate performance of the work under this contract and in such event the provisions of this contract respecting termination for the convenience of the Government shall apply.

(b) The contractor shall not permit any individual to have access to classified information except in accordance with the Atomic Energy Act 1954, as amended, Executive Order 12356, and DOE's regulations or requirements.

(c) The term *Restricted Data* as used in this article means all data concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.204–73 Facility clearance.

As prescribed in 904.404(d)(5), insert the following provision in all solicitations which require the use of Standard Form 328, Certificate Pertaining to Foreign Interests for contracts or subcontracts subject to the provisions of 904.70.

FACILITY CLEARANCE (MAY 2002)

Notices

Section 2536 of title 10, United States Code, prohibits the award of a contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract unless a waiver is granted by the Secretary of Energy. In addition, a Facility Clearance and foreign ownership, control and influence (FOCI) information are required when the contract or subcontract to be awarded is expected to require employees to have access authorizations.

Offerors who have either a Department of Defense or a Department of Energy Facility Clearance generally need not resubmit the following foreign ownership information unless specifically requested to do so. Instead, provide your DOE Facility Clearance code or your DOD assigned commercial and government entity (CAGE) code. If uncertain, consult the office which issued this solicitation.

(a) Use of Certificate Pertaining to Foreign Interests, Standard Form 328.

(1) The contract work anticipated by this solicitation will require access to classified information or special nuclear material. Such access will require a Facility Clearance for the Contractor organization and access authorizations (security clearances) for Contractor personnel working with the classified information or special nuclear material. To

obtain a Facility Clearance the offeror must submit a Certificate Pertaining to Foreign Interests, Standard Form 328, and all required supporting documents to form a complete Foreign Ownership, Control or Influence (FOCI) Package.

(2) Information submitted by the offeror in response to the Standard Form 328 will be used solely for the purposes of evaluating foreign ownership, control or influence and will be treated by DOE, to the extent permitted by law, as business or financial information submitted in confidence.

(3) Following submission of a Standard Form 328 and prior to contract award, the Contractor shall immediately submit to the Contracting Officer written notification of any changes in the extent and nature of FOCI which could affect the offeror's answers to the questions in Standard Form 328. Following award of a contract, the Contractor must immediately submit to the cognizant security office written notification of any changes in the extent and nature of FOCI which could affect the offeror's answers to the questions in Standard Form 328. Notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice must also be furnished concurrently to the cognizant security office.

(b) Definitions.

(1) *Foreign Interest* means any of the following:

(i) A foreign government, foreign government agency, or representative of a foreign government;

(ii) Any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its possessions and trust territories; and

(iii) Any person who is not a citizen or national of the United States.

(2) *Foreign Ownership, Control, or Influence (FOCI)* means the situation where the degree of ownership, control, or influence over a Contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may result.

(c) *Facility Clearance* means an administrative determination that a facility is eligible to access, produce, use or store classified information, or special nuclear material. A Facility Clearance is based upon a determination that satisfactory safeguards and security measures are carried out for the activities being performed at the facility. It is DOE policy that all Contractors or Subcontractors requiring access authorizations be processed for a Facility Clearance at the level appropriate to the activities being performed under the contract. Approval for a Facility Clearance shall be based upon:

(1) A favorable foreign ownership, control, or influence (FOCI) determination based upon the Contractor's response to the ten questions in Standard Form 328 and any required, supporting data provided by the Contractor;

(2) A contract or proposed contract containing the appropriate security clauses;

(3) Approved safeguards and security plans which describe protective measures appropriate to the activities being performed at the facility;

(4) An established Reporting Identification Symbol code for the Nuclear Materials Management and Safeguards Reporting System if access to nuclear materials is involved;

(5) A survey conducted no more than 6 months before the Facility Clearance date, with a composite facility rating of satisfactory, if the facility is to possess classified matter or special nuclear material at its location;

(6) Appointment of a Facility Security Officer, who must possess or be in the process of obtaining an access authorization equivalent to the Facility Clearance; and, if applicable, appointment of a Materials Control and Accountability Representative; and

(7) Access authorizations for key management personnel who will be determined on a case-by-case basis, and must possess or be in the process of obtaining access authorizations equivalent to the level of the Facility Clearance.

(d) A Facility Clearance is required prior to the award of a contract requiring access to classified information and the granting of any access authorizations under a contract. Prior to award of a contract, the DOE must determine that award of the contract to the offeror will not pose an undue risk to the common defense and security as a result of its access to classified information or special nuclear material in the performance of the contract. The Contracting Officer may require the offeror to submit such additional information as deemed pertinent to this determination.

(e) A Facility Clearance is required even for contracts that do not require the Contractor's corporate offices to receive, process, reproduce, store, transmit, or handle classified information or special nuclear material, but which require DOE access authorizations for the Contractor's employees to perform work at a DOE location. This type facility is identified as a non-possessing facility.

(f) Except as otherwise authorized in writing by the Contracting Officer, the provisions of any resulting contract must require that the contractor insert provisions similar to the foregoing in all subcontracts and purchase orders. Any Subcontractors requiring access authorizations for access to classified information or special nuclear material shall

be directed to provide responses to the questions in Standard Form 328, Certificate Pertaining to Foreign Interests, directly to the prime contractor or the Contracting Officer for the prime contract.

NOTICE TO OFFERORS—CONTENTS REVIEW (PLEASE REVIEW BEFORE SUBMITTING)

Prior to submitting the Standard Form 328, required by paragraph (a)(1) of this clause, the offeror should review the FOCI submission to ensure that:

(1) The Standard Form 328 has been signed and dated by an authorized official of the company;

(2) If publicly owned, the Contractor's most recent annual report, and its most recent proxy statement for its annual meeting of stockholders have been attached; or, if privately owned, the audited, consolidated financial information for the most recently closed accounting year has been attached;

(3) A copy of the company's articles of incorporation and an attested copy of the company's by-laws, or similar documents filed for the company's existence and management, and all amendments to those documents;

(4) A list identifying the organization's owners, officers, directors, and executive personnel, including their names, social security numbers, citizenship, titles of all positions they hold within the organization, and what clearances, if any, they possess or are in the process of obtaining, and identification of the government agency(ies) that granted or will be granting those clearances; and

(5) A summary FOCI data sheet.

NOTE: A FOCI submission must be attached for each tier parent organization (*i.e.* ultimate parent and any intervening levels of ownership). If any of these documents are missing, award of the contract cannot be completed.

[67 FR 14877, Mar. 28, 2002]

952.204–75 Public Affairs.

As prescribed in 48 CFR 904.7201, insert the following clause.

PUBLIC AFFAIRS (DEC 2000)

(a) The Contractor must cooperate with the Department in releasing unclassified information to the public and news media regarding DOE policies, programs, and activities relating to its effort under the contract. The responsibilities under this clause must be accomplished through coordination with the Contracting Officer and appropriate DOE public affairs personnel in accordance with procedures defined by the Contracting Officer.

(b) The Contractor is responsible for the development, planning, and coordination of proactive approaches for the timely dissemination of unclassified information regarding DOE activities onsite and offsite, including, but not limited to, operations and programs. Proactive public affairs programs may utilize a variety of communication media, including public workshops, meetings or hearings, open houses, newsletters, press releases, conferences, audio/visual presentations, speeches, forums, tours, and other appropriate stakeholder interactions.

(c) The Contractor's internal procedures must ensure that all releases of information to the public and news media are coordinated through, and approved by, a management official at an appropriate level within the Contractor's organization.

(d) The Contractor must comply with DOE procedures for obtaining advance clearances on oral, written, and audio/visual informational material prepared for public dissemination or use.

(e) Unless prohibited by law, and in accordance with procedures defined by the Contracting Officer, the Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of communications or contacts with Members of Congress relating to the effort performed under the contract.

(f) In accordance with procedures defined by the Contracting Officer, the Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of activities or situations that may attract regional or national news media attention and of non-routine inquiries from national news media relating to the effort performed under the contract.

(g) In releases of information to the public and news media, the Contractor must fully and accurately identify the Contractor's relationship to the Department and fully and accurately credit the Department for its role in funding programs and projects resulting in scientific, technical, and other achievements.

(End of clause)

[65 FR 81008, Dec. 22, 2000]

952.204–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information.

As prescribed at 48 CFR (DEAR) 904.404(d)(6), insert the following clause.

CONDITIONAL PAYMENT OF FEE OR PROFIT—SAFEGUARDING RESTRICTED DATA AND OTHER CLASSIFIED INFORMATION (JAN 2004)

(a) *General.* (1) The payment of fee or profit (*i.e.,* award fee, fixed fee, and incentive fee or

profit) under this contract is dependent upon the contractor's compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information (*i.e.,* Formerly Restricted Data and National Security Information) including compliance with applicable law, regulation, and DOE directives. The term ''contractor'' as used in this clause to address failure to comply shall mean ''contractor or contractor employee.''

(2) In addition to other remedies available to the Government, if the contractor fails to comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information, the contracting officer may unilaterally reduce the amount of fee or profit that is otherwise payable to the contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the contractor will be determined by the severity of the contractor's failure to comply with contract terms and conditions relating to the safeguarding of Restricted data or other classified information pursuant to the degrees specified in paragraph (c) of this clause.

(b) *Reduction amount.* (1) If in any period (*see* 48 CFR 952.204–76 (b)(2)) it is found that the contractor has failed to comply with contract terms and conditions relating to the safeguarding of Restricted Data or other classified information, the contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26 percent nor greater than 100 percent of the total fee or profit earned for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure. The contracting officer must consider mitigating factors that may warrant a reduction below the specified range (*see* 48 CFR 904.402(c)). The mitigating factors include, but are not limited to, the following:

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of safeguarding Restricted Data and other classified information and compliance in related security areas.

(2)(i) Except in the case of performance-based firm-fixed-price contracts (see paragraph (b)(3) of this clause), the contracting officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (*i.e.,* from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the contractor in the period established pursuant to paragraph (b)(2)(i) of this clause.

(3) For performance-based firm-fixed-price contracts, the contracting officer will at the time of contract award include negative monetary incentives in the contract for contractor violations relating to the safeguarding of Restricted Data and other classified information.

(c) *Safeguarding restricted data and other classified information.* Performance failures occur if the contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failures relating to the contractor's obligations under this contract for safeguarding of Restricted Data and other classified information are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Sceret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other information regardless of classification (except for information covered by paragraph (c)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following are examples of performance failures or performance failures of similar import that will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of clause)

[68 FR 68777, Dec. 10, 2003]

952.204–77 Computer Security.

As prescribed in 904.404(d)(7), the following clause shall be included:

COMPUTER SECURITY (AUG 2006)

(a) *Definitions.*

(1) *Computer* means desktop computers, portable computers, computer networks (including the DOE Network and local area networks at or controlled by DOE organizations), network devices, automated information systems, and or other related computer equipment owned by, leased, or operated on behalf of the DOE.

(2) *Individual* means a DOE contractor or subcontractor employee, or any other person who has been granted access to a DOE computer or to information on a DOE computer, and does not include a member of the public who sends an e-mail message to a DOE computer or who obtains information available to the public on DOE Web sites.

(b) *Access to DOE computers.* A contractor shall not allow an individual to have access to information on a DOE computer unless:

(1) The individual has acknowledged in writing that the individual has no expectation of privacy in the use of a DOE computer; and,

(2) The individual has consented in writing to permit access by an authorized investigative agency to any DOE computer used during the period of that individual's access to

information on a DOE computer, and for a period of three years thereafter.

(c) *No expectation of privacy.* Notwithstanding any other provision of law (including any provision of law enacted by the Electronic Communications Privacy Act of 1986), no individual using a DOE computer shall have any expectation of privacy in the use of that computer.

(d) *Written records.* The contractor is responsible for maintaining written records for itself and subcontractors demonstrating compliance with the provisions of paragraph (b) of this section. The contractor agrees to provide access to these records to the DOE, or its authorized agents, upon request.

(e) *Subcontracts.* The contractor shall insert this clause, including this paragraph (e), in subcontracts under this contract that may provide access to computers owned, leased or operated on behalf of the DOE.

(End of clause)

[71 FR 40885, July 19, 2006]

952.208 Clauses related to required sources of supply.

952.208–7 Tagging of leased vehicles.

As prescribed in 908.1104, insert the following clause when leasing commercial vehicles for periods in excess of 60 days.

TAGGING OF LEASED VEHICLES (APR 1984)

(a) DOE intends to use U.S. Government license tags.

(b) While it is the intention that vehicles leased hereunder shall operate on Federal tags, the DOE reserves the right to utilize State tags if necessary to accomplish its mission. Should State tags be required, the contractor shall furnish the DOE the documentation required by the State to acquire such tags.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 67 FR 14872, Mar. 28, 2002]

952.208–70 Printing.

As prescribed in 908.802, insert the following clause.

PRINTING (APR 1984)

The contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single unit, or no more than 25,000 units in the aggregate of multiple units, will not be deemed to be printing. A unit is defined as one sheet, size 8½ by 11 inches one side only, one color. A requirement is defined as a single publication document.

(1) The term *printing* includes the following processes: composition, plate making, presswork, binding, microform publishing, or the end items produced by such processes.

(2) If fulfillment of the contract will necessitate reproduction in excess of the limits set forth above, the contractor shall notify the contracting officer in writing and obtain the contracting officer's approval prior to acquiring on DOE's behalf production, acquisition, and dissemination of printed matter. Such printing must be obtained from the Government Printing Office (GPO), a contract source designated by GPO or a Joint Committee on Printing authorized federal printing plant.

(3) Printing services not obtained in compliance with this guidance will result in the cost of such printing being disallowed.

(4) The Contractor will include in each of his subcontracts hereunder a provision substantially the same as this clause including this paragraph (4).

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994]

952.209 Clauses related to contractor's qualifications.

952.209–8 Organizational Conflicts of Interest-Disclosure.

As prescribed in 48 CFR 909.507–1(e), insert the following provision:

ORGANIZATIONAL CONFLICTS OF INTEREST DISCLOSURE-ADVISORY AND ASSISTANCE SERVICES (JUN 1997)

(a) Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) An offeror notified that it is the apparent successful offeror shall provide the statement described in paragraph (c) of this provision. For purposes of this provision, ''apparent successful offeror'' means the proposer selected for final negotiations or, where individual contracts are negotiated with all firms in the competitive range, it means all such firms.

(c) The statement must contain the following:

(1) A statement of any past (within the past twelve months), present, or currently planned financial, contractual, organizational, or other interests relating to the performance of the statement of work. For contractual interests, such statement must include the name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12 months preceding the date of the statement, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable. For financial interests, the statement must include the nature and extent of the interest and any entity or entities involved in the financial relationship. For these and any other interests enough such information must be provided to allow a meaningful evaluation of the potential effect of the interest on the performance of the statement of work.

(2) A statement that no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated as part of the statement required by (b) of this provision.

(d) Failure of the offeror to provide the required statement may result in the offeror being determined ineligible for award. Misrepresentation or failure to report any fact may result in the assessment of penalties associated with false statements or such other provisions provided for by law or regulation.

(End of provision)

[62 FR 40752, July 30, 1997]

952.209–71 [Reserved]

952.209–72 Organizational conflicts of interest.

As prescribed at 48 CFR 909.507–2, insert the following clause:

ORGANIZATIONAL CONFLICTS OF INTEREST (JUN 1997)

(a) *Purpose.* The purpose of this clause is to ensure that the contractor (1) is not biased because of its financial, contractual, organizational, or other interests which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) *Scope.* The restrictions described herein shall apply to performance or participation by the contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as ''contractor'') in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity. For the purpose of this clause, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.

(1) *Use of contractor's work product.* (i) The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited and unsolicited) which stem directly from the contractor's performance of work under this contract for a period of (Contracting Officer see DEAR 9.507–2 and enter specific term) years after the completion of this contract. Furthermore, unless so directed in writing by the contracting officer, the Contractor shall not perform any advisory and assistance services work under this contract on any of its products or services or the products or services of another firm if the contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for advisory and assistance services.

(ii) If, under this contract, the contractor prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the contracting officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the contractor from offering or selling its standard and commercial items to the Government.

(2) *Access to and use of information.* (i) If the contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or data which has not been released or otherwise made available to the public, the contractor agrees that without prior written approval of the contracting officer it shall not:

(A) Use such information for any private purpose unless the information has been released or otherwise made available to the public;

(B) Compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first;

(C) Submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and

(D) Release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The contractor may use technical data it first produces under this contract for its private purposes consistent with paragraphs (b)(2)(i) (A) and (D) of this clause and the patent, rights in data, and security provisions of this contract.

(c) *Disclosure after award.* (1) The contractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this contract, occur during the performance of this contract, it shall make an immediate and full disclosure of such changes in writing to the contracting officer. Such disclosure may include a description of any action which the contractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the contractor was aware of facts required to be disclosed or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the contracting officer, DOE may terminate this contract for default.

(d) *Remedies.* For breach of any of the above restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this contract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Government may terminate the contract for default, disqualify the contractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this contract.

(e) *Waiver.* Requests for waiver under this clause shall be directed in writing to the contracting officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the contracting officer may grant such a waiver in writing.

(End of clause)

Alternate I: In accordance with 909.507–2 and 970.0905, include the following alternate in the specified types of contracts.

(f) *Subcontracts.* (1) The contractor shall include a clause, substantially similar to this clause, including this paragraph (f), in subcontracts expected to exceed the simplified acquisition threshold determined in accordance with FAR part 13 and involving the performance of advisory and assistance services as that term is defined at FAR 37.201. The terms ''contract,'' ''contractor,'' and ''contracting officer'' shall be appropriately modified to preserve the Government's rights.

(2) Prior to the award under this contract of any such subcontracts for advisory and assistance services, the contractor shall obtain from the proposed subcontractor or consultant the disclosure required by DEAR 909.507–1, and shall determine in writing whether the interests disclosed present an actual or significant potential for an organizational conflict of interest. Where an actual or significant potential organizational conflict of interest is identified, the contractor shall take actions to avoid, neutralize, or mitigate the organizational conflict to the satisfaction of the contractor. If the conflict cannot be avoided or neutralized, the contractor must obtain the approval of the DOE contracting officer prior to entering into the subcontract.

(End of alternate)

[62 FR 40752, July 30, 1997]

952.211 Clauses related to contract delivery or performance.

952.211–70 Priorities and allocations for energy programs (solicitations).

As prescribed in 911.604(a), insert the following provision in solicitations that will result in the award of a contract in support of DOE atomic energy programs.

PRIORITIES AND ALLOCATIONS (ATOMIC ENERGY) (APR 2008)

Contracts or purchase orders awarded as a result of this solicitation shall be assigned a [ ] DO-Rating; [ ] DX Rating; and certified for national defense use in accordance with the Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700) (Contracting officer check appropriate box.)

(End of clause)

[73 FR 10985, Feb. 29, 2008]

952.211–71 Priorities and allocations for energy programs (contracts).

As prescribed in 911.604(b), insert the following clause in contracts and purchase orders that are placed in support of authorized DOE atomic energy programs pursuant to the Atomic Energy Act of 1954, as amended.

PRIORITIES AND ALLOCATIONS (ATOMIC ENERGY) (APR 2008)

The Contractor shall follow the provisions of Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700) in obtaining materials (including equipment), services, or facilities needed to fill this contract.

(End of clause)

[73 FR 10985, Feb. 29, 2008]

952.211–72—952.211–73 [Reserved]

952.215–70 Key Personnel.

As prescribed in 48 CFR 915.408–70, the contracting officer shall insert the following clause:

KEY PERSONNEL (DEC 2000)

(a) The personnel listed below or elsewhere in this contract [Insert cross-reference, if applicable] are considered essential to the work being performed under this contract. Before removing, replacing, or diverting any of the listed or specified personnel, the Contractor must: (1) Notify the Contracting Officer reasonably in advance; (2) submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on this contract; and (3) obtain the Contracting Officer's written approval. Notwithstanding the foregoing, if the Contractor deems immediate removal or suspension of any member of its management team is necessary to fulfill its obligation to maintain satisfactory standards of employee competency, conduct, and integrity under the clause at 48 CFR 970.5203–3, Contractor's Organization, the Contractor may remove or suspend such person at once, although the Contractor must notify Contracting Officer prior to or concurrently with such action.

(b) The list of personnel may, with the consent of the contracting parties, be amended from time to time during the course of the contract to add or delete personnel.

[Insert List of Key Personnel unless listed elsewhere in the contract]

(End of clause)

[65 FR 81008, Dec. 22, 2000]

952.216 Clauses related to types of contracts.

952.216–7 Allowable cost and payment.

Alternate I: If the contract is with a nonprofit organization, other than an educational institution; or a State or local government, modify the clause at FAR 52.216–7 Allowable Cost and Payment by deleting from paragraph (a) the phrase ''Subpart 31.2'' and substituting for it ''Subpart 31.7.''

Alternate II: When contracting with a commercial organization modify paragraph (a) of the clause at FAR 52.216–7 by adding the phrase ''as supplemented by Subpart 931.2 of the Department of Energy Acquisition Regulations (DEAR),'' after the acronym ''(FAR)''.

952.216–15 Predetermined indirect cost rates.

Alternate (APR 1994): As prescribed in 916.307(j), modify paragraph (c) of the clause at FAR 52.216–15, Predetermined Indirect Cost Rates, by deleting the words ''Subpart 31.3'' and substituting for them ''Subpart 31.6'' and insert the clause in solicitations and contracts when a cost-reimbursement research and development contract with a State or local government is contemplated and predetermined indirect cost rates are to be used.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.217–70 Acquisition of real property.

Insert the following clause when required by 917.7403.

ACQUISITION OF REAL PROPERTY (APR 1984)

(a) Notwithstanding any other provision of the contract, the prior approval of the contracting officer shall be obtained when, in performance of this contract, the contractor acquires or proposes to acquire use of real property by:

(1) Purchase, on the Government's behalf or in the contractor's own name, with title eventually vesting in the Government.

(2) Lease, and the Government assumes liability for, or will otherwise pay for the obligation under the lease as a reimbursable contract cost.

(3) Acquisition of temporary interest through easement, license or permit, and the Government funds the entire cost of the temporary interest.

(b) Justification of and execution of any real property acquisitions shall be in accordance and compliance with directions provided by the contracting officer.

(c) The substance of this clause, including this paragraph (c), shall be included in any subcontract occasioned by this contract under which property described in paragraph (a) of this clause shall be acquired.

[49 FR 12042, Mar. 28, 1984, as amended at 67 FR 14872, Mar. 28, 2002]

952.219–70 DOE Mentor-Protege program.

In accordance with 919.7014 insert the following provision in applicable solicitations.

DOE MENTOR-PROTEGE PROGRAM (MAY 2000)

The Department of Energy has established a Mentor-Protege Program to encourage its prime contractors to assist firms certified under section 8(a) of the Small Business Act by SBA, other small disadvantaged businesses, women-owned small businesses, Historically Black Colleges and Universities and Minority Institutions, other minority institutions of higher learning and small business concerns owned and controlled by service disabled veterans in enhancing their business abilities. If the contract resulting from this solicitation is awarded on a cost-plus-award fee basis, the contractor's performance as a Mentor may be evaluated as part of the award fee plan. Mentor and Protege firms will develop and submit ''lessons learned'' evaluations to DOE at the conclusion of the contract. Any DOE contractor that is interested in becoming a Mentor should refer to the applicable regulations at 48 CFR 919.70 and should contact the Department of Energy's Office of Small and Disadvantaged Business Utilization.

[65 FR 21371, Apr. 21, 2000]

952.223 Clauses related to environment, conservation, and occupational safety.

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

As prescribed in 923.7002 the clause set forth at 48 CFR 970.5223–1 shall be included in all contracts and subcontracts for, and be made applicable to, work to be performed at a government-owned or leased facility where DOE has elected to assert its statutory authority to establish and enforce occupational safety and health standards applicable to the work conditions of contractor and subcontractor employees, and to the protection of the public health and safety.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 65 FR 81008, Dec. 22, 2000]

952.223–72 Radiation protection and nuclear criticality.

As prescribed in 923.7002 the clause set forth herein shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with states under section 274 of the Atomic Energy Act).

RADIATION PROTECTION AND NUCLEAR CRITICALITY (APR 1984)

The contractor shall take all reasonable precautions in the performance of work under this contract to protect the safety and health of employees and of members of the public against the hazards of ionizing radiation and radioactive materials and shall comply with all applicable radiation protection and nuclear criticality safety standards and requirements (including reporting requirements) of DOE. The contractor shall submit a management program and implementation plan to the contracting officer for review and approval within 30 days after the

effective date of this contract or modification. In the event that the contractor fails to comply with said standards and requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work. Thereafter, a start order for resumption of the work may be issued at the discretion of the contracting officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage.

[49 FR 12042, Mar. 28, 1984; 49 FR 38952, Oct. 2, 1984, as amended at 59 FR 9109, Feb. 25, 1994]

952.223–73—952.223–74 [Reserved]

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.

PRESERVATION OF INDIVIDUAL OCCUPATIONAL RADIATION EXPOSURE RECORDS (APR 1984)

Individual occupational radiation exposure records generated in the performance of work under this contract shall be subject to inspection by DOE and shall be preserved by the contractor until disposal is authorized by DOE or at the option of the contractor delivered to DOE upon completion or termination of the contract. If the contractor exercises the foregoing option, title to such records shall vest in DOE upon delivery.

[49 FR 12042, Mar. 28, 1984; 49 FR 38952, Oct. 2, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 34862, June 27, 1997]

952.223–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information and protection of worker safety and health.

As prescribed at 48 CFR (DEAR) 923.7002(f), insert the following clause.

CONDITIONAL PAYMENT OF FEE OR PROFIT—SAFEGUARDING RESTRICTED DATA AND OTHER CLASSIFIED INFORMATION AND PROTECTION OF WORKER SAFETY AND HEALTH (JAN 2004)

(a) *General.* (1) The payment of fee or profit (*i.e.*, award fee, fixed fee, and incentive fee or profit) under this contract is dependent upon the contractor's compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information (*i.e.,* Formerly Restricted Data and National Security Information) and relating to the protection of worker safety and health, including compliance with applicable law, regulation, and DOE directives. The term ''contractor'' as used in this clause to address failure to comply shall mean ''contractor or contractor employee.''

(2) In addition to other remedies available to the Federal Government, if the contractor fails to comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information or relating to the protection of worker safety and health, the contracting officer may unilaterally reduce the amount of fee or profit that is otherwise payable to the contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the contractor will be determined by the severity of the contractor's failure to comply with contract terms and conditions relating to the safeguarding of Restricted data or other classified information or relating to worker safety and health pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(b) *Reduction amount.* (1) If in any period (*see* 48 CFR 952.223–76 (b)(2)) it is found that the contractor has failed to comply with contract terms and conditions relating to the safeguarding of Restricted Data or other classified information or relating to the protection of worker safety and health, the contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26 percent nor greater than 100 percent of the total fee or profit earned for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure. The contracting officer must consider mitigating factors that may warrant a reduction below the specified range (*see* 48 CFR 904.402(c) and 48 CFR 923.7001(b)). The mitigating factors include, but are not limited to, the following ((v), (vi), (vii), and (viii) apply to WS&H only):

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of: Safeguarding Restricted Data and other classified information and compliance in related security areas; or of protecting WS&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial WS&H standards are routinely practiced (*e.g.,* Voluntary Protection Program Star Status).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.,* offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain WS&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.,* policy, WS&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in WS&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(2)(i) Except in the case of performance-based, firm-fixed-price contracts (*see* paragraph (b)(3) of this clause), the contracting officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (*i.e.,* from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the contractor in the period established pursuant to paragraph (b)(2)(i) of this clause.

(3) For performance-based firm-fixed-price contracts, the contracting officer will at the time of contract award include negative monetary incentives in the contract for contractor violations relating to the safeguarding of Restricted Data and other classified information and relating to protection of worker safety and health.

(c) *Safeguarding restricted data and other classified information.* Performance failures occur if the contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failures relating to the contractor's obligations under this contract for safeguarding of Restricted Data and other classified information are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other classified information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Secret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification (except for information covered by paragraph (c)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following are examples of performance failures or performance failures of similar import will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(d) *Protection of worker safety and health.* Performance failures occur if the contractor does not comply with the contract's WS&H terms and conditions, which may be included in the DOE approved contractor Integrated Safety Management System (ISMS). The degrees of performance failure under which reductions of fee or profit will be determined are:

(1) *First Degree:* Performance failures that are most adverse to WS&H or could threaten the successful completion of a program or project. For contracts including ISMS requirements, failure to develop and obtain required DOE approval of WS&H aspects of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the WS&H aspects of the contractor's ISMS. The following performance failures or performance failures of similar import will be deemed first degree:

(i) Type A accident (defined in DOE Order 225.1A).

(ii) Two Second Degree performance failures during an evaluation period.

(2) *Second Degree:* Performance failures that are significantly adverse to WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1A).

(ii) Non-compliance with approved WS&H aspects of an ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

(3) *Third Degree:* Performance failures that reflect a lack of focus on improving WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in potential breakdown of the contractor's WS&H system. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement effective corrective actions to address deficiencies/non-compliance documented through external (*e.g.*, Federal) oversight and/or reported per DOE Order 232.1A requirements, or internal oversight of DOE O 440.1A requirements.

(ii) Multiple similar non-compliances identified by external (*e.g.*, Federal) oversight that in aggregate indicate a significant WS&H system breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to workers that indicate a significant WS&H system breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(End of clause)

[68 FR 68778, Dec. 10, 2003]

952.223–77 Conditional payment of fee or profit—protection of worker safety and health.

As prescribed at 48 CFR (DEAR) 923.7002(g), insert the following clause.

CONDITIONAL PAYMENT OF FEE OR PROFIT—PROTECTION OF WORKER SAFETY AND HEALTH (JAN 2004)

(a) *General.* (1) The payment of fee or profit (*i.e.*, award fee, fixed fee, and incentive fee or profit) under this contract is dependent upon the contractor's compliance with the terms and conditions of this contract relating to the protection of worker safety and health (WS&H), including compliance with applicable law, regulation, and DOE directives. The term ''contractor'' as used in this clause to address failure to comply shall mean ''contractor or contractor employee.''

(2) In addition to other remedies available to the Federal Government, if the contractor fails to comply with the terms and conditions of this contract relating to the protection of worker safety and health, the contracting officer may unilaterally reduce the amount of fee or profit that is otherwise payable to the contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the contractor will be determined by the severity of the contractor's failure to comply with contract terms and conditions relating to worker safety and health pursuant to the degrees specified in paragraph (c) of this clause.

(b) *Reduction amount.* (1) If in any period (*see* 48 CFR 952.223–77 (b)(2)) it is found that the contractor has failed to comply with contract terms and conditions relating to the protection of worker safety and health, the contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26% nor greater than 100% of the total fee or profit earned for a first degree performance failure, not less than 11% nor greater than 25% for a second degree performance failure, and up to 10% for a third degree performance failure. The contracting officer must consider mitigating factors that may warrant a reduction below the specified range (*see* 48 CFR 923.7001(b)). The mitigating factors include, but are not limited to, the following:

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of protecting WS&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial WS&H standards are routinely practiced (*e.g.*, Voluntary Protection Program Star Status).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.*, offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain WS&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.*, policy, WS&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in WS&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(2)(i) Except in the case of performance based firm-fixed-price contracts (*see* paragraph (b)(3) below), the contracting officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (*i.e.*, from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the contractor in the period established pursuant to paragraph (b)(2)(i) of this clause.

(3) For performance-based firm-fixed-price contracts, the contracting officer will at the time of contract award include negative monetary incentives in the contract for contractor violations relating to the protection of worker safety and health.

(c) *Protection of worker safety and health.* Performance failures occur if the contractor does not comply with the contract's WS&H terms and conditions, which may be included in the DOE approved contractor Integrated

Safety Management System (ISMS). The degrees of performance failure under which reductions of fee or profit will be determined are:

(1) *First Degree:* Performance failures that are most adverse to WS&H or could threaten the successful completion of a program or project. For contracts including ISMS requirements, failure to develop and obtain required DOE approval of WS&H aspects of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the WS&H aspects of the contractor's ISMS. The following performance failures or performance failures of similar import will be deemed first degree:

(i) Type A accident (defined in DOE Order 225.1A).

(ii) Two Second Degree performance failures during an evaluation period.

(2) *Second Degree:* Performance failures that are significantly adverse to WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1A).

(ii) Non-compliance with approved WS&H aspects of an ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

(3) *Third Degree:* Performance failures that reflect a lack of focus on improving WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in potential breakdown of the contractor's WS&H system. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement effective corrective actions to address deficiencies/non-compliance documented through external (*e.g.,* Federal) oversight and/or reported per DOE Order 232.1A requirements, or internal oversight of DOE O 440.1A requirements.

(ii) Multiple similar non-compliances identified by external (*e.g.,* Federal) oversight that in aggregate indicate a significant WS&H system breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to workers that indicate a significant WS&H system breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(End of clause)

[69 FR 68780, Dec. 10, 2004]

952.224–70 Paperwork Reduction Act.

Insert the following clause if it is anticipated that information collection from 10 or more persons will be necessary under the contract.

PAPERWORK REDUCTION ACT (APR 1994)

(a) In the event that it subsequently becomes a contractual requirement to collect or record information calling either for answer to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is to be used for statistical compilations of general public interest, the Paperwork Reduction Act will apply to this contract. No plan, questionnaire, interview guide, or other similar device for collecting information (whether repetitive or single-time) may be used without first obtaining clearance from the Office of Management and Budget (OMB).

(b) The contractor shall request the required OMB clearance from the contracting officer before expending any funds or making public contacts for the collection of data. The authority to expend funds and to proceed with the collection of data shall be in writing by the contracting officer. The contractor must plan at least 90 days for OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the contractor will be considered in accordance with the clause entitled ''Excusable Delays,'' if such clause is applicable. If not, the period of performance may be extended pursuant to this clause if approved by the contracting officer.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.225–70 Subcontracting for nuclear hot cell services.

As prescribed in 925.7004, insert the following clause in solicitations and contracts.

SUBCONTRACTING FOR NUCLEAR HOT CELL SERVICES (MAR 1993)

(a) *Definitions.*

Costs related to the decommissioning of nuclear facilities, as used in this clause, means any cost associated with the compliance

with regulatory requirements governing the decommissioning of nuclear facilities licensed by the Nuclear Regulatory Commission. Such costs for foreign facilities and for Department of Energy facilities are costs of decommissioning associated with the compliance with foreign regulatory requirements or the Department's own requirements.

Costs related to the storage and disposal of nuclear waste, as used in this clause, means any costs, whether required by regulation or incurred as a matter of prudent business practice, associated with the storage or disposal of nuclear waste.

Foreign company, as used in this clause, means a company which offers to perform nuclear hot cell services at a facility which is not subject to the laws and regulations of the United States, its agencies, and its political subdivisions.

Nuclear hot cell services, as used in this clause, means services related to the examination of, or performance of various operations on, nuclear fuel rods, control assemblies, or other components that are emitting large quantities of ionizing radiation, after discharge from nuclear reactors, which are performed in specialized facilities located away from commercial nuclear power plants, generally referred to in the industry as ''hot cells.''

Nuclear waste, as used in this clause, means any radioactive waste material subject to regulation by the Nuclear Regulatory Commission or the Department of Energy, or in the case of foreign offers, by comparable foreign organizations.

United States company, as used in this clause, means a company which offers to perform nuclear hot cell services at a facility subject to the laws and regulations of the United States, its agencies, and its political subdivisions.

(b) In selecting a competitive offer for a first-tier subcontract acquisition of nuclear hot cell services, the contractor shall (1) consider neither costs related to the decommissioning of nuclear waste facilities nor costs related to the storage and disposal of nuclear waste, or (2) add these costs to offers of foreign companies, if—

(i) one or more of the offers is submitted by a United States company and includes costs related to the decommissioning of nuclear facilities and costs related to the storage and disposal of nuclear waste because it is subject to such cost; and

(ii) one or more of the offers is submitted by a foreign company and does not include these types of costs. (A foreign company might not be subject to such costs or might not have to include these types of cost in its offer if the firm is subsidized in decommissioning activity or storage and disposal of nuclear waste, or a foreign government is performing the activities below the actual cost of the activity.)

(c) Upon determining that no offer from a foreign firm has a reasonable chance of being selected for award, the requirements of this clause will not apply.

[58 FR 8911, Feb. 18, 1993; 58 FR 39679, July 26, 1993]

952.226–70 Subcontracting goals under section 3021(a) of the Energy Policy Act of 1992.

As prescribed in 926.7007(a), insert the following provision:

SUBCONTRACTING GOALS UNDER SECTION 3021(A) OF THE ENERGY POLICY ACT OF 1992 (PUB. L. 102–486) (JUN 1996)

(a) *Definition.* Energy Policy Act target groups, as used in this provision means:

(1) An institution of higher education that meets the criteria of 34 CFR 600.4(a) and has a student enrollment that consists of at least 20 percent:

(i) Hispanic Americans, *i.e.,* students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof, or

(ii) Native Americans, *i.e.,* American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) Institutions of higher learning determined by the Secretary of Education to be Historically Black Colleges and Universities pursuant to 34 CFR 608.2; and

(3) Small business concerns, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that are owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) Section 3021 of the Energy Policy Act (Pub. L. 102–486) establishes a goal of award of 10 percent of the contract dollar value for prime and subcontract Energy Policy Act awards to Energy Policy Act target groups.

(c) The offeror, if other than one of the three groups specified in paragraph (a) of this clause, shall submit, as part of its business management proposal or, if this solicitation requires the submission of a Small, Small Disadvantaged and Women-Owned Subcontracting Plan, then as part of that plan, unless otherwise stated in the proposal preparation instructions, individual subcontracting goals for each of the three Energy Policy Act target groups. Individual goals shall be expressed in terms of a percentage of the offeror's proposed contract dollar value. In addition, the offeror shall provide a description of the nature of the effort to be performed by each of the three groups, and, if possible, the identity of the contemplated subcontractor(s).

(d) Unless otherwise stated, such goals shall be considered in the evaluation of the

Business Management Proposal as discussed in Section M of this solicitation or, if applicable, as part of the evaluation of the Small, Small Disadvantaged and Women-Owned Subcontracting Plan.

(End of provision)

[60 FR 22301, May 5, 1995, as amended at 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996]

952.226–71 Utilization of Energy Policy Act target entities.

As prescribed in 926.7007(b), insert the following clause:

UTILIZATION OF ENERGY POLICY ACT TARGET ENTITIES (JUN 1996)

(a) *Definition.*—Energy Policy Act target groups, as used in this provision means:

(1) An institution of higher education that meets the requirements of 34 CFR 600.4(a) and has a student enrollment that consists of at least 20 percent:

(i) Hispanic Americans, *i.e.,* students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof, or

(ii) Native Americans, *i.e.,* American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) Institutions of higher learning determined to be Historically Black Colleges and Universities by the Secretary of Education pursuant to 34 CFR 608.2; and

(3) Small business concerns, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that are owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) *Obligation.* In addition to its obligations under the clause of this contract entitled Utilization of Small Business, Small Disadvantaged and Women-Owned Small Business Concerns, the contractor, in performance of this contract, agrees to provide its best efforts to competitively award subcontracts to entities from among the Energy Policy Act target groups.

(End of clause)

[60 FR 22301, May 5, 1995, as amended at 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996]

952.226–72 Energy Policy Act subcontracting goals and reporting requirements.

As prescribed in 926.7007(c), insert the following clause:

ENERGY POLICY ACT SUBCONTRACTING GOALS AND REPORTING REQUIREMENTS (JUN 1996)

(a) *Definition.* Energy Policy Act target groups, as used in this provision means:

(1) An institution of higher education that meets the requirements of 34 CFR 600.4(a), and has a student enrollment that consists of at least 20 percent:

(i) Hispanic Americans, *i.e.,* students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof, or

(ii) Native Americans, *i.e.,* American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) Institutions of higher learning determined to be Historically Black Colleges and Universities by the Secretary of Education pursuant to 34 CFR 608.2; and

(3) Small business concerns, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that are owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) *Goals.* The contractor, in performance of this contract, agrees to provide its best efforts to award subcontracts to the following classes of entities:

(1) Small business concerns controlled by socially and economically disadvantaged individuals or by women: * * * percent;

(2) Historically Black colleges and universities: * * * percent;

(3) Colleges or universities having a student body in which more than 20 percent of the students are Hispanic Americans or Native Americans: * * * percent.

[* * * These goals are stated in a percentage reflecting the relationship of estimated award value of subcontracts to the value of this contract and appear elsewhere in this contract.]

(c) *Reporting requirements.* (1) The contractor agrees to report, on an annual Federal Government fiscal year basis, its progress against the goals by providing the actual annual dollar value of subcontract payments for the preceding 12-month period, and the relationship of those payments to the incurred contract costs for the same period. Reports submitted pursuant to this clause must be received by the contracting officer (or designee) not later than 45 days after the end of the reporting period.

(2) If the contract includes reporting requirements under FAR 52.219–9, Small, Small Disadvantaged and Women-Owned Subcontracting Plan, the contractor's progress against the goals stated in paragraph (b) of this clause shall be included as an addendum to Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF

295, Summary Subcontract Report, as applicable, for the period that corresponds to the end of the Federal Government fiscal year.

(End of clause)

[60 FR 22302, May 5, 1995, as amended at 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996]

952.226–73 Energy Policy Act target group certification.

As prescribed in 926.7007(d), insert the following provision:

ENERGY POLICY ACT TARGET GROUP CERTIFICATION (SEP 1997)

(a) *Certification.* The offeror is:

(1) ___ An institution of higher education that meets the requirements of 34 CFR 600.4(a), and has a student enrollment that consists of at least 20 percent:

(i) Hispanic Americans, *i.e.,* students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof, or

(ii) Native Americans, *i.e.,* American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) ___ An institution of higher learning determined to be a Historically Black College and University by the Secretary of Education pursuant to 34 CFR 608.2; or

(3) ___ A small business concern, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that is owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) By submission of an offer, the offeror agrees to provide to the Contracting Officer, upon request, evidence satisfactory to the contracting officer that the offeror is an entity from the Energy Policy Act target group identified.

(End of provision)

[60 FR 22302, May 5, 1995; 61 FR 30823, June 18, 1996, as amended at 62 FR 42074, Aug. 5, 1997]

952.226–74 Displaced employee hiring preference.

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

DISPLACED EMPLOYEE HIRING PREFERENCE (JUN 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.

[62 FR 34862, June 27, 1997]

952.227 Provisions and clauses related to patents, technical data and copyrights.

952.227–9 Refund of royalties.

As prescribed in 927.206–2, insert the following clause:

REFUND OF ROYALTIES (MAR 1995)

(a) The contract price includes certain amounts for royalties payable by the Contractor or subcontractors or both, which amounts have been reported to the Contracting Officer.

(b) The term *royalties* as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this contract or any subcontract here-under. The term also includes any costs or charges associated with the access to, use of, or other right pertaining to data that is represented to be proprietary and is related to the performance of this contract or the copying of such data or data that is copyrighted.

(c) The Contractor shall furnish to the Contracting Officer, before final payment under this contract, a statement of royalties paid or required to be paid in connection with performing this contract and subcontracts hereunder together with the reasons.

(d) The Contractor will be compensated for royalties reported under paragraph (c) of this clause, only to the extent that such royalties were included in the contract price and are

determined by the Contracting Officer to be properly chargeable to the Government and allocable to the contract. To the extent that any royalties that are included in the contract price are not, in fact, paid by the Contractor or are determined by the Contracting Officer not to be properly chargeable to the government and allocable to the contract, the contract price shall be reduced. Repayment or credit to the Government shall be made as the Contracting Officer directs. The approval by DOE of any individual payments or royalties shall not prevent the Government from contesting at any time the enforceability, validity, scope of, or title to, any patent or the proprietary nature of data pursuant to which a royalty or other payment is to be or has been made.

(e) If, at any time within 3 years after final payment under this contract, the Contractor for any reason is relieved in whole or in part from the payment of the royalties included in the final contract price as adjusted pursuant to paragraph (d) of this clause, the Contractor shall promptly notify the Contracting Officer of that fact and shall reimburse the Government in a corresponding amount.

(f) The substance of this clause, including this paragraph (f), shall be included in any subcontract in which the amount of royalties reported during negotiation of the subcontract exceeds $250.

(End of clause)

[60 FR 11817, Mar. 2, 1995]

952.227–11 Patent rights—retention by the contractor (short form).

As prescribed in 927.303(a), insert the following clause:

PATENT RIGHTS—RETENTION BY THE CONTRACTOR (SHORT FORM) (MAR 1995)

(a) *Definitions.*

(1) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

(2) *Made* when used in relation to any invention means the conception of first actual reduction to practice of such invention.

(3) *Nonprofit organization* means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(4) *Practical application* means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(5) *Small business firm* means a small business concern as defined at section 2 of Public Law 85–536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3–8 and 13 CFR 121.3–12, respectively, will be used.

(6) *Subject invention* means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.

(7) *Agency licensing regulations* and *agency regulations concerning the licensing of Government-owned inventions* mean the Department of Energy patent licensing regulations at 10 CFR part 781.

(b) *Allocation of principal rights.* The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) *Invention disclosure, election of title, and filing of patent application by Contractor.* (1) The Contractor will disclose each subject invention to the Department of Energy (DOE) within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and,

if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the DOE, the Contractor will promptly notify that agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor.

(2) The Contractor will elect in writing whether or not to retain title to any such invention by notifying DOE within 2 years of disclosure to DOE. However, in any case where publication, on sale or public use has initiated the l-year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by DOE to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure, election, and filing under subparagraphs (c)(l), (2), and (3) of this clause may, at the discretion of the agency, be granted.

(d) *Conditions when the Government may obtain title.* The Contractor will convey to the Federal agency, upon written request, title to any subject invention—

(1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that DOE may only request title within 60 days after learning of the failure of the Contractor to disclose or elect within the specified times.

(2) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the Federal agency, the Contractor shall continue to retain title in that country.

(3) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) *Minimum rights to Contractor and protection of the Contractor right to file.* (1) The Contractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the Federal agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency regulations concerning the licensing of Government owned inventions, any decision concerning the revocation or modification of the license.

(f) *Contractor action to protect the Government's interest.* (1) The Contractor agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title, and (ii) convey title to DOE when requested under paragraph (d) of this clause and to enable the government to obtain patent protection throughout the world in that subject invention.

(2) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor will notify DOE of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, ''This invention was made with Government support under (identify the contract) awarded by the United States Department of Energy. The Government has certain rights in the invention.''

(g) *Subcontracts.* (1) The Contractor will include this clause, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The subcontractor will retain all rights provided for the Contractor in this clause, and the Contractor will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) The contractor shall include in all other subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights clause at 952.227–13.

(3) In the case of subcontracts, at any tier, DOE, subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(h) *Reporting on utilization of subject inventions.* The Contractor agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received, by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by that agency in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Contractor.

(i) *Preference for United States industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *March-in rights.* The Contractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Contractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that—

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Special provisions for contracts with nonprofit organizations.* If the Contractor is a nonprofit organization, it agrees that—

(1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Contractor;

(2) The Contractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) The balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and

(4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the contractor. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business applicants, and the Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this subparagraph (k)(4).

(l) *Communications.* (1) The contractor shall direct any notification, disclosure, or request to DOE provided for in this clause to the DOE patent counsel assisting the DOE contracting activity, with a copy of the communication to the Contracting Officer.

(2) Each exercise of discretion or decision provided for in this clause, except subparagraph (k)(4), is reserved for the DOE Patent Counsel and is not a claim or dispute and is not subject to the Contract Disputes Act of 1978.

(3) Upon request of the DOE Patent Counsel or the contracting officer, the contractor shall provide any or all of the following:

(i) A copy of the patent application, filing date, serial number and title, patent number, and issue date for any subject invention in any country in which the contractor has applied for a patent;

(ii) A report, not more often than annually, summarizing all subject inventions which were disclosed to DOE individually during the reporting period specified; or

(iii) A report, prior to closeout of the contract, listing all subject inventions or stating that there were none.

(End of clause)

[60 FR 11817, Mar. 2, 1995]

952.227–13 Patent rights—acquisition by the Government.

As prescribed at 927.303(a)(1), insert the following clause:

PATENT RIGHTS—ACQUISITION BY THE GOVERNMENT (SEP 1997)

(a) *Definitions.*

Invention, as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Practical application, as used in this clause, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention, as used in this clause, means any invention of the Contractor conceived or first actually reduced to practice in the course of or under this contract.

Patent Counsel, as used in this clause, means the Department of Energy Patent Counsel assisting the procuring activity.

DOE patent waiver regulations, as used in this clause, means the Department of Energy

patent waiver regulations in effect on the date of award of this contract. See 10 CFR part 784.

Agency licensing regulations and *applicable agency licensing regulations*, as used in this clause, mean the Department of Energy patent licensing regulations at 10 CFR part 781.

(b) *Allocations of principal rights*—(1) *Assignment to the Government.* The Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Contractor under subparagraph (b)(2) and paragraph (d) of this clause.

(2) *Greater rights determinations.* (i) The Contractor, or an employee-inventor after consultation with the Contractor, may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the DOE patent waiver regulations. A request for a determination of whether the Contractor or the employee-inventor is entitled to acquire such greater rights must be submitted to the Patent Counsel with a copy to the Contracting Officer at the time of the first disclosure of the invention pursuant to subparagraph (e)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract shall be subject to paragraph (c) of this clause, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.

(ii) Within two (2) months after the filing of a patent application, the Contractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and, promptly upon issuance of a patent, provide the patent number and issue date for any subject invention in any country for which the Contractor has been granted title or the right to file and prosecute on behalf of the United States by the Department of Energy.

(iii) Not less than thirty (30) days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application.

(iv) Upon request, the Contractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(c) *Minimum rights acquired by the Government.* (1) With respect to each subject invention to which the Department of Energy grants the Contractor principal or exclusive rights, the Contractor agrees as follows:

(i) The Contractor hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency).

(ii) The Contractor agrees that with respect to any subject invention in which DOE has granted it title, DOE has the right in accordance with the procedures in the DOE patent waiver regulations (10 CFR part 784) to require the Contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if it determines that—

(A) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(B) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(C) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(D) Such action is necessary because the agreement required by paragraph (i) of this clause has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(iii) The Contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceedings undertaken by that agency in accordance with subparagraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Contractor, its licensee, or assignee to be privileged and confidential and is so marked, the Department of Energy agrees that, to the extent permitted by law,

it will not disclose such information to persons outside the Government.

(iv) The Contractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.

(v) The Contractor agrees to provide for the Government's paid-up license pursuant to subparagraph (c)(1)(i) of this clause in any instrument transferring rights in a subject invention and to provide for the granting of licenses as required by subparagraph (c)(1)(ii) of this clause, and for the reporting of utilization information as required by subparagraph (c)(1)(iii) of this clause, whenever the instrument transfers principal or exclusive rights in a subject invention.

(2) Nothing contained in this paragraph (c) shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(d) *Minimum rights to the Contractor.* (1) The Contractor is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Contractor fails to disclose the subject invention within the times specified in subparagraph (e)(2) of this clause. The Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a part and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable agency licensing regulations and 37 CFR part 404 concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(4) The Contractor may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the conditions in subparagraphs (d)(4)(i) through (d)(4)(vii) of this clause. Such request must be made in writing to the Patent Counsel as part of the disclosure required by subparagraph (e)(2) of this clause, with a copy to the DOE Contracting Officer. DOE approval, if given, will be based on a determination that this would best serve the national interest.

(i) The recipient of such rights, when specifically requested by DOE, and three years after issuance of a foreign patent disclosing the subject invention, shall furnish DOE a report stating:

(A) The commercial use that is being made, or is intended to be made, of said invention, and

(B) The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.

(ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government (including any Government agency) and States and domestic municipal governments, unless the Secretary of Energy or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.

(iii) If noted elsewhere in this contract as a condition of the grant of an advance waiver of the Government's title to inventions under this contract, or, if no advance waiver was granted but a waiver of the Government's title to an identified invention is granted pursuant to subparagraph (b)(2) of this clause upon a determination by the Secretary of Energy that it is in the Government's best interest, this license shall include the right of the Government to sublicense foreign governments pursuant to any existing or future treaty or agreement with such foreign governments.

(iv) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall

have the right to terminate the foreign patent rights granted in this subparagraph (d)(4) in whole or in part unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee that effective steps necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.

(v) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall have the right, commencing four years after foreign patent rights are accorded under this subparagraph (d)(4), to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:

(A) If the Secretary of Energy or designee determines, upon review of such material as he deems relevant, and after the recipient of such rights or other interested person has had the opportunity to provide such relevant and material information as the Secretary or designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or

(B) Unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

(vi) If the contractor is to file a foreign patent application on a subject invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures for such period of time as specified by Patent Counsel, but in no event shall the Government or its employees be liable for any publication thereof.

(vii) Subject to the license specified in subparagraphs (d) (1), (2), and (3) of this clause, the contractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the contractor or inventor fails to have a patent application filed in a timely manner or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the contractor or inventor shall, not less than 60 days before the expiration period for any action required by any patent office, notify the Patent Counsel of such failure or decision, and deliver to the Patent Counsel, the executed instruments necessary for the conveyance specified in this paragraph.

(e) *Invention identification, disclosures, and reports.* (1) The Contractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this contract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Contractor shall disclose each subject invention to the DOE Patent Counsel with a copy to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Contractor. The disclosure to DOE shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Contractor shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor. The report should also include any request for a greater rights determination in accordance with subparagraph (b)(2) of this clause. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Contractor contends in writing at the time the invention is disclosed that is was not so made.

(3) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing all subject inventions during that period, and including a statment that all subject inventions have been disclosed (or that there are not such inventions), and that such disclosure has been made in accordance with the procedures required by paragraph (e)(1) of this clause.

(ii) A final report, within 3 months after completion of the contracted work listing all subject inventions or containing a statement that there were no such inventions, and listing all subcontracts at any tier containing a patent right clause or containing a statement that there were no such subcontracts.

(4) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (e)(2) of this clause.

(5) The Contractor agrees, subject to FAR 27.302(j), that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) *Examination of records relating to inventions.* (1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(i) Any such inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by subparagraphs (e) (1) and (4) of this clause;

(iii) The Contractor and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Contractor invention which the Contracting Officer believes may be a subject invention, the Contractor may be required to disclose the invention to DOE for a determination of ownership rights.

(3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) *Withholding of payment* (This paragraph does not apply to subcontracts).

(1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion, the Contractor fails to—

(i) Convey to the Government, using a DOE-approved form, the title and/or rights of the Government in each subject invention as required by this clause.

(ii) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to subparagraph (e)(1) of this clause;

(iii) Disclose any subject invention pursuant to subparagraph (e)(2) of this clause;

(iv) Deliver acceptable interim reports pursuant to subparagraph (e)(3)(i) of this clause; or

(v) Provide the information regarding subcontracts pursuant to subparagraph (h)(4) of this clause.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer all disclosures of subject inventions required by subparagraph (e)(2) of this clause, and acceptable final report pursuant to subparagraph (e)(3)(ii) of this clause, and the Patent Counsel has issued a patent clearance certification to the Contracting Officer.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government rights.

(h) *Subcontracts.* (1) The contractor shall include the clause at 48 CFR 952.227–11 (suitably modified to identify the parties) in all subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the subcontract is subject to an Exceptional Circumstances Determination by DOE. In all other subcontracts, regardless of tier, for experimental, developmental, demonstration,

or research work, the contractor shall include this clause (suitably modified to identify the parties). The contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) In the event of a refusal by a prospective subcontractor to accept such a clause the Contractor—

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Contracting Officer.

(3) In the case of subcontracts at any tier, DOE, the subcontractor, and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to those matters covered by this clause.

(4) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of such subcontract, and, no more frequently than annually, a listing of the subcontracts that have been awarded.

(5) The contractor shall identify all subject inventions of the subcontractor of which it acquires knowledge in the performance of this contract and shall notify the Patent Counsel, with a copy to the contracting officer, promptly upon identification of the inventions.

(i) *Preference United States industry.* Unless provided otherwise, no Contractor that receives title to any subject invention and no assignee of any such Contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the Government upon a showing by the Contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *Atomic energy.* (1) No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) Except as otherwise authorized in writing by the Contracting Officer, the Contractor will obtain patent agreements to effectuate the provisions of subparagraph (e)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(k) *Background Patents.* (1) *Background Patent* means a domestic patent covering an invention or discovery which is not a subject invention and which is owned or controlled by the Contractor at any time through the completion of this contract:

(i) Which the contractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this contract.

(2) The Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any background patent for purposes of practicing a subject of this contract by or for the Government in research, development, and demonstration work only.

(3) The Contractor also agrees that upon written application by DOE, it will grant to responsible parties, for purposes of practicing a subject of this contract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the Contractor believes that exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Contractor.

(4) Notwithstanding subparagraph (k)(3) of this clause, the contractor shall not be obligated to license any background patent if the Contractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(i) A competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or

(ii) The Contractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

(l) *Publication.* It is recognized that during the course of the work under this contract,

the Contractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Contractor, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.

(m) *Forfeiture of rights in unreported subject inventions.* (1) The Contractor shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Contractor fails to report to Patent Counsel within six months after the time the Contractor:

(i) Files or causes to be filed a United States or foreign patent application thereon; or

(ii) Submits the final report required by subparagraph (e)(2)(ii) of this clause, whichever is later.

(2) However, the Contractor shall not forfeit rights in a subject invention if, within the time specified in subparagraph (m)(1) of this clause, the Contractor:

(i) Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the contract and delivers the decision to Patent Counsel, with a copy to the Contracting Officer; or

(ii) Contending that the invention is not a subject invention, the Contractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel, with a copy to the Contracting Officer; or

(iii) Establishes that the failure to disclose did not result from the Contractor's fault or negligence.

(3) Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes clause of this contract), the Contractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (m) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

(End of clause)

[60 FR 11819, Mar. 2, 1995, as amended at 62 FR 42075, Aug. 5, 1997; 63 FR 10507, Mar. 4, 1998; 67 FR 14872, Mar. 28, 2002]

952.227–14 Rights in data-general. (DOE coverage—alternates VI and VII)

Alternate VI (FEB 1998) As prescribed at 48 CFR 927.404(l) insert Alternate VI to require the contractor to license data regarded as limited rights data or restricted computer software to the Government and third parties at reasonable royalties upon request by the Department of Energy.

(k) *Contractor Licensing.* Except as may be otherwise specified in this contract as data not subject to this paragraph, the contractor agrees that upon written application by DOE, it will grant to the Government and responsible third parties, for purposes of practicing a subject of this contract, a nonexclusive license in any limited rights data or restricted computer software on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the contractor shall not be obliged to license any such data if the contractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(1) Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this contract;

(2) Such data, in the form of results obtained by their use, have a commercially competitive alternate available or readily introducible from one or more other sources;

(3) Such data, in the form of results obtained by their use, are being supplied by the contractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the contractor or its licensees have taken effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or

(4) Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the contract results.

(End of alternate)

Alternate VII (FEB 1998) As prescribed in 48 CFR 927.404(m) make the change described in Alternate VII to limit the contractor's use of DOE restricted data.

Insert the parenthetical phrase ''(except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related

data and technology).'' after the phrase ''data first produced or specifically used by the Contractor in the performance of this contract'' in paragraph (b)(2)(i) of the clause at FAR 52.227–14.

(End of alternate)

[63 FR 10507, Mar. 4, 1998]

952.227–70—952.227–72 [Reserved]

952.227–74 [Reserved]

952.227–82 Rights to proposal data.

Pursuant to 927.7002(d), include this clause in any contract which the decision to make the award included consideration of a technical proposal.

RIGHTS TO PROPOSAL DATA (APR 1994)

Except for technical data contained on pages ___ of the contractor's proposal dated ___ which are asserted by the contractor as being proprietary data, it is agreed that, as a condition of the award of this contract, and notwithstanding the provisions of any notice appearing on the proposal, the Government shall have the right to use, duplicate, disclose and have others do so for any purpose whatsoever, the technical data contained in the proposal upon which this contract is based.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.227–84 Notice of right to request patent waiver.

Include this provision in all appropriate solicitations in accordance with 48 CFR 927.409(t).

RIGHT TO REQUEST PATENT WAIVER (FEB 1998)

Offerors have the right to request a waiver of all or any part of the rights of the United States in inventions conceived or first actually reduced to practice in performance of the contract that may be awarded as a result of this solicitation, in advance of or within 30 days after the effective date of contracting. Even where such advance waiver is not requested or the request is denied, the contractor will have a continuing right under the contract to request a waiver of the rights of the United States in identified inventions, *i.e.,* individual inventions conceived or first actually reduced to practice in performance of the contract. Domestic small businesses and domestic nonprofit organizations normally will receive the patent rights clause at DEAR 952.227–11 which permits the contractor to retain title to such inventions, except under contracts for management or operation of a Government-owned research and development facility or under contracts involving exceptional circumstances or intelligence activities. Therefore, small businesses and nonprofit organizations normally need not request a waiver. See the patent rights clause in the draft contract in this solicitation. See DOE's patent waiver regulations at 10 CFR part 784.

(End of provision)

[63 FR 10508, Mar. 4, 1998]

952.231–70 Date of incurrence of cost.

In accordance with 931.205–32, insert the following clause when advance understandings have been negotiated regarding costs incurred prior to the contract effective date:

DATE OF INCURRENCE OF COST (APR 1984)

The Contractor shall be entitled to reimbursement for costs incurred in an amount not to exceed $_____ on or after _____ which, if incurred after this contract has been entered into, would have been reimbursable under the provisions of this contract.

[49 FR 12042, Mar. 28, 1984; 49 FR 38952, Oct. 2, 1984]

952.231–71 Insurance-litigation and claims.

As prescribed in 48 CFR 931.205–19, insert the following clause in applicable non-management and operating contracts:

INSURANCE-LITIGATION AND CLAIMS (APR 2002)

(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 paragraphs (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 limitation of cost or limitation of funds clause of this contract.

(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 48 CFR part 31, as supplemented in 48 CFR part 931, 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 the Property clause in this contract.

(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.

(End of clause)

[67 FR 14872, Mar. 28, 2002]

952.233–2 Service of protest.

As prescribed in 48 CFR 933.106(a), add the following to the end of the provision at FAR 52.233–2:

(c) Another copy of a protest filed with the General Accounting Office shall be furnished to the following address within the time periods described in paragraph (b) of this clause: U.S. Department of Energy, Assistant General Counsel for Procurement and Financial Assistance (GC–61), 1000 Independence Avenue, S.W., Washington, DC 20585, Fax: (202) 586–4546.

[61 FR 41711, Aug. 9, 1996, as amended at 67 FR 14872, Mar. 28, 2002]

952.233–4 Notice of protest file availability.

As prescribed in 933.106(b), insert the following provision:

NOTICE OF PROTEST FILE AVAILABILITY (SEP 1996)

(a) If a protest of this procurement is filed with the General Accounting Office (GAO) in accordance with 4 CFR part 21, any actual or prospective offeror may request the Department of Energy to provide it with reasonable access to the protest file pursuant to FAR 33.104(a)(3)(ii), implementing section 1065 of Public Law 103–355. Such request must be in writing and addressed to the contracting officer for this procurement.

(b) Any offeror who submits information or documents to the Department for the purpose of competing in this procurement is hereby notified that information or documents it submits may be included in the protest file that will be available to actual or prospective offerors in accordance with the requirements of FAR 33.104(a)(3)(ii). The Department will be required to make such documents available unless they are exempt from disclosure pursuant to the Freedom of Information Act. Therefore, offerors should mark any documents as to which they would assert that an exemption applies. (See 10 CFR part 1004.)

[61 FR 41711, Aug. 9, 1996]

952.233–5 Agency protest review.

As prescribed in 48 CFR 933.106(c), insert the following provision:

AGENCY PROTEST REVIEW (SEP 1996)

Protests to the Agency will be decided either at the level of the Head of the Contracting Activity or at the Headquarters level. The Department of Energy's agency protest procedures, set forth in 933.103, elaborate on these options and on the availability of a suspension of a procurement that is protested to the agency. The Department encourages potential protesters to discuss their concerns with the contracting officer prior to filing a protest.

[61 FR 41711, Aug. 9, 1996]

952.235–70 Key personnel.

In accordance with 935.070, insert the following clause.

KEY PERSONNEL (APR 1994)

The personnel specified in an attachment to this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the contracting officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the contractor without the written consent of the contracting officer: Provided, that the contracting officer may ratify in writing such diversion and such ratification shall constitute the consent of the contracting officer required by this clause. The attachment to this contract may be amended from time to time during the course of the

contract to either add or delete personnel, as appropriate.

[49 FR 12042, Mar. 28, 1984, as amended at 56 FR 41965, Aug. 26, 1991; 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.235–71 Research Misconduct.

As prescribed in 48 CFR Part 935.071, insert the following clause:

RESEARCH MISCONDUCT (JUL 2005)

(a) The contractor is responsible for maintaining the integrity of research performed pursuant to this contract award including the prevention, detection, and remediation of research misconduct as defined by this clause, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this clause.

(b) Unless otherwise instructed by the contracting officer, the contractor must conduct an initial inquiry into any allegation of research misconduct. If the contractor determines that there is sufficient evidence to proceed to an investigation, it must notify the contracting officer and, unless otherwise instructed, the contractor must:

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted;

(2) If the investigation leads to a finding of research misconduct, conduct an adjudication by a responsible official who was not involved in the inquiry or investigation and is separated organizationally from the element which conducted the investigation. The adjudication must include a review of the investigative record and, as warranted, a determination of appropriate corrective actions and sanctions.

(3) Inform the contracting officer if an initial inquiry supports a formal investigation and, if requested by the contracting officer thereafter, keep the contracting officer informed of the results of the investigation and any subsequent adjudication. When an investigation is complete, the contractor will forward to the contracting officer a copy of the evidentiary record, the investigative report, any recommendations made to the contractor's adjudicating official, the adjudicating official's decision and notification of any corrective action taken or planned, and the subject's written response (if any).

(c) The Department may elect to act in lieu of the contractor in conducting an inquiry or investigation into an allegation of research misconduct if the contracting officer finds that:

(1) The research organization is not prepared to handle the allegation in a manner consistent with this clause;

(2) The allegation involves an entity of sufficiently small size that it cannot reasonably conduct the inquiry;

(3) DOE involvement is necessary to ensure the public heath, safety, and security, or to prevent harm to the public interest; or,

(4) The allegation involves possible criminal misconduct.

(d) In conducting the activities under paragraphs (b) and (c) of this clause, the contractor and the Department, if it elects to conduct the inquiry or investigation, shall adhere to the following guidelines:

(1) *Safeguards for information and subjects of allegations.* The contractor shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the contractor without suffering retribution. Safeguards include: protection against retaliation; fair and objective procedures for examining and resolving allegations; and diligence in protecting positions and reputations. The contractor shall also provide the subjects of allegations confidence that their rights are protected and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegation and reasonable access to any evidence submitted to support the allegation or developed in response to an allegation and notice of any findings of research misconduct.

(2) *Objectivity and Expertise.* The contractor shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts an adjudication must not be the same individual(s) who conducted the inquiry or investigation, and must be separate organizationally from the element that conducted the inquiry or investigation.

(3) *Timeliness.* The contractor shall coordinate, inquire, investigate and adjudicate allegations of research misconduct promptly, but thoroughly. Generally, an investigation should be completed within 120 days of initiation, and adjudication should be complete within 60 days of receipt of the record of investigation.

(4) *Confidentiality*. To the extent possible, consistent with fair and thorough processing of allegations of research misconduct and applicable law and regulation, knowledge about the identity of the subjects of allegations and informants should be limited to those with a need to know.

(5) *Remediation and Sanction*. If the contractor finds that research misconduct has occurred, it shall assess the seriousness of

the misconduct and its impact on the research completed or in process. The contractor must take all necessary corrective actions. Such action may include but are not limited to, correcting the research record and as appropriate imposing restrictions, controls, or other parameters on research in process or to be conducted in the future. The contractor must coordinate remedial actions with the contracting officer. The contractor must also consider whether personnel sanctions are appropriate. Any such sanction must be considered and effected consistent with any applicable personnel laws, policies, and procedures, and shall take into account the seriousness of the misconduct and its impact, whether it was done knowingly or intentionally, and whether it was an isolated event or pattern of conduct.

(e) DOE reserves the right to pursue such remedies and other actions as it deems appropriate, consistent with the terms and conditions of the award instrument and applicable laws and regulations. However, the contractor's good faith administration of this clause and the effectiveness of its remedial actions and sanctions shall be positive considerations and shall be taken into account as mitigating factors in assessing the need for such actions. If DOE pursues any such action, it will inform the subject of the action of the outcome and any applicable appeal procedures.

(f) *Definitions.*

Adjudication means a formal review of a record of investigation of alleged research misconduct to determine whether and what corrective actions and sanctions should be taken.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Finding of Research Misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

Inquiry means information gathering and initial fact-finding to determine whether an allegation or apparent instance of misconduct warrants an investigation.

Investigation means the formal examination and evaluation of the relevant facts.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

Research means all basic, applied, and demonstration research in all fields of science, medicine, engineering, and mathematics, including, but not limited to, research in economics, education, linguistics, medicine, psychology, social sciences statistics, and research involving human subjects or animals.

Research Misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

Research record means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

(g) By executing this contract, the contractor provides its assurance that it has established an administrative process for performing an inquiry, mediating if possible, or investigating, and reporting allegations of research misconduct; and that it will comply with its own administrative process and the requirements of 10 CFR part 733 for performing an inquiry, possible mediation, investigation and reporting of research misconduct.

(h) The contractor must insert or have inserted the substance of this clause, including paragraph (g), in subcontracts at all tiers that involve research.

(End of clause)

[70 FR 37015, June 28, 2005]

952.236 Construction and architect-engineer contracts.

952.236–71 Inspection in architect-engineer contracts.

As prescribed at 936.609–3 insert the following clause.

INSPECTION (APR 1994)

The Government, through any authorized representatives, has the right at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require his subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.236–72 Nonrefundable fee for plans and specifications.

In accordance with the requirement at 936.202(h) include the following in solicitations for construction.

NONREFUNDABLE FEE FOR PLANS AND SPECIFICATIONS (APR 1984)

A fee of $_____ is required for the plans and specifications referenced in this solicitation. Send check or money order to _____. The fee is not refundable. Plans and specifications need not be returned.

[49 FR 12042, Mar. 28, 1984; 49 FR 38952, Oct. 2, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 67 FR 14872, Mar. 28, 2002]

952.237–70 Collective bargaining agreements—protective services.

As prescribed in 937.7040, insert the following clause:

COLLECTIVE BARGAINING AGREEMENTS—PROTECTIVE SERVICES (AUG 1993)

When negotiating collective bargaining agreements applicable to the work force under this contract, the Contractor shall use its best efforts to ensure such agreements contain provisions designed to assure continuity of services. All such agreements entered into during the contract period of performance should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations.

For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations. As part of such agreements, management and labor should agree to cooperate fully with the Federal Mediation and Conciliation Service. The contractor shall include the substance of this clause in any subcontracts for protective services.

[58 FR 36152, July 6, 1993; 58 FR 43287, Aug. 16, 1993, as amended at 67 FR 14872, Mar. 28, 2002]

952.242–70 Technical Direction.

As prescribed in 48 CFR 942.270–2, insert the following clause.

TECHNICAL DIRECTION (DEC 2000)

(a) Performance of the work under this contract shall be subject to the technical direction of the DOE Contracting Officer's Representative (COR). The term ''technical direction'' is defined to include, without limitation:

(1) Providing direction to the contractor that redirects contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details, or otherwise serve to accomplish the contractual Statement of Work.

(2) Providing written information to the contractor that assists in interpreting drawings, specifications, or technical portions of the work description.

(3) Reviewing and, where required by the contract, approving, technical reports, drawings, specifications, and technical information to be delivered by the contractor to the Government.

(b) The contractor will receive a copy of the written COR designation from the contracting officer. It will specify the extent of the COR's authority to act on behalf of the contracting officer.

(c) Technical direction must be within the scope of work stated in the contract. The COR does not have the authority to, and may not, issue any technical direction that:

(1) Constitutes an assignment of additional work outside the Statement of Work;

(2) Constitutes a change as defined in the contract clause entitled ''Changes;''

(3) In any manner causes an increase or decrease in the total estimated contract cost, the fee (if any), or the time required for contract performance;

(4) Changes any of the expressed terms, conditions or specifications of the contract; or

(5) Interferes with the contractor's right to perform the terms and conditions of the contract.

(d) All technical direction shall be issued in writing by the COR.

(e) The contractor must proceed promptly with the performance of technical direction duly issued by the COR in the manner prescribed by this clause and within its authority under the provisions of this clause. If, in the opinion of the contractor, any instruction or direction by the COR falls within one of the categories defined in (c)(1) through (c)(5) of this clause, the contractor must not proceed and must notify the Contracting Officer in writing within five (5) working days after receipt of any such instruction or direction and must request the Contracting Officer to modify the contract accordingly. Upon receiving the notification from the contractor, the Contracting Officer must:

(1) Advise the contractor in writing within thirty (30) days after receipt of the contractor's letter that the technical direction is within the scope of the contract effort and does not constitute a change under the Changes clause of the contract;

(2) Advise the contractor in writing within a reasonable time that the Government will issue a written change order; or

(3) Advise the contractor in writing within a reasonable time not to proceed with the instruction or direction of the COR.

(f) A failure of the contractor and Contracting Officer either to agree that the technical direction is within the scope of the contract or to agree upon the contract action to be taken with respect to the technical direction will be subject to the provisions of the clause entitled ''Disputes.''

(End of clause)

[65 FR 81008, Dec. 22, 2000]

952.245 Clauses related to government property.

952.245–2 Government property (fixed-price contracts).

Modify FAR 52.245–2 by adding ''and the DOE Acquisition Regulation Subpart 945.5,'' after the reference to FAR Subpart 45.5 in the first sentence of paragraphs (e)(1) and (e)(2) of the clause.

952.245–5 Government property (cost-reimbursement, time-and-materials, or labor-hour contracts.)

Modify FAR 52.245–5 by adding ''and DOE Acquisition Regulation Subpart 945.5'' after the reference to FAR Subpart 45.5 in paragraphs (e)(1) and (e)(2) of the clause.

952.247–70 Foreign travel.

As prescribed in 48 CFR 947.7002, insert the following clause:

FOREIGN TRAVEL (DEC 2000)

Contractor foreign travel shall be conducted pursuant to the requirements contained in DOE Order 551.1, Official Foreign Travel, or any subsequent version of the order in effect at the time of award.

(End of clause)

[65 FR 81009, Dec. 22, 2000]

952.249 Clauses related to termination.

952.250 Clauses related to indemnification of contractors.

952.250–70 Nuclear hazards indemnity agreement.

Insert the following clause in accordance with section 950.7006.

NUCLEAR HAZARDS INDEMNITY AGREEMENT (JUN 1996)

(a) *Authority.* This clause is incorporated into this contract pursuant to the authority contained in subsection 170d. of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(b) *Definitions.* The definitions set out in the Act shall apply to this clause.

(c) *Financial protection.* Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE may, however, at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the contractor by DOE.

(d)(1) *Indemnification.* To the extent that the contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE, DOE will indemnify the contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the contractor and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170e.(1)(B) of the Act in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or $100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in subparagraph (d)(1) of this clause is public liability as defined in the Act which (i) arises out of or in connection with the activities under this contract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e)(1) *Waiver of Defenses.* In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the contractor, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence which:

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility; or

(ii) Arises out of, results from, or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility; or

(iii) Arises out of or results from the possession, operation, or use by the contractor or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the contractor, on behalf of itself and other persons indemnified, agrees to waive:

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to:

1. Negligence;

2. Contributory negligence;

3. Assumption of risk; or

4. Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God;

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) The term *extraordinary nuclear occurrence* means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR part 840.

(vi) For the purposes of that determination, *offsite* as that term is used in 10 CFR part 840 means away from ''the contract location'' which phrase means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the contractor is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth above:

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this clause and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e. of the Act, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) *Notification and litigation of claims.* The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE, copies of all pertinent papers received by the contractor or filed with respect to such actions or claims. DOE shall have the right to, and may collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to (1) require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder; and (2) appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) *Continuity of DOE obligations.* The obligations of DOE under this clause shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the contractor, or by the completion, termination or expiration of this contract.

(h) *Effect of other clauses.* The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the clause entitled Contract Disputes, provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, and Accounts, records, and inspection, and any provisions that are later added to this contract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) *Civil penalties.* The contractor and its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to civil penalties, pursuant to 234A of the Act, for violations of applicable DOE nuclear-safety related rules, regulations, or orders.

(j) *Criminal penalties.* Any individual director, officer, or employee of the contractor or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to 223(c) of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended, and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.

(k) *Inclusion in subcontracts.* The contractor shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under the subcontract.

Effective date

( ) See note II below for instructions related to this section on Effective Date.

Relationship to general indemnity

( ) See note III below for instructions related to this section on Relationship to General Indemnity.

(End of clause)

NOTE I

Paragraph (i) of the clause will be replaced with ''Reserved'' in contracts specifically exempted from civil penalties by section 234 of the Act. That subsection provides that the following DOE contractors are not subject to the assessment of civil penalties:

(1) The University of Chicago (and any subcontractors or suppliers thereto) for activities associated with Argonne National Laboratory;

(2) The University of California (and any subcontractors or suppliers thereto) for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory;

(3) American Telephone and Telegraph Company and its subsidiaries (and any subcontractors or suppliers thereto) for activities associated with Sandia National Laboratories;

(4) Universities Research Association, Inc. (and any subcontractors or suppliers thereto) for activities associated with FERMI National Laboratory:

(5) Princeton University (and any subcontractor or suppliers thereto) for activities associated with Princeton Plasma Physics Laboratory;

(6) The Associated Universities, Inc. (and any subcontractors or suppliers thereto) for activities associated with the Brookhaven National Laboratory; and

(7) Battelle Memorial Institute (and any subcontractors or suppliers thereto) for activities associated with Pacific Northwest Laboratory.

(End of note)

NOTE II

Contracts with an effective date after the date of June 12, 1996, do not require the effective date provision in this clause. Delete the title.

Use the EFFECTIVE DATE title and the following language, for those contracts:

''( ) This indemnity agreement shall be applicable with respect to nuclear incidents occurring on or after ____.''

(1) Those that contained an indemnity pursuant to Public Law 85–840 prior to August 20, 1988, include the effective date provision above, inserting the effective date of the contract modification that replaced the Public Law 85–804 indemnity with an interim Price-Anderson based indemnity. Pursuant to the Price-Anderson Amendments Act, this substitution must have taken place by February 20, 1989.

(2) Those that contained, and continue to contain, either of the previous Nuclear Hazards Indemnity clauses, include the effective date provision above, inserting ''August 20, 1988.''

(3) Those with an effective date between August 20, 1988, and the date of the Final Rule, that (a) had ''interim coverage'' or (b) did not have ''interim coverage'' but have now been determined to be covered under the PAAA, include the effective date provision above, inserting the contract effective date.

NOTE III

The following alternate will be added to the above Nuclear Hazards Indemnity Agreement clause for all contracts that contain a general authority indemnity pursuant to 950.7101. Caution: Be aware that for contracts that will have this provision added which do not contain an effective date provision, this paragraph shall be marked (1). In the event an Effective Date provision has been included, it shall be market (m).

''( ) To the extent that the contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of public liability by an order or orders limiting same, pursuant to 170e of the Act, the provisions of the clause providing general authority indemnity shall not apply.''

(End of note)

[56 FR 57828, Nov. 14, 1991, as amended at 58 FR 32307, June 9, 1993; 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996; 67 FR 14872, Mar. 28, 2002]

952.250–71—952.250–72 [Reserved]

952.251–70 Contractor employee travel discounts.

As prescribed in 48 CFR 951.70, insert the following clause.

CONTRACTOR EMPLOYEE TRAVEL DISCOUNTS (DEC 2000)

(a) The contractor shall take advantage of travel discounts offered to Federal contractor employee travelers by AMTRAK, hotels, motels, or car rental companies, when use of such discounts would result in lower overall trip costs and the discounted services are reasonably available. Vendors providing these services may require the contractor employee to furnish them a letter of identification signed by the authorized contracting officer.

(b) Contracted airlines. Contractors are not eligible for GSA contract city pair fares.

(c) Discount rail service. AMTRAK voluntarily offers discounts to Federal travelers on official business and sometimes extends those discounts to Federal contractor employees.

(d) Hotels/motels. Many lodging providers extend their discount rates for Federal employees to Federal contractor employees.

(e) Car rentals. The Military Traffic Management Command (MTMC) of the Department of Defense negotiates rate agreements with car rental companies that are available to Federal travelers on official business. Some car rental companies extend those discounts to Federal contractor employees.

(f) Obtaining travel discounts.

(1) To determine which vendors offer discounts to Government contractors, the contractor may review commercial publications such as the Official Airline guides Official Traveler, Innovata, or National Telecommunications. The contractor may also obtain this information from GSA contract Travel Management Centers or the Department of Defense's Commercial Travel Offices.

(2) The vendor providing the service may require the Government contractor to furnish a letter signed by the contracting officer. The following illustrates a standard letter of identification.

OFFICIAL AGENCY LETTERHEAD

TO: Participating Vendor

SUBJECT: OFFICIAL TRAVEL OF GOVERNMENT CONTRACTOR

(FULL NAME OF TRAVELER), the bearer of this letter is an employee of (COMPANY NAME) which has a contract with this agency under Government contract (CONTRACT NUMBER). During the period of the contract (GIVE DATES), AND WITH THE APPROVAL OF THE CONTRACT VENDOR, the employee is eligible and authorized to use available travel discount rates in accordance with Government contracts and/or agreements. Government Contract City Pair fares are not available to Contractors.

SIGNATURE, Title and telephone number of Contracting Officer

[65 FR 81009, Dec. 22, 2000]

SUBCHAPTER I—AGENCY SUPPLEMENTARY REGULATIONS

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

Subpart 970.01—Management and Operating Contract Regulatory System

Sec.
970.0100 Scope of part.
970.0103 Publication and codification.

Subpart 970.03—Improper Business Practices and Personal Conflicts of Interest

970.0309 Whistleblower protection of contractor employees.
970.0309–1 Applicability.
970.0370 Management controls and improvements.
970.0370–1 Policy.
970.0370–2 Contract clause.
970.0371 Conduct of employees of DOE management and operating contractors.
970.0371–1 Scope of section.
970.0371–2 Applicability.
970.0371–3 Definition.
970.0371–4 Gratuities.
970.0371–5 Use of privileged information.
970.0371–6 Incompatibility between regular duties and private interests.
970.0371–7 Outside employment of contractor employees.
970.0371–8 Employee disclosure concerning other employment services.
970.0371–9 Contract clause.

Subpart 970.04—Administrative Matters

970.0404 Safeguarding classified information.
970.0404–1 Definitions.
970.0404–2 General.
970.0404–3 Responsibilities of contracting officers.
970.0404–4 Solicitation provision and contract clauses.
970.0407 Contractor records retention.
970.0407–1 Applicability.
970.0407–1–1 Alternate retention schedules.
970.0407–1–2 Access to and ownership of records.
970.0407–1–3 Contract clause.
970.0470 Department of Energy Directives.
970.0470–1 General.
970.0470–2 Contract clause.

Subpart 970.08—Required Sources of Supplies and Services

970.0801 Excess personal property.
970.0801–1 Policy.
970.0808 Acquisition of printing.
970.0808–1 Scope of section.
970.0808–2 Policy.
970.0808–3 Contract clause.

Subpart 970.09—Contractor Qualifications

970.0905 Organizational conflicts of interest.
970.0970 Performance guarantees.
970.0970–1 Determination of responsibility.
970.0970–2 Solicitation provision.

Subpart 970.11—Describing Agency Needs

970.1100 Policy.
970.1100–1 Performance-based contracting.
970.1100–2 Additional considerations.
970.1103–4 Contract clause.
970.1170 Work authorization.
970.1170–1 Policy.
970.1170–2 Contract provision.

Subpart 970.15—Contracting by Negotiation

970.1504 Contract pricing.
970.1504–1 Price analysis
970.1504–1–1 Fees for management and operating contracts.
970.1504–1–2 Fee policy.
970.1504–1–3 Special considerations: Laboratory management and operation.
970.1504–1–4 Types of contracts and fee arrangements.
970.1504–1–5 General considerations and techniques for determining fixed fees.
970.1504–1–6 Calculating fixed fee.
970.1504–1–7 Fee base.
970.1504–1–8 Special equipment purchases.
970.1504–1–9 Special considerations: Cost-plus-award-fee.
970.1504–1–10 Special considerations: Fee limitations.
970.1504–1–11 Documentation.
970.1504–2 Price negotiation.
970.1504–3 Documentation.
970.1504–3–1 Cost or pricing data.
970.1504–4 Special cost or pricing areas.
970.1504–4–1—970.1504–4–3 [Reserved]
970.1504–5 Solicitation provision contract clauses.

Subpart 970.17—Special Contracting Methods

970.1706 Management and operating contracts.
970.1706–1 Award, renewal, and extension.
970.1706–2 Contract clause.
970.1707 Work for others.
970.1707–1 Scope.
970.1707–2 Purpose.
970.1707–3 Terms governing work for others.

970.1707–4 Contract clause.

Subpart 970.19—Small, Small Disadvantaged and Women-Owned Small Business Concerns

970.1907 Subcontracting with Small Business, Small Disadvantaged Business and Woman-owned Small Business Concerns.
970.1907–1 Subcontracting plan requirements.

Subpart 970.22—Application of Labor Policies

970.2200 Scope of subpart.
970.2201 Basic labor policies.
970.2201–1 Labor relations.
970.2201–1–1 General.
970.2201–1–2 Policies.
970.2201–1–3 Contract clause.
970.2201–2 Overtime management.
970.2201–2–1 Policy.
970.2201–2–2 Contract clause.
970.2204 Labor standards for contracts involving construction.
970.2204–1 Statutory and regulatory requirements.
970.2204–1–1 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.
970.2208 Equal Employment Opportunity.
970.2210 Service contract act.
970.2270 Unemployment compensation.

Subpart 970.23—Environment, Conservation, Occupational Safety, and Drug Free Work Place

970.2303 Hazardous materials identification and material safety.
970.2303–1 General.
970.2303–2 Contract clauses.
970.2304 Use of recovered/recycled materials.
970.2304–1 General.
970.2304–2 Contract clause.
970.2305 Workplace substance abuse programs—Management and operating contracts.
970.2305–1 General.
970.2305–2 Applicability.
970.2305–3 Definitions.
970.2305–4 Solicitation provision and contract clause.
970.5223–5 DOE motor vehicle fleet fuel efficiency.
970.2306 Suspension of payments, termination of contract, and debarment and suspension actions.
970.2307 Contracting for Environmentally Preferable and Energy-Efficient Products and Services.
970.2307–1 Motor vehicle fleet operations.
970.2307–2 Contract clause.

Subpart 970.26—Other Socioeconomic Programs

970.2670 Implementation of Section 3021 of the Energy Policy Act of 1992.
970.2670–1 Requirements.
970.2671 Diversity.
970.2671–1 Policy.
970.2671–2 Contract clause.
970.2672 Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.
970.2672–1 Policy.
970.2672–2 Requirements.
970.2672–3 Contract clause.
970.2673 Regional partnerships.
970.2673–1 Policy.
970.2673–2 Contract clause.

Subpart 970.27—Patents, Data, and Copyrights

970.2701 General.
970.2701–1 Applicability.
970.2702 Patent related clauses.
970.2702–1 Authorization and consent.
970.2702–2 Notice and assistance regarding patent and copyright infringement.
970.2702–3 Patent indemnity.
970.2702–4 Royalties.
970.2702–5 Rights to proposal data.
970.2702–6 Notice of right to request patent waiver.
970.2703 Patent rights.
970.2703–1 Purposes of patent rights clauses.
970.2703–2 Patent rights clause provisions for management and operating contractors.
970.2704 Rights in data.
970.2704–1 General.
970.2704–2 Procedures.
970.2704–3 Contract clauses.
970.2770 Technology transfer.
970.2770–1 General.
970.2770–2 Policy.
970.2770–3 Technology transfer and patent rights.
970.2770–4 Contract clause.

Subpart 970.28—Bonds and Insurance

970.2803 Insurance.
970.2803–1 Workers' compensation insurance.
970.2803–2 Contract clause.

Subpart 970.29—Taxes

970.2902 Federal excise taxes.
970.2902–1 Exemptions from federal excise taxes.
970.2903 State and local taxes.
970.2903–1 Applicability of state and local taxes to the Government.
970.2904 Contract clauses.
970.2904–1 Management and operating contracts.

Subpart 970.30—Cost Accounting Standards

970.3002 CAS Program Requirements.
970.3002–1 Applicability.

Subpart 970.31—Contract Cost Principles and Procedures

970.3101–00–70 Scope of subpart.
970.3101–9 Advance agreements.
970.3101–10 Cost certification.
970.3102–3–70 Home office expenses
970.3102–05 Application of cost principles.
970.3102–05–4 Bonding costs.
970.3102–05–6 Compensation for personal services.
970.3102–05–18 Independent research and development and bid and proposal costs.
970.3102–05–19 Insurance and indemnification.
970.3102–05–22 Lobbying and political activity costs.
970.3102–05–28 Other business expenses.
970.3102–05–30 Patent costs and technology transfer costs.
970.3102–05–33 Professional and consultant service costs. (Department coverage-paragraph (g)).
970.3102–05–46 Travel costs.
970.3102–05–47 Costs related to legal and other proceedings.
970.3102–05–70 Preexisting conditions.
970.3170 Contract clause.

Subpart 970.32—Contract Financing

970.3200 Policy.
970.3200–1 Reduction or suspension of advance, partial, or progress payments.
970.3200–1–1 Contract clause.
970.3204 Advance payments.
970.3204–1 Applicability.
970.3270 Standard financial management clauses.

Subpart 970.34—Major System Acquisition

970.3400 General requirements.
970.3400–1 Mission-oriented solicitation.

Subpart 970.35—Research and Development Contracting

970.3500 Scope of subpart.
970.3501 Federally funded research and development centers.
970.3501–1 Sponsoring agreements.
970.3501–2 Using an FFRDC.
970.3501–3 Reviewing FFRDC's.
970.3501–4 Contract Clause.

Subpart 970.36—Construction and Architect-Engineer Contracts.

970.3605 Contract clauses.
970.3605–1 Other contracts.
970.3605–2 Special construction clause for operating contracts.

Subpart 970.37—Facilities Management Contracting

970.3770 Facilities management.
970.3770–1 Policy.
970.3770–2 [Reserved]

Subpart 970.41—Acquisition of Utility Services

970.4102 Acquiring utility services.
970.4102–1 Policy.

Subpart 970.42—Contract Administration

970.4207–03–02 Certificate of costs.
970.4207–03–70 Contract clause.
970.4207–05–01 Contracting officer determination procedure.

Subpart 970.43—Contract Modifications

970.4302 Changes.
970.4302–1 Contract Clause.

Subpart 970.44—Management and Operating Contractor Purchasing

970.4400 Scope.
970.4401 Responsibilities.
970.4401–1 General.
970.4401–2 Review and approval.
970.4401–3 Advance notification.
970.4402 Contractor purchasing system.
970.4402–1 Policy.
970.4402–2 General requirements.
970.4402–3 Purchasing from contractor-affiliated sources.
970.4402–4 Nuclear material transfers.
970.4403 Contract clause.

Subpart 970.45—Government Property

970.4501 General.
970.4501–1 Contract clause.

Subpart 970.49—Termination of Contracts

970.4905 Contract termination clause.
970.4905–1 Termination for convenience of the government and default.

Subpart 970.50—Extraordinary Contractual Actions

970.5004 Residual powers.
970.5004–1 Contract clause.
970.5070 Indemnification.
970.5070–1 Scope and applicability.
970.5070–2 General.

970.5070–3 Contract clauses.

Subpart 970.52—Solicitation Provisions and Contract Clauses for Management and Operating Contracts

970.5200 Scope of subpart.
970.5201 Text of provisions and clauses.
970.5203–1 Management controls.
970.5203–2 Performance improvement and collaboration.
970.5203–3 Contractor's organization.
970.5204–1 Counterintelligence.
970.5204–2 Laws, regulations, and DOE directives.
970.5204–3 Access to and ownership of records.
970.5208–1 Printing.
970.5209–1 Requirement for guarantee of performance.
970.5211–1 Work authorization.
970.5215–1 Total Available Fee: Base fee amount and performance fee amount.
970.5215–2 [Reserved]
970.5215–3 Conditional payment of fee, profit, or incentives.
970.5215–4 Cost reduction.
970.5215–5 Limitation on fee.
970.5217–1 Work for Others Program.
970.5222–1 Collective bargaining agreements—management and operating contracts.
970.5222–2 Overtime management.
970.5223–1 Integration of environment, safety, and health into work planning and execution.
970.5223–2 Affirmative procurement program.
970.5223–3 Agreement regarding workplace substance abuse programs at DOE facilities.
970.5223–4 Workplace Substance Abuse Programs at DOE sites.
970.5223–5 DOE motor vehicle fleet fuel efficiency.
970.5226–1 Diversity plan.
970.5226–2 Workforce restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.
970.5226–3 Community commitment.
970.5227–1 Rights in data—facilities.
970.5227–2 Rights in data—technology transfer.
970.5227–3 Technology transfer mission.
970.5227–4 Authorization and consent.
970.5227–5 Notice and assistance regarding patent and copyright infringement.
970.5227–6 Patent indemnity—subcontracts.
970.5227–7 Royalty information.
970.5227–8 Refund of royalties.
970.5227–9 Notice of right to request patent waiver.
970.5227–10 Patent rights—management and operating contracts, nonprofit organization or small business firm contractor.
970.5227–11 Patent rights—management and operating contracts, for-profit contractor, non-technology transfer.
970.5227–12 Patent rights—management and operating contracts, for-profit contractor, advance class waiver.
970.5228–1 Insurance—Litigation and claims.
970.5229–1 State and local taxes.
970.5231–4 Preexisting conditions.
970.5232–1 Reduction or suspension of advance, partial, or progress payments upon finding of substantial evidence of fraud.
970.5232–2 Payments and advances.
970.5232–3 Accounts, records, and inspection.
970.5232–4 Obligation of funds.
970.5232–5 Liability with respect to cost accounting standards.
970.5232–6 Work for others funding authorization.
970.5232–7 Financial management system.
970.5232–8 Integrated accounting.
970.5235–1 Federally funded research and development center sponsoring agreement.
970.5236–1 Government facility subcontract approval.
970.5237–2 [Reserved]
970.5242–1 Penalties for unallowable costs.
970.5243–1 Changes.
970.5244–1 Contractor purchasing system.
970.5245–1 Property.

AUTHORITY: 42 U.S.C. 2201, 2282a, 2282b, 2282c; 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

SOURCE: 65 FR 81009, Dec. 22, 2000, unless otherwise noted.

Subpart 970.01—Management and Operating Contract Regulatory System

970.0100 Scope of part.

This part provides Departmental policies, procedures, provisions, and clauses that implement and supplement the Federal Acquisition Regulation (FAR) and other parts of the Department of Energy Acquisition Regulation (DEAR) for the award and administration of the Department's management and operating contracts, as defined at 48 CFR subpart 17.6. The FAR and other parts of the DEAR apply to management and operating contracts. See 48 CFR 970.5200 for guidance regarding which provisions and clauses (from FAR, DEAR Part 970, or other parts of the DEAR) to include in management and operating contracts.

970.0103 Publication and codification.

(a) *Organization of Part 970.* (1) To the extent possible, the titles and text of the subparts, sections, and subsections of this part are numbered to correspond with related material that is contained in the FAR.

(2) The number to the left of the decimal point represents the DEAR part number (*i.e.,* 970). The numbers to the right of the decimal point and to the left of the dash represent, in order, the DEAR subpart (first two digits), and the DEAR section number (second two digits). The numbers to the right of the dash represent the DEAR subsection. A second dash may follow the DEAR subsection number. As applicable, numbers to the right of the second dash represent subordinate subsections.

(3) To the extent practicable, the subpart number corresponds with the FAR part which contains related coverage, and the section number corresponds with the FAR subpart which contains related coverage (*e.g.,* the coverage contained in DEAR 970.0309 corresponds with material contained in FAR 3.9).

(4) Where the FAR does not contain related coverage on a particular subject, the DEAR section number will be numbered using numbers of 70 and up (*e.g.,* 970.0370).

(b) *Special Note Regarding Clause Numbering.* The section number for clauses prescribed in part 970 are numbered to correspond with the subpart in which the clause is prescribed (*e.g.,* 970.5203–1 is prescribed for use at subpart 970.03).

Subpart 970.03—Improper Business Practices and Personal Conflicts of Interest

970.0309 Whistleblower Protection of Contractor Employees.

970.0309–1 Applicability.

The contracting officer shall refer to 48 CFR subpart 903.9 regarding the applicability of the DOE Employee Protection Program to management and operating contracts.

970.0370 Management Controls and Improvements.

970.0370–1 Policy.

(a) Management and operating contractors shall develop and maintain systems of management and quality control to discourage waste, fraud and abuse; and to ensure that components, products, and services that are provided to DOE satisfy the contractor's obligations under the contract.

(b) As a part of the required overall management structure, the contractor must maintain management control systems which, in compliance with the requirements of the clause at 48 CFR 970.5203–1:

(1) Are documented and satisfactory to DOE;

(2) Ensure that all levels of management are accountable for effective management systems and internal controls within their areas of assigned responsibility;

(3) Cover both programmatic and administrative functions;

(4) Provide reasonable assurance that Government resources are safeguarded against theft, fraud, waste, and unauthorized use;

(5) Promote efficient and effective operations;

(6) Ensure that all obligations and costs incurred are in compliance with the intended purposes and the terms and conditions of the contract;

(7) Properly record, manage, and report all revenues, expenditures, transactions and assets;

(8) Maintain financial, statistical and other reports necessary to maintain accurate, reliable, and timely accountability and management controls;

(9) Are periodically reviewed to ensure that the systems provide reasonable assurance that the objectives of the system are being accomplished and that these controls are working effectively;

(10) Are in accordance with the Comptroller General's standards for internal controls, as set forth in the General Accounting Office Policy and Procedures Manual For Guidance to Federal Agencies, (OCT 1984), as amended.

(c) Management and operating contractors shall also develop and maintain a baseline program of quality assurance that will implement documented performance and quality standards, and management controls and assessment techniques to ensure components, services, and products meet DOE's, design criteria and other governing and applicable specifications.

(d) DOE expects all its contractors to seek to identify improvements in any aspect of performance. Management and operating contracts are very large and complex; therefore, the opportunities to identify changes in performance that will increase the effectiveness or efficiency of contract performance are more prevalent than under other contracts. The clause at 48 CFR 970.5203–2 requires DOE management and operating contractors to affirmatively seek to identify, evaluate, and institute, where appropriate, processes that will improve the effectiveness or efficiency of any aspect of contract performance. It further requires the contractor to communicate any such improvements to DOE, other management and operating contractors, and DOE major facilities contractors. The contractor is required to participate in efforts by those contractors to address common problems or the institution of improvements. It allows the contractor to enlist the aid of the DOE contracting officer where necessary to institute or communicate the improvements. The obligations under the clause in no way affect the contractor's obligations under other provisions of the contract to notify or acquire the approval of the contracting officer.

970.0370–2 Contract clause.

(a) The contracting officer shall insert the clause at 970.5203–1, Management Controls, in all management and operating contracts.

(b) The contracting officer shall insert the clause at 970.5203–2, Performance Improvement and Collaboration, in all management and operating contracts.

970.0371 Conduct of employees of DOE management and operating contractors.

970.0371–1 Scope of section.

This section establishes the policies for maintaining satisfactory standards of conduct on the part of individuals employed by DOE management and operating contractors.

970.0371–2 Applicability.

The policies in this section are applicable to all DOE management and operating contractors.

970.0371–3 Definition.

Employees, as used in this section, are defined to mean individuals employed by the contractor, both full and part-time, who are assigned to work under a DOE management and operating contract.

970.0371–4 Gratuities.

Employees of a management and operating contractor shall not, under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract. Reference is made to the requirements prescribed in 48 CFR 3.502.

970.0371–5 Use of privileged information.

Management and operating contractor employees shall not use privileged information for personal gain, or make other improper use of privileged information which is acquired in connection with their employment on contract work. For the purposes of this subsection, the term ''privileged information'' includes but is not limited to, unpublished information relating to technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action;

possible new sites for DOE program operations; internal DOE decisions; policy development; and knowledge of selections of contractors or subcontractors in advance of official announcement.

970.0371–6 Incompatibility between regular duties and private interests.

(a) Employees of a management and operating contractor shall not be permitted to make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's personal concern in the matter may be incompatible with the interest of the Government. For example: An employee of a contractor will not negotiate, or influence the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest; and an employee of a contractor will not be assigned the preparation of an evaluation for DOE or for any DOE contractor of some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest.

(b) The contractor shall be responsible for informing employees that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor.

970.0371–7 Outside employment of contractor employees.

Employees of a management and operating contractor are entitled to the same rights and privileges with respect to outside employment as other citizens. Therefore, there is no general prohibition against contractor employees having outside employment. However, no employee of a contractor performing work on a full or part-time basis under a DOE management and operating contract may engage in employment outside official hours of duty or while on leave if such employment will:

(a) In any manner interfere with the proper and effective performance of the duties of the position;

(b) Appear to create a conflict-of-interest situation, or

(c) Appear to subject DOE or the contractor to public criticism or embarrassment.

970.0371–8 Employee disclosure concerning other employment services.

(a) Management and operating contractors are responsible for requiring its employees to file with the contractor, a written disclosure statement concerning outside employment services which involve the use of information in the area of the employee's employment with the contractor. The disclosure shall contain such information concerning the outside employment as the contractor may prescribe. As a minimum, the employee's disclosure shall:

(1) Acknowledge that the employee has read and is familiar with:

(i) The requirements and restrictions prescribed in this section,

(ii) DOE publication entitled, ''Reporting Results of Scientific and Technical Work Funded by DOE'', and

(iii) The requirements of the contractor's contract with DOE relating to patents.

(2) Include information concerning any rate of remuneration significantly in excess of the employee's regular rate of remuneration;

(3) Identify any actual or potential conflicts with DOE's policies regarding conduct of employees of DOE's contractors set forth in this section;

(4) Address any potential impacts that such employment may have on the contractor's responsibility to report fully and promptly to DOE all significant research and development information; and

(5) Identify any potential conflicts such employment may have with the patent provisions of the contractor's contract with DOE.

(b) The contractor shall provide a copy of all disclosures to the contracting officer.

970.0371–9 Contract clause.

The contracting officer shall insert the clause at 970.5203–3, Contractor's Organization, in all management and operating contracts. The approval authority of the Secretary of Energy required in paragraph (c) may not be delegated. In paragraph (a) the words ''and managerial personnel (see 48 CFR 970.5245–1(j))'' may be inserted after ''(see 48 CFR 952.215–70)''.

Subpart 970.04—Administrative Matters

970.0404 Safeguarding classified information.

970.0404–1 Definitions.

Access Authorization means an administrative determination that an individual is eligible for access to classified information or is eligible for access to, or control over, special nuclear material.

Classified Information means any information or material that is owned by or produced for, or is under the control of the United States Government, and determined pursuant to provisions of Executive Order 12356 of April 2, 1982 (3 CFR, 1982 Comp., p. 166), or prior orders, or as authorized under the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure, and is so designated.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communication security programs.

Facility Clearance means an administrative determination that a facility is eligible to access, produce, use or store classified information or special nuclear material.

Restricted Data means all data concerning design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy; but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2162).

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 14878, Mar. 28, 2002]

970.0404–2 General.

(a) Guidance regarding the National Industrial Security Program as implemented by the Department of Energy may be found at 904.4, Safeguarding Classified Information Within Industry. Additional information concerning contractor ownership when national security or atomic energy information is involved may be found at 904.70. Information regarding contractor ownership involving national security program contracts may be found at 904.71.

(b) Executive Order 12333, United States Intelligence Activities, provides for the organization and control of United States foreign intelligence and counterintelligence activities. DOE has established a counterintelligence program subject to this Executive Order which is described in DOE Order 5670.3 (as amended). All DOE elements, including management and operating contractors and other contractors managing DOE-owned facilities which require access authorizations, should undertake the necessary precautions to ensure that DOE and covered Contractor personnel, programs and resources are properly protected from foreign intelligence threats and activities.

(c) For DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' implements the requirements of section 234B of the Atomic Energy Act (*see* 48 CFR 904.402(c)(1)) for the use of a contract clause that provides for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause, in part, provides for reductions in the amount of fee, profit, or share of cost savings that is

otherwise earned by the contractor for performance failures relating to the safeguarding of Restricted Data and other classified information.

[67 FR 14878, Mar. 28, 2002, as amended at 68 FR 68781, Dec. 10, 2003]

970.0404–3 Responsibilities of contracting officers.

(a) Management and operating contracts which may require the processing or storage of Restricted Data or Special Nuclear Material require application of the applicable DOE Directives in the safeguards and security series.

(b) The contracting officer shall refer to 48 CFR 904.71 for guidance concerning the prohibition on award of a DOE contract under a national security program to a company owned by an entity controlled by a foreign government when access to proscribed information is required to perform the contract.

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 14878, Mar. 28, 2002]

970.0404–4 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 970.5204–1, Counterintelligence, into all management and operating contracts and other contracts for the management of DOE-owned facilities which include the security and classification/declassification clauses.

(b) The contracting officer shall refer to 48 CFR 904.404 and 48 CFR 904.7103 for the prescription of solicitation provisions and contract clauses relating to safeguarding classified information and foreign ownership, control, or influence over contractors.

970.0407 Contractor records retention.

970.0407–1 Applicability.

970.0407–1–1 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 guidance contained in DOE G 1324.5B, Records Management Program and DOE Records Schedules (see current version), rather than those set forth at 48 CFR subpart 4.7, Contractor Records Retention.

970.0407–1–2 Access to and ownership of records.

Contracting officers may agree to contractor ownership of certain categories of records designated in the instruction contained in paragraph (b) of the clause at 48 CFR 970.5204–3, 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 statutory responsibilities required by the Atomic Energy Act and other statutes for oversight of its contractors, including compliance with the Department's health, safety and reporting requirements, and protection of the public interest.

970.0407–1–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5204–3, Access to and Ownership of Records, in management and operating contracts.

970.0470 Department of Energy Directives.

970.0470–1 General.

(a) The contractor is required to comply with the requirements of applicable Federal, State and local laws and regulations, unless relief has been granted by the appropriate authority. For informational purposes, the contracting officer may append the contract with a list of applicable laws or regulations (see 970.5204–2, Laws, Regulations, and DOE Directives, paragraph (a)).

(b) 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 which are applicable to a contract, and

for developing a list of applicable requirements and providing it to the contracting officer for inclusion in the contract.

(c) 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 (b) of this section.

(d) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under a management and operating 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 970.5223–1, Integration of Environment, Safety, and Health into Work Planning and Execution. When such a process is used, the contracting officer shall ensure that the set of tailored requirements, as approved by DOE pursuant to the process, is incorporated into the list identified in paragraph (b) of this section. 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 which varies from an ES&H requirement of an otherwise applicable law or regulation, the contractor must request an exemption or other appropriate regulatory relief that may be specified in the governing regulation.

970.0470–2 Contract clause.

The contracting officer shall insert the clause at DEAR 970.5204–2, Laws, Regulations, and DOE Directives, in management and operating contracts. The contracting officer may modify the clause to indicate the location in the contract of List A, List B, or both.

Subpart 970.08—Required sources of supplies and services

970.0801 Excess personal property.

970.0801–1 Policy.

The provisions of 48 CFR subpart 8.1 (Federal Acquisition Regulation), 41 CFR 101–43 (Federal Property Management Regulation), and 41 CFR 109–43 (DOE Property Management Regulation) apply to DOE's management and operating contracts.

970.0808 Acquisition of printing.

970.0808–1 Scope of section.

This section prescribes the Department's policy concerning duplicating or printing services which may be required in the performance of management and operating contracts.

970.0808–2 Policy.

Management and operating contractors shall provide or secure duplication and printing services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and applicable DOE Directives.

970.0808–3 Contract clause.

The contracting officer shall insert the clause at 970.5208–1, Printing, in all management and operating contracts.

Subpart 970.09—Contractor qualifications

970.0905 Organizational conflicts of interest.

Management and operating contracts shall contain an organizational conflict of interest clause substantially similar to the clause at 48 CFR 952.209–72, Organizational Conflicts of Interest, and which is appropriate to the statement of work of the individual contract. In addition, the contracting officer shall assure that the clause contains appropriate restraints on intra-corporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates. Such restraints shall include personnel access to the facility, technical transfer of information from the facility, and the

availability from the facility of other advantages flowing from performance of the contract. The contracting officer is responsible for ensuring that M&O contractors adopt policies and procedures in the award of subcontracts that will meet the Department's need to safeguard against a biased work product and an unfair competitive advantage. To this end, the organizational conflicts of interest clause in management and operating contracts shall include Alternate I.

970.0970 Performance guarantees.

970.0970–1 Determination of responsibility.

(a) In the award of a management and operating contract, the contracting officer shall determine that the prospective contractor is a responsible contractor and is capable of providing all necessary financial, personnel, and other resources in performance of the contract.

(b) DOE contracts with entities that have been created solely for the purpose of performing a specific management and operating contract. Generally, such newly created entities will have very limited financial and other resources. In such instances, when making the determination of responsibility required under this section, the contracting officer may evaluate the financial resources of other entities only to the extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. A performance guarantee should be the means used unless an equivalent degree of commitment can be obtained by an alternative means.

(c) The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

970.0970–2 Solicitation provision.

The contracting officer shall insert the provision at 48 CFR 970.5209–1, Requirement for Guarantee of Performance, in solicitations when the awardee will be required to be organized solely for performance of the requirement.

Subpart 970.11—Describing Agency Needs

970.1100 Policy.

970.1100–1 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.

970.1100–2 Additional considerations.

(a) While it is not feasible to set forth standard language which would apply to every contract situation, language must be designed for inclusion in a management and operating contract to describe clearly the work being undertaken; the controls, as appropriate, to be exercised by DOE over the performance of that work; and the relationship contemplated between the parties.

(b) The language shall also include the following with respect to subcontracting performance of the work described pursuant to paragraph (a) of this section: ''The contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this clause.''

(c) The provisions required in paragraphs (a) and (b) of this section shall be set forth in the statement of work of the contract.

970.1103–4 Contract clause.

Insert the clause at 48 CFR 52.211–5, Material Requirements, in solicitations and contracts.

970.1170 Work authorization.

970.1170–1 Policy.

Each contract for the management and operation of a DOE site or facility, and other contracts designated by the DOE or NNSA Procurement Executive, must contain a scope of work section that describes, in general terms, work planned and/or required to be performed. Work to be performed under the contract shall be assigned through the use of a work authorization to control individual work activities performed within the scope of work. Work authorizations must be issued prior to the commencement of the work and incurrence of any costs.

[72 FR 29434, May 29, 2007]

970.1170–2 Contract provision.

The Contracting Officer shall insert the clause at 48 CFR 970.5211–1, Work authorization, in each solicitation and contract for the management and operation of a DOE site or facility and in other contracts designated by the DOE or NNSA Procurement Executive.

[72 FR 49434, May 29, 2007]

Subpart 970.15—Contracting by Negotiation

970.1504 Contract pricing.

970.1504–1 Price analysis.

970.1504–1–1 Fees for management and operating contracts.

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

970.1504–1–2 Fee policy.

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

(b) There are three basic principles underlying the Department's fee policy:

(1) The amount of available fee should reflect the financial risk assumed by the contractor.

(2) It is the policy of the Department, when work elements cannot be fixed price, incentive fees (including award fees) tied to objective measures should be used to the maximum extent appropriate.

(3) When work elements cannot be fixed price and award fees are employed, they should be tied to either objective or subjective measures. Each

measure should, to the maximum extent appropriate, be directly tied to a specific portion of the fee pool.

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

(d) Annual fee amounts shall be established in accordance with this subsection. Annual amounts shall not exceed maximum amounts derived from the appropriate fee schedule (and Classification Factor, if applicable) unless approved in advance by the Procurement Executive, or designee. In no event shall any fee exceed statutory limits imposed by 41 U.S.C. 254(b).

(e)(1) Contracting Officers shall include negative fee incentives in contracts when appropriate. A negative fee incentive is one in which the contractor will not be paid the full target fee amount when the actual performance level falls below the target level established in the contract.

(2) Negative fee incentives may only be used when:

(i) A target level of performance can be established, which the contractor can reasonably be expected to reach;

(ii) The value of the negative incentive is commensurate with the lower level of performance and any additional administrative costs;

(iii) Factors likely to prevent attainment of the target level of performance are clearly within the control of the contractor; and

(iv) The contract indicates clearly a level below which performance is not acceptable.

(f) Prior to the issuance of a competitive solicitation or the initiation of negotiations for an extension of an existing contract, the HCA shall coordinate the maximum available fee, as allowed by 48 CFR 970.1504–1–1, and the fee amount targeted for negotiation, if less, with the Procurement Executive, or designee. Solicitations shall identify maximum available fee under the contract and may invite offerors to propose fee less than the maximum available.

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

(h) Multiple fee arrangements should be used in accordance with 48 CFR 970.1504–1–4.

(i)(1) In addition to other performance requirements specified in the contract, DOE management and operating contractors and other contractors designated by the Procurement Executive, or designee, are subject to performance requirements relating to: environment, safety, and health (ES&H), including worker safety and health (WS&H); and safeguarding of Restricted Data and other classified information. Performance requirements relating to ES&H will be set forth in the contract's ES&H terms and conditions, including a DOE approved Integrated Safety Management System (ISMS), or similar document. As applicable, performance requirements relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of the contract entitled ''Security'' and ''Laws, Regulations, and DOE Directives,'' as well as in other terms and conditions that prescribe requirements for the safeguarding of Restricted Data and other classified information.

(2) If the contractor does not meet the performance requirements of the contract relating to ES&H or to the safeguarding of Restricted Data and other classified information, otherwise earned fee, fixed fee, profit, or share of cost savings may be unilaterally reduced by the contracting officer in accordance with the clause entitled ''Conditional Payment of Fee, Profit,

and Other Incentives—Facility Management Contracts.''

(3) The clause entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' provides for reductions of earned fee, fixed fee, profit, or share of cost savings under the contract depending upon the severity of the contractor's performance failure relating to ES&H requirements and, if applicable, relating to the safeguarding of Restricted Data and other classified information. When reviewing performance failures that would otherwise warrant a potential reduction of earned fee, fixed fee, profit, or share of cost savings, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are included in the clause.

(4) The contracting officer must obtain the concurrence of the cognizant Program Secretarial Officer

(i) Prior to effecting any reduction of fee or profit in accordance with the terms and conditions of the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts;'' and

(ii) For determinations that no reduction of fee or profit is warranted for a particular performance failure(s) that would otherwise be subject to a reduction.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68781, Dec. 10, 2003]

970.1504–1–3 Special considerations: Laboratory management and operation.

(a) For the management and operation of a laboratory, the contracting officer shall consider whether any fee is appropriate. Considerations should include:

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

(2) The proportion of retained earnings (as established under generally accepted accounting methods) that are utilized to fund the performance of work related to the DOE contracted effort;

(3) Facilities capital or capital equipment acquisition plans;

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

(5) The utility of fee as a performance incentive; and

(6) The need for fee to attract qualified contractors, organizations, and institutions.

(b) In the event fee is considered appropriate, the contracting officer shall determine the amount of fee in accordance with this subsection.

(1) Costs incurred in the operation of a laboratory that are allowable and allocable under the cost principles (*i.e.*, commercial using 48 CFR 31.2, nonprofit using OMB Circular A–122, or university-affiliated using OMB Circular A–21), regulations (including 48 CFR 970.31), or statutes applicable to the operating contractor should be classified as direct or indirect (overhead or G&A) charges to the contract and not included as proposed fee. Exceptions must be approved by the Procurement Executive, or designee.

(2) Except as specified in 48 CFR 970.1504–1–3(c)(3), the maximum total amount of fee shall be calculated in accordance with 48 CFR 970.1504–1–5 or 48 CFR 970.1504–1–9, as appropriate. The total amount of fee under any laboratory management and operating contract or other designated contract shall not exceed, and may be significantly less than, the result of that calculation. In determining the total amount of fee, the contracting officer shall consider the evaluation of the factors in paragraph (a) of this subsection as well as any benefits the laboratory operator will receive due to its tax status.

(c) In the event fee is considered appropriate, the contracting officer shall establish the type of fee arrangement in accordance with this subsection.

(1) The amount of fee may be established as total available fee with a base fee portion and a performance fee portion. Base fee, if any, shall be an amount in recognition of the risk of financial liability assumed by the contractor and shall not exceed the cost risk associated with those liabilities or the amount calculated in accordance with 48 CFR 970.1504–1–5, whichever is

less. The total available fee, excepting any base fee, shall normally be associated with performance at or above the target level of performance as defined by the contract. If performance in either of the two general work categories appropriate for laboratories (science/technology and support) is rated at less than the target level of performance, the total amount of the available fee shall be subject to downward adjustment. Such downward adjustment shall be subject to the terms of the clause at 48 CFR 970.5215–3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts, if contained in the contract.

(2) The amount of fee may be established as a fixed fee in recognition of the risk of financial liability to be assumed by the contractor, with such fixed fee amount not exceeding the cost risk associated with the liabilities assumed or the amount of fee calculated in accordance with 48 CFR 970.1504–1–5, whichever is less.

(3) If the fixed fee or total available fee exceeds 75% of the fee that would be calculated per 48 CFR 970.1504–1–5 or 48 CFR 970.1504–1–9; or if a fee arrangement other than one of those set forth in paragraphs (c) (1) or (2) of this subsection is considered appropriate, the approval of the Procurement Executive, or designee, shall be obtained prior to its use.

(4) Fee, if any, as well as the type of fee arrangement, will normally be established for the life of the contract. It will be established at time of award, as part of the extend/compete decision, at the time of option exercise, or at such other time as the parties can mutually reach agreement, *e.g.*, negotiations. Such agreement shall require the approval of the Procurement Executive, or designee.

(5) Fee established for longer than one year shall be subject to adjustment in the event of a significant change (greater than ±10% or a lessor amount if appropriate) to the budget or work scope.

(6) Retained earnings (reserves) shall be identified and a plan for their use and disposition developed.

(7) The use of retained earnings as a result of performance of laboratory management and operation may be restricted if the operator is an educational institution.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68781, Dec. 10, 2003]

970.1504–1–4 Types of contracts and fee arrangements.

(a) Contract types and fee arrangements suitable for management and operating contracts may include cost, cost-plus-fixed-fee, cost-plus-award-fee, cost-plus-incentive-fee, fixed-price incentive, firm-fixed-price or any combination thereof (see 48 CFR 16.1). In accordance with 48 CFR 970.1504–1–2(b)(1), the fee arrangement chosen for each work element should reflect the financial risk for project failure that contractors are willing to accept. Contracting officials shall structure each contract and the elements of the work in such a manner that the risk is manageable and, therefore, assumable by the contractor.

(b) Consistent with the concept of a performance-based management contract, those contract types which incentivize performance and cost control are preferred over a cost-plus-fixed-fee arrangement. Accordingly, a cost-plus-fixed-fee contract in instances other than those set forth in 48 CFR 970.1504–1–3(c)(2) may only be used when approved in advance by the Procurement Executive, or designee.

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

(1) Where work cannot be adequately defined to the point that a fixed price contract is acceptable, the attainment of acquisition objectives generally will be enhanced by using a cost-plus-award-fee contract or other incentive fee arrangement to effectively motivate the contractor to superior performance and to provide the Department with flexibility to evaluate actual performance and the conditions under which it was achieved.

(2) The construct of fee for a cost-plus-award-fee management and operating contract is that total available fee will equal a base fee amount and a performance fee amount. The total available fee amount including the performance fee amount the contractor may earn, in whole or in part during

performance, shall be established annually (or as otherwise agreed to by the parties and approved by the Procurement Executive, or designee), in an amount sufficient to motivate performance excellence.

(3) However, consistent with concepts of performance-based contracting, it is Departmental policy to place fee at risk based on performance. Accordingly, a base fee amount will be available only when approved in advance by the Procurement Executive, or designee, except as permitted in 48 CFR 970.1504–1–3(c)(1). Any base fee amount shall be fixed, expressed as a percent of the total available fee at inception of the contract, and shall not exceed that percent during the life of the contract.

(4) The performance fee amount may consist of an objective fee component and a subjective fee component. Objective performance measures, when appropriately applied, provide greater incentives for superior performance than do subjective performance measures and should be used to the maximum extent appropriate. Subjective measures should be used when it is not feasible to devise effective predetermined objective measures applicable to cost, technical performance, or schedule for particular work elements.

(d) Consistent with performance-based contracting concepts, performance objectives and measures related to performance fee should be as clearly defined as possible and, where feasible, expressed in terms of desired performance results or outcomes. Specific measures for determining performance achievement should be used. The contract should identify the amount and allocation of fee to each performance result or outcome.

(e) Because the nature and complexity of the work performed under a management and operating contract may be varied, opportunities may exist to utilize multiple contract types and fee arrangements. Consistent with paragraph (a) of this subsection and 48 CFR 16.1, the contracting officer should apply that contract type or fee arrangement most appropriate to the work component. However, multiple contract types or fee arrangements:

(1) Must conform to the requirements of 48 CFR part 915 and 48 CFR parts 15 and 16, and

(2) Where appropriate to the type, must be supported by:

(i) Negotiated costs subject to the requirements of the Truth in Negotiations Act,

(ii) A pre-negotiation memorandum, and

(iii) A plan describing how each contract type or fee arrangement will be administered.

(f) Cost reduction incentives are addressed in the clause at 48 CFR 970.5215–4, Cost Reduction. This clause provides for incentives for quantifiable cost reductions associated with contractor proposed changes to a design, process, or method that has an established cost, technical, and schedule baseline, is defined, and is subject to a formal control procedure. The clause is to be included in management and operating contracts as appropriate. Proposed changes must be: Initiated by the contractor, innovative, applied to a specific project or program, and not otherwise included in an incentive under the contract. Such cost reduction incentives do not constitute fee and are not subject to statutory or regulatory fee limitations; however, they are subject to all appropriate requirements set forth in this subpart.

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

970.1504–1–5 General considerations and techniques for determining fixed fees.

(a) The Department's fee policy recognizes that fee is remuneration to contractors for the entrepreneurial function of organizing and managing

resources, the use of their resources (including capital resources), and, as appropriate, their assumption of the risk that some incurred costs (operating and capital) may not be reimbursed.

(b) Use of a purely cost-based structured approach for determining fee objectives and amounts for DOE management and operating contracts is inappropriate considering the limited level of contractor cost, capital goods, and operating capital outlays for performance of such contracts. Instead of being solely cost-based, the desirable approach calls for a structure that allows evaluation of the following eight significant factors, as outlined in order of importance, and the assignment of appropriate fee values (subject to the limitations on fixed fee in 48 CFR 970.1504–1–6):

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

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

(3) Management risk relating to performance, including:

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

(ii) Labor intensity of the job;

(iii) Special control problems; and

(iv) Advance planning, forecasting and other such requirements;

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

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

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

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

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

(c) The total fee objective for a particular annual fixed fee negotiation is established by evaluating the factors in this subsection, assigning fee values to them, and totaling the resulting amounts (subject to limitations on total fixed fee in 48 CFR 970.1504–1–6).

[65 FR 81009, Dec. 22, 2000]

970.1504–1–6 Calculating fixed fee.

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

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

(1) Production;

(2) Research and Development; and

(3) Environmental Management.

(c) The schedules are:

PRODUCTION EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to $1 Million	.....	.....	7.66
1,000,000	$76,580	7.66	6.78
3,000,000	212,236	7.07	6.07
5,000,000	333,670	6.67	4.90
10,000,000	578,726	5.79	4.24

PRODUCTION EFFORTS—Continued

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
15,000,000	790,962	5.27	3.71
25,000,000	1,161,828	4.65	3.35
40,000,000	1,663,974	4.16	2.92
60,000,000	2,247,076	3.75	2.57
80,000,000	2,761,256	3.45	2.34
100,000,000	3,229,488	3.23	1.45
150,000,000	3,952,622	2.64	1.12
200,000,000	4,510,562	2.26	0.61
300,000,000	5,117,732	1.71	0.53
400,000,000	5,647,228	1.41	0.45
500,000,000	6,097,956	1.22	.....
Over $500 Million	6,097,956	.....	0.45

RESEARCH AND DEVELOPMENT EFFORTS

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

ENVIRONMENTAL MANAGEMENT EFFORTS

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

970.1504–1–7 Fee Base.

(a) The fee base is an estimate of necessary allowable costs, with some exclusions. It is used in the fee schedules to determine the maximum annual fee for a fixed fee contract. That portion of the fee base that represents the cost of the Production, Research and Development, or Environmental Management work to be performed, shall be exclusive of the cost of source and special nuclear materials; estimated costs of

land, buildings and facilities whether to be leased, purchased or constructed; depreciation of Government facilities; and any estimate of effort for which a separate fee is to be negotiated.

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

(1) Any part of the estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract or other similar costs which is of such magnitude or nature as to distort the technical and management effort actually required of the contractor;

(2) At least 20% of the estimated cost or price of subcontracts and other major contractor procurements;

(3) Up to 100% of the estimated cost or price of subcontracts and other major contractor procurements if they are of a magnitude or nature as to distort the technical and management effort actually required of the contractor;

(4) Special equipment as defined in 48 CFR 970.1504–1–8;

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

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

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

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

(9) Any cost of work funded with uncosted balances previously included in a fee base of this or any other contract performed by the contractor;

(10) Cost of rework attributable to the contractor; and

(11) State taxes.

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

(d) The portion of the fee base associated with the Production, Research and Development, or Environmental Management work to be performed and the associated schedules in this part are not intended to reflect the portion of the fee base or related compensation for unusual architect-engineer, construction services, or special equipment provided by the management and operating contractor. Architect-engineer and construction services are normally covered by special agreements based on the policies applying to architect-engineer or construction contracts. Fees paid for such services shall be calculated using the provisions of 48 CFR 91504–1–5 relating to architect-engineer or construction fees and shall be in addition to the operating fees calculated for the Production, Research and Development, or Environmental Management work to be performed. Special equipment purchases shall be addressed in accordance with the provisions of 48 CFR 970.1504–1–8 relating to special equipment.

(e) No schedule set forth in 48 CFR 915.404–4–71–5 or 48 CFR 970.1504–1–6 shall be used more than once in the determination of the fee amount for an annual period, unless prior approval of the Procurement Executive, or designee, is obtained.

970.1504–1–8 Special equipment purchases.

(a) Special equipment is sometimes procured in conjunction with management and operating contracts. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment which shall not exceed the maximum fee allowable as established using the schedule in 48 CFR 915.404–4–71–5(h).

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

(c) For purposes of this subsection, special equipment is equipment for

which the purchase price is of such a magnitude compared to the cost of installation as to distort the amount of technical direction and management effort required of the contractor. Special equipment is of a nature that requires less management attention. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment using the schedule in 48 CFR 915.404–4–71–5(h). The determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved in each project. This category of equipment would generally include:

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

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

970.1504–1–9 Special considerations: Cost-plus-award-fee.

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

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

(c) The annual total available fee for the contract shall equal the product of the fee(s) that would have been calculated for an annual fixed fee contract and the classification factor(s) most appropriate for the facility/task. If more than one fee schedule is applicable to the contract, the annual total available fee shall be the sum of the available fees derived proportionately from each fee schedule; consideration of significant factors applicable to each fee schedule; and application of a Classification Factor(s) most appropriate for the work.

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

Facility/task category	Classification factor
A	3.0
B	2.5
C	2.0
D	1.25

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

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

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

(ii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals with consideration given to the degree the nature of the work advances state of the art technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is significantly demanding when compared to similar industrial/DOE settings (*i.e.*, nuclear energy processing, industrial environmental cleanup);

(iii) Construction of facilities such as nuclear reactors, atomic particle accelerators, or complex laboratories or industrial units especially designed for handling radioactive materials;

(iv) Research and development directly supporting paragraphs (e)(1)(i), (ii), or (iii) of this subsection and not conducted in a laboratory, or

(v) As designated by the Procurement Executive, or designee. (Classification factor 3.0)

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

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

(ii) The manufacture or assembly of nuclear components;

(iii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals, or other substances which pose a significant threat to the environment or the health and safety of workers or the public, if the nature of the work uses

state of the art technologies or applications in such operations and/or the inherent difficulty or risk of the work is more demanding than that found in similar industrial/DOE settings (*i.e.,* nuclear energy, chemical or petroleum processing, industrial environmental cleanup);

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

(v) Construction of facilities involving operations requiring a high degree of design layout or process control;

(vi) Research and development directly supporting paragraphs (e)(2)(i), (ii), (iii), (iv) or (v) of this subsection and not conducted in a laboratory; or

(vii) As designated by the Procurement Executive, or designee. (Classification factor 2.5)

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

(i) The physical cleanup, processing, or storage of nuclear radioactive or toxic chemicals if the nature of the work uses routine technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is similar to that found in similar industrial/DOE settings (*i.e.,* nuclear energy, chemical processing, industrial environmental cleanup);

(ii) Plant and facility maintenance;

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

(iv) Construction of facilities involving operations requiring normal processes and operations; general or administrative service buildings; or routine infrastructure requirements;

(v) Research and development directly supporting paragraphs (e)(3)(i), (ii), (iii) or (iv) of this subsection and not conducted in a laboratory; or

(vi) As designated by the Procurement Executive, or designee. (Classification factor 2.0)

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

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

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

(h) All management and operating contracts awarded on a cost-plus-award-fee basis shall set forth in the contract, or the Performance Evaluation and Measurement Plan(s) required by the contract clause at 48 CFR 970.5215–1, Total Available Fee: Base Fee Amount and Performance Fee Amount, a site specific method of rating the contractor's performance of the contract requirements and a method of fee determination tied to the method of rating.

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

(j) DOE Operations/Field Office Managers must ensure that all important areas of contract performance are specified in the contract or Performance Evaluation and Measurement Plan(s), even if such areas are not assigned specific weights or percentages of available fee.

970.1504–1–10 Special considerations: Fee limitations.

In situations where the objective performance incentives are of unusual difficulty or where the successful completion of the performance incentives would provide extraordinary value to the Government, fees in excess of those allowed under 48 CFR 970.1504–1–5 and 48 CFR 970.1504–1–9 may be allowed with the approval of the Procurement Executive, or designee. Requests to allow fees in excess of those provided under other provisions of this fee policy must be accompanied by a written justification with detailed supporting rationale as to how the specific circumstances satisfy the two criteria listed in this subsection.

970.1504–1–11 Documentation.

The contracting officer shall tailor the documentation of the determination of fee prenegotiation objective based on 48 CFR 15.406–1,

Prenegotiation objectives, and the determination of the negotiated fee in accordance with 48 CFR 15.406–3, Documenting the negotiation. The contracting officer shall include as part of the documentation: the rationale for the allocation of cost and the assignment of Facility/Task Categories; a discussion of the calculations described in 48 CFR 970.1504–1–5; and discussion of any other relevant provision of this subsection.

970.1504–2 Price negotiation.

(a) Management and operating contract prices (fee) and DOE obligations to support contract performance shall be governed by:

(1) The level of activity authorized and the amount of funds appropriated for DOE approved programs by specific program legislation;

(2) Congressional budget and reporting limitations;

(3) The amount of funds apportioned to DOE;

(4) The amount of obligational authority allotted to program officials and Approved Funding Program limitations; and

(5) The amount of funds actually available to the DOE operating activity as determined in accordance with applicable financial regulations and directives.

(b) Funds shall be obligated and made available by contract provision or modification after the funds become available for obligation for payment to support performance of DOE approved projects, tasks, work authorizations, or services.

(c) Contractor expenditures shall be limited to the overall amount of funds available and obligated on the contract. As prescribed at 48 CFR 970.3270(b), the clause at 48 CFR 970.5232–4, Obligation of Funds, is used for this purpose.

970.1504–3 Documentation.

970.1504–3–1 Cost or pricing data.

(a) The certification requirements of 48 CFR 15.406–2 are not applied to DOE cost-reimbursement management and operating contracts.

(b) The contracting officer shall ensure that management and operating contractors and their subcontractors obtain cost or pricing data prior to the award of a negotiated subcontract or modification of a subcontract in accordance with 48 CFR 15.406–2, and incorporate appropriate contract provisions similar to those set forth at 48 CFR 52.215–10 and 48 CFR 52.215–11 that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of the submission of defective cost or pricing data by a subcontractor at any tier.

(c) The clauses at 48 CFR 52.215–12 and 48 CFR 52.215–13 shall be included in management and operating contracts.

970.1504–4 Special cost or pricing areas.

970.1504–4–1—970.1504–4–3 [Reserved]

970.1504–5 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5215–1, Total Available Fee: Base Fee Amount and Performance Fee Amount, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, that include cost-plus-award-fee arrangements.

(1) The contracting officer shall include the clause with its Alternate I when the award fee cycle consists of two or more evaluation periods.

(2) The contracting officer shall include the clause with its Alternate II when the award fee cycle consists of one evaluation period.

(3) The contracting officer shall include the clause with its Alternate III when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment.

(4) The contracting officer shall include the clause with its Alternate IV when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option.

(b)(1) The contracting officer shall insert the clause at 48 CFR 970.5215–3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts, in all DOE management and operating contracts and

other contracts determined by the Procurement Executive, or designee.

(2) The contracting officer shall include the clause with its Alternate I in contracts that do not contain the clause at 48 CFR 952.204–2, Security.

(3) The contracting officer shall include the clause with its Alternate II in contracts that are awarded on a cost-plus-award-fee basis. The contracting officer should consider including the clause with its Alternate II in contracts that are awarded on a multiple fee basis if the cost-plus-award-fee portion of the contract is significant.

(c) The contracting officer shall insert the clause at 48 CFR 970.5215–4, Cost Reduction, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, if cost savings programs are contemplated.

(d) The Contracting officer shall insert the provision at 48 CFR 970.5215–5, Limitation on Fee, in solicitations for management and operating contracts, and other contracts determined by the Procurement Executive, or designee.

[65 FR 81009, Dec. 22, 2000, as amended at 69 FR 68781, Dec. 10, 2003; 71 FR 16243, Mar. 31, 2006]

Subpart 970.17—Special Contracting Methods

970.1706 Management and operating contracts.

970.1706–1 Award, renewal, and extension.

(a) *Contract term.* Effective work performance under a management and operating contract is facilitated by the use of a relatively long contract term of up to ten (10) years. Accordingly, management and operating contracts shall provide for a basic contract term not to exceed five (5) years and may include an option(s) to extend the term for additional periods; provided, that no one option period exceeds five (5) years in duration and the total term of the contract, including any options exercised, does not exceed ten (10) years. The specific term of the base period and of any options periods shall be determined at the time of the authorization to compete or extend the contract. The term ''option'' as used in this subpart means a unilateral right in the contract by which the Government can extend the term of the contract. Accordingly, except as may be provided for through the inclusion of an option(s) in the contract to extend the term, any extension to continue the contract with the incumbent contractor beyond its term shall only occur when such extension can be justified under one of the statutory authorities identified in 48 CFR 6.302 and when authorized by the Head of the Agency.

(b) *Exercise of option.* As part of the review required by 48 CFR 17.605(b), the contracting officer shall assess whether competing the contract will produce a more advantageous offer than exercising the option. The incumbent contractor's past performance under the contract, the extent to which performance-based management contract provisions are present, or can be negotiated into, the contract, and the impact of a change in a contractor on the Department's discharge of its programs are considerations that shall be addressed in the contracting officer's decision that the exercise of the option is in the Government's best interest. The contracting officer's decision shall be approved by the Procurement Executive and the cognizant Assistant Secretary(s).

(c) *Conditional Authorization of Noncompetitive Extension Made Pursuant to Authority Under CICA.* Authorization to extend a management and operating contract by the Head of the Agency shall be considered conditional upon the successful negotiation of the contract to be extended in accordance with the Department's negotiation objectives. The Head of the Contracting Activity shall advise the Procurement Executive no later than 6 months after receipt of the conditional authorization as to whether the Department's objectives will be met and, if not, the contracting activity's plans for competing the requirement.

970.1706–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 52.217–9, Option to Extend the Term of the Contract, in all management and operating contracts

when the inclusion of an option is appropriate.

970.1707 Work for others.

970.1707–1 Scope.

Pursuant to Section 33 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2053), DOE is authorized to make its facilities available to other Federal and non-Federal entities (sponsors) for the conduct of certain research and development and training activities. Pursuant to the Economy Act of 1932, as amended (31 U.S.C. 1535), or other applicable authority, other Federal entities may request DOE to conduct work. DOE has implemented these and other statutory authorities and requirements in its Work for Others Program. DOE's internal procedures governing the Work for Others Program are described in DOE Order 481.1C, WORK FOR OTHERS (NON-DEPARTMENT OF ENERGY FUNDED WORK).

[69 FR 75003, Dec. 15, 2004]

970.1707–2 Purpose.

The purpose of DOE's Work for Others Program is to:

(a) Provide access for non-DOE entities to highly specialized or unique DOE facilities, services, or technical expertise, when private facilities are inadequate;

(b) Increase research and development interactions among DOE's management and operating contractors and industry in order to transfer DOE technologies to industry for further development or commercialization;

(c) Maintain facility core competencies;

(d) Enhance the science and technology capabilities at DOE facilities; and,

(e) Provide assistance to other Federal agencies and non-Federal entities in accomplishing goals that may otherwise be unattainable and to avoid the possible duplication of effort at Federal facilities.

[69 FR 75003, Dec. 15, 2004]

970.1707–3 Terms governing work for others.

(a) DOE's internal review and approval procedural requirements for individual work for others agreements are set forth in DOE Order 481.1C (as supplemented by DOE Manual 481.1–1A for agreements with non-Federal entities), which may be amended from time to time, and such other guidance as may be issued by DOE. Contracting officers must ensure that the contractor's procedures for its operations are consistent with DOE's procedural requirements.

(b) A contractor may perform work for other Federal or non-Federal sponsors only if:

(1) The contractor is authorized by contract clause to perform such work;

(2) The work is not directly funded by DOE appropriations and is fully reimbursed by the sponsor;

(3) The DOE Contracting Officer or authorized designee approves the work in advance; and,

(4) The work is performed in accordance with DOE policies, procedures and directives applicable to the contract.

(c) Contracting officers must ensure that the requesting Federal entity certifies that:

(1) The interagency agreement with DOE complies with the Economy Act of 1932 (31 U.S.C. 1535) and other applicable statutory authorities and 48 CFR 6.002, which prohibits the use of an Interagency Agreement for the purpose of avoiding the competition requirements of the Federal Acquisition Regulation; and,

(2) The work to be performed will not place the DOE contractor in direct competition with the domestic private sector.

[69 FR 75003, Dec. 15, 2004]

970.1707–4 Contract clause.

Insert the clause at 970.5217–1, Work for Others Program (Non-DOE Funded Work), in any contract that may involve work under the Work for Others Program, pursuant to 970.1707–3(b).

[69 FR 75003, Dec. 15, 2004]

Subpart 970.19—Small, Small Disadvantaged and Women-Owned Small Business Concerns

970.1907 Subcontracting with Small Business, Small Disadvantaged Business and Woman-Owned Small Business Concerns.

970.1907–1 Subcontracting plan requirements.

Pursuant to the clause at 48 CFR 52.219–9, Small Business Subcontracting Plan, which is required for all management and operating contracts, each management and operating contract shall include a subcontracting plan which is effective for the term of the contract. Goals for the contract shall be negotiated annually when revised funding levels are determined. The plan should include provisions for revising the goals or any other sections of the plan. Such revisions shall be in writing, approved by the contracting officer, and shall be specifically made a material part of the contract.

Subpart 970.22—Application of Labor Policies

970.2200 Scope of subpart.

This subpart prescribes Department of Energy labor policies pertaining to the award and administration of management and operating contracts.

970.2201 Basic labor policies.

970.2201–1 Labor relations.

970.2201–1–1 General.

Contracting officers shall, in appropriate circumstances, follow the guidance in 48 CFR Subpart 22.1, as supplemented in this section, in the award and administration of management and operating contracts.

970.2201–1–2 Policies.

(a) The extent of Government ownership of the nation's energy plant and materials, and the overriding concerns of national defense and security, impose special conditions on personnel and labor relations in the energy program. Such special conditions include the need for continuity of vital operations at DOE installations; retention by DOE of absolute authority on all questions of security; and DOE review of labor expenses under management and operating contracts as a part of its responsibility for assuring judicious expenditure of public funds. It is the intent of DOE that personnel and labor policies throughout the energy program reflect the best experience of American industry in aiming to achieve the type of stable labor-management relations that are essential to the proper development of the energy program. The following enunciates the principles upon which the DOE policy is based:

(1) *Employment standards.* (i) Management and operating contractors are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract work and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, or national origin. Contractors shall be required to take affirmative action to achieve these objectives.

(ii) The job qualifications and suitability of prospective employees should be established by the contractor prior to employment by careful personnel investigations. Such personnel investigations should include, as appropriate: A credit check; verification of high school degree/diploma or degree/diploma granted by an institution of higher learning within the last 5 years; contacts with listed personal references; contacts with listed employers for the past 3 years (excluding employment of less than 60 days duration, part-time employments, and craft/union employments); and local law enforcement checks when such checks are not prohibited by State or local law or regulation, and when the individual resides in the jurisdiction where the contractor is located. When a DOE access authorization (security clearance) will be required, the aforementioned preemployment checks must be conducted and the applicant's job qualifications and suitability must be established before a request is made to the DOE to process the applicant for access authorization. Evidence must be furnished to

the DOE with the applicant's security forms that specify: The date each check was conducted, the entity contacted that provided information concerning the applicant, a synopsis of the information provided as a result of each contact, and a statement that all information available has been reviewed and favorably adjudicated in accordance with the contractor's personnel policies. When an applicant is being hired specifically for a position which requires a DOE access authorization, the applicant shall not be placed in that position prior to the access authorization being granted by the DOE unless an exception has been obtained from the Head of the Contracting Activity, or designee. If an applicant is placed in that position prior to access authorization being granted by the DOE, the applicant may not be afforded access to classified matter or special nuclear materials (in categories requiring access authorization) until the DOE notifies the employer that access authorization has been granted. Management and operating contractors and other contractors operating DOE facilities may include the requirements set forth in this subsection in subcontracts (appropriately modified to identify the parties) wherein subcontract employees will be required to hold DOE access authorization in order to perform onsite duties, such as protective force operations.

(iii) Consistent with the policies set forth in this subpart, the contractor is responsible for maintaining satisfactory standards for employee qualifications, performance, conduct, and business ethics under its own personnel policies.

(2) *Security*. On all matters of security at its facilities, DOE retains absolute authority and neither the regulations and policies pertaining to security, nor their administration, are matters for collective bargaining between the contractor's management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible, DOE will consult with representatives of the contractor's management and labor when formulating security regulations and policies that may affect the collective bargaining process.

(3) *Wages, salaries, and employee benefits.* (i) Wages, salaries, and employee benefits shall be administered in a manner designated to adapt the normal practices and conditions of industry or institutions of higher education to the contract work, and to provide for appropriate review by DOE. Area practices, valid patterns, and well-established commercial or academic practices of the contractors, as appropriate, form the criteria for the establishment and adjustment of compensation schedules.

(ii) The aspects of wages, hours, and working conditions which are the substance of collective bargaining in normal organized industries will be left to the orderly processes of negotiation and agreement between DOE contractor management and employee representatives with maximum possible freedom from Government interference.

(4) *Employee relations.* The handling of employee relations on contract work, including such matters as the conduct and discipline of the work force and the handling of employee grievances, is part of the normal management responsibility of the contractor.

(5) *Collective bargaining.* (i) DOE review of collective bargaining practices will be premised on the view that management's trusteeship for the operation of the Government facilities includes the duty to adopt practices which are fundamental to the friendly adjustment of disputes, and which experience has shown, promote orderly collective bargaining relationships. Practices inconsistent with this view may be objected to if not found to be otherwise clearly warranted.

(ii) Consistent with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at DOE-owned facilities should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement entered into during the period of performance of this contract should provide an

effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operation for the term of the collective bargaining agreement.

(iii) DOE expects its management and operating contractors and the unions representing the contractor's employees to cooperate fully with the Federal Mediation and Conciliation Service.

(6) *Personnel training.* DOE encourages and supports personnel training programs aimed at improving work efficiency or developing needed skills which are not otherwise obtainable.

(7) *Working conditions.* Accident, fire, health, and occupational hazards associated with DOE activities will be held to a practical minimum level and controlled in the interest of maintenance of health and prevention of accidents. Subject to DOE control, contractors shall be required to maintain comprehensive continuous preventive and protective programs appropriate to the particular activities throughout all operations. Appropriate financial protection in case of occupational disability must be provided to employees on DOE projects.

(b) Title to payroll and associated records under certain contracts for the management and operation of DOE facilities, and for necessary miscellaneous construction incidental to the function of these facilities, shall vest in the Government. Such records are to be disposed of in accordance with DOE directions. For such contracts, the Solicitor of Labor has granted a tolerance from the Department of Labor Regulations to omit from the prescribed labor clauses the requirement for the retention of payrolls and associated records for a period of three years after completion of the contract. Under this tolerance, the records retention requirements for all labor clauses in the contract and the Fair Labor Standards Act are satisfied by disposal of such records in accordance with applicable DOE directives.

970.2201–1–3 Contract clause.

In addition to the clause at 48 CFR 52.222–1, Notice to the Government of Labor Disputes, the contracting officer shall insert the clause at 970.5222–1, Collective Bargaining Agreements—Management and Operating Contracts, in all management and operating contracts.

970.2201–2 Overtime management.

970.2201–2–1 Policy.

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.

970.2201–2–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5222–2, Overtime Management, in management and operating contracts.

970.2204 Labor standards for contracts involving construction.

970.2204–1 Statutory and regulatory requirements.

970.2204–1–1 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.

(a) Particular work items falling within one or more of the following criteria normally will be classified as noncovered by the Davis-Bacon Act, hereinafter referred to in this section as the ''Act.''

(1) Individual work items estimated to cost $2,000 or less. The total dollar amount of the management and operating contract is not a factor to be considered and bears no relation to individual work items classified as construction, alteration and/or repair, including painting and decorating. However, no item of work, the cost of which is estimated to be in excess of $2,000, shall be artificially divided into portions less than $2,000 for the purpose of avoiding the application of the Act.

(2) Work and services that are a part of operational and maintenance activities or which, being very closely and directly involved therewith, are more in the nature of operational activities than construction, alteration, and/or repair work. This includes work and services which would involve a material risk to continuity of operations, to

life or property, or to DOE operating requirements, if performed by persons other than the contractor's regular production and maintenance forces. However, any decision that contracts or work items are noncovered for these reasons must be made by the Head of the Contracting Activity without power of delegation.

(3) Assembly, modification, setup, installation, replacement, removal, rearrangement, connection, testing, adjustment, and calibration of machinery and equipment. However, it is noted that these activities are covered if they are part of, or would be a logical part of, the construction of a facility, or if construction-type work which is not ''incidental'' to the overall effort is involved.

(4) Experimental development of equipment, processes, or devices, including assembly, fitting, installation, testing, reworking, and disassembly. This refers to equipment, processes, and devices which are assembled for the purpose of conducting a test or experiment. The design may be only conceptual in character, and professional personnel who are responsible for the experiment participate in the assembly. Specifically excluded from the category of experimental development are buildings and building utility services, as distinguished from temporary connections thereto. Also specifically excluded from this category is equipment to be used for continuous testing (*e.g.*, a machine to be continuously used for testing the tensile strength of structural members).

(5) Experimental work in connection with peaceful uses of nuclear energy. This refers to equipment, processes and devices which are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment is such that professional personnel who are responsible for the test or experiment and/or data to be derived therefrom must, by necessity, participate in the assembly and interconnections. Specifically excluded from experimental work are buildings, building utility services, structural changes, drilling, tunneling, excavation, and back-filling work which can be performed according to customary drawings and specifications, and utility services of modifications to utility services, as distinguished from temporary connections thereto. Work in this category may be performed in mines or in other locations specifically constructed for tests or experiments.

(6) Emergency work to combat the effects of fire, flood, earthquake, equipment failure, accident, or other casualties, and to restart the operational activity following the casualty. Work which is not directly related to restarting the activity or which involves rebuilding or replacement of a structure, structural components, or equipment is excluded from this category.

(7) Decontamination, including washing, scrubbing, and scraping to remove contamination; removal of contaminated soil or other material; and painting or other resurfacing, provided that such painting or resurfacing is an integral part of the decontamination activity and performed by the employees of the contractors performing the decontamination.

(8) Burial of contaminated soil waste or contained liquid; however, initial preparatory work readying the burial ground for use (*e.g.*, any grading or excavating that is a part of initial site preparation, fencing, drilling wells for continued monitoring of contamination, construction of guard or other office space) is covered. Work performed subsequent to burial which involves the placement of concrete or other like activity is also covered.

(b) The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside coverage of the Act since it may be necessary to separate work which should be classified as covered. Therefore, the Heads of Contracting Activities shall establish and maintain controls for the careful scrutiny of proposed work assignments under such contracts to assure that:

(1) Contractors whose contracts do not contemplate the performance of work covered by the Act with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Act. If the actual work assignments do involve covered work,

the contract should be modified to include applicable provisions of the Act.

(2) Where covered work is performed by a contractor whose contract contains provisions required by the Act, such work is performed as required by law and the contract. After the contractor has been informed, as provided in paragraph (b)(3) of this subsection, that certain work is covered, the responsibilities of the Head of the Contracting Activity to assure compliance is the same as it would be if the work were being performed under a separate construction contract.

(3) Controls provided for above include consideration by the Head of the Contracting Activity and the contractor, before work is begun or contracted out, of the relation of the Act to the annual programming of work; the contractor's work orders; and work contracted out in excess of $2,000. The Head of the Contracting Activity may, if consistent with DOE's responsibilities as described in this subsection, prescribe from time to time classes of work as to which applicability or nonapplicability of the Act is clear, for which the Head of the Contracting Activity will require no further DOE determination on coverage in advance of the work. For all work, controls to be established by the Head of the Contracting Activity should provide for notification to the contractor before work is begun as to whether such work is covered. The Head of the Contracting Activity is responsible for submitting to the Wage and Hours Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, all DOE requests for project area or installation wage determinations, or individual determinations, or extensions or modification thereto. Requests for such determinations shall be made on Standard Form 308, at least 30 calendar days before they are required for use in advertising for bids or requests for proposals.

(c) *Experimental installations.* Within DOE programs, a variety of experiments are conducted involving materials, fuels, coolants, and processing equipment. Certain types of situations where tests and experiments have presented coverage questions are described as follows:

(1) *Set-ups of device and/or processes.* The proving out of investigative findings and theories of a scientific and technical nature may require the set-up of various devices and/or processes at an early, pre-prototype stage of development. These may range from laboratory bench size to much larger set-ups. As a rule, these set-ups are made within established facilities (normally laboratories), required utility connections are made to services provided as a part of the basic facilities, and the activity as a whole falls within the functional purpose of the facility. Such set-ups are generally not covered. However, the erection of structures which are public works is covered if construction type work, other than incidental work, is involved. Preparatory work for the set-up requiring structural changes or modifications of basic utility services, as distinguished from connections thereto, is covered. The following are illustrations of noncovered set-ups of devices and/or processes:

(i) Assembly of piping and equipment within existing ''hot cell'' facilities for proving out a conceptual design of a chemical processing unit;

(ii) Assembly of equipment, including adaptation and modification thereof, in existing ''hot cell'' facilities to prove out a conceptual design for remotely controlled machining equipment;

(iii) Assembly of the first graphite pile in a stadium at Stagg Field in Chicago;

(iv) Assembly of materials and equipment for particular aspects of the direct current thermonuclear experiments to explore feasibility and to study other ramifications of the concept of high energy injection and to collect data thereon.

(2) *Loops.* Many experiments are carried on in equipment assemblies, called loops, in which liquids or gases are circulated under monitored and controlled conditions. For purposes of determining coverage under the Act, loops may be classed as loop facilities or as loop set-ups. Both of these classes of loops can include in-reactor loops and out-of-reactor loops. In differentiating between clearly identified loop set-ups and loop facilities, an area exists in which there have been some questions of coverage, such as certain

loops at the Material Test Reactor and at Engineering Test Reactor and the Idaho National Engineering and Environmental Laboratory site. Upon clarification of this area, further illustrations will be added. In the meantime, the differentiation between loop set-ups and loop facilities must be made on a case-by-case basis, taking into account the total criteria set forth in this subpart.

(i) *Loop set-ups.* The assembly, erection, modification, and disassembly of a loop set-up is noncovered. A noncontroversial example of a loop set-up is one which is assembled in a laboratory, *e.g.,* Oak Ridge National Laboratory, Argonne National Laboratory, or Lawrence Livermore National Laboratory, for a particular test and thereafter disassembled. However, preparatory work for a loop set-up requiring structural changes or modifications of basic utility services as distinguished from connections thereto is covered, as are material and equipment that are installed for a loop set-up which is a permanent part of the facility or which is use for a succession of experimental programs.

(ii) *Loop facilities.* A loop facility differs from a loop set-up in that it is of a more permanent character. It is usually, but not always, of greater size. It normally involves the building or modification of a structure. Sometimes it is installed as a part of construction of the facility. It may be designed for use in a succession of experimental programs over a longer period of time. Examples of loop facilities are the in-reactor ''K'' loops at Hanford and the large Aircraft Nuclear Propulsion loop at the Idaho National Engineering and Environmental Laboratory site. The on-site assembly and erection of such loop facilities are covered. However, once a loop facility is completed and becomes operational, the criteria set forth in this paragraph for operational and maintenance activities apply.

(3) *Reactor component experiments.* Other experiments are carried on by insertion of experimental components within reactor systems without the use of a loop assembly. An example of reactor facilities erected for such experimental purposes are the special power excursion test reactors (SPETRs) at the National Reactor Test Site which are designed for studying reactor behavior and performance characteristics of certain reactor components. Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding to permit work on the reactor to proceed following a short period of power interruption, and buildings as needed to house the reactor and its auxiliary equipment. The erection and on-site assembly of such a reactor facility is covered, but the components whose characteristics are under study are excluded from coverage. To illustrate, one of the SPETRs planned for studies of nuclear reactor safety is designed to accommodate various internal fuel and control assemblies. The internal structure of the pressure vessel is designed so that cores of different shapes and sizes may be placed in the vessel for investigation, or the entire internal structure may be easily removed and replaced by a structure which will accept a different core design. Similarly, the control rod assembly is arranged to provide for flexibility in the removal of instrument leads and experimental assemblies from within the core.

(4) *Tests or experiments in peaceful uses of nuclear energy.* These tests or experiments are varied in nature and some are only in a planning stage. They consist of one or more nuclear or nonnuclear detonations for the purposes of acquiring data. The data can include seismic effects, radiation effects, amount of heat generated, amount of material moved and so forth. Some of these tests are conducted in existing mines, while others are conducted in facilities specifically constructed for the tests or experiments. In general, all work which can be performed in accordance with customary drawings and specifications, as well as other work in connection with preparation of facilities is treated as covered work. Such work includes tunneling, drilling, excavation and back-filling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear

device to be detonated, and the instrumentation and connection between such material or device and the instrumentation are treated as noncovered work.

(5) *Tests or experiments in military uses of nuclear energy.* As in 970.2204–1–1(c)(4), these tests or experiments can be varied in nature. However, under this category it is intended to include only detonation of nonnuclear material or nuclear devices. The material or devices can be detonated either underground, at ground level, or above the ground. These tests or experiments have been conducted in, on, or in connection with facilities specifically constructed for such tests or experiments. As in tests or experiments in peaceful uses of nuclear energy, all work which can be performed in accord with customary drawings and specifications, as well as other work in connection with preparation of facilities are treated as covered work. Such work includes building towers or similar structures, tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear devices and instrumentation are treated as noncovered work.

(d) *Construction site contiguous to an established manufacturing facility.* As DOE-owned property sometimes encompasses several thousand acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a period of years, and established manufacturing activities may be regularly carried on at one site at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly, and reconditioning of components and equipment which in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is noncovered, the installation of any such manufactured items on a construction job is covered.

970.2208 Equal employment opportunity.

The equal employment opportunity provisions of 48 CFR subpart 22.8 and subpart 922.8 of this chapter, including Executive Order 11246 and 41 CFR part 60, are applicable to DOE management and operating contracts.

970.2210 Service Contract Act.

The Service Contract Act of 1965 is not applicable to contracts for the management and operation of DOE facilities, but it is applicable to subcontracts under such contracts (see 48 CFR 970.5244–1).

970.2270 Unemployment compensation.

(a) Each state has its own unemployment compensation system to provide payments to workers who become unemployed involuntarily and through no fault of their own. Funds are provided for unemployment compensation benefits through a payroll tax on employers. Most DOE contractors are subject to the unemployment compensation tax laws of the states in which they are located. It is the policy to assure, both in the negotiation and administration of cost-reimbursement type contracts, that economical and practical arrangements are made and practiced with respect to unemployment compensation.

(b) *Contract exempt from state laws.* (1) Some contractors are exempt from state unemployment compensation laws, usually on grounds that they are nonprofit organizations or subdivisions of State governments. Most states, however, permit such employers to elect unemployment compensation coverage on a voluntary basis. Under such circumstances, all existing or prospective cost-reimbursement contractors shall be encouraged to provide unemployment compensation coverage or equivalent substitutes.

(2) It is also DOE policy that, prior to the award or extension of a management and operating contract, exempt contractors or prospective contractors shall be required to submit to the contracting officer a statement that they will either elect coverage or provide

equivalent substitutes for unemployment compensation, or in the alternative, submit evidence that it is impractical to do so. If any exempt contractor or prospective contractor submits that it is impractical to elect coverage or to provide an equivalent substitute, appropriate Office of Contract and Resource Management, within the Headquarters procurement organization, staff shall review that position prior to recommending an award or extension of the contract. If there are substantial reasons for not electing coverage or for not providing equivalent substitutes, a contract may be awarded or extended. Headquarters' staff review and recommendation shall be based on such factors as:

(i) The specific provisions of the unemployment compensation law of the State;

(ii) The extent to which the establishment of special conditions on DOE work may have an adverse effect on the contractor's general policies and operating costs in its private operations;

(iii) The numerical relationship between the contractor's private work force and its employees performing only work for DOE;

(iv) The contractor's record with respect to work force stability and the general outlook with respect to future work force stability;

(v) In a replacement contractor situation, whether or not the prior contractor had coverage or suitable substitutes; and

(vi) The particular labor relations implications involved.

Subpart 970.23—Environment, Conservation, Occupational Safety, and Drug Free Work Place

970.2303 Hazardous materials identification and material safety.

970.2303–1 General.

(a) The Department of Energy regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The Department also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

(b) The inclusion of environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in accordance with this subpart and in consultation with appropriate environmental, safety and health program management personnel.

(c)(1) For DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, the clause entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts'' implements the requirements of section 234C of the Atomic Energy Act for the use of a contract clause that provides for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker safety and health concerns. The clause, in part, provides for reductions in the amount of fee, profit, or share of cost savings that is otherwise earned by the contractor for performance failures relating to worker safety and health violations under the Department's regulations.

(2)(i) Section 234C of the Atomic Energy Act states that DOE shall either pursue civil penalties (implemented at 10 CFR part 851) for a violation under section 234C of the Atomic Energy Act (42 U.S.C. 2282c) or a contract fee reduction, but not both.

(ii) The contracting officer must coordinate with the Office of Price Anderson Enforcement within the Office of the Assistant Secretary for Environment, Safety and Health (or with any designated successor office) before pursuing contract fee reduction in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker safety and health concerns.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68782, Dec. 10, 2003]

970.2303–2 Contract clauses.

(a) When work under management and operating contracts and subcontracts thereunder is to be performed at a facility where DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 48 CFR 970.5223–1, Integration of Environment, Safety and Health into Work Planning and Execution, shall be used in such contract or subcontract and made applicable to the work if conditions in paragraphs (a)(1) through (3) of this section, are satisfied:

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(b) The clause set forth in 952.223–72, Radiation Protection and Nuclear Criticality, shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with States under section 274 of the Atomic Energy Act).

970.2304 Use of recovered/recycled materials.

970.2304–1 General.

The policy for the acquisition and use of EPA designated items, *i.e.*, items with recovered/recycled content, is set forth at 48 CFR (FAR) 23.4—Use of Recovered Materials as supplemented by 48 CFR (DEAR) 923.405(e) and by 48 CFR (FAR) 23.704, Application to Government-owned or leased facilities, and 48 CFR (FAR) 23.705, Contract clause.

[68 FR 6359, Feb. 7, 2003]

970.2304–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR (FAR) 52.223–10, Waste Reduction Program, and the clause at 48 CFR (DEAR) 970.5223–2, Affirmative Procurement Program, in contracts for the management of DOE facilities, including national laboratories. If the contractor subcontracts a significant portion of the operation of the Government facility which includes the acquisition of items designated in EPA's Comprehensive Procurement Guidelines, the subcontract shall contain a clause substantially the same as that at 48 CFR (DEAR) 970.5223–2. The EPA Comprehensive Procurement Guidelines identify products which Federal agencies and their contractors are to procure with recycled content pursuant to 40 CFR part 247. Examples of such subcontracts would be operation of the facility supply function, construction or remodeling at the facility, or maintenance of the facility motor vehicle fleet. In situations in which the facility management contractor can reasonably determine the amount of products with recovered/recycled content to be acquired under the subcontract, the facility management contractor is not required to flow down the reporting requirement of the 970.5223–2 clause. Instead, the facility management contractor may include the subcontract quantities in its own report and include an agreement in the subcontract that such products will be acquired with recovered/recycled content and that the subcontractor will advise if it is unable to procure such products with recovered/recycled content because the product is not available:

(a) Competitively within a reasonable time;

(b) At a reasonable price; or,

(c) Within the performance requirements.

[68 FR 6359, Feb. 7, 2003]

970.2305 Workplace substance abuse programs—management and operating contracts.

970.2305–1 General.

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for management and operating contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's management and operating contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

970.2305–2 Applicability.

(a) All management and operating contracts awarded under the authority of the Atomic Energy Act of 1954, as amended, are required to implement the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) Except as otherwise provided for in this subpart, management and operating contracts subject to the requirements of 10 CFR part 707 and this subpart shall not be subject to 48 CFR 23.5, Drug Free Workplace.

970.2305–3 Definitions.

Terms and words relating to DOE's Workplace Substance Abuse Programs, as used in this section, have the same meanings assigned to such terms and words in 10 CFR part 707.

970.2305–4 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 48 CFR 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

(b) The contracting officer shall insert the clause at 970.5223–4, Workplace Substance Abuse Programs at DOE Sites, in contracts for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

970.2306 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer shall comply with the procedures of 48 CFR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with the clause at 48 CFR 970.5223–4, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are:

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with the terms of the provision at 48 CFR 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites;

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace; or,

(4) The offeror has submitted a false certification in response to the provision at 48 CFR 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites.

970.2307 Contracting for Environmentally Preferable and Energy-Efficient Products and Services.

970.2307–1 Motor vehicle fleet operations.

Executive Order 13149 provides that the Federal motor vehicle fleet will serve as an example and provide a leadership role in the reduction of petroleum consumption through improvements in fleet fuel efficiency and the use of alternative fuel vehicles and alternative fuels. Part 2 of the Order establishes goals for Federal Government

fleet efficiency and requires the development of strategies to accomplish the goals. Section 403 of the Order provides that environmentally preferable motor vehicle products, including biobased motor vehicle products, will be used in the maintenance of Federal fleet motor vehicles when these products are reasonably available and meet vehicle manufacturers' recommended performance standards. Environmentally preferable motor vehicle products are among the products contained in the Comprehensive Procurement Guidelines list of products with recycled content to be procured pursuant to the clause at 48 CFR 970.5223–2. Section 505 of Executive Order 13149 requires that the goals and requirements of the Order be included in all management contracts which include Federal motor vehicle fleet operations. Section 506 of Executive Order 13149 exempts military tactical, law enforcement, and emergency vehicles from the requirements of the order.

[68 FR 52131, Sept. 2, 2003]

970.2307–2 Contract clause.

Include the clause at 970.5223–5, DOE Motor Vehicle Fleet Fuel Efficiency, in all management contracts providing for Contractor management of the motor vehicle fleet.

[68 FR 52131, Sept. 2, 2003]

Subpart 970.26—Other Socioeconomic Programs

970.2670 Implementation of Section 3021 of the Energy Policy Act of 1992.

970.2670–1 Requirements.

The goal requirements of section 3021 of the Energy Policy Act of 1992, and the attendant reporting requirements shall be included in the subcontracting plan for the management and operating contract and shall apply to the annual dollar obligations specifically provided to the contractor for competitively awarded subcontracts that fulfill Energy Policy Act requirements.

970.2671 Diversity.

970.2671–1 Policy.

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.

970.2671–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5226–1, Diversity Plan, in all management and operating contracts.

970.2672 Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

970.2672–1 Policy.

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 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.

970.2672–2 Requirements.

The requirements set forth in 48 CFR 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.

970.2672–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5226–2, 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.

970.2673 Regional partnerships.

970.2673–1 Policy.

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include:

(a) Recognizing the diverse interests of the region and its stakeholders,

(b) Engaging regional stakeholders in issues and concerns of mutual interest, and

(c) Recognizing that giving back to the community is a worthwhile business practice.

970.2673–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5226–3, Community Commitment, in all management and operating contracts.

Subpart 970.27—Patents, Data, and Copyrights

970.2701 General.

970.2701–1 Applicability.

This subpart applies to negotiation of patent rights, rights in technical data provisions and other related provisions for the Department of Energy contracts for the management and operation of DOE's major sites or facilities, including the conduct of research and development and nuclear weapons production, and contracts which involve major, long-term or continuing activities conducted at a DOE site.

970.2702 Patent related clauses.

970.2702–1 Authorization and consent.

Contracting officers must use the clause at 970.5227–4, Authorization and Consent, instead of the clause at 48 CFR 52.227–1.

970.2702–2 Notice and assistance regarding patent and copyright infringement.

Contracting officers must use the clause at 970.5227–5, Notice and Assistance Regarding Patent and Copyright Infringement, instead of the clause at 48 CFR 52.227–2.

970.2702–3 Patent indemnity.

(a) Contracting officers must use the clause at 970.5227–6, Patent Indemnity—Subcontracts to assure that subcontracts appropriately address patent indemnity.

(b) Normally, the clause at 48 CFR 52.227–3 would not be appropriate for an M&O contract; however, if there is a question, such as when the mission of the contractor involves production, the contracting officer must consult with local patent counsel and use the clause where appropriate.

970.2702–4 Royalties.

Contracting officers must use the solicitation provision at 970.5227–7, Royalty Information, and the clause at 970.5227–8, Refund of Royalties instead of the provision at 48 CFR 52.227–8 and the clause at 48 CFR 52.227–9, respectively.

970.2702–5 Rights to proposal data.

Contracting officers must include the clause at 48 CFR 52.227–23, Rights to Proposal Data, in all solicitations and contracts for the management and operation of DOE sites and facilities.

970.2702–6 Notice of right to request patent waiver.

Contracting officers must include the provision at 970.5227–9 in all solicitations for contracts for the management and operation of DOE sites or facilities.

970.2703 Patent rights.

970.2703–1 Purposes of patent rights clauses.

(a) DOE sites and facilities are managed and operated on behalf of the Department of Energy by a contractor, pursuant to management and operating contracts that are generally awarded for a five (5) year term, with the possibility for renewal. Special provisions relating to patent rights are appropriately incorporated into an M&O contract because of the unique circumstances and responsibilities of managing and operating a Government-owned facility, as compared to other federally funded research and development contracts.

(b)(1) *Technology transfer mission clause.* In accordance with Public Law 101–189, section 3133(d), DOE may grant technology transfer authority to M&O contractors operating a DOE facility. Generally, M&O contractors have the right to elect to retain title to inventions made under the contract, whether a nonprofit or educational organizations, as a result of 35 U.S.C. 200 *et seq.* (Bayh-Dole Act), or a large business, as a result of a class patent waiver issued pursuant to 10 CFR part 784. Under such contracts, the M&O contractor assumes responsibilities for commercializing retained inventions, in accordance with the Technology Transfer Mission clause provided at 970.5227–3. That clause also governs such activities as the distribution of royalties earned from inventions made under the contract and the transfer of patent rights in inventions made under the contract to successor contractors.

(2) If the M&O contractor is a nonprofit organization or small business firm having technology transfer authority, the following clauses are inserted into the M&O contract: 970.5227–3 and 970.5227–10.

(3) If the M&O contract has technology transfer as a mission and is to be performed by a for-profit, large business firm that has been granted an advance class waiver, the following clauses are inserted into the M&O contract: 970.5227–3 and 970.5227–12. The terms of the clause at 970.5227–12 are subject to modification to conform to the terms of the class waiver.

(4) If the M&O contract does not have a technology transfer mission and is to be performed by a for-profit, large business firm and does not have advance class waiver under 10 CFR part 784, the patent rights clause at 970.5227–11 is inserted into the M&O contract, and the Technology Transfer Mission clause is inapplicable.

(5) If the contractor is an educational institution, a non-profit organization or a small business firm and is conducting privately funded technology transfer activities, involving the use of private funds to conduct licensing and marketing activities related to inventions made under the contract in accordance with the Bayh-Dole Act, DOE may modify the patent rights clause (970.5227–10) to address issues such as the disposition of royalties earned under the privately funded technology transfer program, the transfer of patent rights to a successor contractor, allowable cost restrictions concerning privately funded technology transfer activities, and the Government's freedom from any liability related to licensing under the contractor's privately funded technology transfer program.

(c) Contracting officers must consult with DOE patent counsel assisting the contracting activity or the Assistant General Counsel for Technology Transfer and Intellectual Property for assistance in selecting for use in the solicitation, negotiating, or approving appropriate patent rights clauses for a M&O contract. It may be appropriate to include more than one patent rights clause in a solicitation if the successful contractor could, for instance, be either an educational or a large business. If a large business may be selected for performance of a contract that will include a technology transfer clause, the solicitation must include the clause at 970.5227–12 to reflect the waiver that will likely be granted. If the solicitation includes more than one patent clause, it must include an explanation

of the circumstances under which the appropriate clause will be used. The final award must contain only one patent rights clause.

970.2703–2 Patent rights clause provisions for management and operating contractors.

(a) *Allocation of Principal Rights: Bayh-Dole provisions.* If the management and operating contractor is an educational institution or nonprofit organization, the patent rights clause provided at 970.5227–10 must be inserted into the M&O contract. Such entities are beneficiaries of Bayh-Dole Act, including the paramount right of the contractor to elect to retain title to inventions conceived or first actually reduced to practice in performance of work under the contract, except in DOE-exempted areas of technology or in operation of DOE facilities primarily dedicated to naval nuclear propulsion or weapons related programs.

(b) *Allocation of Principal Rights: Government title.* (1) The patent rights clause provided at 970.5227–11 must be incorporated into the M&O contract if the contractor is a for-profit, large business firm and the contract does not have a technology transfer mission or if, without regard to the type of contractor, the contract is for the operation of a DOE facility primarily dedicated to naval nuclear propulsion or weapons related programs. That clause provides for DOE's statutory obligation to take title to inventions conceived or first actually reduced to practice in the course of or under an M&O contract, and does not contemplate an advance class waiver of Government rights in inventions, or participation by the contractor in technology transfer activities.

(2) While only in rare circumstances does a for-profit large business contractor whose contract contains no technology transfer mission receive rights in or title to inventions made under the contract, the contractor does have the right to request a license or foreign patent rights in inventions made under the contract, and may petition for a waiver of Government rights in identified inventions. The patent rights clause 970.5227–11 does not include many of the provisions of patent rights clauses 970.5227–10 and 970.5227–12, related to the filing of patent applications by the contractor, the granting of rights in inventions by the contractor to third parties (preference for United States industry), and conditions allowing the Government to grant licenses to third parties in inventions retained by the contractor (march-in rights). Any instrument granting rights in inventions made under a contract governed by patent rights clause 970.5227–11 must include these additional provisions within its terms and conditions.

(c) *Allocation of Principal Rights: Contractor right to elect title under an advance class waiver.* If the M&O contractor is a for-profit, large business firm and the Government has granted an advance class waiver of Government rights in inventions made in the course of or under the M&O contract, under the authority of the Atomic Energy Act of 1954 (42 U.S.C. 2182) and the Federal Nonnuclear Energy Act of 1974 (42 U.S.C. 5908(c)), the patent rights clause provided at 970.5227–12 must be inserted into the M&O contract, unless the terms and conditions of such an approved waiver alter or replace the patent rights clause provisions pursuant to 10 CFR part 784.

(d) *Extensions of time—DOE discretion.* The patent rights clauses for M&O contracts require the contractor to take certain actions within prescribed time periods to comply with the contract and preserve its rights in inventions. The M&O contractor may request extensions of time in which to take such actions by submitting written justification to DOE, and DOE may grant the contractor's requests, on a case-by-case basis. If the time period expired due to negligence by the contractor, DOE may grant a request for an extension of time upon a showing by the contractor that corrective procedures are in place to avoid such negligence in the future. If a contractor is requesting an extension of time in which to elect to retain title to an invention, DOE may grant the request if the extension allows the contractor to conduct further experimentation, market research, or other analysis helpful to determine contractor interest in electing title to the invention, among other

considerations. Generally, the extensions of time are for periods of between six (6) months to one (1) year.

(e) *Facilities license.* These include the rights to make, use, transfer, or otherwise dispose of all articles, materials, products, or processes embodying inventions or discoveries used or embodied in the facility regardless of whether or not conceived or first actually reduced to practice under or in the course of such a contract. The patent rights clauses, 970.5227–10, 970.5227–11, 970.5227–12, each contain a provision granting the Government this facilities license.

(f) *Deletion of classified inventions provision.* If DOE determines that the research, development, demonstration or production work to be performed during the course of a management and operating contract most probably will not involve classified subject matter or result in any inventions that require security classification, DOE patent counsel may advise the contracting officer to delete the patent rights clause provision entitled, ''Classified Inventions'' from the M&O contract.

(g) *Alternate 1—Weapons Related Research or Production.* If DOE grants technology transfer authority to a DOE facility, pursuant to Public Law 101–189, section 3133(d), and the DOE owned facility is involved in weapons related research and development, or production, then Alternate 1 of the patent rights clauses must be inserted into the M&O contract. Alternate 1 defines weapons related subject inventions and restricts the contractor's rights with respect to such inventions.

970.2704 Rights in data.

970.2704–1 General.

(a) Rights in data relating to the performance of the contract and to all facilities are significant in assuring continuity of the management and operation of DOE facilities. It is crucial in assuring DOE's continuing ability to perform its statutory missions that DOE obtain rights to all data produced or specifically used by its management and operating contractors and appropriate subcontractors. In order to obtain the necessary rights in technical data, DOE contracting officers shall assure that management and operating contracts contain either the Rights in Data clause at 48 CFR 970.5227–1, Rights in Data—Facilities, or the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer. Selection of the appropriate clause is dependent upon whether technology transfer is a mission of the management and operating contract pursuant to the National Competitiveness Technology Transfer Act of 1989, Public Law 101–189, (15 U.S.C. 3711 *et seq.*, as amended). If technology transfer is not a mission of the management and operating contract, the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, shall be used. In those instances in which technology transfer is a mission of the contract, the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, shall be used.

(b) Employees of the management and operating contractor may not be used to assist in the preparation of a proposal or bid for services which are similar or related to those being performed under the contract, which are to be performed by the contractor or its parent or affiliate organization for commercial customers unless the employee has been separated from work under the DOE contract for such period as the Head of the Contracting Activity or designee shall have directed.

970.2704–2 Procedures.

(a) The clauses at 48 CFR 970.5227–1, Rights in Data-Facilities, and 48 CFR 970.5227–2, Rights in Data—Technology Transfer, both provide generally for Government ownership and for unlimited rights in the Government for all data first produced in the performance of the contract and unlimited rights in data specifically used in the performance of the contract. Both clauses provide that, subject to patent, security, and other provisions of the contract, the contractor may use contract data for its private purposes. The contractor, under either clause, must treat any data furnished by DOE or acquired from other Government agencies or private entities in the performance of their contracts in accordance with any restrictive legends contained therein.

(b) Since both clauses secure access to and, if requested, delivery of technical data used in the performance of the contract, there is generally no need to use the Additional Technical Data Requirements clause at 48 CFR 52.227–16 in the management and operating contract.

(c)(1) Paragraph (d) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, and paragraph (f) of the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, provide for the inclusion in subcontracts of the Rights in Technical Data—General clause at 48 CFR 52.227–14, with Alternate V, and modified in accordance with DEAR 927.409. Those clauses also provide for the inclusion in appropriate subcontracts Alternates II, III, and IV to the clause at 48 CFR 52.227–14 with DOE's prior approval and the inclusion of the Additional Technical Data Requirements clause at 48 CFR 52.227–16 in all subcontracts for research, development, or demonstration and all other subcontracts having special requirements for the production or delivery of data. In subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated by the contractor under its contract with DOE, the management and operating contractor shall use the Rights in Data—Facilities clause at 48 CFR 970.5227–1.

(2) Where, however, a subcontract is to be awarded by the management and operating contractor in connection with a program, as discussed at 927.404–70, which provides statutory authority to protect from public disclosure, data first produced under contracts awarded pursuant to the program, contracting officers shall ensure that the management and operating contractor includes in that subcontract the rights in data clause provided by DOE Patent Counsel, consistent with any accompanying guidance.

(3) Management and operating contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use, nor may they acquire rights in a subcontractor's limited rights data or restricted computer software except through the use of Alternate II or III to the clause at 48 CFR 52.227–14, respectively, without the prior approval of DOE Patent Counsel.

(d)(1) Paragraphs (e) and (f) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, and paragraphs (g) and (h) of the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, provide for the contractor's granting a nonexclusive license in any limited rights data and restricted computer software specifically used in performance of the contract.

(2) In certain instances the objectives of DOE would be frustrated if the Government did not obtain, at the time of contracting, limited license rights on behalf of responsible third parties and the Government, and to limited rights data or restricted computer software or both necessary for the practice of subject inventions or data first produced or delivered in the performance of the contract. This situation may arise in the performance of management and operating contracts and contracts for the management or operation of a DOE facility or site. Contracting officers should consult with program officials and Patent Counsel. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of the small business or non-profit organization have been authorized in accordance with 35 U.S.C. 202(f). Where such a background license is in DOE's interest, a provision that provides substantially as Alternate VI at 48 CFR 952.227–14 should be added to the appropriate clause, 48 CFR 970.5227–1, Rights in Data—Facilities, or 48 CFR 970.5227–2, Rights in Data—Technology Transfer.

(e) The Rights in Data—Technology Transfer clause at 48 CFR 970.5227–2 differs from the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, in the context of its more detailed treatment of copyright. In management and operating contracts that have technology transfer as a mission, the right to assert copyright in data first produced under the contract will be a valuable

right, and commercialization of such data, including computer software, will assist the management and operating contractor in advancing the technology transfer mission of the contract. The clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, provides for DOE approval of DOE's taking a limited copyright license for a period of five years, and, in certain rare cases, specified longer periods in order to contribute to commercialization of the data.

(f) Contracting officers should consult with Patent Counsel to assure that requirements regarding royalties and conflicts of interest associated with asserting copyright in data first produced under the contract are appropriately addressed in the Technology Transfer Mission clause (48 CFR 970.5227–3) of the management and operating contract. Where it is not otherwise clear which DOE program funded the development of a computer software package, such as where the development was funded out of a contractor's overhead account, the DOE program which was the primary source of funding for the entire contract is deemed to have administrative responsibility. This issue may arise, among others, in the decision whether to grant the contractor permission to assert copyright. See paragraph (e) of the Rights in Data—Technology Transfer clause at 970.5227–2.

(g) In management and operating contracts involving access to DOE-owned Category C–24 restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related restricted data and technology. Alternate I to each clause shall be used where access to Category C–24 restricted data is contemplated in the performance of a contract.

970.2704–3 Contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, in management and operating contracts which do not contain the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

(b) The contracting officer shall insert the clause at 970.5227–2, Rights in Data—Technology Transfer, in management and operating contracts which contain the clause at 970.5227–3, Technology Transfer Mission. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

970.2770 Technology Transfer.

970.2770–1 General.

This subpart prescribes policies and procedures for implementing the National Competitiveness Technology Transfer Act of 1989, Public Law 101–189, (15 U.S.C. 3711 *et seq.*, as amended). The Act requires that technology transfer be established as a mission of each Government-owned laboratory operated under contract by a non-Federal entity. The National Defense Authorization Act for Fiscal Year 1994 expanded the definition of ''laboratory'' to include weapon production facilities that are operated for national security purposes and are engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components.

970.2770–2 Policy.

All new awards for or extensions of existing DOE laboratory or weapon production facility management and operating contracts shall have technology transfer, including authorization to award Cooperative Research and Development Agreements (CRADAs), as a laboratory or facility mission under Section 11(a)(1) of the Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96–480 (15 U.S.C. 3701 *et seq.*, as amended). A management and operating contractor for a facility not deemed to be a laboratory or weapon production facility may be authorized on a case-by-case basis to support the DOE technology transfer mission including, but not limited to, participating in CRADAs awarded by

DOE laboratories and weapon production facilities.

970.2770–3 Technology transfer and patent rights.

The National Competitiveness Technology Transfer Act of 1989 (NCTTA) established technology transfer as a mission for Government-owned, contractor-operated laboratories, including weapons production facilities, and authorizes those laboratories to negotiate and award cooperative research and development agreements with public and private entities for purposes of conducting research and development and transferring technology to the private sector. In implementing the NCTTA, DOE has negotiated technology transfer clauses with the contractors managing and operating its laboratories. Those technology transfer clauses must be read in concert with the patent rights clause required by this subpart. Thus, each management and operating contractor holds title to subject inventions for the benefit of the laboratory or facility being managed and operated by that contractor.

970.2770–4 Contract clause.

(a) The contracting officer shall insert the clause at 970.5227–3, Technology Transfer Mission, in each solicitation for a new or an extension of an existing laboratory or weapon production facility management and operating contract.

(b) If the contractor is a nonprofit organization or small business eligible under 35 U.S.C. 200 *et seq.*, to receive title to any inventions under the contract and proposes to fund at private expense the maintaining, licensing, and marketing of the inventions, the contracting officer shall use the basic clause with its Alternate I.

(c) If the facility is operated for national security purposes and engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components, the contracting officer shall use the basic clause with its Alternate II.

Subpart 970.28—Bonds and Insurance

970.2803 Insurance.

970.2803–1 Workers' Compensation Insurance.

(a) *Policies and requirements.* (1) Workers' compensation insurance protects employers against liability imposed by workers' compensation laws for injury or death to employees arising out of, or in the course of, their employment. This type of insurance is required by state laws unless employers have acceptable programs of self-insurance.

(2) *Special requirements.* Certain workers' compensation laws contain provisions which result in limiting the protection afforded persons subject to such laws. The policy with respect to these limitations as they affect persons employed by management and operating contractors is set forth as follows:

(i) *Elective provisions.* Some worker's compensation laws permit an employer to elect not to be subject to its provisions. It is DOE policy to require these contractors to be subject to workers' compensation laws in jurisdictions permitting election.

(ii) *Statutory immunity.* Under the provisions of some workers' compensation laws, certain types of employers; *e.g.*, nonprofit educational institutions, are relieved from liability. If a contractor has a statutory option to accept liability, it is DOE policy to require the contractor to do so.

(iii) *Limited medical benefits.* Some workers' compensation laws limit the liability of the employer for medical care to a maximum dollar amount or to a specified period of time. In such cases, a contractor's workers' compensation insurance policy should contain a standard extrastatutory medical coverage endorsement.

(iv) *Limits on occupational disease coverage and employers' liability.* Some workers' compensation laws do not provide coverage for all occupational diseases. In such situations, a contractor's workers' compensation insurance policy should contain voluntary coverage for all occupational diseases.

(3) *Contractor ''employees' benefit plan''—self-insurers.* The policies and requirements set forth in paragraph (a)(2) of this section apply where management and operating contractors purchase workers' compensation insurance. With respect to self-insured contractors, the objectives specified in paragraph (a)(2) also shall be met through primary or excess workers' compensation and employers' liability insurance policy(ies) or an approved combination thereof. ''Employees'' benefit plans'' which were established in prior years may be continued to contrast termination at existing benefit levels.

(b) *Assignment of responsibilities.* (1) Office of Contract and Resource Management, within the Headquarters procurement organization, other officials, and the Heads of Contracting Activities, consistent with their delegations of responsibility, shall assure management and operating contracts are consistent with the policies and requirements of paragraph (a) of this section.

(2) In discharging assigned responsibility, the Heads of Contracting Activities shall:

(i) Periodically review workers' compensation insurance programs of management and operating contractors in the light of applicable workers' compensation statutes to assure conformance with the requirements of paragraph (a) of this section.

(ii) Evaluate the adequacy of coverage of ''self-insured'' workers'' compensation programs;

(iii) Provide arrangements for the administration of any existing ''employees'' benefit plans until such plans'' are terminated; and

(iv) Submit to the Office of Contract and Resource Management, within the Headquarters procurement organization, all proposals for the modification of existing ''employees' benefit plans.''

(3) The Office of Contract and Resource Management, within the Headquarters procurement organization, is responsible for approving management and operating contractor ''employees' benefit plans.''

970.2803–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5228–1, Insurance—Litigation and Claims, in all management and operating contracts. Paragraphs (h)(3) and (j)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

Subpart 970.29—Taxes

970.2902 Federal excise taxes.

970.2902–1 Exemptions from Federal excise taxes.

(a) The exemption respecting taxes on communication services or facilities has been held to extend to such services when furnished to DOE management and operating contractors who pay for such services or facilities from advances made to them by DOE under their contracts.

(b) Where it is considered that a request for an additional exemption in the performance of a management and operating contract would be justified, a recommendation that such a request be made should be forwarded to the Chief Financial Officer, Headquarters.

(c) Where tax exemption certificates are required in connection with the taxes cited in this section, the Head of the Contracting Activity will supply standard Government forms (SF 1094, U.S. Tax Exemption Certificate) on request.

970.2903 State and local taxes.

970.2903–1 Applicability of state and local taxes to the government.

It is DOE policy to secure those immunities or exemptions from state and local taxes to which it is entitled under the Federal Constitution or state laws. In carrying out this policy, the Heads of Contracting Activities shall:

(a) Take all necessary steps to preclude payment of any taxes for which any of the immunities or exemptions cited in this subpart are available. Advice of Counsel should be sought as to the availability of such immunities or exemptions;

(b) Acquire directly and furnish to contractors as Government furnished property, equipment, material, or services when, in the opinion of the Head of the Contracting Activity:

(1) Such direct acquisition will result in substantial savings to the Government, taking into consideration any additional administrative costs;

(2) Such direct acquisition will not have a substantial adverse effect on the relationship between DOE and its contractor; and

(3) Such direct acquisition will not have a substantial adverse effect on the DOE program or schedules.

970.2904 Contract clauses.

970.2904–1 Management and operating contracts.

(a) Pursuant to 48 CFR 29.401–6(b), the clause at 48 CFR 52.229–10, State of New Mexico Gross Receipts and Compensating Tax, is applicable to management and operating contracts that meet the three conditions stated. The contracting officer shall modify paragraph (b) of the clause to replace the phrase ''Allowable Cost and Payment clause'' with the phrase ''Payments and advances.''

(b) Contracting officers shall include the clause at 48 CFR 970.5229–1, State and Local Taxes, in management and operating contracts.

Subpart 970.30—Cost Accounting Standards

970.3002 CAS program requirements.

970.3002–1 Applicability.

The provisions of 48 CFR part 30 and 48 CFR chapter 99 (FAR Appendix) shall be followed for management and operating contracts.

Subpart 970.31—Contract Cost Principles and Procedures

970.3101–00–70 Scope of subpart.

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

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

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

(i) At any time, in accordance with the contract terms and conditions, the contracting officer may pursue an advance agreement in connection with any cost item under a contract.

970.3101–10 Cost certification.

(a) Certain contracts require certification of the costs proposed for final payment purposes. Section 48 CFR 970.4207–03–02 states the administrative procedures for the certification provisions and the related contract clause prescription.

(b) If unallowable costs are included in final cost settlement proposals, penalties may be assessed. Section 48 CFR 970.4207–03–02 states the administrative procedures for penalty assessment provisions and the related clause prescription.

970.3102–3–70 Home office expenses.

(a) For on-site work, DOE's fee for management and operating contracts, determined under the policy of and calculated per the procedures in 48 CFR 970.1504–1–3, generally provides adequate compensation for home or corporate office general and administrative expenses incurred in the general management of the contractor's business as a whole.

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

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

(ii) Conventional Home Office Expense allocation techniques that use bases such as total operating costs, labor dollars, hours etc., are not appropriate because they inherently assume

significant contractor investment (in terms of its own resources, such as, labor, material, overhead, etc.). Contractor investments are minimal under DOE's operating and management contracts. The contracts are totally financed by DOE advance payments, and DOE provides government-owned facilities, property, and other needed resources.

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

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

(i) Fee in addition to its normal fee (but see 48 CFR 970.1504–1–3(b)(1) if the contract is for the management and operation of a laboratory); or

(ii) Compensation on the basis of actual cost.

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

(b) For off-site work, the DOE allows Home Office Expenses under architect-engineer, supply and research contracts with commercial contractors performing the work in their own facilities. Home Office Expenses may, however, be included for reimbursement under such DOE off-site architect-engineer, supply and research contracts, only to the extent that they are determined, after careful examination, to be allowable, reasonable, and properly allocable to the work. Work performed in a contractor's own facilities under a management and operating or construction contract may likewise be allowed to bear the properly allocable portion of allowable Home Office Expenses.

970.3102–05 Application of cost principles.

970.3102–05–4 Bonding costs. (DOE coverage-paragraph (d))

(d) The allowability of bonding costs shall be determined pursuant to 48 CFR 970.5228–1, Insurance-litigation and claims.

970.3102–05–6 Compensation for personal services. (DOE coverage-paragraphs (a) and (p))

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

(7)(i) Reimbursable costs for compensation for personal services are to be set forth in a personnel appendix which is a part of the contract. This personnel appendix shall be negotiated using the principles and policies of 48 CFR 31.205–6, Compensation, as supplemented by this section, 970.3102–05–6, and other pertinent parts of the DEAR. Costs that are unallowable under other contract terms shall not be allowable as compensation for personnel services.

(ii) The personnel appendix sets forth in detail personnel costs and related expenses allowable under the contract and documents personnel policies, practices and plans which have been

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

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

970.3102–05–18 Independent research and development and bid and proposal costs. (DOE coverage-paragraphs (c)).

(c) Independent Research and Development and Bid and Proposal costs are unallowable. However, contracting officer approved Laboratory Directed Research and Development costs and those costs incurred in support of the Department's various reimbursable programs are allowable.

970.3102–05–19 Insurance and indemnification.

The supplemental material on the costs of insurance and indemnification is found in 48 CFR 970.5228–1, Insurance-Litigation and Claims.

970.3102–05–22 Lobbying and political activity costs. (DOE coverage-paragraph(b)).

(b) Costs of the following activities are excepted from 48 CFR 31.205–22, Lobbying and political activity costs, coverage, provided that the resultant costs are reasonable and otherwise fall into the following exceptions:

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

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

970.3102–05–28 Other business expenses. (DOE coverage-paragraph (i)).

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

970.3102–05–30 Patent costs and technology transfer costs.

(a) For management and operating contracts that do not include the clause at 970.5227–3, Technology Transfer Mission, the cost principle at 48 CFR 31.205–30 applies.

(b) For management and operating contracts that do include the clause at 970.5227–3, Technology Transfer Mission, the following patent and technology transfer costs are allowable:

(1) Costs of preparing invention disclosures, reports, and other patent related documents required by the contract;

(2) Costs of searching the art relating to invention disclosures;

(3) Costs incurred in connection with the filing and prosecution of patent applications for subject inventions, except where those costs are incurred as part of a privately funded technology transfer program recognized under the contract; and

(4) Other costs incurred in accordance with the patent rights clause and the Technology Transfer Mission clause included in the contract.

970.3102–05–33 Professional and consultant service costs. (Department coverage-paragraph (g)).

(g) Section 931.205–33 is applicable to management and operating contracts under this part.

[66 FR 4627, Jan. 18, 2001]

970.3102–05–46 Travel costs.

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

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

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

(i) Federal Travel Regulation, prescribed by the General Services Administration (41 CFR chapters 300 through 304), for travel in the conterminous 48 United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 922–002–00000–2;

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

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

(3) In special or unusual situations, actual costs in excess of the maximum per diem rates are allowable provided

that such amounts do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations referenced in paragraphs (a)(2)(i), (ii), or (iii) of this subsection. For such higher amounts to be allowable, all of the following conditions must be met:

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

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

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

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

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

(5) An advance agreement (see 48 CFR 31.109 and 48 CFR 970.3101–9) with respect to compliance with paragraphs (a)(2) and (a)(3) of this subsection may be useful and desirable.

(6)(i) The maximum per diem rates referenced in paragraph (a)(2) of this subsection generally would not constitute a reasonable daily charge—

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

(B) On partial travel days (*e.g.*, day of departure and return).

(ii) Appropriate downward adjustments from the maximum per diem rates would normally be required under these circumstances. While these adjustments need not be calculated in accordance with the Federal Travel Regulation or Joint Travel Regulations, they must result in a reasonable charge.

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

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

(ii) Purpose of the trip; and

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

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

(c) Travel costs directly attributable to specific contract performance are allowable and may be charged to the contract under 48 CFR 31.202.

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

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

(2) The costs of travel by contractor-owned, -leased, or -chartered aircraft are limited to the standard airfare described in paragraph (d) of this subsection for the flight destination unless travel by such aircraft is specifically required by contract specification, term, or condition, or a higher amount

is approved by the contracting officer. A higher amount may be agreed to when one or more of the circumstances for justifying higher than standard airfare listed in paragraph (d) of this subsection are applicable, or when an advance agreement under paragraph (e)(3) of this subsection has been executed. In all cases, travel by contractor-owned, -leased, or -chartered aircraft must be fully documented and justified. For each contractor-owned, -leased, or -chartered aircraft used for any business purpose which is charged or allocated, directly or indirectly, to a Government contract, the contractor must maintain and make available manifest/logs for all flights on such company aircraft. As a minimum, the manifest/log shall indicate—

(i) Date, time, and points of departure;

(ii) Destination, date, and time of arrival;

(iii) Name of each passenger and relationship to the contractor;

(iv) Authorization for trip; and

(v) Purpose of trip.

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

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

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

(f) Costs of contractor-owned or -leased automobiles, as used in this paragraph, include the costs of lease, operation (including personnel), maintenance, depreciation, insurance, etc. These costs are allowable, if reasonable, to the extent that the automobiles are used for company business. That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is compensation for personal services and is unallowable as stated in 48 CFR 31.205–6(m)(2).

970.3102–05–47 Costs related to legal and other proceedings. (DOE coverage-paragraph (h)).

(h) Costs Associated with Whistleblower Actions.

Section 931.205–47(h) of this chapter is applicable to management and operating contracts under this part and must be included in the contract's cost reimbursement subcontracts.

970.3102–05–70 Preexisting conditions.

Clause 48 CFR 970.5231–4, Preexisting conditions, provides guidance on situations where this category of costs may be allowable.

[65 FR 81009, Dec. 22, 2000. Redesignated at 67 FR 14873, Mar. 28, 2002]

970.3170 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5231–4, Preexisting Conditions, in all management and operating contracts.

(a) The contracting officer shall include the clause with its Alternate I in contracts with incumbent management and operating contractors.

(b) The contracting officer shall include the clause with its Alternate II in contracts with management and operating contractors not previously working at that particular site or facility.

Subpart 970.32—Contract Financing

970.3200 Policy.

It is the policy of the DOE to finance management and operating contracts through advance payments and the use of special financial institution accounts.

970.3200–1 Reduction or suspension of advance, partial, or progress payments.

(a) The procedures prescribed at 48 CFR 32.006 shall be followed regarding the reduction or suspension of payments under management and operating contracts.

(b) Agency head responsibilities under 48 CFR 32.006 have been delegated to the Senior Procurement Executive.

(c) The remedy coordination official is responsible for receiving, assessing, and making recommendations to the Senior Procurement Executive.

970.3200–1–1 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5232–1, Reduction or suspension of contract payments, in management and operating contracts.

970.3204 Advance payments.

970.3204–1 Applicability.

(a) The Head of the Contracting Activity shall authorize advance payments without interest, and approve the findings, determinations and the contract terms and conditions concerning advance payments in accordance with the procedures set forth in 48 CFR subpart 32.4, Advance Payments, as supplemented by 48 CFR subpart 932.4.

(b) Advance payments shall be made under a payments cleared financing arrangement for deposit in a special financial institution account or, at the option of the Government, by direct payment or other payment mechanism to the contractor.

(c) Prior to providing any advance payments, the contracting officer shall enter into an agreement with the contractor and a financial institution regarding a special financial institution account where the advanced funds will be deposited by the Government. Such agreement shall:

(1) Provide that DOE shall retain title to the unexpended balance of funds in the special financial institution account including collections, if any, deposited by the contractor;

(2) Provide that the title in paragraph (c)(1) of this subsection shall be superior to any claim or lien of the financial institution of deposit or others; and

(3) Incorporate all applicable requirements, as determined by the Office of Chief Financial Officer.

(d) Deviations from the requirements cited in paragraph (c) of this subsection shall be considered a deviation requiring approval of the Head of the Contracting Activity.

(e) Letter-of-credit arrangements shall be prepared in accordance with 48 CFR 32.406, Letters of Credit, and shall be coordinated between the procurement and finance organizations.

970.3270 Standard financial management clauses.

(a) The following DEAR and FAR clauses are standard financial management clauses. The contracting officer shall insert them in all management and operating contracts:

(1) 48 CFR 970.5232–2, Payments and Advances. (i) The contracting officer shall insert the basic clause with its Alternate I if a separate fixed-fee is provided for a separate item of work.

(ii) The contracting officer shall insert the basic clause with its Alternate II when total available fee provisions in the basic clause are used.

(iii) The contracting officer shall insert the basic clause with its Alternate III in management and operating contracts with integrated accounting systems.

(iv) The contracting officer shall insert the basic clause with its Alternate IV in management and operating contracts without integrated accounting systems.

(2) 48 CFR 970.5232–3, Accounts, records, and inspection. If the contract includes the clause at 48 CFR 52.215–11, Price Reduction for Defective Cost or Pricing Data, the contracting officer shall use the clause with its Alternate I.

(3) 48 CFR 970.5232–4, Obligation of funds. The contracting officer may use the clause with its Alternate I in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

(4) 48 CFR 970.5203–1, Management controls.

(5) 48 CFR 970.5232–5, Liability with respect to Cost Accounting Standards.

(6) 48 CFR 970.5232–6, Work for others funding authorization.

(7) 48 CFR 52.230–2, Cost Accounting Standards.

(8) 48 CFR 52.230–6, Administration of Cost Accounting Standards.

(b) The following DEAR clauses are standard financial management clauses. The contracting officer shall

insert them in all management and operating contracts with integrated accounting systems:

(1) 48 CFR 970.5232–7, Financial management system.

(2) 48 CFR 970.5232–8, Integrated accounting.

(c) Any deviations from the standard financial management clauses specified in paragraphs (a) and (b) of this section require the approval of the Head of the Contracting Activity and the written concurrence of the Department's Chief Financial Officer.

[65 FR 81009, Dec. 22, 2000, as amended at 72 FR 29081, May 24, 2007]

Subpart 970.34—Major System Acquisition

970.3400 General requirements.

970.3400–1 Mission-oriented solicitation.

Contractors shall be required to promptly advise the DOE contracting officer of any advance notices of, or solicitations for, requirements which would logically involve DOE facilities or resources operated or managed by the contractor, which are received from another agency pursuant to 48 CFR 34.005. Management and operating contracts shall provide that the contractor shall not respond or otherwise propose to participate in response to the requirements of such solicitations unless the contractor has obtained the prior written approval of the DOE manager of the field activity having cognizance over the contract. Such approval shall not be given except in compliance with applicable DOE directives, and with the concurrence of the cognizant Senior Program Official.

970.35 Research and development contracting.

Subpart 970.35—Research and Development Contracting

970.3500 Scope of subpart.

This subpart implements 48 CFR 35.017 regarding the establishment, use, review, and termination of Federally Funded Research and Development Centers (FFRDCs) sponsored by the Department of Energy.

970.3501 Federally funded research and development centers.

970.3501–1 Sponsoring agreements.

(a) The contract award document constitutes the sponsoring agreement between the Department of Energy and the contractor operating an FFRDC.

(b) The contract statement of work shall define the purpose and mission of the FFRDC.

(c) Other elements of the sponsoring agreement which shall be incorporated into the contract include:

(1) The appropriate termination clause of the contract (as prescribed in 48 CFR subpart 49.5).

(2) The plan for the identification, use, and disposition of retained earnings developed pursuant to 48 CFR 970.1504–1–3(c)(6), if applicable;

(3) The clause entitled ''Federally Funded Research and Development Center Sponsoring Agreement,'' which, in part, prescribes limitations on the FFRDC competing with the private sector, and requirements for the FFRDC's acceptance of work from a nonsponsor; and

(4) Other terms and conditions considered necessary for the particular circumstances of the FFRDC (*e.g.,* advance understandings on particular cost items).

970.3501–2 Using an FFRDC.

The contractor may only accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements of DOE Order 481.1, Work for Others (Non-Department of Energy Funded Work).

970.3501–3 Reviewing FFRDC's.

(a) All Department of Energy sponsored FFRDC's are operated by management and operating contractors.

(b) Coincident with the review required by 48 CFR 17.605(b) and 48 CFR 970.1702–1(b) regarding the decision to extend or compete a management and operating contract, the contracting officer shall, in accordance with internal Departmental procedures:

(1) Conduct the review required by 48 CFR 35.017–4 concerning the use and need for the FFRDC; and

(2) Recommend for Secretarial approval, the continuation or termination of the Department's sponsorship of an FFRDC at the time authorization is required to extend or compete a management and operating contract.

970.3501–4 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5235–1, Federally Funded Research and Development Center Sponsoring Agreement, in all solicitations and contracts for the management and operation of an FFRDC sponsored by the Department of Energy.

Subpart 970.36—Construction and Architect-Engineer Contracts

970.3605 Contract clauses.

970.3605–1 Other contracts.

The clause in 48 CFR 52.236–8, Other Contracts, shall be used in all management and operating contracts.

970.3605–2 Special construction clause for operating contracts.

The clause in 48 CFR 970.5236–1, Government Facility Subcontract Approval, shall be used in management and operating contracts when the contractor will not perform covered work with its own forces but may procure construction by subcontract.

Subpart 970.37—Facilities Management Contracting

970.3770 Facilities management.

970.3770–1 Policy.

Contractors managing DOE facilities shall be required to comply with the DOE Directives applicable to facilities management.

970.3770–2 [Reserved]

Subpart 970.41—Acquisition of Utility Services

970.4102 Acquiring utility services.

970.4102–1 Policy.

(a) Utility services defined at 48 CFR 41.101 for the furnishing of electricity, gas (natural or manufactured), steam, water, and/or sewerage to facilities owned or leased by DOE shall be acquired directly by DOE and not by a contractor using a subcontractor arrangement, except as provided in paragraph (b) of this subsection.

(b) Where it is determined to be in the best interest of the Government, a DOE contracting activity may authorize a management and operating contractor for a facility to acquire such utility service for the facility, after requesting and receiving concurrence to make such an authorization from the Director, Public Utilities Branch, Headquarters. Any request for such concurrence should be included in the Utility Service Requirements and Options Studies required by DOE directives in subseries 4540 (Public Services). Alternatively, it may be made in a separate document submitted to the Director of that office early in the acquisition cycle. Any request shall set forth why it is in the best interest of the DOE to acquire utility service(s) by subcontract, *i.e.*, what the benefits are, such as economic advantage.

(c) The requirements of 48 CFR part 41, this section, and DOE directives in subseries 4540 shall be applied to a subcontract level acquisition for furnishing utility services to a facility owned or leased by DOE.

Subpart 970.42—Contract Administration

970.4207–03–02 Certificate of costs.

(a) The contracting officer shall require that management and operating contractors provide a submission, pursuant to 48 CFR 970.5232–2–(j), for settlement of costs incurred during the period stipulated on the submission and a certification that the costs included in the submission are allowable. The contracting officer shall assess a penalty pursuant to 48 CFR 970.5242–1 if unallowable costs are included in the submission. Unallowable costs are either expressly unallowable or determined unallowable.

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

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

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

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

(iii) was mutually agreed to be unallowable.

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

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

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

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

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

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

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

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

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

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

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

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

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

970.4207–03–70 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5242–1, Penalties for unallowable costs, in all management and operating solicitations and contracts.

970.4207–05–01 Contracting officer determination procedure. (DOE coverage-paragraph (b))

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

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

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

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

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

Subpart 970.43—Contract Modifications

970.4302 Changes.

970.4302–1 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5243–1, Changes, in all management and operating contracts.

Subpart 970.44—Management and Operating Contractor Purchasing

970.4400 Scope.

This subpart prescribes policies and procedures concerning the purchasing systems and activities of management and operating contractors.

970.4401 Responsibilities.

970.4401–1 General.

(a) In the Department of Energy, overall responsibility for the oversight of the performance of management and operating contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of the Contracting Activity (HCA). Contracting officers are responsible for the management and operating contractors' conformance with this subpart and the applicable terms and conditions of their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs.

(b) In carrying out their overall responsibilities, HCAs shall:

(1) Require management and operating contractors to maintain written descriptions of their individual purchasing systems and methods and further require that, upon award or extension of the contract, the entire written description be submitted to the contracting officer for review and acceptance;

(2) Require that any changes to the management and operating contractor's written description having any substantive impact upon the contractor's purchasing system and methods be submitted to the contracting officer for review and acceptance prior to issuance;

(3) Ensure the review of individual purchasing actions of certain types, or above stated dollar levels, by the contracting officer pursuant to 48 CFR subpart 44.2 or as set forth in the contractor's approved system and methods; and

(4) Ensure that periodic appraisals of the contractor's management of all facets of the purchasing function, including compliance with the contractor's approved system and methods, are performed by the contracting officer. Such appraisals shall be performed through either of the following methodologies:

(i) Contractor Purchasing System Reviews, conducted in accordance with 48 CFR subpart 44.3; or

(ii) When approved by the contracting officer, contractor participation in the conduct of the Balanced Scorecard performance measurement and performance management system.

(c) In performing the reviews required by paragraphs (b)(1) and (2), and the appraisals required by paragraph (b)(4) of this subsection, HCAs shall assure that contracting officers determine that the contractors' written systems and methods are consistent with this subpart and the applicable terms and conditions of their contracts.

970.4401–2 Review and approval.

(a) The Heads of the Contracting Activities shall establish thresholds, by subcontract type and dollar level, for the review and approval of proposed subcontracting actions by each management and operating contractor under their cognizance. Such thresholds may not exceed the authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive. In establishing these thresholds, the Heads of the Contracting Activities should consider such factors as the following:

(1) The nature of work to be performed under the management and operating contract;

(2) The size, experience, ability, reliability, and organization of the management and operating contractor's purchasing function;

(3) The internal controls, procedures, and organizational stature of the management and operating contractor's purchasing function; and

(4) Policies with respect to such reviews and approvals established by the Senior Procurement Executive.

(b) Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41, entitled Production of Special Nuclear Material, of the Atomic Energy Act of 1954, as amended.

(c) The Heads of the Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchasing from contractor-affiliated sources or the purchase of specific items, or classes of items, which by the terms of the contract may require DOE approval.

(d) The Heads of the Contracting Activities may raise or lower the review and approval thresholds established pursuant to paragraph (a) of this subsection at any time. Such action may be considered upon the periodic review of the contractor's purchasing system, but in any case those adjusted thresholds may not exceed the approval authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive.

(e) DOE approvals of specific proposed purchases pursuant to this subpart shall communicate that such approval does not relieve the management and operating contractor of any obligation under its prime contract with DOE; is given without prejudice to any rights or claims of the Government thereunder; creates no obligation on the part of the Government to the subcontractor, and is not a predetermination of the allowability of costs to be incurred under the subcontract.

(f) Contracting officers shall assure that management and operating contractors establish and maintain subcontract files which contain those documents essential to present an accurate and adequate record of all purchasing transactions.

(g) Contracting officers shall assure that management and operating contractors document purchases in writing, setting forth the information and data used in determining that the purchases are in the best interest of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the purchase.

(h) The Heads of the Contracting Activities shall assure that the contracting activity establishes and maintains files of the documents associated with the review and approval of subcontract actions subject to DOE review and approval. Those files shall include, among other necessary documentation, an appraisal of the proposed action by the contracting activity and a copy of the approving or disapproving document forwarded to the management and operating contractor, including a listing of any deficiencies, a listing of any required corrective actions, any suggestions, or other relevant comments.

970.4401–3 Advance notification.

(a) Contracting officers shall assure that the written description of the management and operating contractor's purchasing system and methods provides for advance notice to the DOE contracting officer of the proposed award of the following specified types of subcontracts, except as stated in paragraph (b) of this subsection:

(1) Pursuant to section 304(b) of the Federal Property and Administrative Service Act of 1949, as amended (41 U.S.C. 254(b)):

(i) Cost reimbursement-type subcontracts of any award value; and

(ii) Fixed price-type subcontracts which exceed the simplified acquisition threshold, or 5 percent of the total estimated cost of the prime contract.

(2) Purchases from contractor-affiliated sources over a value established by the HCA.

(b) Pursuant to section 602(d)13 of the Act (40 U.S.C. 474(13)) referred to in paragraph (a) of this section, the advance notification requirement for the types of purchases listed in paragraphs (a) (1) and (2) of this subsection shall not apply to subcontracts relating to functions derived from the Atomic Energy Commission.

(c) The advance notice shall contain, at a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of competition, or justification for a noncompetitive purchase procurement. The contracting officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

970.4402 Contractor purchasing system.

970.4402–1 Policy.

(a) DOE contracts for the management and operation of its facilities, the

design and production of nuclear weapons, energy research and development, and the performance of other services. These management and operating (M&O) contractors have been selected for their technical and managerial expertise and are expected to bring to bear these technical and managerial skills to accomplish the significant Federal mission(s) described in their contracts with, and work plans approved by, DOE.

(b) Purchasing done by management and operating contractors is one area in which the particular skills of the contractors will be brought to bear in order to more readily accomplish the contractors' assigned missions. The contracting procedures of the contractor's organization, therefore, form the basis for the development of a purchasing system and methods that will comply with its contract with DOE and this subpart.

970.4402–2 General requirements.

The following shall apply to the purchasing systems of management and operating contractors:

(a) The objective of a management and operating contractor's purchasing system is to deliver to its customers on a timely basis those best value products and services necessary to accomplish the purposes of the Government's contract. To achieve this objective, contractors are expected to use their experience, expertise and initiative consistent with this subpart.

(b) The purchasing systems and methods used by management and operating contractors shall be well-defined, consistently applied, and shall follow purchasing practices appropriate for the requirement and dollar value of the purchase. It is anticipated that purchasing practices and procedures will vary among contractors and according to the type and kinds of purchases to be made.

(c) Contractor purchases are not Federal procurements, and are not directly subject to the Federal Acquisition Regulations in 48 CFR. Nonetheless, certain Federal laws, Executive Orders, and regulations may affect contractor purchasing, as required by statute, regulation, or contract terms and conditions.

(d) Contractor purchasing systems shall identify and apply the best in commercial purchasing practices and procedures (although nothing precludes the adoption of Federal procurement practices and procedures) to achieve system objectives. Where specific requirements do not otherwise apply, the contractor purchasing system shall provide for appropriate measures to ensure the:

(1) Acquisition of quality products and services at fair and reasonable prices;

(2) Use of capable and reliable subcontractors who either:

(i) Have track records of successful past performance, or

(ii) Can demonstrate a current superior ability to perform;

(3) Minimization of acquisition leadtime and administrative costs of purchasing;

(4) Use of effective competitive techniques;

(5) Reduction of performance risks associated with subcontractors, and facilitation of quality relationships which can include techniques such as partnering agreements, ombudsmen, and alternative disputes procedures;

(6) Use of self-assessment and benchmarking techniques to support continuous improvement in purchasing;

(7) Maintenance of the highest professional and ethical standards;

(8) Maintenance of file documentation appropriate to the value of the purchase and which is adequate to establish the propriety of the transaction and the price paid; and

(9) Maximization of opportunities for small business, HUBZone small business, small disadvantaged business, and woman-owned small business concerns to participate in contract performance.

970.4402–3 Purchasing from contractor-affiliated sources.

(a) A management and operating contractor may purchase from sources affiliated with the contractor (any division, subsidiary, or affiliate of the contractor or its parent company) in the same manner as from other sources, provided:

(1) The management and operating contractor's purchasing function is

independent of the proposed contractor-affiliated source;

(2) The same terms and conditions would apply if the purchase were from a third party;

(3) Award is made in accordance with policies and procedures designed to permit effective competition which have been approved by the contracting officer. (This requirement for competition shall not preclude acquisition of technical services from contractor-affiliated entities where those entities have a special expertise, and the basis therefor is documented.); and

(4) The award is legally enforceable where the entities are separately incorporated.

(b) Subcontracts for performance of contract work itself (as distinguished from the purchase of supplies and services needed in connection with the performance of work) require DOE authorization and may involve an adjustment of the contractor's fee, if any. If the management and operating contractor seeks authorization to have some part of the contract work performed by a contractor-affiliated source, and that contractor's performance of that work was a factor in the negotiated fee, DOE approval would normally require:

(1) That the contractor-affiliated source perform such work without fee or profit, or

(2) An equitable downward adjustment to the management and operating contractor's fee, if any.

(c) Determination on cost of money allowance as prescribed at 48 CFR 31.225–10 shall be treated as follows:

(1) When a purchase from a contractor-affiliated source results from competition and is in accord with provisions and conditions of paragraphs (a)(1) through (a)(4) of this subsection, the contractor-affiliated source may include cost of money as an allowable element of the costs of its goods or services supplied to the contractor; provided:

(i) The purchase is based on cost as set forth in 48 CFR 970.3102–3–21 and

(ii) The cost of money amount is computed in accordance with 48 CFR 31.205–10 and related procedures (see 48 CFR 970.30).

(2) When a purchase from a contractor-affiliated source is made non-competitively, cost of money shall not be considered an allowable element of the cost of the contractor-affiliated source purchase.

970.4402–4 Nuclear material transfers.

(a) Management and operating contractors, in preparing subcontracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall be required to assure that each such subcontract or agreement contains a:

(1) Description of the material to be transferred;

(2) Provision specifying the method by which the quantities are to be measured and reported;

(3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) Provision for the use of an independent third party as an umpire to settle unresolved differences in the analytical samples; and

(5) Provision specifying in detail which party shall bear the costs of resolving a difference and what constitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

970.4403 Contract clause.

The contracting officer shall insert the clause at 970.5244–1, Contractor Purchasing System, in all management and operating contracts.

Subpart 970.45—Government Property

970.4501 General.

970.4501–1 Contract clause.

(a) The contracting officer shall insert the clause at 970.5245–1, Property, in management and operating contracts. Paragraph (f)(1)(i)(c) of the clause applies to a non-profit contractor only to the extent specifically provided in the individual contract. Specific managerial personnel may be listed in paragraph (j), provided their

listing is consistent with the clause and the DEAR.

(b) The contracting officer shall insert the basic clause with its Alternate I in contracts with nonprofit contractors.

Subpart 970.49—Termination of Contracts

970.4905 Contract termination clause.

970.4905–1 Termination for convenience of the government and default.

(a) The contracting officer shall include the clause at 48 CFR 52.249–6, Termination (Cost Reimbursement), as modified pursuant to paragraph (b) of this subsection, in all cost-reimbursement management and operating contracts, regardless of whether the contract is for production, or research and development with an educational or nonprofit institution.

(b) The contracting officer shall modify paragraph (i) of the clause to insert ''as supplemented in subpart 970.31 of the Department of Energy Acquisition Regulation,'' after the phrase, ''part 31 of the Federal Acquisition Regulation.''

Subpart 970.50—Extraordinary Contractual Actions

970.5004 Residual powers.

970.5004–1 Contract clause.

When use of the clause at 48 CFR 52.250–1, Indemnification Under Public Law 85–804, is appropriate, the contracting officer may substitute the words ''Obligation of funds'' for the words ''Limitation of Cost or Limitation of Funds.''

970.5070 Indemnification.

970.5070–1 Scope and applicability.

(a) Section 170d. of the Atomic Energy Act of 1954, as amended, requires DOE to enter into agreements of indemnity with contractors whose work involves the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation.

(b) Details of such indemnification are discussed at 48 CFR 950.70.

970.5070–2 General.

DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents. However, if authorized by the DOE Headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be

(a) Permitted to furnish financial protection to themselves, or

(b) Permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

970.5070–3 Contract clauses.

(a) The clause at 48 CFR 952.250–70, Nuclear Hazards Indemnity Agreement, shall be included in all management and operating contracts involving the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation arising out of or in connection with the contract work, including such events caused by a product delivered to a DOE-owned, facility for use by DOE or its contractors. The clause at 48 CFR 952.250–70 also shall be included in any management and operating contract for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(b) The clause at 48 CFR 952.250–70 shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170 c. or k. of the Act for activities to be performed under the contract.

Subpart 970.52—Solicitation Provisions and Contract Clauses for Management and Operating Contracts

970.5200 Scope of subpart.

This subpart prescribes some of the solicitation provisions and contract

clauses for use in management and operating contracts. The provisions and clauses contained in this subpart supplement the provisions and clauses prescribed in the FAR and in other parts of the DEAR (48 CFR 901 through 48 CFR 952), and, pursuant to the individual provision or clause prescription, are to be used in addition to or in place of such clauses. Management and operating contracts are hybrid contracts, in some cases including aspects of several FAR contract types, for example, supplies and construction. For some FAR solicitation provisions and contract clauses, this subpart prescribes their use despite the hybrid nature of the work required. To assist Departmental contracting personnel in determining the applicability of FAR and DEAR clauses to management and operating contracts, additional guidance is published and made available by the Office of Procurement and Assistance Policy, within the Headquarters procurement organization.

970.5201 Text of provisions and clauses.

970.5203–1 Management controls.

As prescribed in 48 CFR 970.0370–2(a) and 48 CFR 970.3270(a)(4), insert the following clause:

MANAGEMENT CONTROLS (JUN 2007)

(a)(1) The contractor shall be responsible for maintaining, as an integral part of its organization, effective systems of management controls for both administrative and programmatic functions. Management controls comprise the plan of organization, methods, and procedures adopted by management to reasonably ensure that: the mission and functions assigned to the contractor are properly executed; efficient and effective operations are promoted including consideration of outsourcing of functions; resources are safeguarded against waste, loss, mismanagement, unauthorized use, or misappropriation; all encumbrances and costs that are incurred under the contract and fees that are earned are in compliance with applicable clauses and other current terms, conditions, and intended purposes; all collections accruing to the contractor in connection with the work under this contract, expenditures, and all other transactions and assets are properly recorded, managed, and reported; and financial, statistical, and other reports necessary to maintain accountability and managerial control are accurate, reliable, and timely.

(2) The systems of controls employed by the contractor shall be documented and satisfactory to DOE.

(3) Such systems shall be an integral part of the contractor's management functions, including defining specific roles and responsibilities for each level of management, and holding employees accountable for the adequacy of the management systems and controls in their areas of assigned responsibility.

(4) The contractor shall, as part of the internal audit program required elsewhere in this contract, periodically review the management systems and controls employed in programs and administrative areas to ensure that they are adequate to provide reasonable assurance that the objectives of the systems are being accomplished and that these systems and controls are working effectively. Annually, or at other intervals directed by the contracting officer, the contractor shall supply to the contracting officer copies of the reports reflecting the status of recommendations resulting from management audits performed by its internal audit activity and any other audit organization. This requirement may be satisfied in part by the reports required under paragraph (i) of 970.5232–3, Accounts, records, and inspection.

(b) The contractor shall be responsible for maintaining, as a part of its operational responsibilities, a baseline quality assurance program that implements documented performance, quality standards, and control and assessment techniques.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 71 FR 16243, Mar. 31, 2006; 72 FR 29081, May 24, 2007; 72 FR 39761, July 20, 2007]

970.5203–2 Performance improvement and collaboration.

As prescribed in 48 CFR 970.0370–2(b), insert the following clause:

PERFORMANCE IMPROVEMENT AND COLLABORATION (MAY 2006)

(a) The contractor agrees that it shall affirmatively identify, evaluate, and institute practices, where appropriate, that will improve performance in the areas of environmental and health, safety, scientific and technical, security, business and administrative, and any other areas of performance in the management and operation of the contract. This may entail the alteration of existing practices or the institution of new procedures to more effectively or efficiently perform any aspect of contract performance or reduce overall cost of operation under the contract. Such improvements may result

from changes in organization, outsourcing decisions, simplification of systems while retaining necessary controls, or any other approaches consistent with the statement of work and performance measures of this contract.

(b) The contractor agrees to work collaboratively with the Department, all other management and operating, DOE major facilities management contractors and affiliated contractors which manage or operate DOE sites or facilities for the following purposes: (i) to exchange information generally, (ii) to evaluate concepts that may be of benefit in resolving common issues, in confronting common problems, or in reducing costs of operations, and (iii) to otherwise identify and implement DOE-complex-wide management improvements discussed in paragraph (a). In doing so, it shall also affirmatively provide information relating to its management improvements to such contractors, including lessons learned, subject to security considerations and the protection of data proprietary to third parties.

(c) The contractor may consult with the contracting officer in those instances in which improvements being considered pursuant to paragraph (a) involve the cooperation of the DOE. The contractor may request the assistance of the contracting officer in the communication of the success of improvements to other management and operating contractors in accordance with paragraph (b) of this clause.

(d) The contractor shall notify the contracting officer and seek approval where necessary to fulfill its obligations under the contract. Compliance with this clause in no way alters the obligations of the Contractor under any other provision of this contract.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 71 FR 16243, Mar. 31, 2006]

970.5203–3 Contractor's organization.

As prescribed in 48 CFR 970.0371–9, insert the following clause:

CONTRACTOR'S ORGANIZATION (DEC 2000)

(a) Organization chart. As promptly as possible after the execution of this contract, the contractor shall furnish to the contracting officer a chart showing the names, duties, and organization of key personnel (see 48 CFR 952.215–70) to be employed in connection with the work, and shall furnish supplemental information to reflect any changes as they occur.

(b) Supervisory representative of contractor. Unless otherwise directed by the contracting officer, a competent full-time resident supervisory representative of the contractor satisfactory to the contracting officer shall be in charge of the work at the site, and any work off-site, at all times.

(c) Control of employees. The contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to its employees as may be necessary. In the event the contractor fails to remove any employee from the contract work whom DOE deems incompetent, careless, or insubordinate, or whose continued employment on the work is deemed by DOE to be inimical to the Department's mission, the contracting officer may require, with the approval of the Secretary of Energy, the contractor to remove the employee from work under the contract. This includes the right to direct the contractor to remove its most senior key person from work under the contract for serious contract performance deficiencies.

(d) Standards and procedures. The contractor shall establish such standards and procedures as are necessary to implement the requirements set forth in 48 CFR 970.0371. Such standards and procedures shall be subject to the approval of the contracting officer.

(End of clause)

970.5204–1 Counterintelligence.

(a) As prescribed in 48 CFR 970.0404–4(a), insert the following clause in contracts containing the clauses at 48 CFR 952.204–2, Security, and 48 CFR 952.204–70, Classification/Declassification:

COUNTERINTELLIGENCE (DEC 2000)

(a) The contractor shall take all reasonable precautions in the work under this contract to protect DOE programs, facilities, technology, personnel, unclassified sensitive information and classified matter from foreign intelligence threats and activities conducted for governmental or industrial purposes, in accordance with DOE Order 5670.3, Counterintelligence Program; Executive Order 12333, U.S. Intelligence Activities; and other pertinent national and Departmental Counterintelligence requirements.

(b) The contractor shall appoint a qualified employee(s) to function as the Contractor Counterintelligence Officer. The Contractor Counterintelligence Officer will be responsible for conducting defensive Counterintelligence briefings and debriefings of employees traveling to foreign countries or interacting with foreign nationals; providing thoroughly documented written reports relative to targeting, suspicious activity and other matters of Counterintelligence interest; immediately reporting targeting, suspicious activity and other Counterintelligence concerns to the DOE Headquarters Counterintelligence Division; and providing

assistance to other elements of the U.S. Intelligence Community as stated in the aforementioned Executive Order, the DOE Counterintelligence Order, and other pertinent national and Departmental Counterintelligence requirements.

(End of clause)

970.5204–2 Laws, regulations, and DOE directives.

As prescribed in 48 CFR 970.0470–2, insert the following clause:

LAWS, REGULATIONS, AND DOE DIRECTIVES (DEC 2000)

(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 (d) 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 of this contract entitled, ''Changes.''

(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 the clause entitled ''Integration of Environment, Safety, and Health into Work Planning and Execution.'' 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) Except as otherwise directed by the contracting officer, the contractor shall procure all necessary permits or licenses required for the performance of work under this contract.

(e) Regardless of the performer of the work, the contractor is responsible for compliance with the requirements of this clause. The contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(End of clause)

970.5204–3 Access to and ownership of records.

As prescribed in 48 CFR 970.0407–1–3, insert the following clause:

ACCESS TO AND OWNERSHIP OF RECORDS (DEC 2000)

(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 progress 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 worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, 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 970.5232–3, 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 200.1, Information Management Program (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) *Subcontracts.* 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 970.5223–1, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 70 FR 37016, June 28, 2005]

970.5208–1 Printing.

As prescribed in 48 CFR 970.0808–3, insert the following clause:

PRINTING (DEC 2000)

(a) To the extent that duplicating or printing services may be required in the performance of this contract, the Contractor shall provide or secure such services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and DOE Directives relative thereto.

(b) The term ''Printing'' includes the following processes: Composition, platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.

(c) Printing services not obtained in compliance with this guidance shall result in the cost of such printing being disallowed.

(d) The Contractor shall include the substance of this clause in all subcontracts hereunder which require printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations).

(End of clause)

970.5209–1 Requirement for guarantee of performance.

As prescribed in 48 CFR 970.0970–2, the contracting officer shall insert the following provision in solicitations for management and operating contracts:

REQUIREMENT FOR GUARANTEE OF PERFORMANCE (DEC 2000)

The successful offeror is required by other provisions of this solicitation to organize a dedicated corporate entity to carry out the work under the contract to be awarded as a result of this solicitation. The successful offeror will be required, as part of the determination of responsibility of the newly organized, dedicated corporate entity and as a condition of the award of the contract to that entity, to furnish a guarantee of that entity's performance. That guarantee of performance must be satisfactory in all respects to the Department of Energy.

(End of clause)

970.5211–1 Work authorization.

As prescribed in 970.1170–2, insert the following clause:

WORK AUTHORIZATION (MAY 2007)

(a) *Work authorization proposal.* Prior to the start of each fiscal year, the Contracting Officer or designee shall provide the contractor with program execution guidance in sufficient detail to enable the contractor to develop an estimated cost, scope, and schedule. In addition, the Contracting Officer may unilaterally assign work. The contractor shall submit to the Contracting Officer or other designated official, a detailed description of work, a budget of estimated costs, and a schedule of performance for the work it recommends be undertaken during that upcoming fiscal year.

(b) *Cost estimates.* The contractor and the Contracting Officer shall establish a budget of estimated costs, description of work, and schedule of performance for each work assignment. If agreement cannot be reached as to scope, schedule, and estimated cost, the Contracting Officer may issue a unilateral work authorization, pursuant to this clause. The work authorization, whether issued bilaterally or unilaterally shall become part of the contract. No activities shall be authorized or costs incurred prior to Contracting Officer issuance of a work authorization or direction concerning continuation of activities of the contract.

(c) *Performance.* The contractor shall perform work as specified in the work authorization, consistent with the terms and conditions of this contract.

(d) *Modification.* The Contracting Officer may at any time, without notice, issue changes to work authorizations within the overall scope of the contract. A proposal for adjustment in estimated costs and schedule for performance of work, recognizing work made unnecessary as a result, along with new work, shall be submitted by the contractor in accordance with paragraph (a) of this clause. Resolution shall be in accordance with paragraph (b) of this clause.

(e) *Increase in estimated cost.* The contractor shall notify the Contracting Officer immediately whenever the cost incurred, plus the projected cost to complete work is projected to differ (plus or minus) from the estimate by 10 percent. The contractor shall submit a proposal for modification in accordance with paragraph (a) of this clause. Resolution shall be in accordance with paragraph (b) of this clause.

(f) *Expenditure of funds and incurrence of costs.* The expenditure of monies by the contractor in the performance of all authorized work shall be governed by the ''Obligation of Funds'' or equivalent clause of the contract.

(g) *Responsibility to achieve environment, safety, health, and security compliance.* Notwithstanding other provisions of the contract, the contractor may, in the event of an emergency, take that corrective action necessary to sustain operations consistent with

applicable environmental, safety, health, and security statutes, regulations, and procedures. If such action is taken, the contractor shall notify the Contracting Officer within 24 hours of initiation and, within 30 days, submit a proposal for adjustment in estimated costs and schedule established in accordance with paragraphs (a) and (b) of this clause.

(End of clause)

[72 FR 29434, May 29, 2007]

970.5215–1 Total available fee: Base fee amount and performance fee amount.

As prescribed in 48 CFR 970.1504–5(a), insert the following clause. The clause should be tailored to reflect the contract's actual inclusion of base fee amount and performance fee amount.

TOTAL AVAILABLE FEE: BASE FEE AMOUNT AND PERFORMANCE FEE AMOUNT (DEC 2000)

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

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

(c) *Determination of Total Available Fee Amount Earned.* (1) The Government shall, at the conclusion of each specified evaluation period, evaluate the contractor's performance of all requirements, including performance based incentives completed during the period, and determine the total available fee amount earned. At the contracting officer's discretion, evaluation of incentivized performance may occur at the scheduled completion of specific incentivized requirements.

(2) The DOE Operations/Field Office Manager, or designee, will be (insert title of DOE Operations/Field Office Manager, or designee). The contractor agrees that the determination as to the total available fee earned is a unilateral determination made by the DOE Operations/Field Office Manager, or designee.

(3) The evaluation of contractor performance shall be in accordance with the Performance Evaluation and Measurement Plan(s) described in subparagraph (d) of this clause unless otherwise set forth in the contract. The Contractor shall be promptly advised in writing of the fee determination, and the basis of the fee determination. In the event that the contractor's performance is considered to be less than the level of performance set forth in the Statement of Work, as amended to include the current Work Authorization Directive or similar document, for any contract requirement, it will be considered by the DOE Operations/Field Office Manager, or designee, who may at his/her discretion adjust the fee determination to reflect such performance. Any such adjustment shall be in accordance with the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts'' if contained in the contract.

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

(1) The Government shall establish a Performance Evaluation and Measurement Plan(s) upon which the determination of the total available fee amount earned shall be based. The Performance Evaluation and Measurement Plan(s) will address all of the requirements of contract performance specified in the contract directly or by reference. A copy of the Performance Evaluation and Measurement Plan(s) shall be provided to the Contractor:

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

(ii) not later than thirty days prior to the scheduled start date of the evaluation period, if the requirements, evaluation areas, specific incentives, amount of fee, and allocation of fee to such evaluation areas and

specific incentives have been unilaterally established by the contracting officer.

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

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

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

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

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

(e) *Schedule for total available fee amount earned determinations.* The DOE Operations/Field Office Manager, or designee, shall issue the final total available fee amount earned determination in accordance with: the schedule set forth in the Performance Evaluation and Measurement Plan(s); or as otherwise set forth in this contract . However, a determination must be made within sixty calendar days after the receipt by the contracting officer of the Contractor's self-assessment, if one is required or permitted by paragraph (f) of this clause, or seventy calendar days after the end of the evaluation period, whichever is later, or a longer period if the Contractor and contracting officer agree. If the contracting officer evaluates the Contractor's performance of specific requirements on their completion, the payment of any earned fee amount must be made within seventy calendar days (or such other time period as mutually agreed to between the contracting officer and the Contractor) after such completion. If the determination is delayed beyond that date, the Contractor shall be entitled to interest on the determined total available fee amount earned at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date. This rate is referred to as the ''Renegotiation Board Interest Rate,'' and is published in the FEDERAL REGISTER semiannually on or about January 1 and July 1. The interest on any late total available fee amount earned determination will accrue daily and be compounded in 30-day increments inclusive from the first day after the schedule determination date through the actual date the determination is issued. That is, interest accrued at the end of any 30-day period will be added to the determined amount of fee earned and be subject to interest if not paid in the succeeding 30-day period.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.1504–5(a)(1), when the award fee cycle consists of two or more evaluation periods, add the following to paragraph (c):

(4) At the sole discretion of the Government, unearned total available fee amounts may be carried over from one evaluation period to the next, so long as the periods are within the same award fee cycle.

Alternate II (DEC 2000). As prescribed in 48 CFR 970.1504–5(a)(2), when the award fee cycle consists of one evaluation period, add the following to paragraph (c):

(4) Award fee not earned during the evaluation period shall not be allocated to future evaluation periods.

Alternate III (DEC 2000). As prescribed in 48 CFR 970.1504–5(a)(3), when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment, add the following as paragraph (f):

(f) *Contractor self-assessment.* Following each evaluation period, the Contractor shall submit a self-assessment within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

Alternate IV (DEC 2000). As prescribed in 48 CFR 970.1504–5(a)(4), when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option, add the following text as paragraph (f):

(f) *Contractor self-assessment.* Following each evaluation period, the Contractor may submit a self-assessment, provided such assessment is submitted within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the Contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68782, Dec. 10, 2003]

970.5215–2 [Reserved]

970.5215–3 Conditional payment of fee, profit, and other incentives—facility management contracts

As prescribed in 48 CFR 970.1504–5(c)(1), insert the following clause:

CONDITIONAL PAYMENT OF FEE, PROFIT, AND OTHER INCENTIVES—FACILITY MANAGEMENT CONTRACTS (JAN 2004)

(a) *General.* (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon:

(i) The contractor's or contractor employees' compliance with the terms and conditions of this contract relating to environment, safety and health (ES&H), which includes worker safety and health (WS&H), including performance under an approved Integrated Safety Management System (ISMS); and

(ii) The contractor's or contractor employees' compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information.

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including the DOE approved contractor ISMS or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) The performance requirements of this contract relating to the safeguarding of Restricted Data and other classified information are set forth in the clauses of this contract entitled, ''Security'' and ''Laws, Regulations, and DOE Directives,'' as well as in other terms and conditions.

(4) If the contractor does not meet the performance requirements of this contract relating to ES&H or to the safeguarding of Restricted Data and other classified information during any performance evaluation period established under the contract pursuant to the clause of this contract entitled, ''Total Available Fee: Base Fee Amount and Performance Fee Amount,'' otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the contracting officer.

(b) *Reduction amount.* (1) The amount of earned fee, fixed fee, profit, or share of cost savings that may be unilaterally reduced will be determined by the severity of the performance failure pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(2) If a reduction of earned fee, fixed fee, profit, or share of cost savings is warranted, unless mitigating factors apply, such reduction shall not be less than 26 percent nor greater than 100 percent of the amount of earned fee, fixed fee, profit, or the contractor's share of cost savings for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure.

(3) In determining the amount of the reduction and the applicability of mitigating factors, the contracting officer must consider the contractor's overall performance in meeting the ES&H or security requirements of the contract. Such consideration must include performance against any site specific performance criteria/requirements that provide additional definition, guidance for the amount of reduction, or guidance for the applicability of mitigating factors. In all cases, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range (*see* 48 CFR 970.1504–1–2). The mitigating factors include, but are not limited to, the following ((v), (vi), (vii) and (viii) apply to ES&H only).

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of: ES&H and compliance in related areas; or of safeguarding Restricted Data and other classified information and compliance in related areas.

(v) Contractor demonstration to the contracting officer's satisfaction that the principles of industrial ES&H standards are routinely practiced (*e.g.*, Voluntary Protection Program, ISO 14000).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.*, offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.*, policy, ES&H programs).
* * *

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(4)(i) The amount of fee, fixed fee, profit, or share of cost savings that is otherwise earned by a contractor during an evaluation period may be reduced in accordance with this clause if it is determined that a performance failure warranting a reduction under this clause occurs within the evaluation period.

(ii) The amount of reduction under this clause, in combination with any reduction made under any other clause in the contract, shall not exceed the amount of fee, fixed fee, profit, or the contractor's share of cost savings that is otherwise earned during the evaluation period.

(iii) For the purposes of this clause, earned fee, fixed fee, profit, or share of cost savings for the evaluation period shall mean the amount determined by the contracting officer or fee determination official as otherwise payable based on the contractor's performance during the evaluation period. Where the contract provides for financial incentives that extend beyond a single evaluation period, this amount shall also include: any provisional amounts determined otherwise payable in the evaluation period; and, if provisional payments are not provided for, the allocable amount of any incentive determined otherwise payable at the conclusion of a subsequent evaluation period. The allocable amount shall be the total amount of the earned incentive divided by the number of evaluation periods over which it was earned.

(iv) The Government will effect the reduction as soon as practicable after the end of the evaluation period in which the performance failure occurs. If the Government is not aware of the failure, it will effect the reduction as soon as practical after becoming aware. For any portion of the reduction requiring an allocation the Government will effect the reduction at the end of the evaluation period in which it determines the total amount earned under the incentive. If at any time a reduction causes the sum of the payments the contractor has received for fee, fixed fee, profit, or share of cost savings to exceed the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned (provisionally or otherwise), the contractor shall immediately return the excess to the Government. (What the contractor ''has earned'' reflects any reduction made under this or any other clause of the contract.)

(v) At the end of the contract:

(A) The Government will pay the contractor the amount by which the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned exceeds the sum of the payments the contractor has received; or

(B) The contractor shall return to the Government the amount by which the sum of the payments the contractor has received exceeds the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned. (What the contractor ''has earned'' reflects any reduction made under this or any other clause of the contract.)

(c) *Environment, Safety and Health (ES&H).* Performance failures occur if the contractor does not comply with the contract's ES&H terms and conditions, including the DOE approved contractor ISMS. The degrees of performance failure under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are:

(1) First Degree: Performance failures that are most adverse to ES&H. Failure to develop and obtain required DOE approval of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the contractor's ISMS. The following performance failures or performance failures of similar import will be considered first degree.

(i) Type A accident (defined in DOE Order 225.1A).

(ii) Two Second Degree performance failures during an evaluation period.

(2) Second Degree: Performance failures that are significantly adverse to ES&H. They include failures to comply with an approved ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. They also include breakdowns of the Safety Management System. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1A).

(ii) Non-compliance with an approved ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

(3) Third Degree: Performance failures that reflect a lack of focus on improving ES&H.

They include failures to comply with an approved ISMS that result in potential breakdown of the System. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement effective corrective actions to address deficiencies/non-compliances documented through: external (*e.g.,* Federal) oversight and/or reported per DOE Order 232.1A requirements; or internal oversight of DOE Order 440.1A requirements.

(ii) Multiple similar non-compliances identified by external (*e.g.,* Federal) oversight that in aggregate indicate a significant programmatic breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to the worker, the public, or the environment or that indicate a significant programmatic breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(d) *Safeguarding restricted data and other classified information.* Performance failures occur if the contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failure under which reductions of fee, profit, or share of cost savings will be determined are as follows:

(1) First Degree: Performance failures that have been determined, in accordance with applicable law, DOE regulation, or directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) Second Degree: Performance failures that have been determined, in accordance with applicable law, DOE regulation, or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Secret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification (except for information covered by paragraph (d)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other classified information classified as Secret.

(3) Third Degree: Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following are examples of performance failures or performance failures of similar import that will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of clause)

Alternate I (JAN 2004). As prescribed in 48 CFR 970.1504–5(c)(2), replace paragraphs (a), (b)(1), (b)(2), and (b)(3) of the basic clause with the following paragraphs (a), (b)(1), (b)(2), and (b)(3) and delete paragraph (d).

(a) *General.* (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon the contractor's or contractor employees' compliance with the terms and conditions of this contract relating to environment, safety and health (ES&H), which includes worker safety and health (WS&H), including performance under an approved Integrated Safety Management System (ISMS).

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including the DOE approved contractor ISMS or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) If the contractor does not meet the performance requirements of this contract relating to ES&H during any performance evaluation period established under the contract pursuant to the clause of this contract entitled, ''Total Available Fee: Base Fee Amount and Performance Fee Amount,'' otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the contracting officer.

(b) *Reduction amount.* (1) The amount of earned fee, fixed fee, profit, or share of cost savings that may be unilaterally reduced will be determined by the severity of the performance failure pursuant to the degrees specified in paragraph (c) of this clause.

(2) If a reduction of earned fee, fixed fee, profit, or share of cost savings is warranted, unless mitigating factors apply, such reduction shall not be less than 26 percent nor greater than 100 percent of the amount of earned fee, fixed fee, profit, or the contractor's share of cost savings for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure.

(3) In determining the amount of the reduction and the applicability of mitigating factors, the contracting officer must consider the contractor's overall performance in meeting the ES&H requirements of the contract. Such consideration must include performance against any site specific performance criteria/requirements that provide additional definition, guidance for the amount of reduction, or guidance for the applicability of mitigating factors. In all cases, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range (*see* 48 CFR 970.1504–1–2). The mitigating factors include the following.

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of ES&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial ES&H standards are routinely practiced (*e.g.*, Voluntary Protection Program Star Status, or ISO 14000 Certification).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.*, offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.*, policy, ES&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons-learned and best practices inter- and intra-DOE sites.

Alternate II (JAN 2004). As prescribed in 48 CFR 970.1504–5(c)(3), insert the following as paragraphs (e) and (f) in contracts awarded on a cost-plus-award fee, incentive fee or multiple fee basis (if Alternate I is also used, redesignate the following as paragraphs (d) and (e)).

(e) *Minimum requirements for specified level of performance.* (1) At a minimum the contractor must perform the following:

(i) The requirements with specific incentives which do not require the achievement of cost efficiencies in order to be performed at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document unless an otherwise minimum level of performance has been established in the specific incentive;

(ii) All of the performance requirements directly related to requirements specifically incentivized which do not require the achievement of cost efficiencies in order to be performed at a level of performance such that the overall performance of these related requirements is at an acceptable level; and

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

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the Government. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the performance evaluation period, the DOE Operations/Field Office Manager, or designee, may reduce any otherwise earned fee, fixed fee, profit, or shared net savings for the performance evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit, or shared net savings being less than 25 percent of the total available fee amount. Such 25 percent shall include base fee, if any.

(f) *Minimum requirements for cost performance.* (1) Requirements incentivized by other than cost incentives must be performed within their specified cost constraint and must not adversely impact the costs of performing unrelated activities.

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

(3) The contractor's performance within the stipulated cost performance levels for the performance evaluation period shall be determined by the Government. To the extent the contractor fails to achieve the stipulated cost performance levels, the DOE Operations/Field Office Manager, or designee, may reduce in whole or in part any otherwise earned fee, fixed fee, profit, or shared net savings for the performance evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit or shared net savings being less than 25 percent of the total available fee amount. Such 25 percent shall include base fee, if any.

[69 FR 68782, Dec. 10, 2004]

970.5215–4 Cost reduction.

As prescribed in 48 CFR 970.1504–5(d), insert the following clause:

COST REDUCTION (DEC 2000)

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

(b) *Definitions. Administrative cost* is the contractor cost of developing and administering the CRP.

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

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

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

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

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

Shared Net Savings are those net savings which result from:

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

(2) a design, process, or method change, which occurs in the fiscal year in which the

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

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

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

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

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

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

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

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

(d) *Evaluation and Decision.* All CRPs must be submitted to and approved by the contracting officer. Included in the information provided by the CRP must be a discussion of the extent the proposed cost reduction effort may:

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

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

(3) Require a change in other contractual agreements;

(4) Result in significant organizational and personnel impacts;

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

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

(7) Impact successful and timely completion of any of the work in the cost, technical, and schedule baseline.

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

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

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

(3) Not result in any impairment of essential functions.

(f) The failure of the contracting officer to notify the Contractor of the acceptance, rejection, or deferral of a CRP within the specified time shall not be construed as approval.

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

(h) *Sharing Arrangement.* If a CRP is accepted, the Contractor may share in the shared net savings. For a CRP negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, with the specific incentive arrangement (negotiated target costs, target fees, share lines, ceilings, profit, etc.) set forth in the contractual document authorizing the effort, the Contractor's share shall be the actual fee or profit resulting from such an arrangement. For a CRP negotiated as a cost savings incentive resulting from a design, process, or method change, the Contractor's share shall be a percentage, not to exceed 25% of the shared net savings. The specific percentage and sharing period shall be set forth in the contractual document.

(i) *Validation of Shared Net Savings.* The contracting officer shall validate actual shared net savings. If actual shared net savings cannot be validated, the contractor will not be entitled to a share of the net shared savings.

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

(k) *Subcontracts.* The Contractor may include a clause similar to this clause in any

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

(End of clause)

970.5215–5 Limitation on fee.

As prescribed in 48 CFR 970.1504–5(e), the contracting officer shall insert the following provision:

LIMITATION ON FEE (DEC 2000)

(a) For the purpose of this solicitation, fee amounts shall not exceed the total available fee allowed by the fee policy at 48 CFR 970.1504–1–1, or as specifically stated elsewhere in the solicitation.

(b) The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit: fixed fee to not exceed an amount established pursuant to 48 CFR 970.1504–1–5; and total available fee to not exceed an amount established pursuant to 48 CFR 970.1504–1–9; or fixed fee or total available fee to an amount as specifically stated elsewhere in the solicitation.

(End of clause)

970.5217–1 Work for Others Program.

As prescribed in 48 CFR (DEAR) 970.1707–4 insert the following clause:

WORK FOR OTHERS PROGRAM (NON-DOE FUNDED WORK) (JAN 2005)

(a) *Authority to Perform Work for Others.* Pursuant to the Economy Act of 1932, as amended (31 U.S.C. 1535), and the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) or other applicable authority, the Contractor may perform work for non-DOE entities (sponsors) on a fully reimbursable basis in accordance with this clause.

(b) *Contractor's Implementation.* The Contractor must draft, implement, and maintain formal policies, practices, and procedures in accordance with this clause, which must be submitted to the Contracting Officer for review and approval.

(c) *Conditions of Participation in Work for Others Program.* The Contractor:

(1) Must not perform Work for Others activities that would place it in direct competition with the domestic private sector;

(2) Must not respond to a request for proposals or any other solicitation from another Federal agency or non-Federal organization that involves direct comparative competition, either as an offeror, team member, or subcontractor to an offeror; however, the Contractor may, following notification to the Contracting Officer, respond to Broad Agency Announcements, Financial Assistance solicitations, and similar solicitations from another Federal Agency or non-Federal organizations when the selection is based on merit or peer review, the work involves basic or applied research to further advance scientific knowledge or understanding, and a response does not result in direct, comparative competition;

(3) Must not commence work on any Work for Others activity until a Work for Others proposal package has been approved by the DOE Contracting Officer or designated representative;

(4) Must not incur project costs until receipt of DOE notification that a budgetary resource is available for the project, except as provided in 48 CFR 970.5232–6;

(5) Must ensure that all costs associated with the performance of the work, including specifically all DOE direct costs and applicable surcharges, are included in any Work for Others proposal;

(6) Must maintain records for the accumulation of costs and the billing of such work to ensure that DOE's appropriated funds are not used in support of Work for Others activities and to provide an accounting of the expenditures to DOE and the sponsor upon request;

(7) Must perform all Work for Others projects in accordance with the standards, policies, and procedures that apply to performance under this contract, including but not limited to environmental, safety and health, security, safeguards and classification procedures, and human and animal research regulations;

(8) May subcontract portion(s) of a Work for Others project; however, the Contractor must select the subcontractor and the work to be subcontracted. Any subcontracted work must be in direct support of the DOE contractor's performance as defined in the DOE approved work for others proposal package; and,

(9) Must maintain a summary listing of project information for each active Work for Others project, consisting of:

(i) Sponsoring agency;

(ii) Total estimated costs;

(iii) Project title and description;

(iv) Project point of contact; and,

(v) Estimated start and completion dates.

(d) *Negotiation and Execution of Work for Others Agreement.* (1) When delegated authority by the Contracting Officer, the Contractor may negotiate the terms and conditions that will govern the performance of a specific Work for Others project. Such terms and conditions must be consistent with the

terms, conditions, and requirements of the Contractor's contract with DOE. The Contractor may use DOE-approved contract terms and conditions as delineated in DOE Manual 481.1–1A or terms and conditions previously approved by the responsible Contracting Officer or authorized designee for agreements with non-Federal entities. The Contractor must not hold itself out as representing DOE when negotiating the proposed Work for Others agreement.

(2) The Contractor must submit all Work for Others agreements to the DOE Contracting Officer for DOE review and approval. The Contractor may not execute any proposed agreement until it has received notice of DOE approval.

(e) *Preparation of Project Proposals.* When the Contractor proposes to perform Work for Others activities pursuant to this clause, it may assist the project sponsor in the preparation of project proposal packages including the preparation of cost estimates.

(f) *Work for Others Appraisals.* DOE may conduct periodic appraisals of the Contractor's compliance with its Work for Others Program policies, practices and procedures. The Contractor must provide facilities and other support in conjunction with such appraisals as directed by the Contracting Officer or authorized designee.

(g) *Annual Work for Others Report.* The Contractor must provide assistance as required by the Contracting Officer or authorized designee in the preparation of a DOE Annual Summary Report of Work for Others Activities under the contract.

[69 FR 75004, Dec. 15, 2004]

970.5222–1 Collective Bargaining Agreements Management and Operating Contracts.

As prescribed in 48 CFR 970.2201–1–3, insert the following clause:

COLLECTIVE BARGAINING AGREEMENTS—MANAGEMENT AND OPERATING CONTRACTS (DEC 2000)

When negotiating collective bargaining agreements applicable to the work force under this contract, the Contractor shall use its best efforts to ensure such agreements contain provisions designed to assure continuity of services. All such agreements entered into during the contract period of performance should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations. As part of such agreements, management and labor should agree to cooperate fully with the Federal Mediation and Conciliation Service. The contractor shall include the substance of this clause in any subcontracts for protective services or other services performed on the DOE-owned site which will affect the continuity of operation of the facility.

(End of clause)

970.5222–2 Overtime management.

As prescribed in 48 CFR 970.2201–2–2, insert the following clause:

OVERTIME MANAGEMENT (DEC 2000)

(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.

(End of clause)

970.5223–1 Integration of environment, safety, and health into work planning and execution.

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

INTEGRATION OF ENVIRONMENT, SAFETY, AND HEALTH INTO WORK PLANNING AND EXECUTION (DEC 2000)

(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 entitled ''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) Regardless of the performer of the work, the contractor is responsible for compliance with the ES&H requirements applicable to this contract. The contractor is responsible for flowing down the ES&H requirements applicable to this contract to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(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 choose not to require the subcontractor to submit a Safety Management System for the contractor's review and approval.

(End of clause)

970.5223–2 Affirmative procurement program.

As prescribed in 48 CFR (DEAR) 970.2304–2, insert the following clause in contracts for the management and operation of DOE facilities, including national laboratories.

AFFIRMATIVE PROCUREMENT PROGRAM—MARCH 2003

(a) In the performance of this contract, the Contractor shall comply with the requirements of Executive Order 13101 and the U.S. Department of Energy (DOE) Affirmative Procurement Program Guidance. This guidance includes requirements concerning environmentally preferable products and services, recycled content products and biobased products. This guidance is available on the Internet.

(b) In complying with the requirements of paragraph (a) of this clause, the Contractor shall coordinate its activities with the DOE Recycling Coordinator. Reports required by paragraph (c) of this clause shall be submitted through the DOE Recycling Coordinator.

(c) The Contractor shall prepare and submit reports, at the end of the Federal fiscal year, on matters related to the acquisition of items designated in EPA's Comprehensive Procurement Guidelines that Federal agencies and their Contractors are to procure with recovered/recycled content.

(d) If the Contractor subcontracts a significant portion of the operation of the Government facility which includes the acquisition of items designated in EPA's Comprehensive Procurement Guidelines, the subcontract shall contain a clause substantially the same as this clause. The EPA Comprehensive Procurement Guidelines identify products which Federal agencies and their Contractors are to procure with recycled content pursuant to 40 CFR 247. Examples of such a subcontract would be operation of the facility supply function, construction or remodeling at the facility, or maintenance of the facility motor vehicle fleet. In situations in which the facility management contractor can reasonably determine the amount of products with recovered/recycled content to be acquired under the subcontract, the facility management contractor is not required to flow down the reporting requirement of this clause. Instead, the facility management contractor may include such quantities in its own report and include an agreement in the subcontract that such products will be acquired with recovered/recycled content and that the subcontractor will advise if it is unable to procure such products with recovered/recycled content because the product is not available:

(i) Competitively within a reasonable time;

(ii) At a reasonable price; or,

(iii) Within the performance requirements.

If reports are required of the subcontractor, such reports shall be submitted to the facility management contractor. The reports may be submitted at the conclusion of the subcontract term provided that the subcontract delivery term is not multi-year in nature. If the delivery term is multi-year, the subcontractor shall report its accomplishments for each Federal fiscal year in a manner and at a time or times acceptable to both parties

(e) When this clause is used in a subcontract, the word ''Contractor'' will be understood to mean ''subcontractor'' and the term ''DOE Recycling Coordinator'' will be understood to mean ''Contractor Recycling Coordinator.''

[68 FR 6359, Feb. 7, 2003]

970.5223–3 Agreement regarding Workplace Substance Abuse Programs at DOE facilities.

As prescribed in 970.2305–4(a), the contracting officer shall insert the following provision:

AGREEMENT REGARDING WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (DEC 2000)

(a) Any contract awarded as a result of this solicitation will be subject to the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) By submission of its offer, the officer agrees to provide to the contracting officer, within 30 days after notification of selection for award, or award of a contract, whichever occurs first, pursuant to this solicitation, its written workplace substance abuse program consistent with the requirements of 10 CFR part 707.

(c) Failure of the offeror to agree to the condition of responsibility set forth in paragraph (b) of this provision, renders the offeror unqualified and ineligible for award.

(End of provision)

970.5223–4 Workplace Substance Abuse Programs at DOE Sites.

As prescribed in 48 CFR 970.2305–4(b), insert the following clause:

WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (DEC 2000)

(a) *Program Implementation.* The contractor shall, consistent with 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, incorporated herein by reference with full force and effect, develop, implement, and maintain a workplace substance abuse program.

(b) *Remedies.* In addition to any other remedies available to the Government, the contractor's failure to comply with the requirements of 10 CFR part 707 or to perform in a manner consistent with its approved program may render the contractor subject to: the suspension of contract payments, or, where applicable, a reduction in award fee; termination for default; and suspension or debarment.

(c) *Subcontracts.* (1) The contractor agrees to notify the contracting officer reasonably in advance of, but not later than 30 days prior to, the award of any subcontract the contractor believes may be subject to the requirements of 10 CFR part 707.

(2) The DOE prime contractor shall require all subcontracts subject to the provisions of 10 CFR part 707 to agree to develop and implement a workplace substance abuse program that complies with the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, as a condition for award of the subcontract. The DOE prime contractor shall review and approve each subcontractor's program, and shall periodically monitor each subcontractor's implementation of the program for effectiveness and compliance with 10 CFR part 707.

(3) The contractor agrees to include, and require the inclusion of, the requirements of this clause in all subcontracts, at any tier, that are subject to the provisions of 10 CFR part 707.

(End of clause)

970.5223–5 DOE motor vehicle fleet fuel efficiency.

As prescribed in 48 CFR 970.2307–2, insert the following clause in contracts providing for Contractor management of the motor vehicle fleet.

DOE MOTOR VEHICLE FLEET FUEL EFFICIENCY (OCT 2003)

When managing Government-owned vehicles for the Department of Energy, the Contractor will conduct operations relating to such vehicles in accordance with the goals and requirements of *Executive Order 13149, Greening the Government Through Federal Fleet and Transportation Efficiency,* and implementing guidance contained in the document entitled *U.S. Department of Energy Compliance Strategy for Executive Order 13149* (April 2001) and future revisions of this compliance strategy that are identified in writing by the Contracting Officer. Section 506 of Executive Order 13149 exempts military tactical, law enforcement, and emergency vehicles from the requirements of the order.

(End of clause)

[71 FR 52132, Sept. 2, 2003]

970.5226–1 Diversity plan.

As prescribed in 48 CFR 970.2671–2, insert the following clause:

DIVERSITY PLAN (DEC 2000)

The Contractor shall submit a Diversity Plan to the contracting officer for approval within 90 days after the effective date of this contract (or contract modification, if appropriate). The contractor shall submit an update to its Plan annually or with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided in Appendix __. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan shall address, at a minimum, the Contractor's approach for promoting diversity through (1) the Contractor's work

force, (2) educational outreach, (3) community involvement and outreach, (4) subcontracting, (5) economic development (including technology transfer), and (6) the prevention of profiling based on race or national origin.

(End of clause)

970.5226–2 Workforce restructuring under section 3161 of the National Defense Authorization Act for fiscal year 1993.

As prescribed in 48 CFR 970.2672–3, insert the following clause:

WORKFORCE RESTRUCTURING UNDER SECTION 3161 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1993 (DEC 2000)

(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.

(End of clause)

970.5226–3 Community commitment.

As prescribed in 48 CFR 970.2673–2, insert the following clause:

COMMUNITY COMMITMENT (DEC 2000)

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include: (1) Recognizing the diverse interests of the region and its stakeholders, (2) engaging regional stakeholders in issues and concerns of mutual interest, and (3) recognizing that giving back to the community is a worthwhile business practice. Accordingly, the Contractor agrees that its business operations and performance under the Contract will be consistent with the intent of the policy and elements set forth above.

(End of clause)

970.5227–1 Rights in data-facilities.

As prescribed in 48 CFR 970.2704–3(a), insert the following clause:

RIGHTS IN DATA—FACILITIES (DEC 2000)

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (e) of this clause.

(5) *Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of paragraph (f) of this clause.

(6) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights,* as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative

works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, or except for other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Work for Others Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (e) of this clause (''Rights in Limited Rights Data'') or paragraph (f) of this clause (''Rights in Restricted Computer Software''); and

(v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical, business or financial data in the form of recorded information which it receives from, or is given access to by, DOE or a third party, including a DOE Contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyrighted Material.* (1) The Contractor shall not, without prior written authorization of the Patent Counsel, assert copyright in any technical data or computer software first produced in the performance of this contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the Contractor.

(2) The Contractor agrees not to include in the technical data or computer software delivered under the contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data or computer software to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the technical data or computer software prior to its delivery.

(d) *Subcontracting.* (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 927.409(a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval of DOE Patent

Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with DEAR 927.409(h). The contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227–1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use.

(e) *Rights in Limited Rights Data.* Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Limited Rights Notice'' set forth. All such limited rights data shall be marked with the following ''Limited Rights Notice'':

Limited Rights Notice

These data contain ''limited rights data,'' furnished under Contract No. _____ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the ''limited rights data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(c) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(d) This ''limited rights data'' may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(End of notice)

(f) *Rights in Restricted Computer Software.* (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Restricted Rights Notice'' set forth below. All such restricted computer software shall be marked with the following ''Restricted Rights Notice'':

Restricted Rights Notice-Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. _____. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used.

Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. _____ with (name of Contractor).

(End of notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr), in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice ''Unpublished-rights reserved under the Copyright Laws of the United States.''

(g) *Relationship to patents.* Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.2704–3(a), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase ''and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology'' after ''laser isotope separation'' and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, as appropriate.

(End of clause)

970.5227–2 Rights in data-technology transfer.

As prescribed in 48 CFR 970.2704–3(b), insert the following clause:

RIGHTS IN DATA—TECHNOLOGY TRANSFER
(DEC 2000)

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The

term includes technical data and computer software. The term ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of paragraph (g) of this clause.

(5) *Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of subparagraph (h) of this clause.

(6) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights,* as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, and except for data subject to the withholding provisions for protected Cooperative Research and Development Agreement (CRADA) information in accordance with Technology Transfer actions under this Contract, or other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Work for Others Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software. the rights of the Government in such data shall be governed solely by the provisions of paragraph (g) of this clause (''Rights in Limited Rights Data'') or paragraph (h) of this clause (''Rights in Restricted Computer Software''); and (v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in provisions of this clause;

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data; and

(iii) The right to assert copyright subsisting in scientific and technical articles as provided in paragraph (d) of this clause and the right to request permission to assert copyright subsisting in works other than scientific and technical articles as provided in paragraph (e) of this clause.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical business or financial data in the form of recorded information which it receives from, or is given access to by DOE or a third party, including a DOE contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyright (General).* (1) The Contractor agrees not to mark, register, or otherwise assert copyright in any data in a published or unpublished work, other than as set forth in paragraphs (d) and (e) of this clause.

(2) Except for material to which the Contractor has obtained the right to assert copyright in accordance with either paragraph (d) or (e) of this clause, the Contractor agrees not to include in the data delivered under this Contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (d) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the data to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the data prior to its delivery.

(d) *Copyrighted works (scientific and technical articles).* (1) The Contractor shall have the right to assert, without prior approval of the contracting officer, copyright subsisting in scientific and technical articles composed under this contract or based on or containing data first produced in the performance of this Contract, and published in academic, technical or professional journals, symposia, proceedings, or similar works. When assertion of copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) on the data when such data are delivered to the Government as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) The contractor shall mark each scientific or technical article first produced or composed under this Contract and submitted for journal publication or similar means of dissemination with a notice, similar in all material respects to the following, on the front reflecting the Government's non-exclusive, paid-up, irrevocable, world-wide license in the copyright.

Notice: This manuscript has been authored by [insert the name of the Contractor] under Contract No. [insert the contract number] with the U.S. Department of Energy. The United States Government retains and the publisher, by accepting the article for publication, acknowledges that the United States Government retains a non-exclusive, paid-up, irrevocable, world-wide license to publish or reproduce the published form of this manuscript, or allow others to do so, for United States Government purposes.

(End of notice)

(3) The title to the copyright of the original of unclassified graduate theses and the original of related unclassified scientific papers shall vest in the author thereof, subject to the right of DOE to retain duplicates of such documents and to use such documents for any purpose whatsoever without any claim on the part of the author or the contractor for additional compensation.

(e) *Copyrighted works (other than scientific and technical articles and data produced under a CRADA).* The Contractor may obtain permission to assert copyright subsisting in technical data and computer software first produced by the Contractor in performance of this Contract, where the Contractor can show that commercialization would be enhanced by such copyright protection, subject to the following:

(1) Contractor Request to Assert Copyright.

(i) For data other than scientific and technical articles and data produced under a CRADA, the Contractor shall submit in writing to Patent Counsel its request to assert copyright in data first produced in the performance of this Contract pursuant to this clause. The right of the Contractor to copyright data first produced under a CRADA is as described in the individual CRADA. Each request by the Contractor must include:

(A) The identity of the data (including any computer program) for which the Contractor requests permission to assert copyright, as well as an abstract which is descriptive of the data and is suitable for dissemination purposes, (B) The program under which it was funded, (C) Whether, to the best knowledge of the Contractor, the data is subject to an international treaty or agreement, (D) Whether the data is subject to export control, (E) A statement that the Contractor plans to commercialize the data in compliance with the clause of this contract entitled, ''Technology Transfer Mission,'' within five (5) years after obtaining permission to assert copyright or, on a case-by-case basis, a specified longer period where the Contractor can demonstrate that the ability to commercialize effectively is dependent upon such longer period, and (F) For data other than computer software, a statement explaining why the assertion of copyright is necessary to enhance commercialization and is consistent with DOE's dissemination responsibilities.

(ii) For data that is developed using other funding sources in addition to DOE funding, the permission to assert copyright in accordance with this clause must also be obtained

by the Contractor from all other funding sources prior to the Contractor's request to Patent Counsel. The request shall include the Contractor's certification or other documentation acceptable to Patent Counsel demonstrating such permission has been obtained.

(iii) Permission for the Contractor to assert copyright in excepted categories of data as determined by DOE will be expressly withheld. Such excepted categories include data whose release (A) would be detrimental to national security, i.e., involve classified information or data or sensitive information under Section 148 of the Atomic Energy Act of 1954, as amended, or are subject to export control for nonproliferation and other nuclear-related national security purposes, (B) would not enhance the appropriate transfer or dissemination and commercialization of such data, (C) would have a negative impact on U.S. industrial competitiveness, (D) would prevent DOE from meeting its obligations under treaties and international agreements, or (E) would be detrimental to one or more of DOE's programs. Additional excepted categories may be added by the Assistant General Counsel for Technology Transfer and Intellectual Property. Where data are determined to be under export control restriction, the Contractor may obtain permission to assert copyright subject to the provisions of this clause for purposes of limited commercialization in a manner that complies with export control statutes and applicable regulations. In addition, notwithstanding any other provision of this Contract, all data developed with Naval Reactors' funding and those data that are classified fall within excepted categories. The rights of the Contractor in data are subject to the disposition of data rights in the treaties and international agreements identified under this Contract as well as those additional treaties and international agreements which DOE may from time to time identify by unilateral amendment to the Contract; such amendment listing added treaties and international agreements is effective only for data which is developed after the date such treaty or international agreement is added to this Contract. Also, the Contractor will not be permitted to assert copyright in data in the form of various technical reports generated by the Contractor under the Contract without first obtaining the advanced written permission of the contracting officer.

(2) DOE Review and Response to Contractor's Request. The Patent Counsel shall use its best efforts to respond in writing within 90 days of receipt of a complete request by the Contractor to assert copyright in technical data and computer software pursuant to this clause. Such response shall either give or withhold DOE's permission for the Contractor to assert copyright or advise the Contractor that DOE needs additional time to respond, and the reasons therefor.

(3) Permission for Contractor to Assert Copyright.

(i) For computer software, the Contractor shall furnish to the DOE designated, centralized software distribution and control point, the Energy Science and Technology Software Center, at the time permission to assert copyright is given under paragraph (e)(2) of this clause: (A) An abstract describing the software suitable for publication, (B) the source code for each software program, and (C) the object code and at least the minimum support documentation needed by a technically competent user to understand and use the software. The Patent Counsel, for good cause shown by the Contractor, may allow the minimum support documentation to be delivered within 60 days after permission to assert copyright is given or at such time the minimum support documentation becomes available. The Contractor acknowledges that the DOE designated software distribution and control point may provide a technical description of the software in an announcement identifying its availability from the copyright holder.

(ii) Unless otherwise directed by the contracting officer, for data other than computer software to which the Contractor has received permission to assert copyright under paragraph (e)(2) of this clause above, the Contractor shall within sixty (60) days of obtaining such permission furnish to DOE's Office of Scientific and Technical Information (OSTI) a copy of such data as well as an abstract of the data suitable for dissemination purposes. The Contractor acknowledges that OSTI may provide an abstract of the data in an announcement to DOE, its contractors and to the public identifying its availability from the copyright holder.

(iii) For a five year period or such other specified period as specifically approved by Patent Counsel beginning on the date the Contractor is given permission to assert copyright in data, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works and perform publicly and display publicly, by or on behalf of the Government. Upon request, the initial period may be extended after DOE approval. The DOE approval will be based on the standard that the work is still commercially available and the market demand is being met.

(iv) After the period approved by Patent Counsel for application of the limited Government license described in paragraph (e)(3)(iii) of this clause, or if, prior to the end of such period(s), the Contractor abandons commercialization activities pertaining to the data to which the Contractor has been given permission to assert copyright, the

Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, distribute copies to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so.

(v) Whenever the Contractor asserts copyright in data pursuant to this paragraph (e), the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 on the copyrighted data and also an acknowledgment of the Government sponsorship and license rights of paragraphs (e)(3) (iii) and (iv) of this clause. Such action shall be taken when the data are delivered to the Government, published, licensed or deposited for registration as a published work in the U.S. Copyright Office. The acknowledgment of Government sponsorship and license rights shall be as follows: Notice: These data were produced by (insert name of Contractor) under Contract No. _____ with the Department of Energy. For (period approved by DOE Patent Counsel) from (date permission to assert copyright was obtained), the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government. There is provision for the possible extension of the term of this license. Subsequent to that period or any extension granted, the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, and to permit others to do so. The specific term of the license can be identified by inquiry made to Contractor or DOE. Neither the United States nor the United States Department of Energy, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any data , apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights.

(End of notice)

(vi) With respect to any data to which the Contractor has received permission to assert copyright, the DOE has the right, during the five (5) year or specified longer period approved by Patent Counsel as provided for in paragraph (e) of this clause, to request the Contractor to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant(s) upon terms that are reasonable under the circumstances, and if the Contractor refuses such request, to grant such license itself, if the DOE determines that the Contractor has not made a satisfactory demonstration that either it or its licensee(s) is actively pursuing commercialization of the data as set forth in subparagraph (e)(1)(A) of this clause. Before licensing under this subparagraph (vi), DOE shall furnish the Contractor a written request for the Contractor to grant the stated license, and the Contractor shall be allowed thirty (30) days (or such longer period as may be authorized by the contracting officer for good cause shown in writing by the Contractor) after such notice to show cause why the license should not be granted. The Contractor shall have the right to appeal the decision of the DOE to grant the stated license to the Invention Licensing Appeal Board as set forth in 10 CFR 781.65—''Appeals.''

(vii) No costs shall be allowable for maintenance of copyrighted data, primarily for the benefit of the Contractor and/or a licensee which exceeds DOE Program needs, except as expressly provided in writing by the contracting officer. The Contractor may use its net royalty income to effect such maintenance costs.

(viii) At any time the Contractor abandons commercialization activities for data for which the Contractor has received permission to assert copyright in accordance with this clause, it shall advise OSTI and Patent Counsel and upon request assign the copyright to the Government so that the Government can distribute the data to the public.

(4) The following notice may be placed on computer software prior to any publication and prior to the Contractor's obtaining permission from the Department of Energy to assert copyright in the computer software pursuant to paragraph (c)(3) of this section.

Notice: This computer software was prepared by [insert the Contractor's name and the individual author], hereinafter the Contractor, under Contract [insert the Contract Number] with the Department of Energy (DOE). All rights in the computer software are reserved by DOE on behalf of the United States Government and the Contractor as provided in the Contract. You are authorized to use this computer software for Governmental purposes but it is not to be released or distributed to the public. NEITHER THE GOVERNMENT NOR THE CONTRACTOR MAKES ANY WARRANTY, EXPRESS OR IMPLIED, OR ASSUMES ANY LIABILITY FOR THE USE OF THIS SOFTWARE. This notice including this sentence must appear on any copies of this computer software.

(End of notice)

(5) a similar notice can be used for data, other than computer software, upon approval of DOE Patent Counsel.

(f) *Subcontracting.* (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is

expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 927.409(a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with 48 CFR 927.409(h). The Contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227–1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data and restricted computer software for their private use.

(g) *Rights in Limited Rights Data.* Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Limited Rights Notice'' set forth below. All such limited rights data shall be marked with the following ''Limited Rights Notice:''

Limited Rights Notice

These data contain ''limited rights data,'' furnished under Contract No. _____ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the ''limited rights data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(c) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(d) This ''limited rights data'' may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

This Notice shall be marked on any reproduction of this data in whole or in part.

(End of notice)

(h) *Rights in Restricted Computer Software.* (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract; provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Restricted Rights

Notice'' set forth below. All such restricted computer software shall be marked with the following ''Restricted Rights Notice:''

Restricted Rights Notice—Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. _____. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. _____ with (name of Contractor).

(End of notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr) in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice ''Unpublished-rights reserved under the Copyright Laws of the United States.''

(i) *Relationship to patents.* Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.2704–3(b), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase ''and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology'' after ''laser isotope separation'' and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, as appropriate.

(End of clause)

970.5227–3 Technology transfer mission.

As prescribed in 48 CFR 970.2770–4(a), insert the following clause:

TECHNOLOGY TRANSFER MISSION (AUG 2002)

This clause has as its purpose implementation of the National Competitiveness Technology Transfer Act of 1989 (Sections 3131, 3132, 3133, and 3157 of Pub. L. 101–189 and as amended by Pub. L. 103–160, Sections 3134 and 3160). The Contractor shall conduct technology transfer activities with a purpose of providing benefit from Federal research to U.S. industrial competitiveness.

(a) *Authority.* (1) In order to ensure the full use of the results of research and development efforts of, and the capabilities of, the

Laboratory, technology transfer, including Cooperative Research and Development Agreements (CRADAs), is established as a mission of the Laboratory consistent with the policy, principles and purposes of Sections 11(a)(1) and 12(g) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a); Section 3132(b) of Pub. L. 101–189, Sections 3134 and 3160 of Pub. L. 103–160, and of Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*); Section 152 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2182); Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); and Executive Order 12591 of April 10, 1987.

(2) In pursuing the technology transfer mission, the Contractor is authorized to conduct activities including but not limited to: identifying and protecting Intellectual Property made, created or acquired at or by the Laboratory; negotiating licensing agreements and assignments for Intellectual Property made, created or acquired at or by the Laboratory that the Contractor controls or owns; bailments; negotiating all aspects of and entering into CRADAs; providing technical consulting and personnel exchanges; conducting science education activities and reimbursable Work for Others (WFO); providing information exchanges; and making available laboratory or weapon production user facilities. It is fully expected that the Contractor shall use all of the mechanisms available to it to accomplish this technology transfer mission, including, but not limited to, CRADAs, user facilities, WFO, science education activities, consulting, personnel, assignments, and licensing in accordance with this clause.

(b) *Definitions.* (1) *Contractor's Laboratory Director* means the individual who has supervision over all or substantially all of the Contractor's operations at the Laboratory.

(2) *Intellectual Property* means patents, trademarks, copyrights, mask works, protected CRADA information, and other forms of comparable property rights protected by Federal Law and other foreign counterparts.

(3) *Cooperative Research and Development Agreement (CRADA)* means any agreement entered into between the Contractor as operator of the Laboratory, and one or more parties including at least one non-Federal party under which the Government, through its laboratory, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the Laboratory; except that such term does not include a procurement contract, grant, or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of Title 31 of the United States Code.

(4) *Joint Work Statement (JWS)* means a proposal for a CRADA prepared by the Contractor, signed by the Contractor's Laboratory Director or designee which describes the following:

(i) Purpose;

(ii) Scope of Work which delineates the rights and responsibilities of the Government, the Contractor and Third Parties, one of which must be a non-Federal party;

(iii) Schedule for the work; and

(iv) Cost and resource contributions of the parties associated with the work and the schedule.

(5) *Assignment* means any agreement by which the Contractor transfers ownership of Laboratory Intellectual Property, subject to the Government's retained rights.

(6) *Laboratory Biological Materials* means biological materials capable of replication or reproduction, such as plasmids, deoxyribonucleic acid molecules, ribonucleic acid molecules, living organisms of any sort and their progeny, including viruses, prokaryote and eukaryote cell lines, transgenic plants and animals, and any derivatives or modifications thereof or products produced through their use or associated biological products, made under this contract by Laboratory employees or through the use of Laboratory research facilities.

(7) *Laboratory Tangible Research Product* means tangible material results of research which

(i) are provided to permit replication, reproduction, evaluation or confirmation of the research effort, or to evaluate its potential commercial utility;

(ii) are not materials generally commercially available; and

(iii) were made under this contract by Laboratory employees or through the use of Laboratory research facilities.

(8) *Bailment* means any agreement in which the Contractor permits the commercial or non-commercial transfer of custody, access or use of Laboratory Biological Materials or Laboratory Tangible Research Product for a specified purpose of technology transfer or research and development, including without limitation evaluation, and without transferring ownership to the bailee.

(c) *Allowable Costs.* (1) The Contractor shall establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications (ORTA) pursuant to paragraphs (b) and (c) of Section 11 of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710). The costs associated with the conduct of technology transfer through the ORTA including

activities associated with obtaining, maintaining, licensing, and assigning Intellectual Property rights, increasing the potential for the transfer of technology, and the widespread notice of technology transfer opportunities, shall be deemed allowable provided that such costs meet the other requirements of the allowable costs provisions of this Contract. In addition to any separately designated funds, these costs in any fiscal year shall not exceed an amount equal to 0.5 percent of the operating funds included in the Federal research and development budget (including Work For Others) of the Laboratory for that fiscal year without written approval of the contracting officer.

(2) The Contractor's participation in litigation to enforce or defend Intellectual Property claims incurred in its technology transfer efforts shall be as provided in the clause entitled ''Insurance—Litigation and Claims'' of this contract.

(d) *Conflicts of Interest—Technology Transfer.* The Contractor shall have implementing procedures that seek to avoid employee and organizational conflicts of interest, or the appearance of conflicts of interest, in the conduct of its technology transfer activities. These procedures shall apply to other persons participating in Laboratory research or related technology transfer activities. Such implementing procedures shall be provided to the contracting officer for review and approval within sixty (60) days after execution of this contract. The contracting officer shall have thirty (30) days thereafter to approve or require specific changes to such procedures. Such implementing procedures shall include procedures to:

(1) Inform employees of and require conformance with standards of conduct and integrity in connection with the CRADA activity in accordance with the provisions of paragraph (n)(5) of this clause;

(2) Review and approve employee activities so as to avoid conflicts of interest arising from commercial utilization activities relating to Contractor-developed Intellectual Property;

(3) Conduct work performed using royalties so as to avoid interference with or adverse effects on ongoing DOE projects and programs;

(4) Conduct activities relating to commercial utilization of Contractor-developed Intellectual Property so as to avoid interference with or adverse effects on user facility or WFO activities of the Contractor;

(5) Conduct DOE-funded projects and programs so as to avoid the appearance of conflicts of interest or actual conflicts of interest with non-Government funded work;

(6) Notify the contracting officer with respect to any new work to be performed or proposed to be performed under the Contract for DOE or other Federal agencies where the new work or proposal involves Intellectual Property in which the Contractor has obtained or intends to request or elect title;

(7) Except as provided elsewhere in this Contract, obtain the approval of the contracting officer for any licensing of or assignment of title to Intellectual Property rights by the Contractor to any business or corporate affiliate of the Contractor;

(8) Obtain the approval of the contracting officer prior to any assignment, exclusive licensing, or option for exclusive licensing, of Intellectual Property to any individual who has been a Laboratory employee within the previous two years or to the company in which the individual is a principal; and

(9) Notify non-Federal sponsors of WFO activities, or non-Federal users of user facilities, of any relevant Intellectual Property interest of the Contractor prior to execution of WFOs or user agreements.

(10) Notify DOE prior to evaluating a proposal by a third party or DOE, when the subject matter of the proposal involves an elected or waived subject invention under this contract or one in which the Contractor intends to elect to retain title under this contract.

(e) *Fairness of Opportunity*. In conducting its technology transfer activities, the Contractor shall prepare procedures and take all reasonable measures to ensure widespread notice of availability of technologies suited for transfer and opportunities for exclusive licensing and joint research arrangements. The requirement to widely disseminate the availability of technology transfer opportunities does not apply to a specific application originated outside of the Laboratory and by entities other than the Contractor.

(f) *U.S. Industrial Competitiveness.* (1) In the interest of enhancing U.S. Industrial Competitiveness, the Contractor shall, in its licensing and assignments of Intellectual Property, give preference in such a manner as to enhance the accrual of economic and technological benefits to the U.S. domestic economy. The Contractor shall consider the following factors in all of its licensing and assignment decisions involving Laboratory intellectual property where the Laboratory obtains rights during the course of the Contractor's operation of the Laboratory under this contract:

(i) whether any resulting design and development will be performed in the United States and whether resulting products, embodying parts, including components thereof, will be substantially manufactured in the United States; or

(ii) (A) whether the proposed licensee or assignee has a business unit located in the United States and whether significant economic and technical benefits will flow to the United States as a result of the license or assignment agreement; and

(B) in licensing any entity subject to the control of a foreign company or government,

whether such foreign government permits United States agencies, organizations or other persons to enter into cooperative research and development agreements and licensing agreements, and has policies to protect United States Intellectual Property rights.

(2) If the Contractor determines that neither of the conditions in paragraphs (f)(1)(i) or (ii) of this clause are likely to be fulfilled, the Contractor, prior to entering into such an agreement, must obtain the approval of the contracting officer. The contracting officer shall act on any such requests for approval within thirty (30) days.

(3) The Contractor agrees to be bound by the provisions of 35 U.S.C. 204 (Preference for United States industry).

(g) *Indemnity—Product Liability.* In entering into written technology transfer agreements, including but not limited to, research and development agreements, licenses, assignments and CRADAs, the Contractor agrees to include in such agreements a requirement that the U.S. Government and the Contractor, except for any negligent acts or omissions of the Contractor, be indemnified for all damages, costs, and expenses, including attorneys' fees, arising from personal injury or property damage occurring as a result of the making, using or selling of a product, process or service by or on behalf of the Participant, its assignees or licensees which was derived from the work performed under the agreement. The Contractor shall identify and obtain the approval of the contracting officer for any proposed exceptions to this requirement such as where State or local law expressly prohibit the Participant from providing indemnification or where the research results will be placed in the public domain.

(h) *Disposition of Income.* (1) Royalties or other income earned or retained by the Contractor as a result of performance of authorized technology transfer activities herein shall be used by the Contractor for scientific research, development, technology transfer, and education at the Laboratory, consistent with the research and development mission and objectives of the Laboratory and subject to Section 12(b)(5) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(b)(5)) and Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*) as amended through the effective date of this contract award or modification. If the net amounts of such royalties and income received from patent licensing after payment of patenting costs, licensing costs, payments to inventors and other expenses incidental to the administration of Subject Inventions during any fiscal year exceed 5 percent of the Laboratory's budget for that fiscal year, 75 percent of such excess amounts shall be paid to the Treasury of the United States, and the remaining amount of such excess shall be used by the Contractor for the purposes as described above in this paragraph. Any inventions arising out of such scientific research and development activities shall be deemed to be Subject Inventions under the Contract.

(2) The Contractor shall include as a part of its annual Laboratory Institutional Plan or other such annual document a plan setting out those uses to which royalties and other income received as a result of performance of authorized technology transfer activities herein will be applied at the Laboratory, and at the end of the year, provide a separate accounting for how the funds were actually used. Under no circumstances shall these royalties and income be used for an illegal augmentation of funds furnished by the U.S. Government.

(3) The Contractor shall establish subject to the approval of the contracting officer a policy for making awards or sharing of royalties with Contractor employees, other coinventors and coauthors, including Federal employee coinventors when deemed appropriate by the contracting officer.

(i) *Transfer to Successor Contractor.* In the event of termination or upon the expiration of this Contract, any unexpended balance of income received for use at the Laboratory shall be transferred, at the contracting officer's request, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The Contractor shall transfer title, as one package, to the extent the Contractor retains title, in all patents and patent applications, licenses, accounts containing royalty revenues from such license agreements, including equity positions in third party entities, and other Intellectual Property rights which arose at the Laboratory, to the successor contractor or to the Government as directed by the contracting officer.

(j) *Technology Transfer Affecting the National Security.* (1) The Contractor shall notify and obtain the approval of the contracting officer, prior to entering into any technology transfer arrangement, when such technology or any part of such technology is classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168). Such notification shall include sufficient information to enable DOE to determine the extent that commercialization of such technology would enhance or diminish security interests of the United States, or diminish communications within DOE's nuclear weapon production complex. DOE shall use its best efforts to complete its determination within sixty (60) days of the Contractor's notification, and provision of any supporting information, and DOE shall promptly notify the Contractor as to whether the technology is transferable.

(2) The Contractor shall include in all of its technology transfer agreements with

third parties, including, but not limited to, CRADAs, licensing agreements and assignments, notice to such third parties that the export of goods and/or Technical Data from the United States may require some form of export control license or other authority from the U.S. Government and that failure to obtain such export control license may result in criminal liability under U.S. laws.

(3) For other than fundamental research as defined in National Security Decision Directive 189, the Contractor is responsible to conduct internal export control reviews and assure that technology is transferred in accordance with applicable law.

(k) *Records.* The Contractor shall maintain records of its technology transfer activities in a manner and to the extent satisfactory to the DOE and specifically including, but not limited to, the licensing agreements, assignments and the records required to implement the requirements of paragraphs (e), (f), and (h) of this clause and shall provide reports to the contracting officer to enable DOE to maintain the reporting requirements of Section 12(c)(6) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(6)). Such reports shall be made annually in a format to be agreed upon between the Contractor and DOE and in such a format which will serve to adequately inform DOE of the Contractor's technology transfer activities while protecting any data not subject to disclosure under the Rights in Technical Data clause and paragraph (n) of this clause. Such records shall be made available in accordance with the clauses of this Contract pertaining to inspection, audit and examination of records.

(l) *Reports to Congress.* To facilitate DOE's reporting to Congress, the Contractor is required to submit annually to DOE a technology transfer plan for conducting its technology transfer function for the upcoming year, including plans for securing Intellectual Property rights in Laboratory innovations with commercial promise and plans for managing such innovations so as to benefit the competitiveness of United States industry. This plan shall be provided to the contracting officer on or before October 1st of each year.

(m) *Oversight and Appraisal.* The Contractor is responsible for developing and implementing effective internal controls for all technology transfer activities consistent with the audit and record requirements of this Contract. Laboratory Contractor performance in implementing the technology transfer mission and the effectiveness of the Contractor's procedures will be evaluated by the contracting officer as part of the annual appraisal process, with input from the cognizant Secretarial Officer or program office.

(n) *Technology Transfer Through Cooperative Research and Development Agreements.* Upon approval of the contracting officer and as provided in a DOE approved Joint Work Statement (JWS), the Laboratory Director, or designee, may enter into CRADAs on behalf of the DOE subject to the requirements set forth in this paragraph.

(1) *Review and Approval of CRADAs.* (i) Except as otherwise directed in writing by the contracting officer, each JWS shall be submitted to the contracting officer for approval. The Contractor's Laboratory Director or designee shall provide a program mission impact statement and shall include an impact statement regarding related Intellectual Property rights known by the Contractor to be owned by the Government to assist the contracting officer in the approval determination.

(ii) The Contractor shall also include (specific to the proposed CRADA), a statement of compliance with the Fairness of Opportunity requirements of paragraph (e) of this clause.

(iii) Within thirty (30) days after submission of a JWS or proposed CRADA, the contracting officer shall approve, disapprove or request modification to the JWS or CRADA. The contracting officer shall provide a written explanation to the Contractor's Laboratory Director or designee of any disapproval or requirement for modification of a JWS or proposed CRADA.

(iv) Except as otherwise directed in writing by the contracting officer, the Contractor shall not enter into, or begin work under, a CRADA until approval of the CRADA has been granted by the contracting officer. The Contractor may submit its proposed CRADA to the contracting officer at the time of submitting its proposed JWS or any time thereafter.

(2) *Selection of Participants.* The Contractor's Laboratory Director or designee in deciding what CRADA to enter into shall:

(i) Give special consideration to small business firms, and consortia involving small business firms;

(ii) Give preference to business units located in the United States which agree that products or processes embodying Intellectual Property will be substantially manufactured or practiced in the United States and, in the case of any industrial organization or other person subject to the control of a foreign company or government, take into consideration whether or not such foreign government permits United States agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements;

(iii) Provide Fairness of Opportunity in accordance with the requirements of paragraph (e) of this clause; and

(iv) Give consideration to the Conflicts of Interest requirements of paragraph (d) of this clause.

(3) *Withholding of Data.* (i) Data that is first produced as a result of research and development activities conducted under a

CRADA and that would be a trade secret or commercial or financial data that would be privileged or confidential, if such data had been obtained from a non-Federal third party, may be protected from disclosure under the Freedom of Information Act as provided in the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(7)) for a period as agreed in the CRADA of up to five (5)years from the time the data is first produced. The DOE shall cooperate with the Contractor in protecting such data.

(ii) Unless otherwise expressly approved by the contracting officer in advance for a specific CRADA, the Contractor agrees, at the request of the contracting officer, to transmit such data to other DOE facilities for use by DOE or its Contractors by or on behalf of the Government. When data protected pursuant to paragraph (n)(3)(i) of this clause is so transferred, the Contractor shall clearly mark the data with a legend setting out the restrictions against private use and further dissemination, along with the expiration date of such restrictions.

(iii) In addition to its authority to license Intellectual Property, the Contractor may enter into licensing agreements with third parties for data developed by the Contractor under a CRADA subject to other provisions of this Contract. However, the Contractor shall neither use the protection against dissemination nor the licensing of data as an alternative to the submittal of invention disclosures which include data protected pursuant to paragraph (n)(3)(i) of this clause.

(4) *Work For Others and User Facility Programs.* (i) WFO and User Facility Agreements (UFAs) are not CRADAs and will be available for use by the Contractor in addition to CRADAs for achieving utilization of employee expertise and unique facilities for maximizing technology transfer. The Contractor agrees form prospective CRADA participants, which are intending to substantially pay full cost recovery for the effort under a proposed CRADA, of the availability of alternative forms of agreements, *i.e.*, WFO and UFA, and of the Class Patent Waiver provisions associated therewith.

(ii) Where the Contractor believes that the transfer of technology to the U.S. domestic economy will benefit from, or other equity considerations dictate, an arrangement other than the Class Waiver of patent rights to the sponsor in WFO and UFAs, a request may be made to the contracting officer for an exception to the Class Waivers.

(iii) Rights to inventions made under agreements other than funding agreements with third parties shall be governed by the appropriate provisions incorporated, with DOE approval, in such agreements, and the provisions in such agreements take precedence over any disposition of rights contained in this Contract. Disposition of rights under any such agreement shall be in accordance with any DOE class waiver (including Work for Others and User Class Waivers) or individually negotiated waiver which applies to the agreement.

(5) *Conflicts of Interest.* (i) Except as provided in paragraph (n)(5)(iii) of this clause, the Contractor shall assure that no employee of the Contractor shall have a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA, if, to such employee's knowledge:

(A) Such employee, or the spouse, child, parent, sibling, or partner of such employee, or an organization (other than the Contractor) in which such employee serves as an officer, director, trustee, partner, or employee—

(*1*) holds financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA;

(*2*) receives a gift or gratuity from any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA; or

(B) A financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA, is held by any person or organization with whom such employee is negotiating or has any arrangement concerning prospective employment.

(ii) The Contractor shall require that each employee of the Contractor who has a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA certify through the Contractor to the contracting officer that the circumstances described in paragraph (n)(5)(i) of this clause do not apply to that employee.

(iii) The requirements of paragraphs (n)(5)(i) and (n)(5)(ii) of this clause shall not apply in a case where the contracting officer is advised by the Contractor in advance of the participation of an employee described in those paragraphs in the preparation, negotiation or approval of a CRADA of the nature of and extent of any financial interest described in paragraph (n)(5)(i) of this clause, and the contracting officer determines that such financial interest is not so substantial as to be considered likely to affect the integrity of the Contractor employee's participation in the process of preparing, negotiating, or approving the CRADA.

(o) *Technology Transfer in Other Cost-Sharing Agreements.* In conducting research and development activities in cost-shared agreements not covered by paragraph (n) of this clause, the Contractor, with prior written permission of the contracting officer, may provide for the withholding of data produced thereunder in accordance with the applicable provisions of paragraph (n)(3) of this clause.

(End of clause)

Alternate I (AUG 2002). As prescribed in 48 CFR 970.2770–4(b), add the following definition under paragraph (b) and the following new paragraph (p):

(b)(8) *Privately funded technology transfer* means the prosecuting, maintaining, licensing, and marketing of inventions which are not owned by the Government (and not related to CRADAs) when such activities are conducted entirely without the use of Government funds.

(p) Technology Partnership Ombudsman.

(1) The Contractor agrees to establish a position to be known as ''Technology Partnership Ombudsman,'' to help resolve complaints from outside organizations regarding the policies and actions of the contractor with respect to technology partnerships (including CRADAs), patents owned by the contractor for inventions made at the laboratory, and technology licensing.

(2) The Ombudsman shall be a senior official of the Contactor's laborratory staff, who is not involved in day-to-day technology partnerships, patents or technology licensing, or, if appointed from outside the laboratory or facility, shall function as such senior official.

(3) The duties of the Technology Partnership Ombudsman shall include:

(i) Serving as the focal point for assisting the public and industry in resolving complaints and disputes with the laboratory or facility regarding technology partnerships, patents, and technology licensing;

(ii) Promoting the use of collaborative alternative dispute resolution techniques such as mediation to facilitate the speedy and low cost resolution of complaints and disputes, when appropriate; and

(iii) Submitting a quarterly report, in a format provided by DOE, to the Secretary of Energy, the Administrator for Nuclear Security, the Director of the DOE Office of Dispute Resolution, and the Contracting Officer concerning the number and nature of complaints and disputes raised, along with the Ombudsman's assessment of their resolution, consistent with the protection of confidential and sensitive information.

(q) Nothing in paragraphs (c) Allowable Costs, (e) Fairness of Opportunity, (f) U.S. Industrial Competitiveness, (g) Indemnity—Product Liability, (h) Disposition of Income, and (i) Transfer to Successor Contractor of this clause are intended to apply to the contractor's privately funded technology transfer activities if such privately funded activities are addressed elsewhere in the contract.

Alternate II (DEC 2000). As prescribed in 48 CFR 970.2770–4(c), the contracting officer shall substitute the phrase ''weapon production facility'' wherever the word ''laboratory'' appears in the clause.

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002]

970.5227–4 Authorization and consent.

Insert the following clause in solicitations and contracts in accordance with 970.2702–1:

AUTHORIZATION AND CONSENT (AUG 2002)

(a) The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

(b) If the Contractor is sued for copyright infringement or anticipates the filing of such a lawsuit, the Contractor may request authorization and consent to copy a copyrighted work from the contracting officer. Programmatic necessity is a major consideration for DOE in determining whether to grant such request.

(c)(1) The Contractor agrees to include, and require inclusion of, the Authorization and Consent clause at 52.227–1, without Alternate 1, but suitably modified to identify the parties, in all subcontracts expected to exceed $100,000 at any tier for supplies or services, including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services.

(2) The Contractor agrees to include, and require inclusion of, paragraph (a) of this Authorization and Consent clause, suitably modified to identify the parties, in all subcontracts at any tier for research and development activities expected to exceed $100,000.

(3) Omission of an authorization and consent clause from any subcontract, including those valued less than $100,000 does not affect this authorization and consent.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002]

970.5227–5 Notice and assistance regarding patent and copyright infringement.

Insert the following clause in solicitations and contracts in accordance with 970.2702–2:

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (DEC 2000)

(a) The Contractor shall report to the Contracting Officer promptly and in reasonable written detail, each notice or claim of patent

or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) If any person files a claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the Contractor pertaining to such suit or claim. Except where the Contractor has agreed to indemnify the Government, the Contractor shall furnish such evidence and information at the expense of the Government.

(c) The Contractor agrees to include, and require inclusion of, this clause suitably modified to identify the parties, in all subcontracts at any tier expected to exceed $100,000.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002]

970.5227–6 Patent indemnity—subcontracts.

Insert the following clause in solicitations and contracts in accordance with 970.2702–3:

PATENT INDEMNITY—SUBCONTRACTS (DEC 2000)

Except as otherwise authorized by the Contracting Officer, the Contractor shall obtain indemnification of the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a secrecy order by the Government) from Contractor's subcontractors for any contract work subcontracted in accordance with FAR 48 CFR 52.227–3.

(End of clause)

970.5227–7 Royalty information.

Insert the following provision in solicitations in accordance with 970.2702–4:

ROYALTY INFORMATION (DEC 2000)

(a) *Cost or charges for royalties.* If the response to this solicitation contains costs or charges for royalties totaling more than $250, the following information shall be included in the response relating to each separate item of royalty or license fee:

(1) Name and address of licensor;

(2) Date of license agreement;

(3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable;

(4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable;

(5) Percentage or dollar rate of royalty per unit;

(6) Unit price of contract item;

(7) Number of units; and

(8) Total dollar amount of royalties.

(b) Copies of current licenses. In addition, if specifically requested by the Contracting Officer before execution of the contract, the offeror shall furnish a copy of the current license agreement and an identification of applicable claims of specific patents or other basis upon which the royalty may be payable.

(End of provision)

970.5227–8 Refund of royalties.

Insert the following clause in solicitations and contracts in accordance with 970.2702–4:

REFUND OF ROYALTIES (AUG 2002)

(a) During performance of this Contract, if any royalties are proposed to be charged to the Government as costs under this Contract, the Contractor agrees to submit for approval of the Contracting Officer, prior to the execution of any license, the following information relating to each separate item of royalty:

(1) Name and address of licensor;

(2) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable;

(3) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable;

(4) Percentage or dollar rate of royalty per unit;

(5) Unit price of contract item;

(6) Number of units;

(7) Total dollar amount of royalties; and

(8) A copy of the proposed license agreement.

(b) If specifically requested by the Contracting Officer, the Contractor shall furnish a copy of any license agreement entered into prior to the effective date of this clause and an identification of applicable claims of specific patents or other basis upon which royalties are payable.

(c) The term ''royalties'' as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications that are used in the performance of this contract or any subcontract hereunder.

(d) The Contractor shall furnish to the Contracting Officer, annually upon request, a statement of royalties paid or required to be paid in connection with performing this Contract and subcontracts hereunder.

(e) For royalty payments under licenses entered into after the effective date of this Contract, costs incurred for royalties proposed under this paragraph shall be allowable only to the extent that such royalties are approved by the Contracting Officer. If the Contracting Officer determines that existing or proposed royalty payments are inappropriate, any payments subsequent to such determination shall be allowable only to the extent approved by the Contracting Officer.

(f) Regardless of prior DOE approval of any individual payments or royalties, DOE may contest at any time the enforceability, validity, scope of, or title to a patent for which the Contractor makes a royalty or other payment.

(g) If at any time within 3 years after final payment under this contract, the Contractor for any reason is relieved in whole or in part from the payment of any royalties to which this clause applies, the Contractor shall promptly notify the Contracting Officer of that fact and shall promptly reimburse the Government for any refunds received or royalties paid after having received notice of such relief.

(h) The Contractor agrees to include, and require inclusion of, this clause, including this paragraph (h), suitably modified to identify the parties in any subcontract at any tier in which the amount of royalties reported during negotiation of the subcontract exceeds $250.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002]

970.5227–9 Notice of right to request patent waiver.

Insert the following provision in solicitations in accordance with 970.2704–6:

NOTICE OF RIGHT TO REQUEST PATENT WAIVER (DEC 2000)

Offerors have the right to request a waiver of all or any part of the rights of the United States in inventions conceived or first actually reduced to practice in performance of the contract, in advance of or within 30 days after the effective date of contracting. If such advance waiver is not requested or the request is denied, the Contractor has a continuing right under the contract to request a waiver of the rights of the Government in identified inventions, *i.e.,* individual inventions conceived or first actually reduced to practice in performance of the contract. Contractors that are domestic small businesses and domestic nonprofit organizations may not need a waiver and will have included in their contracts a patent clause reflecting their right to elect title to subject inventions pursuant to the Bayh-Dole Act (35 U.S.C. 200 *et seq.*).

(End of provision)

970.5227–10 Patent rights—management and operating contracts, nonprofit organization or small business firm contractor.

As prescribed in 970.2703–1(b)(2), insert the following clause:

PATENT RIGHTS-MANAGEMENT AND OPERATING CONTRACTS, NONPROFIT ORGANIZATION OR SMALL BUSINESS FIRM CONTRACTOR (DEC 2000)

(a) *Definitions.*

(1) *DOE licensing regulations* means the Department of Energy patent licensing regulations at 10 CFR Part 781.

(2) *Exceptional circumstance subject invention* means any subject invention in a technical field or related to a task determined by the Department of Energy to be subject to an exceptional circumstance under 35 U.S.C. 202(a)(ii) and in accordance with 37 CFR 401.3(e).

(3) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*).

(4) *Made* when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(5) *Nonprofit organization* means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(6) *Patent Counsel* means the Department of Energy (DOE) Patent Counsel assisting the DOE contracting activity.

(7) *Practical application* means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(8) *Small business firm* means a small business concern as defined at section 2 of Pub. L. 85–536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3–8 and 13 CFR 121.3–12, respectively, are used.

(9) *Subject Invention* means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of Principal Rights.*

(1) *Retention of title by the Contractor.* Except for exceptional circumstance subject inventions, the contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(2) *Exceptional circumstance subject inventions.* Except to the extent that rights are retained by the Contractor in a determination of exceptional circumstances or granted to a contractor through a determination of greater rights in accordance with subparagraph (b)(4) of this clause, the Contractor does not have a right to retain title to any exceptional circumstance subject inventions and agrees to assign to the Government the entire right, title, and interest, throughout the world, in and to any exceptional circumstance subject inventions.

(i) Inventions within or relating to the following fields of technology are exceptional circumstance subject inventions:

(A) uranium enrichment technology;

(B) storage and disposal of civilian high-level nuclear waste and spent fuel technology; and

(C) national security technologies classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168).

(ii) Inventions made under any agreement, contract or subcontract related to the following are exceptional circumstance subject inventions:

(A) DOE Steel Initiative and Metals Initiative;

(B) U.S. Advanced Battery Consortium; and

(C) any funding agreement which is funded in part by the Electric Power Research Institute (EPRI) or the Gas Research Institute (GRI).

(iii) DOE reserves the right to unilaterally amend this contract to modify, by deletion or insertion, technical fields, tasks, or other classifications for the purpose of determining DOE exceptional circumstance subject inventions.

(3) *Treaties and international agreements.* Any rights acquired by the Contractor in subject inventions are subject to any disposition of right, title, or interest in or to subject inventions provided for in treaties or international agreements identified at Appendix [*Insert Reference*] to this contract. DOE reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into or to be entered into by the Government after the effective date of this contract and to effectuate those license or other rights which are necessary for the Government to meet its obligations to foreign governments, their nationals and international organizations under such treaties or international agreements with respect to subject inventions made after the date of the amendment.

(4) *Contractor request for greater rights in exceptional circumstance subject inventions.* The Contractor may request rights greater than allowed by the exceptional circumstance determination in an exceptional circumstance subject invention by submitting such a request in writing to Patent Counsel at the time the exceptional circumstance subject invention is disclosed to DOE or within eight (8) months after conception or first actual reduction to practice of the exceptional circumstance subject invention, whichever occurs first, unless a longer period is authorized in writing by the Patent Counsel for good cause shown in writing by the Contractor. DOE may, in its discretion, grant or refuse to grant such a request by the Contractor.

(5) *Contractor employee-inventor rights.* If the Contractor does not elect to retain title to a subject invention or does not request greater rights in an exceptional circumstance subject invention, a Contractor employee-inventor, after consultation with the Contractor and with written authorization from the Contractor in accordance with 10 CFR 784.9(b)(4), may request greater rights, including title, in the subject invention or the exceptional circumstance invention from DOE, and DOE may, in its discretion, grant or refuse to grant such a request by the Contractor employee-inventor.

(6) *Government assignment of rights in Government employees' subject inventions.* If a Government employee is a joint inventor of a subject invention or of an exceptional circumstance subject invention to which the Contractor has rights, the Government may assign or refuse to assign to the Contractor

any rights in the subject invention or exceptional circumstance subject invention acquired by the Government from the Government employee, in accordance with 48 CFR 27.304–1(d). The rights assigned to the Contractor are subject to any provision of this clause that is applicable to subject inventions in which the Contractor retains title, including reservation by the Government of a nonexclusive, nontransferable, irrevocable, paid-up license, except that the Contractor shall file its initial patent application claiming the subject invention or exceptional circumstance invention within one (1) year after the assignment of such rights. The Contractor shall share royalties collected for the manufacture, use or sale of the subject invention with the Government employee.

(c) Subject Invention Disclosure, Election of Title and Filing of Patent Application by Contractor.

(1) *Subject invention disclosure.* The contractor will disclose each subject invention to the Patent Counsel within two months after the inventor discloses it in writing to contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s) and all sources of funding by B&R code for the invention. It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. The disclosure shall include a written statement as to whether the invention falls within an exceptional circumstance field. DOE will make a determination and advise the Contractor within 30 days of receipt of an invention disclosure as to whether the invention is an exceptional circumstance subject invention. In addition, after disclosure to the Patent Counsel, the Contractor will promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the contractor. The Contractor shall obtain approval from Patent Counsel prior to any release or publication of information concerning any nonelectable subject invention such as an exceptional circumstance subject invention or any subject invention related to a treaty or international agreement.

(2) *Election by the Contractor.* Except as provided in paragraph (b)(2) of this clause, the Contractor will elect in writing whether or not to retain title to any such invention by notifying the Federal agency within two years of disclosure to the Federal agency. However, in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) *Filing of patent applications by the Contractor.* The Contractor will file its initial patent application on a subject invention to which it elects to retain title within one year after election of title or, if earlier, or prior to the end of any 1-year statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries or international patent offices within either ten months of the corresponding initial patent application or six months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) *Contractor's request for an extension of time.* Requests for an extension of the time for disclosure, election, and filing under subparagraphs (c)(1), (2) and (3) may, at the discretion of Patent Counsel, be granted.

(5) *Publication Approval.* During the course of the work under this contract, the Contractor or its employees may desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. In order that public disclosure of such information will not adversely affect the patent interest of DOE or the Contractor, approval for release or publication shall be secured from the Contractor personnel responsible for patent matters prior to any such release or publication. Where DOE's approval of publication is requested, DOE's response to such requests for approval shall normally be provided within 90 days except in circumstances in which a domestic patent application must be filed in order to protect foreign rights. In the case involving foreign patent rights, DOE shall be granted an additional 180 days with which to respond to the request for approval, unless extended by mutual agreement.

(d) Conditions When the Government May Obtain Title.

The Contractor will convey to the DOE, upon written request, title to any subject invention—

(1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that DOE may only request title within

sixty (60) days after learning of the failure of the Contractor to disclose or to elect within the specified times.

(2) In those countries in which the Contractor fails to file a patent application within the times specified in subparagraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in subparagraph (c) above, but prior to its receipt of the written request of the DOE, the Contractor shall continue to retain title in that country.

(3) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in a reexamination or opposition proceeding on, a patent on a subject invention.

(4) If the Contractor requests that DOE acquire title or rights from the Contractor in a subject invention to which the Contractor had initially retained title or rights, or in an exceptional circumstance subject invention to which the Contractor was granted greater rights, DOE may acquire such title or rights from the Contractor, or DOE may decide against acquiring such title or rights from the Contractor, at DOE's sole discretion.

(e) Minimum Rights of the Contractor and Protection of the Contractor's Right to File.

(1) *Request for a Contractor license.* The Contractor may request the right to reserve a revocable, nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. DOE may grant or refuse to grant such a request by the Contractor. When DOE approves such reservation, the Contractor's license will normally extend to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE, except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(2) *Revocation or modification of a Contractor license.* The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR Part 404 and DOE licensing regulations at 10 CFR Part 781. This license will not be revoked in the field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the subject invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application of the subject invention in that foreign country.

(3) *Notice of revocation of modification of a Contractor license.* Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and DOE licensing regulations at 10 CFR part 781 concerning the licensing of Government owned inventions, any decision concerning the revocation or modification of the license.

(f) Contractor Action to Protect the Government's Interest.

(1) *Execution of delivery of title or license instruments.* The Contractor agrees to execute or to have executed, and promptly deliver to the Patent Counsel all instruments necessary to accomplish the following actions:

(i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title, and

(ii) convey title to DOE when requested under subparagraphs (b) or paragraph (d) of this clause and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) *Notification of discontinuation of patent protection.* The contractor will notify the

Patent Counsel of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than thirty days before the expiration of the response period required by the relevant patent office.

(4) *Notification of Government rights.* The contractor agrees to include, within the specification of any United States patent applications and any patent issuing thereon covering a subject invention, the following statement, ''This invention was made with government support under (identify the contract) awarded by (identify the Federal agency). The government has certain rights in the invention.''

(5) *Invention Identification Procedures.* The Contractor shall establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed and shall submit a written description of such procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

(6) *Invention Filing Documentation.* If the Contractor files a domestic or foreign patent application claiming a subject invention, the Contractor shall promptly submit to Patent Counsel, upon request, the following information and documents:

(i) the filing date, serial number, title, and a copy of the patent application (including an English-language version if filed in a language other than English);

(ii) an executed and approved instrument fully confirmatory of all Government rights in the subject invention; and

(iii) the patent number, issue date, and a copy of any issued patent claiming the subject invention.

(7) *Duplication and disclosure of documents.* The Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause; provided, however, that any such duplication or disclosure by the Government is subject to the confidentiality provision at 35 U.S.C. 205 and 37 CFR Part 40.

(g) Subcontracts.

(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—nonprofit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 48 CFR 952.227–11, suitably modified to identify the parties, in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202 and subparagraph (b)(2) of this clause. The subcontractor retains all rights provided for the contractor in the patent rights clause at 48 CFR 952.227–11.

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations and small business firms.* Except for the subcontracts described in subparagraph (g)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties, in any contract for experimental, developmental, demonstration or research work. For subcontracts subject to exceptional circumstances, the contractor must consult with DOE patent counsel with respect to the appropriate patent clause.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(5) *Subcontractor refusal to accept terms of patent clause.* If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such a refusal, including any relevant information for expediting disposition of the matter, and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention.

(h) *Reporting on Utilization of Subject Inventions.* The Contractor agrees to submit to DOE on request, periodic reports, no more frequently than annually, on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees.

Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Contractor.

(i) *Preference for United States Industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *March-in Rights.* The Contractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any DOE supplemental regulations to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Contractor, assignee or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that—

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived, or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Special Provisions for Contracts With Nonprofit Organizations.* If the Contractor is a nonprofit organization, it agrees that—

(1) *DOE approval of assignment of rights.* Rights to a subject invention in the United States may not be assigned by the Contractor without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions of this clause as the Contractor.

(2) *Small business firm licensees.* It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business firm applicants, and the Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this subparagraph (k)(2).

(3) *Contractor licensing of subject inventions.* To the extent that it provides the most effective technology transfer, licensing of subject inventions shall be administered by Contractor employees on location at the facility.

(l) *Communications.* The Contractor shall direct any notification, disclosure or request provided for in this clause to the Patent Counsel assisting the DOE contracting activity.

(m) *Reports.*

(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a specified period, or a statement that no subject inventions were made during the specified period; and a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement

that no such subcontracts were awarded during the specified period.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period, or a statement that no such subcontracts were awarded during the contract performance period.

(n) *Examination of Records Relating to Subject Inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including laboratory notebooks), records, documents, and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, including exceptional circumstance subject inventions, or to determine Contractor compliance with any requirement of this clause.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, including exceptional circumstance subject inventions, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(4) *Power of inspection.* With respect to a subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall furnish the Government, upon request by DOE, an irrevocable power to inspect and make copies of a prosecution file for any patent application claiming the subject invention.

(o) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or product manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(p) *Atomic Energy.*

(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of subparagraph (p)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(q) *Classified Inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(r) *Patent Functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(s) *Educational Awards Subject to 35 U.S.C. 212.* The Contractor shall notify the Contracting Officer prior to the placement of any person subject to 35 U.S.C. 212 in an area of technology or task (1) related to exceptional circumstance technology or (2) which is subject to treaties or international agreements as set forth in paragraph (b)(3) of this clause or agreements other than funding agreements. The Contracting Officer may disapprove of any such placement.

(t) *Annual Appraisal by Patent Counsel.* Patent Counsel may conduct an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(End of clause)

Alternate 1 Weapons Related Subject Inventions. As prescribed at 970.2703–2(g), insert the following as subparagraphs (a)(10) and (b)(7), respectively:

(a) *Definitions.* (10) Weapons Related Subject Invention means any subject invention conceived or first actually reduced to practice in the course of or under work funded by or through defense programs , including Department of Defense and intelligence reimbursable work, or the Naval Nuclear Propulsion Program of the Department of Energy or the National Nuclear Security Administration.

(b) *Allocation of Principal Rights*—(7) *Weapons related subject inventions.* Except to the extent that DOE is solely satisfied that the Contractor meets certain procedural requirements and DOE grants rights to the Contractor in weapons related subject inventions, the Contractor does not have the right to retain title to any weapons related subject inventions.

(End of alternate)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48571, July 25, 2002]

970.5227–11 Patent rights—management and operating contracts, for-profit contractor, non-technology transfer.

Insert the following clause in solicitations and contracts in accordance with 970.2703–1(b)(4):

PATENT RIGHTS—MANAGEMENT AND OPERATING CONTRACTS, FOR-PROFIT CONTRACTOR, NON-TECHNOLOGY TRANSFER (DEC 2000)

(a) *Definitions.* (1) *DOE licensing regulations* means the Department of Energy patent licensing regulations at 10 CFR Part 781.

(2) *DOE patent waiver regulations* means the Department of Energy patent waiver regulations at 10 CFR Part 784.

(3) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

(4) *Made* when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(5) *Patent Counsel* means DOE Patent Counsel assisting the contracting activity.

(6) *Practical application* means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(7) *Subject Invention* means any invention of the contractor conceived or first actually reduced to practice in the course of or under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of Principal Rights*—(1) *Assignment to the Government.* Except to the extent that rights are retained by the Contractor by a determination of greater rights in accordance with subparagraph (b)(2) of this clause or by a request for foreign patent rights in accordance with subparagraph (d)(2) of this clause, the Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention.

(2) *Greater rights determinations.* The Contractor, or an Contractor employee-inventor after consultation with the Contractor and with the written authorization of the Contractor in accordance with DOE patent waiver regulations, may request greater rights, including title, in an identified subject invention than the nonexclusive license and the foreign patent rights provided for in paragraph (d) of this clause, in accordance with the DOE patent waiver regulations. Such a request shall be submitted in writing to Patent Counsel with a copy to the Contracting Officer at the time the subject invention is first disclosed to DOE in accordance with subparagraph (c)(2) of this clause, or not later than eight (8) months after such disclosure, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. DOE may grant or refuse to grant

such a request by the Contractor or Contractor employee-inventor. Unless otherwise provided in the greater rights determination, any rights in a subject invention obtained by the Contractor pursuant to a determination of greater rights are subject to a nonexclusive, nontransferable, irrevocable, paid-up license to the Government to practice or have practiced the subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency), and to any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(c) *Subject Invention Disclosures*—(1) *Contractor procedures for reporting subject inventions to Contractor personnel.* Subject inventions shall be reported to Contractor personnel responsible for patent matters within six (6) months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this contract. Accordingly, the Contractor shall establish and maintain effective procedures for ensuring such prompt identification and timely disclosure of subject inventions to Contractor personnel responsible for patent matters, and the procedures shall include the maintenance of laboratory notebooks, or equivalent records, and other records that are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and the maintenance of records demonstrating compliance with such procedures. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation of the effectiveness of such procedures by the Contracting Officer.

(2) *Subject invention disclosure.* The Contractor shall disclose each subject invention to Patent Counsel with a copy to the Contracting Officer within two (2) months after the subject invention is reported to Contractor personnel responsible for patent matters, in accordance with subparagraph (c)(1) of this clause, or, if earlier, within six (6) months after the Contractor has knowledge of the subject invention, but in any event before any on sale, public use, or publication of the subject invention. The disclosure to DOE shall be in the form of a written report and shall include:

(i) the contract number under which the subject invention was made;

(ii) the inventor(s) of the subject invention;

(iii) a description of the subject invention in sufficient technical detail to convey a clear understanding of the nature, purpose and operation of the subject invention, and of the physical, chemical, biological or electrical characteristics of the subject invention, to the extent known by the Contractor at the time of the disclosure;

(iv) the date and identification of any publication, on sale or public use of the invention;

(v) the date and identification of any submissions for publication of any manuscripts describing the invention, and a statement of whether the manuscript is accepted for publication, to the extent known by the Contractor at the time of the disclosure;

(vi) a statement indicating whether the subject invention concerns exceptional circumstances pursuant to 35 U.S.C. 202(ii), related to national security, or subject to a treaty or an international agreement, to the extent known or believed by Contractor at the time of the disclosure;

(vii) all sources of funding by Budget and Resources (B&R) code; and

(viii) the identification of any agreement relating to the subject invention, including Cooperative Research and Development Agreements and Work-for-Others agreements. Unless the Contractor contends otherwise in writing at the time the invention is disclosed, inventions disclosed to DOE under this paragraph are deemed made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908.

(3) *Publication after disclosure.* After disclosure of the subject invention to the DOE, the Contractor shall promptly notify Patent Counsel of the acceptance for publication of any manuscript describing the subject invention or of any expected or on sale or public use of the subject invention, known by the Contractor.

(4) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract, and to execute all papers necessary to file patent applications claiming subject inventions or to establish the Government's rights in the subject inventions. This disclosure format shall at a minimum include the information required by subparagraph (c)(2) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(5) *Contractor procedures for reporting subject inventions to DOE.* The Contractor agrees to establish and maintain effective procedures for ensuring the prompt identification and timely disclosure of subject inventions to DOE. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation of the effectiveness of such procedures by the Contracting Officer.

(6) *Duplication and disclosure of documents.* The Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause; provided, however, that any such duplication or disclosure by the Government is subject to 35 U.S.C. 205 and 37 CFR 401.13.

(d) *Minimum Rights of the Contractor.* (1) Contractor License. (i) *Request for a Contractor license.* Except for subject inventions that the Contractor fails to disclose within the time periods specified at subparagraph (c)(2) of this clause, the Contractor may request a revocable, nonexclusive, royalty-free license in each patent application filed in any country claiming a subject invention and any resulting patent in which the Government obtains title, and DOE may grant or refuse to grant such a request by the Contractor. If DOE grants the Contractor's request for a license, the Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded.

(ii) *Transfer of a Contractor license.* DOE shall approve any transfer of the Contractor's license in a subject invention, and DOE may determine the Contractor's license is non-transferrable, on a case-by-case basis.

(iii) *Revocation or modification of a Contractor license.* DOE may revoke or modify the Contractor's domestic license to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR Part 404 and DOE licensing regulations. DOE may not revoke the Contractor's domestic license in that field of use or the geographical areas in which the Contractor, its licensee, or its domestic subsidiaries or affiliates achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. DOE may revoke or modify the Contractor's license in any foreign country to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates failed to achieve practical application in that foreign country.

(iv) *Notice of revocation or modification of a Contractor license.* Before revocation or modification of the license, DOE shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed thirty (30) days from the date of the notice (or such other time as may be authorized by DOE for good cause shown by the Contractor) to show cause why the license should not be revoked or modified. The Contractor has the right to appeal any decision concerning the revocation or modification of its license, in accordance with applicable regulations in 37 CFR Part 404 and DOE licensing regulations.

(2) *Contractor's right to request foreign patent rights.* If the Government has title to a subject invention and the Government decides against securing patent rights in a foreign country for the subject invention, the Contractor may request such foreign patent rights from DOE, and DOE may grant the Contractor's request, subject to a nonexclusive, nontransferable, irrevocable, paid-up license to the Government to practice or have practiced the subject invention in the foreign country, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee. Such a request shall be submitted in writing to the Patent Counsel as part of the disclosure required by subparagraph (c)(2) of this clause, with a copy to the DOE Contracting Officer, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. DOE may grant or refuse to grant such a request, and may consider whether granting the Contractor's request best serves the interests of the United States.

(e) *Examination of Records Relating to Inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including laboratory notebooks), records, and documents and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, or to determine Contractor (and inventor) compliance with the requirements of this clause, including proper identification and disclosure of subject inventions, and establishment and maintenance of invention disclosure procedures.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(f) *Subcontracts*—(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—nonprofit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause

at 48 CFR 952.227–11, suitably modified to identify the parties in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202(a)(ii).

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations and small business firms.* Except for the subcontracts described in subparagraph (f)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties, in any contract for experimental, developmental, demonstration or research work.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to those matters covered by this clause.

(5) *Subcontractor refusal to accept terms of patent rights clause.* If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such a refusal, including any relevant information for expediting disposition of the matter, and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention, with a copy of the notification and identification to the Contracting Officer.

(g) *Atomic Energy*—(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent Agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of subparagraph (g)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(h) *Publication.* The Contractor shall receive approval from Patent Counsel prior to releasing or publishing information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract, to ensure such release or publication does not adversely affect the patent interests of DOE or the Contractor.

(i) *Communications.* The Contractor shall direct any notification, disclosure, or request provided for in this clause to the Patent Counsel assisting the DOE contracting activity, with a copy of the communication to the Contracting Officer.

(j) *Reports*—(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a specified period, or a statement that no subject inventions were made during the specified period; and/or a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement that no such subcontracts were awarded during the specified period. The interim report shall state whether the Contractor's invention disclosures were submitted to DOE in accordance with the requirements of subparagraphs (c)(1) and (c)(5) of this clause.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract or within three (3) months of the date of completion of the contracted work, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and/or a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period, or a statement that no such subcontracts were awarded during the contract performance period.

(k) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the Government

at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(l) *Classified Inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(m) *Patent Functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(n) *Annual Appraisal by Patent Counsel.* Patent Counsel may conduct an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(End of clause)

970.5227–12 Patent rights—management and operating contracts, for-profit contractor, advance class waiver.

Insert the following clause in solicitations and contracts in accordance with 970.2703–1(b)(3):

PATENT RIGHTS—MANAGEMENT AND OPERATING CONTRACTS, FOR-PROFIT CONTRACTOR, ADVANCE CLASS WAIVER (DEC 2000)

(a) *Definitions.* (1) *DOE licensing regulations* means the Department of Energy patent licensing regulations at 10 CFR Part 781.

(2) *DOE patent waiver regulations* means the Department of Energy patent waiver regulations at 10 CFR Part 784.

(3) *Exceptional Circumstance Subject Invention* means any subject invention in a technical field or related to a task determined by the Department of Energy to be subject to an exceptional circumstance under 35 U.S.C. 202(a)(ii), and in accordance with 37 CFR 401.3(e).

(4) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

(5) *Made* when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(6) *Patent Counsel* means DOE Patent Counsel assisting the contracting activity.

(7) *Practical application* means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(8) *Subject Invention* means any invention of the contractor conceived or first actually reduced to practice in the course of or under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of Principal Rights*—(1) *Assignment to the Government.* Except to the extent that rights are retained by the Contractor by the granting of an advance class waiver pursuant to subparagraph (b)(2) of this clause or a determination of greater rights pursuant to subparagraph (b)(7) of this clause, the Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention.

(2) *Advance class waiver of Government rights to the Contractor.* DOE may grant to the Contractor an advance class waiver of Government rights in any or all subject inventions, at the time of execution of the contract, such that the Contractor may elect to retain

the entire right, title and interest throughout the world to such waived subject inventions, in accordance with the terms and conditions of the advance class waiver. Unless otherwise provided by the terms of the advance class waiver, any rights in a subject invention retained by the Contractor under an advance class waiver are subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in subparagraph (b)(3) of this clause, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(3) *Government license.* With respect to any subject invention to which the Contractor retains title, either under an advance class waiver pursuant to subparagraph (b)(2) or a determination of greater rights pursuant to subparagraph (b)(7) of this clause, the Government has a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(4) *Foreign patent rights.* If the Government has title to a subject invention and the Government decides against securing patent rights in a foreign country for the subject invention, the Contractor may request such foreign patent rights from DOE, and DOE may grant the Contractor's request, subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in subparagraph (b)(3) of this clause, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(5) *Exceptional circumstance subject inventions.* Except to the extent that rights are retained by the Contractor by a determination of greater rights in accordance with subparagraph (b)(7) of this clause, the Contractor does not have the right to retain title to any exceptional circumstance subject inventions and agrees to assign to the Government the entire right, title, and interest, throughout the world, in and to any exceptional circumstance subject inventions.

(i) Inventions within or relating to the following fields of technology are exceptional circumstance subject inventions:

(A) uranium enrichment technology;

(B) storage and disposal of civilian high-level nuclear waste and spent fuel technology; and

(C) national security technologies classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168).

(ii) Inventions made under any agreement, contract or subcontract related to the following initiatives or programs are exceptional circumstance subject inventions:

(A) DOE Steel Initiative and Metals Initiative;

(B) U.S. Advanced Battery Consortium; and

(C) any funding agreement which is funded in part by the Electric Power Research Institute (EPRI) or the Gas Research Institute (GRI).

(iii) DOE reserves the right to unilaterally amend this contract to modify, by deletion or insertion, technical fields, programs, initiatives, and/or other classifications for the purpose of defining DOE exceptional circumstance subject inventions.

(6) *Treaties and international agreements.* Any rights acquired by the Contractor in subject inventions are subject to any disposition of right, title, or interest in or to subject inventions provided for in treaties or international agreements identified at Appendix [*Insert Reference*], to this contract. DOE reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into or to be entered into by the Government after the effective date of this contract and to effectuate those license or other rights which are necessary for the Government to meet its obligations to foreign governments, their nationals and international organizations under such treaties or international agreements with respect to subject inventions made after the date of the amendment.

(7) *Contractor request for greater rights.* The Contractor may request greater rights in an identified subject invention, including an exceptional circumstance subject invention, to which the Contractor does not have the right to elect to retain title, in accordance with the DOE patent waiver regulations, by submitting such a request in writing to Patent Counsel with a copy to the Contracting Officer at the time the subject invention is first disclosed to DOE pursuant to subparagraph (c)(1) of this clause, or not later than eight (8) months after such disclosure, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. DOE may grant or refuse to grant such a request by the Contractor. Unless otherwise provided in the greater rights determination, any rights in a subject invention obtained by the Contractor under a determination of greater rights is subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in subparagraph (b)(3) of this clause, and to any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(8) *Contractor employee-inventor rights.* If the Contractor does not elect to retain title to a subject invention or does not request greater rights in a subject invention, including an exceptional circumstance subject invention, to which the Contractor does not have the right to elect to retain title, a Contractor employee-inventor, after consultation with the Contractor and with written authorization from the Contractor in accordance with 10 CFR 784.9(b)(4), may request

greater rights, including title, in the subject invention or the exceptional circumstance invention from DOE, and DOE may grant or refuse to grant such a request by the Contractor employee-inventor.

(9) *Government assignment of rights in Government employees' subject inventions.* If a DOE employee is a joint inventor of a subject invention to which the Contractor has rights, DOE may assign or refuse to assign any rights in the subject invention acquired by the Government from the DOE employee to the Contractor, consistent with 48 CFR 27.304–1(d). Unless otherwise provided in the assignment, the rights assigned to the Contractor are subject to the Government license provided for in subparagraph (b)(3) of this clause, and to any provision of this clause applicable to subject inventions in which rights are retained by the Contractor, and to any reservations and conditions deemed appropriate by the Secretary of Energy or designee. The Contractor shall share royalties collected for the manufacture, use or sale of the subject invention with the DOE employee.

(c) *Subject Invention Disclosure, Election of Title, and Filing of Patent Application by Contractor*—(1) *Subject invention disclosure.* The Contractor shall disclose each subject invention to Patent Counsel with a copy to the Contracting Officer within two (2) months after an inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within six (6) months after the Contractor has knowledge of the subject invention, but in any event before any on sale, public use, or publication of the subject invention. The disclosure to DOE shall be in the form of a written report and shall include:

(i) the contract number under which the subject invention was made;

(ii) the inventor(s) of the subject invention;

(iii) a description of the subject invention in sufficient technical detail to convey a clear understanding of the nature, purpose and operation of the subject invention, and of the physical, chemical, biological or electrical characteristics of the subject invention, to the extent known by the Contractor at the time of the disclosure;

(iv) the date and identification of any publication, on sale or public use of the invention;

(v) the date and identification of any submissions for publication of any manuscripts describing the invention, and a statement of whether the manuscript is accepted for publication, to the extent known by the Contractor at the time of the disclosure;

(vi) a statement indicating whether the subject invention is an exceptional circumstance subject invention, related to national security, or subject to a treaty or an international agreement, to the extent known or believed by Contractor at the time of the disclosure;

(vii) all sources of funding by Budget and Resources (B&R) code; and

(viii) the identification of any agreement relating to the subject invention, including Cooperative Research and Development Agreements and Work-for-Others agreements.

Unless the Contractor contends otherwise in writing at the time the invention is disclosed, inventions disclosed to DOE under this paragraph are deemed made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908.

(2) *Publication after disclosure.* After disclosure of the subject invention to the DOE, the Contractor shall promptly notify Patent Counsel of the acceptance for publication of any manuscript describing the subject invention or of any expected or on sale or public use of the subject invention, known by the Contractor. The Contractor shall obtain approval from Patent Counsel prior to any release or publication of information concerning an exceptional circumstance subject invention or any subject invention related to a treaty or international agreement.

(3) *Election by the Contractor under an advance class waiver.* If the Contractor has the right to elect to retain title to subject inventions under an advance class waiver granted in accordance with subparagraph (b)(2) of this clause, and unless otherwise provided for by the terms of the advance class waiver, the Contractor shall elect in writing whether or not to retain title to any subject invention by notifying DOE within two (2) years of the date of the disclosure of the subject invention to DOE, in accordance with subparagraph (c)(1) of this clause. The notification shall identify the advance class waiver, state the countries, including the United States, in which rights are retained, and certify that the subject invention is not an exceptional circumstance subject invention or subject to a treaty or international agreement. If a publication, on sale or public use of the subject invention has initiated the 1-year statutory period under 35 U.S.C. 102(b), the period for election may be shortened by DOE to a date that is no more than sixty (60) days prior to the end of the 1-year statutory period.

(4) *Filing of patent applications by the Contractor under an advance class waiver.* If the Contractor has the right to retain title to a subject invention in accordance with an advance class waiver pursuant to subparagraph (b)(2) of this clause or a determination of greater rights pursuant to paragraph (b)(7) of this clause, and unless otherwise provided for by the terms of the advance class waiver or greater rights determination, the Contractor shall file an initial patent application claiming the subject invention to which it retains title either within one (1) year

after the Contractor's election to retain or grant of title to the subject invention or prior to the end of any 1-year statutory period under 35 U.S.C. 102(b), whichever occurs first. Any patent applications filed by the Contractor in foreign countries or international patent offices shall be filed within either ten (10) months of the corresponding initial patent application or, if such filing has been prohibited by a Secrecy Order, within six (6) months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications.

(5) *Submission of patent information and documents.* If the Contractor files a domestic or foreign patent application claiming a subject invention, the Contractor shall promptly submit to Patent Counsel the following information and documents:

(i) The filing date, serial number, title, and a copy of the patent application (including an English-language version if filed in a language other than English);

(ii) An executed and approved instrument fully confirmatory of all Government rights in the subject invention; and

(iii) The patent number, issue date, and a copy of any issued patent claiming the subject invention.

(6) *Contractor's request for an extension of time.* Requests for an extension of the time to disclose a subject invention, to elect to retain title to a subject invention, or to file a patent application under subparagraphs (c)(1), (3), and (4) of this clause may be granted at the discretion of Patent Counsel or DOE.

(7) *Duplication and disclosure of documents.* The Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause; provided, however, that any such duplication or disclosure by the Government is subject to 35 U.S.C. 205 and 37 CFR Part 40.

(d) *Conditions When the Government May Obtain Title Notwithstanding an Advance Class Waiver*—(1) *Return of title to a subject invention.* If the Contractor requests that DOE acquire title or rights from the Contractor in a subject invention, including an exceptional circumstance subject invention, to which the Contractor retained title or rights under subparagraph (b)(2) or subparagraph (b)(7) of this clause, DOE may acquire such title or rights from the Contractor, or DOE may decide against acquiring such title or rights from the Contractor, at DOE's sole discretion.

(2) *Failure to disclose or elect to retain title.* Title vests in DOE and DOE may request, in writing, a formal assignment of title to a subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE, if the Contractor elects not to retain title to the subject invention under an advance class waiver, or the Contractor fails to disclose or fails to elect to retain title to the subject invention within the times specified in subparagraphs (c)(1) and (c)(3) of this clause.

(3) *Failure to file domestic or foreign patent applications.* In those countries in which the Contractor fails to file a patent application within the times specified in subparagraph (c)(4) of this clause, DOE may request, in writing, title to the subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE; provided, however, that if the Contractor has filed a patent application in any country after the times specified in subparagraph (c)(4) of this clause, but prior to its receipt of DOE's written request for title, the Contractor continues to retain title in that country.

(4) *Discontinuation of patent protection by the Contractor.* If the Contractor decides to discontinue the prosecution of a patent application, the payment of maintenance fees, or the defense of a subject invention in a reexamination or opposition proceeding, in any country, DOE may request, in writing, title to the subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE.

(5) *Termination of advance class waiver.* DOE may request, in writing, title to any subject inventions from the Contractor, and the Contractor shall convey title to the subject inventions to DOE, if the advance class waiver granted under subparagraph (b)(2) of this clause is terminated under paragraph (u) of this clause.

(e) *Minimum Rights of the Contractor*—(1) *Request for a Contractor license.* Except for subject inventions that the Contractor fails to disclose within the time periods specified at subparagraph (c)(1) of this clause, the Contractor may request a revocable, nonexclusive, royalty-free license in each patent application filed in any country claiming a subject invention and any resulting patent in which the Government obtains title, and DOE may grant or refuse to grant such a request by the Contractor. If DOE grants the Contractor's request for a license, the Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded.

(2) *Transfer of a Contractor license.* DOE shall approve any transfer of the Contractor's license in a subject invention, and DOE may determine that the Contractor's license is non-transferrable, on a case-by-case basis.

(3) *Revocation or modification of a Contractor license.* DOE may revoke or modify the Contractor's domestic license to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR Part 404 and DOE licensing regulations. DOE may not revoke the Contractor's domestic license in that field of use or the geographical areas in which the Contractor, its licensees or its domestic subsidiaries or affiliates have achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. DOE may revoke or modify the Contractor's license in any foreign country to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates failed to achieve practical application in that foreign country.

(4) *Notice of revocation or modification of a Contractor license.* Before revocation or modification of the license, DOE shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed thirty (30) days from the date of the notice (or such other time as may be authorized by DOE for good cause shown by the Contractor) to show cause why the license should not be revoked or modified. The Contractor has the right to appeal any decision concerning the revocation or modification of its license, in accordance with applicable regulations in 37 CFR Part 404 and DOE licensing regulations.

(f) Contractor Action to Protect the Government's Interest. (1) *Execution and delivery of title or license instruments.* The Contractor agrees to execute or have executed, and to deliver promptly to DOE all instruments necessary to accomplish the following actions:

(i) establish or confirm the Government's rights throughout the world in subject inventions to which the Contractor elects to retain title;

(ii) convey title in a subject invention to DOE pursuant to subparagraph (b)(5) and paragraph (d) of this clause; or

(iii) enable the Government to obtain patent protection throughout the world in a subject invention to which the Government has title.

(2) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract, and to execute all papers necessary to file patent applications claiming subject inventions or to establish the Government's rights in the subject inventions. This disclosure format shall at a minimum include the information required by subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) *Contractor procedures for reporting subject inventions to DOE.* The Contractor agrees to establish and maintain effective procedures for ensuring the prompt identification and timely disclosure of subject inventions to DOE. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation and approval of the effectiveness of such procedures by the Contracting Officer.

(4) *Notification of discontinuation of patent protection.* With respect to any subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall notify Patent Counsel of any decision to discontinue the prosecution of a patent application, payment of maintenance fees, or defense of a subject invention in a reexamination or opposition proceeding, in any country, not less than thirty (30) days before the expiration of the response period for any action required by the corresponding patent office.

(5) *Notification of Government rights.* With respect to any subject invention to which the Contractor has title, the Contractor agrees to include, within the specification of any United States patent application and within any patent issuing thereon claiming a subject invention, the following statement, ''This invention was made with Government support under (identify the contract) awarded by the United States Department of Energy. The Government has certain rights in the invention.''

(6) *Avoidance of Royalty Charges.* If the Contractor licenses a subject invention, the Contractor agrees to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the subject invention to any party.

(7) *DOE approval of assignment of rights.* Rights in a subject invention in the United States may not be assigned by the Contractor without the approval of DOE.

(8) *Small business firm licensees.* The Contractor shall make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and may give a preference to a small business firm when licensing a subject invention if the Contractor determines

that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision as to whether to give a preference in any specific case is at the discretion of the Contractor.

(9) *Contractor licensing of subject inventions.* To the extent that it provides the most effective technology transfer, licensing of subject inventions shall be administered by Contractor employees on location at the facility.

(g) *Subcontracts*—(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—nonprofit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 48 CFR 952.227–11, suitably modified to identify the parties, in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202 and subparagraph (b)(5) of this clause.

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations or small business firms.* Except for the subcontracts described in subparagraph (g)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties and any applicable exceptional circumstance, in any contract for experimental, developmental, demonstration or research work.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to those matters covered by this clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(5) Subcontractor refusal to accept terms of patent rights clause. If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such refusal and including relevant information for expediting disposition of the matter; and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention, with a copy of the notification and identification to the Contracting Officer.

(h) *Reporting on Utilization of Subject Inventions.* Upon request by DOE, the Contractor agrees to submit periodic reports, no more frequently than annually, describing the utilization of a subject invention or efforts made by the Contractor or its licensees or assignees to obtain utilization of the subject invention. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information reasonably specified by DOE. Upon request by DOE, the Contractor also agrees to provide reports in connection with any march-in proceedings undertaken by DOE, in accordance with paragraph (j) of this clause. If any data or information reported by the Contractor in accordance with this provision is considered privileged and confidential by the Contractor, its licensee, or assignee and the Contractor properly marks the data or information privileged or confidential, DOE agrees not to disclose such information to persons outside the Government, to the extent permitted by law.

(i) *Preference for United States Industry.* Notwithstanding any other provision of this clause the Contractor agrees that with respect to any subject invention in which it retains title, neither it nor any assignee may grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, DOE may waive the requirement for such an agreement upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to

manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *March-In Rights.* With respect to any subject invention to which the Contractor has elected to retain or is granted title, DOE may, in accordance with the procedures in the DOE patent waiver regulations, require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances. If the Contractor, assignee or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that—

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs that are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by government regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement to substantially manufacture in the United States and required by paragraph (i) of this clause has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Communications.* The Contractor shall direct any notification, disclosure, or request provided for in this clause to the Patent Counsel identified in the contract.

(l) *Reports*—(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a specified period, or a statement that no subject inventions were made during the specified period; and/or a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement that no such subcontracts were awarded during the specified period. The interim report shall state whether the Contractor's invention disclosures were submitted to DOE in accordance with the requirements of subparagraphs (f)(3) and (f)(4) of this clause.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract or within three (3) months of the date of completion of the contracted work, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and/or a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period, or a statement that no such subcontracts were awarded during the contract performance period.

(m) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(n) *Atomic Energy*—(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent Agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of subparagraph (o)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(o) *Classified Inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a

classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(p) *Examination of Records Relating to Inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including laboratory notebooks), records, and documents and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, including exceptional circumstance subject inventions, or to determine Contractor (and inventor) compliance with the requirements of this clause, including proper identification and disclosure of subject inventions, and establishment and maintenance of invention disclosure procedures.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(4) *Power of inspection.* With respect to a subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall furnish the Government, upon request by DOE, an irrevocable power to inspect and make copies of a prosecution file for any patent application claiming the subject invention.

(q) *Patent Functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(r) *Educational Awards Subject to 35 U.S.C. 212.* The Contractor shall notify the Contracting Officer prior to the placement of any person subject to 35 U.S.C. 212 in an area of technology or task (1) related to exceptional circumstance technology or (2) any person who is subject to treaties or international agreements as set forth in paragraph (b)(6) of this clause or to agreements other than funding agreements. The Contracting Officer may disapprove of any such placement.

(s) *Annual Appraisal by Patent Counsel.* Patent Counsel may conduct an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(t) *Publication.* The Contractor shall receive approval from Patent Counsel prior to releasing or publishing information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract, to ensure such release or publication does not adversely affect the patent rights of DOE or the Contractor.

(u) *Termination of Contractor's Advance Class Waiver.* If a request by the Contractor for an advance class waiver pursuant to subparagraph (b)(2) of this clause or a determination of greater rights pursuant to paragraph (c) of this clause contains false material statements or fails to disclose material facts, and DOE relies on the false statements or omissions in granting the Contractor's request, the waiver or grant of any Government rights (in whole or in part) to the subject invention(s) may be terminated at the discretion of the Secretary of Energy or designee. Prior to termination, DOE shall provide the Contractor with written notification of the termination, including a statement of facts in support of the termination, and the Contractor shall be allowed thirty (30) days, or a longer period authorized by the Secretary of Energy or designee for good cause shown in writing by the Contractor, to show cause for not terminating the waiver or grant. Any termination of an advance class waiver or a determination of greater rights is subject to the Contractor's license as provided for in paragraph (f) of this clause.

(End of clause)

Alternate 1 Weapons Related Subject Inventions. As prescribed at 970.2703–2(g), insert the following as subparagraphs (a)(9)and (b)(10), respectively:

(a) *Definitions.* (9) *Weapons Related Subject Invention* means any subject invention conceived or first actually reduced to practice in the course of or under work funded by or through defense programs, including Department of Defense and intelligence reimbursable work, or the Naval Nuclear Propulsion Program of the Department of Energy or the National Nuclear Security Administration.

(b) *Allocation of Principal Rights.* (10) *Weapons related subject inventions.* Except to the

extent that DOE is solely satisfied that the Contractor meets certain procedural requirements and DOE grants rights to the Contractor in weapons related subject inventions, the Contractor does not have a right to retain title to any weapons related subject inventions.

(End of alternate)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48571, July 25, 2002]

970.5228–1 Insurance—litigation and claims.

As prescribed in 48 CFR 970.2803–2, insert the following clause:

INSURANCE—LITIGATION AND CLAIMS (DEC 2000)

(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.''

(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 48 CFR part 31, as supplemented by 48 CFR 970.31, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons, including employees but excluding costs incidental to worker's compensation actions, (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by contractor managerial personnel'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 970.5245–1.

(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.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 66 FR 4627, Jan. 18, 2001; 67 FR 14873, Mar. 28, 2002]

970.5229–1 State and local taxes.

As prescribed in 48 CFR 970.2904–1(b), insert the following clause in management and operating contracts. The requirement for the notice prescribed in paragraph (a) of the clause may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.

STATE AND LOCAL TAXES (DEC 2000)

(a) The contractor agrees to notify the contracting officer of any State or local tax, fee, or charge levied or purported to be levied on or collected from the contractor with respect to the contract work, any transaction thereunder, or property in the custody or control of the contractor and constituting an allowable item of cost if due and payable, but which the contractor has reason to believe, or the contracting officer has advised the contractor, is or may be inapplicable or invalid; and the contractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the contracting officer. Any State or local tax, fee, or charge paid with the approval of the contracting officer or on the basis of advice from the contracting officer that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

(b) The contractor agrees to take such action as may be required or approved by the contracting officer to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the contracting officer to seek recovery of any payments made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the Government to join with the contractor in any proceedings for the recovery thereof or to sue for recovery in the name of the contractor. If the contracting officer directs the contractor

to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the contractor for a tax, fee, or charge it has refrained from paying in accordance with this clause, the procedures and requirements of the clause entitled ''Insurance-Litigation and Claims'' shall apply and the costs and expenses incurred by the contractor shall be allowable items of costs, as provided in this contract, together with the amount of any judgment rendered against the contractor.

(c) The Government shall hold the contractor harmless from penalties and interest incurred through compliance with this clause. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government.

(End of clause)

970.5231–4 Preexisting conditions.

As prescribed in 48 CFR 970.3170, insert the following clause:

PREEXISTING CONDITIONS (DEC 2000)

(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.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.3170 (a), in contracts with incumbent management and operating contractors, substitute the following for paragraph (a) of the basic clause:

(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 (DEC 2000). As prescribed in 48 CFR 970.3170 (b), add the following paragraph (c) to the basic clause in contracts with management and operating contractors not previously working at that particular site or facility:

(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.

(End of clause)

970.5232–1 Reduction or suspension of advance, partial, or progress payments upon finding of substantial evidence of fraud.

As prescribed in 48 CFR 970.3200–1–1, insert the following clause:

REDUCTION OR SUSPENSION OF ADVANCE, PARTIAL, OR PROGRESS PAYMENTS (DEC 2000)

(a) The contracting officer may reduce or suspend further advance, partial, or progress payments to the contractor upon a written determination by the Senior Procurement Executive that substantial evidence exists that the contractor's request for advance, partial, or progress payment is based on fraud.

(b) The contractor shall be afforded a reasonable opportunity to respond in writing.

(End of clause)

970.5232–2 Payments and advances.

As prescribed in 48 CFR 970.3270(a)(1), insert the following clause:

PAYMENTS AND ADVANCES (DEC 2000)

(a) *Installments of fixed-fee.* The fixed-fee payable under this contract shall become due and payable in periodic installments in accordance with a schedule determined by the contracting officer. 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 payments cleared financing arrangement without prior written approval of the contracting officer.

(b) *Payments on Account of Allowable Costs.* The contracting officer and the contractor shall agree as to the extent to which payment for allowable costs or payments for other items specifically approved in writing by the contracting officer (for example, negotiated fixed amounts) shall be made from advances of Government funds. When pension contributions are paid by the contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from costs for payment purposes until such costs are paid. If pension contribution are paid on a quarterly or more frequent basis, accrual therefor may be included in costs for payment purposes, provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from cost for payment purposes until payment has been made.

(c) *Special financial institution account—use.* All advances of Government funds shall be withdrawn pursuant to a payments cleared financing arrangement prescribed by DOE in favor of the financial institution or, at the option of the Government, shall be made by direct payment or other payment mechanism to the contractor, and shall be deposited only in the special financial institution account referred to in the Special Financial Institution Account Agreement, which is incorporated into this contract as Appendix—. No part of the funds in the special financial institution account shall be commingled with any funds of the contractor or used for a purpose other than that of making payments for costs allowable and, if applicable, fees earned under this contract, negotiated fixed amounts, or payments for other items specifically approved in writing by the contracting officer. If the contracting officer determines that the balance of such special financial institution account exceeds the contractor's current needs, the contractor shall promptly make such disposition of the excess as the contracting officer may direct.

(d) *Title to funds advanced.* Title to the unexpended balance of any funds advanced and of any special financial institution account established pursuant to this clause shall remain in the Government and be superior to any claim or lien of the financial institution of deposit or others. It is understood that an advance to the contractor hereunder is not a loan to the contractor, and will not require the payment of interest by the contractor, and that the contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.

(e) *Financial settlement.* The Government shall promptly pay to the contractor the unpaid balance of allowable costs (or other items specifically approved in writing by the contracting officer) and fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after:

(1) Compliance by the contractor with DOE's patent clearance requirements, and

(2) The furnishing by the contractor of:

(i) An assignment of the contractor's rights to any refunds, rebates, allowances, accounts receivable, collections accruing to the contractor in connection with the work under this contract, or other credits applicable to allowable costs under the contract;

(ii) A closing financial statement;

(iii) The accounting for Government-owned property required by the clause entitled ''Property''; and

(iv) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract subject only to the following exceptions:

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible to exact statement by the contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the contractor to third parties arising out of the performance of this contract; provided that such claims are not known to the contractor on the date of the execution of the release; and provided further that the contractor gives notice of such claims in writing to the contracting officer promptly, but not more than one (1) year after the contractor's right of action first accrues. In addition, the contractor shall provide prompt notice to the contracting officer of all potential claims under this clause, whether in litigation or not (see also Contract Clause___, DEAR 970.5228–1, ''Insurance—Litigation and Claims'');

(C) Claims for reimbursement of costs (other than expenses of the contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the contractor under the provisions of this contract relating to patents; and

(D) Claims recognizable under the clause entitled, Nuclear Hazards Indemnity Agreement.

(3) In arriving at the amount due the contractor under this clause, there shall be deducted,

(i) Any claim which the Government may have against the contractor in connection with this contract, and

(ii) Deductions due under the terms of this contract, and not otherwise recovered by or credited to the Government. The unliquidated balance of the special financial institution account may be applied to the amount due and any balance shall be returned to the Government forthwith.

(f) *Claims.* Claims for credit against funds advanced for payment shall be accompanied by such supporting documents and justification as the contracting officer shall prescribe.

(g) *Discounts.* The contractor shall take and afford the Government the advantage of all known and available cash and trade discounts, rebates, allowances, credits, salvage, and commissions unless the contracting officer finds that action is not in the best interest of the Government.

(h) *Collections.* All collections accruing to the contractor in connection with the work under this contract, except for the contractor's fee and royalties or other income accruing to the contractor from technology transfer activities in accordance with this contract, shall be Government property and shall be processed and accounted for in accordance with applicable requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract and, to the extent consistent with those requirements, shall be deposited in the special financial institution account or otherwise made available for payment of allowable costs under this contract, unless otherwise directed by the contracting officer.

(i) *Direct payment of charges.* The Government reserves the right, upon ten days written notice from the contracting officer to the contractor, to pay directly to the persons concerned, all amounts due which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the contractor therefor.

(j) *Determining allowable costs.* The contracting officer shall determine allowable costs in accordance with the Federal Acquisition Regulation subpart 31.2 and the Department of Energy Acquisition Regulation subpart 48 CFR 970.31 in effect on the date of this contract and other provisions of this contract.

Alternate I (DEC 2000). As prescribed in 48 CFR 970.3270(a)(1)(i), if a separate fixed-fee is provided for a separate item of work, paragraph (a) of the basic clause should be modified to permit payment of the entire fixed-fee upon completion of that item.

Alternate II (DEC 2000). As prescribed in 48 CFR 970.3270(a)(1)(ii), when total available fee provisions are used, replace paragraph (a) of the basic clause with the following paragraph (a):

(a) *Payment of Total available fee: Base Fee and Performance Fee.* The base fee amount, if any, is payable in equal monthly installments. Total available fee amount earned is payable following the Government's Determination of Total Available Fee Amount Earned in accordance with the clause of this contract entitled ''Total Available Fee: Base Fee Amount and Performance Fee Amount.'' Base fee amount and total available fee 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 amount or total available fee amount earned payment may be withdrawn against the payments cleared financing arrangement without the prior written approval of the contracting officer.

Alternate III (DEC 2000). As prescribed in 48 CFR 970.3270(a)(1)(iii), the following paragraph (k) shall be included in management and operating contracts with integrated accounting systems:

(k) Review and approval of costs incurred. The contractor shall prepare and submit annually as of September 30, a ''Statement of Costs Incurred and Claimed'' (Cost Statement) for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the Cost Statement. The contractor shall certify the Cost Statement subject to the penalty provisions for unallowable costs as stated in sections 306(b) and (i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256), as amended. DOE, after audit and appropriate adjustment, will approve such Cost Statement. This approval by DOE will constitute an acknowledgment by DOE that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the contractor in accordance with DOE accounting policies, but will not relieve the contractor of responsibility for DOE's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to DOE.

Alternate IV (DEC 2000). As prescribed in 48 CFR 970.3270(a)(1)(iv), the following paragraph (k) shall be included in management and operating contracts without integrated accounting systems:

(k) *Certification and penalties.* The contractor shall prepare and submit a ''Statement of Costs Incurred and Claimed'' (Cost Statement) for the total of net expenditures incurred for the period covered by the Cost Statement. It is anticipated that this will be an annual submission unless otherwise agreed to by the contracting officer. The contractor shall certify the Cost Statement subject to the penalty provisions for unallowable costs as stated in sections 306(b) and (i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256), as amended.

970.5232–3 Accounts, records, and inspection.

As prescribed in 48 CFR 970.3270(a)(2), insert the following clause:

ACCOUNTS, RECORDS, AND INSPECTION (JUN 2007)

(a) *Accounts.* The contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting: all allowable costs incurred; collections accruing to the contractor in connection with the work under this contract, other applicable credits, negotiated fixed amounts, and fee accruals under this contract; and the receipt, use, and disposition of all Government property coming into the possession of the contractor under this contract. The system of accounts employed by the contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

(b) *Inspection and audit of accounts and records.* All books of account and records relating to this contract shall be subject to inspection and audit by DOE or its designees in accordance with the provisions of Clause ___, Access to and ownership of records, at all reasonable times, before and during the period of retention provided for in paragraph (d) of this clause, and the contractor shall afford DOE proper facilities for such inspection and audit.

(c) *Audit of subcontractors' records.* The contractor also agrees, with respect to any subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the contracting officer.

(d) *Disposition of records.* Except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under 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 progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as otherwise provided in this contract, including provisions of Clause___, Access to and ownership of records, all other records in the possession of the contractor relating to this contract shall be preserved by the contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the contractor.

(e) *Reports.* The contractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this contract as the contracting officer may from time to time require.

(f) *Inspections.* The DOE shall have the right to inspect the work and activities of the contractor under this contract at such time and in such manner as it shall deem appropriate.

(g) *Subcontracts.* The contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through (g) and paragraph (h) of this clause in all subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

(h) *Comptroller General.* (1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.

(2) This paragraph may not be construed to require the contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(3) Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

(i) *Internal audit.* The contractor agrees to design and maintain an internal audit plan and an internal audit organization.

(1) Upon contract award, the exercise of any contract option, or the extension of the contract, the contractor must submit to the contracting officer for approval an Internal

Audit Implementation Design to include the overall strategy for internal audits. The Audit Implementation Design must describe:

(i) The internal audit organization's placement within the contractor's organization and its reporting requirements;

(ii) The audit organization's size and the experience and educational standards of its staff;

(iii) The audit organization's relationship to the corporate entities of the contractor;

(iv) The standards to be used in conducting the internal audits;

(v) The overall internal audit strategy of this contract, considering particularly the method of auditing costs incurred in the performance of the contract;

(vi) The intended use of external audit resources;

(vii) The plan for audit of subcontracts, both pre-award and post-award; and

(viii) The schedule for peer review of internal audits by other contractor internal audit organizations, or other independent third party audit entities approved by the DOE contracting officer.

(2) By each January 31 of the contract performance period, the contractor must submit an annual audit report, providing a summary of the audit activities undertaken during the previous fiscal year. That report shall reflect the results of the internal audits during the previous fiscal year and the actions to be taken to resolve weaknesses identified in the contractor's system of business, financial, or management controls.

(3) By each June 30 of the contract performance period, the contractor must submit to the contracting officer an annual audit plan for the activities to be undertaken by the internal audit organization during the next fiscal year that is designed to test the costs incurred and contractor management systems described in the internal audit design.

(4) The contracting officer may require revisions to documents submitted under paragraphs (i)(1), (i)(2), and (i)(3) of this clause, including the design plan for the internal audits, the annual report, and the annual internal audits.

(j) *Remedies.* If at any time during contract performance, the contracting officer determines that unallowable costs were claimed by the contractor to the extent of making the contractor's management controls suspect, or the contractor's management systems that validate costs incurred and claimed suspect, the contracting officer may, in his or her sole discretion, require the contractor to cease using the special financial institution account in whole or with regard to specified accounts, requiring reimbursable costs to be claimed by periodic vouchering. In addition, the contracting officer, where he or she deems it appropriate, may: Impose a penalty under 970.5242–1, Penalties for unallowable costs; require a refund; reduce the contractor's otherwise earned fee; and take such other action as authorized in law, regulation, or this contract.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.3270(a)(2)(i), if the contract includes the clause at 48 CFR 52.215–11, Price Reduction for Defective Cost or Pricing Data, the basic clause shall be modified as follows:

(a) Paragraph (a) of the basic clause shall be modified by adding the words ''or anticipated to be incurred'' after the words ''allowable costs incurred.''

(b) Paragraph (g) of the basic clause shall be modified by adding the following:

The contractor further agrees to include an ''Audit'' clause, the substance of which is the ''Audit'' clause set forth at 48 CFR 52.215–2, in each subcontract which does not include provisions similar to those in paragraph (a) through paragraph (g) and paragraph (h) of this clause, but which contains a ''defective cost or pricing data'' clause.

[65 FR 81009, Dec. 22, 2000, as amended at 72 FR 29081, May 24, 2007]

970.5232–4 Obligation of funds.

As prescribed in 48 CFR 970.3270(a)(3), insert the following clause:

OBLIGATION OF FUNDS (DEC 2000)

(a) *Obligation of funds.* The amount presently obligated by the Government with respect to this contract is ____ dollars ($____). Such amount may be increased unilaterally by DOE by written notice to the contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification of this contract). Estimated collections from others for work and services to be performed under this contract are not included in the amount presently obligated. Such collections, to the extent actually received by the contractor, shall be processed and accounted for in accordance with applicable requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract. Nothing in this paragraph is to be construed as authorizing the contractor to exceed limitations stated in financial plans established by DOE and furnished to the contractor from time to time under this contract.

(b) *Limitation on payment by the Government.* Except as otherwise provided in this contract and except for costs which may be incurred by the contractor pursuant to the Termination clause of this contract or costs

of claims allowable under the contract occurring after completion or termination and not released by the contractor at the time of financial settlement of the contract in accordance with the clause entitled ''Payments and Advances,'' payment by the Government under this contract on account of allowable costs shall not, in the aggregate, exceed the amount obligated with respect to this contract, less the contractor's fee and any negotiated fixed amount. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of:

(1) collections accruing to the contractor in connection with the work under this contract and processed and accounted for in accordance with applicable requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract, and

(2) other funds which DOE may legally use for such purpose, provided DOE will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available.

(c) *Notices—Contractor excused from further performance.* The contractor shall notify DOE in writing whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause), plus the contractor's best estimate of collections to be received and available during the ____ day period hereinafter specified, is in the contractor's best judgment sufficient to continue contract operations at the programmed rate for only ____ days and to cover the contractor's unpaid fee and any negotiated fixed amounts, and outstanding encumbrances and liabilities on account of costs allowable under the contract at the end of such period. Whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause), less the amount of the contractor's fee then earned but not paid and any negotiated fixed amounts, is in the contractor's best judgment sufficient only to liquidate outstanding encumbrances and liabilities on account of costs allowable under this contract, the contractor shall immediately notify DOE and shall make no further encumbrances or expenditures (except to liquidate existing encumbrances and liabilities), and, unless the parties otherwise agree, the contractor shall be excused from further performance (except such performance as may become necessary in connection with termination by the Government) and the performance of all work hereunder will be deemed to have been terminated for the convenience of the Government in accordance with the provisions of the Termination clause of this contract.

(d) *Financial plans; cost and encumbrance limitations.* In addition to the limitations provided for elsewhere in this contract, DOE may, through financial plans, such as Approved Funding Programs, or other directives issued to the contractor, establish controls on the costs to be incurred and encumbrances to be made in the performance of the contract work. Such plans and directives may be amended or supplemented from time to time by DOE. The contractor agrees

(1) to comply with the specific limitations (ceilings) on costs and encumbrances set forth in such plans and directives,

(2) to comply with other requirements of such plans and directives, and

(3) to notify DOE promptly, in writing, whenever it has reason to believe that any limitation on costs and encumbrances will be exceeded or substantially underrun.

(e) *Government's right to terminate not affected.* The giving of any notice under this clause shall not be construed to waive or impair any right of the Government to terminate the contract under the provisions of the Termination clause of this contract.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.3270(a)(3)(i), paragraph (d) of the clause may be omitted in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

970.5232–5 Liability with respect to cost accounting standards.

As prescribed in 48 CFR 970.3270(a)(5), insert the following clause:

LIABILITY WITH RESPECT TO COST ACCOUNTING STANDARDS (DEC 2000)

(a) The contractor is not liable to the Government for increased costs or interest resulting from its failure to comply with the clauses of this contract entitled, ''Cost Accounting Standards,'' and ''Administration of Cost Accounting Standards,'' if its failure to comply with the clauses is caused by the contractor's compliance with published DOE financial management policies and procedures or other requirements established by the Department's Chief Financial Officer or Procurement Executive.

(b) The contractor is not liable to the Government for increased costs or interest resulting from its subcontractors' failure to comply with the clauses at FAR 52.230–2, ''Cost Accounting Standards,'' and FAR 52.230–6, ''Administration of Cost Accounting Standards,'' if the contractor includes in each covered subcontract a clause making the subcontractor liable to the Government for increased costs or interest resulting from the subcontractor's failure to comply with

the clauses; and the contractor seeks the subcontract price adjustment and cooperates with the Government in the Government's attempts to recover from the subcontractor.

970.5232–6 Work for others funding authorization.

As prescribed in 48 CFR 970.3270(a)(6), insert the following clause:

WORK FOR OTHERS FUNDING AUTHORIZATION (DEC 2000)

Any uncollectible receivables resulting from the contractor utilizing contractor corporate funding for reimbursable work shall be the responsibility of the contractor, and the United States Government shall have no liability to the contractor for the contractor's uncollected receivables. The contractor is permitted to provide advance payment utilizing contractor corporate funds for reimbursable work to be performed by the contractor for a non-Federal entity in instances where advance payment from that entity is required under the Laws, regulations, and DOE directives clause of this contract and such advance cannot be obtained. The contractor is also permitted to provide advance payment utilizing contractor corporate funds to continue reimbursable work to be performed by the contractor for a Federal entity when the term or the funds on a Federal interagency agreement required under the Laws, regulations, and DOE directives clause of this contract have elapsed. The contractor's utilization of contractor corporate funds does not relieve the contractor of its responsibility to comply with all requirements for Work for Others applicable to this contract.

970.5232–7 Financial management system.

As prescribed in 48 CFR 970.3270(b)(1), insert the following clause:

FINANCIAL MANAGEMENT SYSTEM (DEC 2000)

The contractor shall maintain and administer a financial management system that is suitable to provide proper accounting in accordance with DOE requirements for assets, liabilities, collections accruing to the contractor in connection with the work under this contract, expenditures, costs, and encumbrances; permits the preparation of accounts and accurate, reliable financial and statistical reports; and assures that accountability for the assets can be maintained. The contractor shall submit to DOE for written approval an annual plan for new financial management systems and/or subsystems and major enhancements and/or upgrades to the currently existing financial systems and/or subsystems. The contractor shall notify DOE thirty (30) days in advance of any planned implementation of any substantial deviation from this plan and, as requested by the contracting officer, shall submit any such deviation to DOE for written approval before implementation.

970.5232–8 Integrated accounting.

As prescribed in 48 CFR 970.3270(b)(2), insert the following clause:

INTEGRATED ACCOUNTING (DEC 2000)

Integrated accounting procedures are required for use under this contract. The contractor's financial management system shall include an integrated accounting system that is linked to DOE's accounts through the use of reciprocal accounts and that has electronic capability to transmit monthly and year-end self-balancing trial balances to the Department's Primary Accounting System for reporting financial activity under this contract in accordance with requirements imposed by the contracting officer pursuant to the Laws, regulations, and DOE directives clause of this contract.

970.5235–1 Federally funded research and development center sponsoring agreement.

As prescribed in 48 CFR 970.3501–4, the contracting officer shall insert the following clause:

FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER SPONSORING AGREEMENT (DEC 2000)

(a) Pursuant to 48 CFR 35.017–1, this contract constitutes the sponsoring agreement between the Department of Energy and the contractor, which establishes the relationship for the operation of a Department of Energy sponsored Federally Funded Research and Development Center (FFRDC).

(b) In the operation of this FFRDC, the contractor may be provided access beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to Government employees and facilities needed to discharge its responsibilities efficiently and effectively. Because of this special relationship, it is essential that the FFRDC be operated in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of its affairs to the Department of Energy.

(c) Unless otherwise provided by the contract, the contractor may accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements and limitations of DOE Order 481.1, Work for Others (Non-Department of Energy Funded Work) (see current version).

(d) As an FFRDC, the contractor shall not use its privileged information or access to government facilities to compete with the private sector. Specific guidance on restricted activities is contained in DOE Order 481.1.

(End of clause)

970.5236–1 Government facility subcontract approval.

As prescribed in 48 CFR 970.3605–2, insert the following clause:

GOVERNMENT FACILITY SUBCONTRACT APPROVAL (DEC 2000)

Upon request of the contracting officer and acceptance thereof by the contractor, the contractor shall procure, by subcontract, the construction of new facilities or the alteration or repair of Government-owned facilities at the plant. Any subcontract entered into under this paragraph shall be subject to the written approval of the contracting officer and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

(End of clause)

970.5237–2 [Reserved]

970.5242–1 Penalties for unallowable costs.

As prescribed in 48 CFR 970.4207–03–70, insert the following clause:

PENALTIES FOR UNALLOWABLE COSTS (DEC 2000)

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

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

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

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

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

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

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

(iii) was mutually agreed to be unallowable.

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

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

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

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

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

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

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

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

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

(End of clause)

970.5243–1 Changes.

As prescribed in 48 CFR 970.4302–1, the contracting officer shall insert the following clause in all management and operating contracts:

CHANGES (DEC 2000)

(a) *Changes and adjustment of fee.* The contracting officer may at any time and without notice to the sureties, if any, issue written directions within the general scope of this contract requiring additional work or directing the omission of, or variation in, work covered by this contract. If any such direction results in a material change in the amount or character of the work described in the ''Statement of Work,'' an equitable adjustment of the fee, if any, shall be made in accordance with the agreement of the parties

and the contract shall be modified in writing accordingly. Any claim by the contractor for an adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the contractor of the notification of change; provided, however, that the contracting officer, if it is determined that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause entitled ''Disputes.''

(b) *Work to continue.* Nothing contained in this clause shall excuse the contractor from proceeding with the prosecution of the work in accordance with the requirements of any direction hereunder.

(End of clause)

970.5244–1 Contractor purchasing system.

As prescribed in 48 CFR 970.4402–5, insert the following clause:

CONTRACTOR PURCHASING SYSTEM (MAY 2006)

(a) *General.* The contractor shall develop, implement, and maintain formal policies, practices, and procedures to be used in the award of subcontracts consistent with this clause and 48 CFR 970.44. The contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to DOE in accordance with 48 CFR 970.4401–1. The contractor shall maintain file documentation which is appropriate to the value of the purchase and is adequate to establish the propriety of the transaction and the price paid. The contractor's purchasing performance will be evaluated against such performance criteria and measures as may be set forth elsewhere in this contract. DOE reserves the right at any time to require that the contractor submit for approval any or all purchases under this contract. The contractor shall not purchase any item or service the purchase of which is expressly prohibited by the written direction of DOE and shall use such special and directed sources as may be expressly required by the DOE contracting officer. DOE will conduct periodic appraisals of the contractor's management of all facets of the purchasing function, including the contractor's compliance with its approved system and methods. Such appraisals will be performed through the conduct of Contractor Purchasing System Reviews in accordance with 48 CFR subpart 44.3, or, when approved by the contracting officer, through the contractor's participation in the conduct of the Balanced Scorecard performance measurement and performance management system. The contractor's approved purchasing system and methods shall include the requirements set forth in paragraphs (b) through (y) of this clause.

(b) *Acquisition of utility services.* Utility services shall be acquired in accordance with the requirements of 48 CFR 970.41.

(c) *Acquisition of Real Property.* Real property shall be acquired in accordance with 48 CFR Subpart 917.74.

(d) *Advance Notice of Proposed Subcontract Awards.* Advance notice shall be provided in accordance with 48 CFR 970.4401–3.

(e) *Audit of Subcontractors.* (1) The contractor shall provide for:

(i) periodic post-award audit of cost-reimbursement subcontractors at all tiers, and

(ii) audits, where necessary, to provide a valid basis for pre-award or cost or price analysis.

(2) Responsibility for determining the costs allowable under each cost-reimbursement subcontract remains with the contractor or next higher-tier subcontractor. The contractor shall provide, in appropriate cases, for the timely involvement of the contractor and the DOE contracting officer in resolution of subcontract cost allowability.

(3) Where audits of subcontractors at any tier are required, arrangements may be made to have the cognizant Federal agency perform the audit of the subcontract. These arrangements shall be made administratively between DOE and the other agency involved and shall provide for the cognizant agency to audit in an appropriate manner in light of the magnitude and nature of the subcontract. In no case, however, shall these arrangements preclude determination by the DOE contracting officer of the allowability or unallowability of subcontractor costs claimed for reimbursement by the contractor.

(4) Allowable costs for cost reimbursable subcontracts are to be determined in accordance with the cost principles of 48 CFR Part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by 48 CFR Part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 48 CFR 970.4402–3 and 48 CFR 970.3102–3–21(b).

(f) *Bonds and Insurance.* (1) The contractor shall require performance bonds in penal amounts as set forth in 48 CFR 28.102–2(a) for all fixed priced and unit-priced construction subcontracts in excess of $100,000. The contractor shall consider the use of performance bonds in fixed price nonconstruction subcontracts, where appropriate.

(2) For fixed-price, unit-priced and cost reimbursement construction subcontracts in excess of $100,000 a payment bond shall be obtained on Standard Form 25A modified to name the contractor as well as the United States of America as obligees. The penal amounts shall be determined in accordance with 48 CFR 28.102–2(b).

(3) For fixed-price, unit-priced and cost-reimbursement construction subcontracts, greater than $25,000, but not greater than $100,000, the contractor shall select two or more of the payment protections at 48 CFR 28.102–1(b), giving particular consideration to the inclusion of an irrevocable letter of credit as one of the selected alternatives.

(4) A subcontractor may have more than one acceptable surety in both construction and other subcontracts, provided that in no case will the liability of any one surety exceed the maximum penal sum for which it is qualified for any one obligation. For subcontracts other than construction, a co-surety (two or more sureties together) may reinsure amounts in excess of their individual capacity, with each surety having the required underwriting capacity that appears on the list of acceptable corporate sureties.

(g) *Buy American.* The contractor shall comply with the provisions of the Buy American Act as reflected in 48 CFR 52.225–3 and 48 CFR 52.225–5. The contractor shall forward determinations of nonavailability of individual items to the DOE contracting officer for approval. Items in excess of $100,000 require the prior concurrence of the Head of Contracting Activity. If, however, the contractor has an approved purchasing system, the Head of the Contracting Activity may authorize the contractor to make determinations of nonavailability for individual items valued at $100,000 or less.

(h) *Construction and Architect-Engineer Subcontracts*—(1) *Independent Estimates.* A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted.

(2) *Specifications.* Specifications for construction shall be prepared in accordance with the DOE publication entitled ''General Design Criteria Manual.''

(3) *Prevention of Conflict of Interest.* (i) The contractor shall not award a subcontract for construction to the architect-engineer firm or an affiliate that prepared the design. This prohibition does not preclude the award of a ''turnkey'' subcontract so long as the subcontractor assumes all liability for defects in design and construction and consequential damages.

(ii) The contractor shall not award both a cost-reimbursement subcontract and a fixed-price subcontract for construction or architect-engineer services or any combination thereof to the same firm where those subcontracts will be performed at the same site.

(iii) The contractor shall not employ the construction subcontractor or an affiliate to inspect the firm's work. The contractor shall assure that the working relationships of the construction subcontractor and the subcontractor inspecting its work and the authority of the inspector are clearly defined.

(i) *Contractor-Affiliated Sources.* Equipment, materials, supplies, or services from a contractor-affiliated source shall be purchased or transferred in accordance with 48 CFR 970.4402–3.

(j) *Contractor-Subcontractor Relationship.* The obligations of the contractor under paragraph (a) of this clause, including the development of the purchasing system and methods, and purchases made pursuant thereto, shall not relieve the contractor of any obligation under this contract (including, among other things, the obligation to properly supervise, administer, and coordinate the work of subcontractors). Subcontracts shall be in the name of the contractor, and shall not bind or purport to bind the Government.

(k) *Government Property.* Identification, inspection, maintenance, protection, and disposition of Government property shall conform with the policies and principles of 48 CFR Part 45, 48 CFR 945, the Federal Property Management Regulations 41 CFR Chapter 101, the DOE Property Management Regulations 41 CFR Chapter 109, and their contracts.

(l) *Indemnification.* Except for Price-Anderson Nuclear Hazards Indemnity, no subcontractor may be indemnified except with the prior approval of the Senior Procurement Executive.

(m) *Leasing of Motor Vehicles.* Contractors shall comply with 48 CFR 8.11 and 48 CFR 908.11.

(n) [Reserved]

(o) *Management, Acquisition and Use of Information Resources.* Requirements for automatic data processing resources and telecommunications facilities, services, and equipment, shall be reviewed and approved in accordance with applicable DOE Orders and regulations regarding information resources.

(p) *Priorities, Allocations and Allotments.* Priorities, allocations and allotments shall be extended to appropriate subcontracts in accordance with the clause or clauses of this contract dealing with priorities and allocations.

(q) *Purchase of Special Items.* Purchase of the following items shall be in accordance with the following provisions of 48 CFR 908.71 and the Federal Property Management Regulations, 41 CFR Chapter 101:

(1) Motor vehicles—48 CFR 908.7101
(2) Aircraft—48 CFR 908.7102
(3) Security Cabinets—48 CFR 908.7106
(4) Alcohol—48 CFR 908.7107
(5) Helium—48 CFR 908.7108
(6) Fuels and packaged petroleum products—48 CFR 908.7109
(7) Coal—48 CFR 908.7110
(8) Arms and Ammunition—48 CFR 908.7111
(9) Heavy Water—48 CFR 908.7121(a)
(10) Precious Metals—48 CFR 908.7121(b)
(11) Lithium—48 CFR 908.7121(c)
(12) Products and services of the blind and severely handicapped—41 CFR 101–26.701

(13) Products made in Federal penal and correctional institutions—41 CFR 101–26.702

(r) *Purchase vs. Lease Determinations.* Contractors shall determine whether required equipment and property should be purchased or leased, and establish appropriate thresholds for application of lease vs. purchase determinations. Such determinations shall be made:

(1) at time of original acquisition;

(2) when lease renewals are being considered; and

(3) at other times as circumstances warrant.

(s) *Quality Assurance.* Contractors shall provide no less protection for the Government in its subcontracts than is provided in the prime contract.

(t) *Setoff of Assigned Subcontractor Proceeds.* Where a subcontractor has been permitted to assign payments to a financial institution, the assignment shall treat any right of setoff in accordance with 48 CFR 932.803.

(u) *Strategic and Critical Materials.* The contractor may use strategic and critical materials in the National Defense Stockpile.

(v) *Termination.* When subcontracts are terminated as a result of the termination of all or a portion of this contract, the contractor shall settle with subcontractors in conformity with the policies and principles relating to settlement of prime contracts in 48 CFR Subparts 49.1, 49.2 and 49.3. When subcontracts are terminated for reasons other than termination of this contract, the contractor shall settle such subcontracts in general conformity with the policies and principles in 48 CFR Subparts 49.1, 49.2, 49.3 and 49.4. Each such termination shall be documented and consistent with the terms of this contract. Terminations which require approval by the Government shall be supported by accounting data and other information as may be directed by the contracting officer.

(w) *Unclassified Controlled Nuclear Information.* Subcontracts involving unclassified uncontrolled nuclear information shall be treated in accordance with 10 CFR part 1017.

(x) *Subcontract Flowdown Requirements.* In addition to terms and conditions that are included in the prime contract which direct application of such terms and conditions in appropriate subcontracts, the contractor shall include the following clauses in subcontracts, as applicable:

(1) Davis-Bacon clauses prescribed in 48 CFR 22.407.

(2) Foreign Travel clause prescribed in 48 CFR 952.247–70.

(3) Counterintelligence clause prescribed in 48 CFR 970.0404–4(a).

(4) Service Contract Act clauses prescribed in 48 CFR 22.1006.

(5) State and local taxes clause prescribed in 48 CFR 970.2904–1.

(6) Cost or pricing data clauses prescribed in 48 CFR 970.1504–3–1(b).

(y) Legal Services. Contractor purchases of litigation and other legal services are subject to the requirements in 10 CFR part 719 and the requirements of this clause.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 66 FR 4627, Jan. 18, 2001; 71 FR 16243, Mar. 31, 2006]

970.5245–1 Property.

As prescribed in 48 CFR 970.4501–1(a), insert the following clause:

PROPERTY (DEC 2000)

(a) *Furnishing of Government property.* The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(b) *Title to property.* Except as otherwise provided by the contracting officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The contractor shall make such disposition of rejected items as the contracting officer shall direct. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon (1) issuance for use of such property in the performance of this contract, or (2) commencement of processing or use of such property in the performance of this contract, or (3) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.

(c) *Identification.* To the extent directed by the contracting officer, the contractor shall identify Government property coming into the contractor's possession or custody, by marking and segregating in such a way, satisfactory to the contracting officer, as shall indicate its ownership by the Government.

(d) *Disposition.* The contractor shall make such disposition of Government property which has come into the possession or custody of the contractor under this contract as

the contracting officer may direct during the progress of the work or upon completion or termination of this contract. The contractor may, upon such terms and conditions as the contracting officer may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the contracting officer and the contractor as the fair value thereof. The amount received by the contractor as the result of any disposition, or the agreed fair value of any such property acquired by the contractor, shall be applied in reduction of costs allowable under this contract or shall be otherwise credited to account to the Government, as the contracting officer may direct. Upon completion of the work or the termination of this contract, the contractor shall render an accounting, as prescribed by the contracting officer, of all government property which had come into the possession or custody of the contractor under this contract.

(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.

(h) *Government property for Government use only*. Government property shall be used only for the performance of this contract.

(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.

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

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.4501–1(b), when the award is to a nonprofit contractor, replace paragraph (j) of the basic clause with the following paragraph (j):

(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).

CHAPTER 10—DEPARTMENT OF THE TREASURY

(Parts 1000 to 1099)

Subchapter A—GENERAL

Part		*Page*
1001	Department of the Treasury Acquisition Regulation (DTAR) System	549
1002	Definitions of Words and Terms	550
1003	Improper Business Practices and Personal Conflicts of Interest	550
1004	Administrative Matters	550

Subchapter B—COMPETITION AND ACQUISITION PLANNING

1005	Publicizing Contract Actions	551
1011	Describing Agency Needs	551

Subchapter D—SOCIOECONOMIC PROGRAMS

1019	Small Business Programs	553

Subchapter E—GENERAL CONTRACTING REQUIREMENTS

1028	Bonds and Insurance	557
1033	Protests, Disputes, and Appeals	557

Subchapter H—CLAUSES AND FORMS

1052	Solicitation Provisions and Contract Clauses	559

Subchapter A—GENERAL

PART 1001—DEPARTMENT OF THE TREASURY ACQUISITION REGULATORY (DTAR) SYSTEM

Subpart 1001.1—Purpose, Authority, Issuance

Sec.
1001.101 Purpose.
1001.104 Applicability.
1001.105 Issuance.
1001.105–1 Publication and code arrangement.
1001.105–2 Arrangement of regulations.
1001.105–3 Copies.
1001.106 OMB Approval under the Paperwork Reduction Act.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1001.1—Purpose, Authority, Issuance

1001.101 Purpose.

This subpart establishes Chapter 10, the Department of the Treasury Acquisition Regulation (DTAR), within Title 48 of the Federal Acquisition Regulation (FAR) System. The DTAR contains policies and procedures that supplement FAR coverage and directly affect the contractual relationship between the Department of the Treasury and its business partners (e.g., prospective offerors/bidders and contractors). When FAR coverage is adequate, there will be no corresponding DTAR coverage.

1001.104 Applicability

The FAR and DTAR apply to all acquisitions of supplies and services, which obligate appropriated funds. For acquisitions made from non-appropriated funds, the Senior Procurement Executive will determine the rules and procedures that will apply. The DTAR does not apply to the acquisitions of the U.S. Mint.

1001.105 Issuance.

1001.105–1 Publication and code arrangement.

The DTAR and its subsequent changes will be published in the FEDERAL REGISTER and codified in the Code of Federal Regulations (CFR). The DTAR will be issued as 48 CFR Chapter 10.

1001.105–2 Arrangement of regulations.

(a) *References and citations.* The DTAR is divided into the same parts, subparts, sections, subsections, and paragraphs as the FAR except that 10 or 100 will precede the DTAR citation so that there are four numbers to the left of the first decimal. Reference to DTAR material must be made in a manner similar to that prescribed by FAR 1.105–2(c).

1001.105–3 Copies.

Copies of the DTAR in FEDERAL REGISTER or CFR form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402.

1001.106 OMB Approval under the Paperwork Reduction Act.

OMB has assigned the following control numbers that must appear on the upper right-hand corner of the face page of each solicitation, contract, modification and order: OMB Control No. 1505–0081 (Offeror submissions), OMB Control No. 1505–0080 (Contractor submissions), and OMB Control No. 1505–0107 (Protests). OMB regulations and OMB's approval and assignment of control numbers are conditioned upon Treasury bureaus not requiring more than three copies (including the original) of any document of information. OMB has granted a waiver to permit the Department to require up to eight copies of proposal packages, including proprietary data, for solicitations, provided that contractors who submit only an original and two copies will not be placed at a disadvantage.

PART 1002—DEFINITIONS OF WORDS AND TERMS

Subpart 1002.1—Definitions.

Sec.
1002.101 Definitions.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1002.1—Definitions.

1002.101 Definitions.

Bureau Chief Procurement Officer (BCPO) means the senior acquisition person at each bureau's headquarters. Within the Internal Revenue Service, this may be the Director, Procurement or the Deputy Director, Procurement.

Legal counsel means the Treasury or bureau office providing legal services to the contracting activity.

Senior Procurement Executive (SPE) for the Department of the Treasury is the Director, Office of the Procurement Executive.

PART 1003—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 1003.9—Whistleblower Protections for Contractor Employees

Sec.
1003.901 Definitions.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1003.9—Whistleblower Protections for Contractor Employees

1003.901 Definitions.

Authorized official of an agency means Treasury's SPE.

PART 1004—ADMINISTRATIVE MATTERS

Subpart 1004.4—Safeguarding Classified Information Within Industry

Sec.
1004.470 Investigative Requirement for Contractors.
1004.470–1 General.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1004.4—Safeguarding Classified Information Within Industry

1004.470 Investigative Requirements for Contractors.

1004.470–1 General.

Contract employees not requiring access to classified information must meet the investigative requirements of Chapter II, Section 2 of TD P 71–10, Department of the Treasury—Security Manual.

Subchapter B—COMPETITION AND ACQUISITION PLANNING

PART 1005—PUBLICIZING CONTRACT ACTIONS

Subpart 1005.2—Synopses of Proposed Contract Actions

Sec.
1005.202 Exceptions.

AUTHORITY: 41 U.S.C. 418(b) (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1005.2—Synopses of Proposed Contract Actions

1005.202 Exceptions.

(b)(1) The Office of Federal Procurement Policy and the Small Business Administration have extended the Pilot Program on Acquisition of Services from Small Businesses. It allows for a waiver of the synopsis requirement for services from competitive small businesses between $25,000 and $100,000. Contracting officers may waive the synopsis requirement after determining the following:

(1) Acquisitions covered by the waiver are for services (excluding those exempted from set-asides under the Small Business Competitiveness Demonstration Program) in amounts over $25,000, but not exceeding the simplified acquisition threshold ($100,000), of which supply items are expected to constitute less than 20 percent of the value of the contract;

(ii) The covered acquisitions will be set-aside for small businesses;

(iii) Quotes or offers for covered acquisitions will be solicited and obtained from a minimum of five small business concerns;

(iv) The Procurement Marketing and Access Network (PRO-Net) will be used to identify and solicit bids from a minimum of five small businesses; and

(v) If practicable, two sources not included in the previous solicitation for the same services will be solicited.

PART 1011—DESCRIBING AGENCY NEEDS

Subpart 1011.1—Selecting and Developing Requirements Documents

Sec.
1011.103 Market acceptance.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1011.1—Selecting and Developing Requirements Documents

1011.103 Market Acceptance.

(a) BCPOs can act on behalf of the head of the agency in this subpart only. BCPOs, under appropriate circumstances, require offerors to make the required demonstrations.

Subchapter D—SOCIOECONOMIC PROGRAMS

PART 1019—SMALL BUSINESS PROGRAMS

Subpart 1019.2—Policies

Sec.
1019.202 Specific policies.
1019.202–70 The Treasury Mentor-Protégé Program
1019.202–70–3 Non-affiliation.
1019.202–70–4 General policy.
1019.202–70–5 Incentives for prime contractor participation.
1019.202–70–7 Mentor firms.
1019.202–70–8 Protégé firms.
1019.202–70–9 Selection of Protégé firms.
1019.202–70–10 Application process for mentor firms to participate in the program.
1019.202–70–11 OSBD review and approval process of agreement.
1019.202–70–12 Agreement contents.
1019.202–70–13 Developmental assistance.
1019.202–70–14 Obligation.
1019.202–70–16 Solicitation provisions and contract clauses.

Subpart 1019.7—The Small Business Subcontracting Program

1019.708 Contract clauses.
1019.708–70 Solicitation provisions and contract clauses.

Subpart 1019.8—Contracting With the Small Business Adminstration (The 8(a) Program)

1019.811 Preparing the contracts.
1019.811–3 Contract clauses.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1019.2—Policies

1019.202 Specific policies.

1019.202–70 The Treasury Mentor-Protégé Program.

1019.202–70–3 Non-affiliation.

For purposes of the Small Business Act, a protégé firm may not be considered an affiliate of a mentor firm solely on the basis that the protégé firm is receiving developmental assistance referred to in DTAR 1019.202–70–13 from such mentor firm under the Program.

1019.202–70–4 General policy.

(a) Eligible prime contractors, not included on the ''List of Parties Excluded from Federal Procurement and Nonprocurement Programs'', that are approved as mentors will enter into agreements with eligible protégés. Mentors provide appropriate developmental assistance to enhance the capabilities of protégés to perform as contractors or subcontractors.

(b) A firm's status as a protégé under a Treasury contract must not have an effect on the firm's eligibility to seek other contracts or subcontracts.

1019.202–70–5 Incentives for prime contractor participation.

(a) Under the Small Business Act, 15 U.S.C. 637(d)(4)(E), Treasury is authorized to provide appropriate incentives to encourage subcontracting opportunities consistent with the efficient and economical performance of the contract. Proposed mentor-protégé efforts will be considered during the evaluation of such negotiated, competitive offers. Contracting officers must provide, as an incentive, a bonus score, not to exceed 5% of the relative importance assigned to the technical/management factors.

(b) A mentor's performance will be evaluated against the criteria described in DTAR 1052.219–75.

(c) Before awarding a contract that requires a subcontracting plan, the existence of a mentor-protégé arrangement, and performance (if any) under an existing arrangement, must be considered by the contracting officer in:

(1) Evaluating the quality of a proposed subcontracting plan under FAR 19.705–4; and

(2) Evaluating the contractor compliance with the subcontracting plans submitted in previous contracts as a factor in determining contractor responsibility under FAR 19.705–5(a)(1).

(d) Mentor-protégé arrangements may provide the government with greater assurance that a protégé subcontractor will be able to perform under the contract.

(e) The Office of Small Business Development (OSBD) Mentoring Award is a non-monetary award that will be presented (annually or as often as appropriate) to the mentoring firm providing the most effective developmental support of a protégé. The Mentor-Protégé Program Manager will recommend an award winner to the Director, Office of Small Business Development.

1019.202–70–7 Mentor firms.

A mentor firm may be either a large or small business, eligible for award of a Government contract that can provide developmental assistance to enhance the capabilities of protégés to perform as subcontractors. Mentors will be encouraged to enter into arrangements with protégés in addition to firms with whom they have established business relationships.

1019.202–70–8 Protégé firms.

(a) For selection as a protégé, a firm must be:

(1) A small business, women-owned small business, small disadvantaged business, small business owned and controlled by service disabled veterans, or qualified HUBZone small business:

(2) ''Small'' in the NAICS for the services or supplies to be provided by the protégé under its subcontract to the mentor; and

(3) Eligible for receipt of Government contracts.

(b) Except for small disadvantaged business, or qualified HUBZone small business firms, a protégé firm may self-certify to a mentor firm that it meets the requirements set forth if paragraph (a) of this section. Mentors may rely in good faith on written representations by potential protégé that they meet the specified eligibility requirements. The small disadvantaged business and HUBZone status eligibility and documentation requirements are determined according to FAR 19.304 and FAR 19.1303, respectively.

(c) Protégés may not have multiple mentors unless approved, in writing, by the Director, Office of Small Business Development (OSBD). Protégés participating in other agency mentor-protégé programs in addition to the Treasury Program should maintain a system for preparing separate reports of mentoring activity for each agency's program.

1019.202–70–9 Selection of protégé firms.

(a) Mentor firms will be solely responsible for selecting protégé firms. The mentor is encouraged to identify and select the types of protégé firms listed in 1019.202–70–7. Mentor firms may have multiple protégés.

(b) The selection of protégé firms by mentor firms may not be protested. Any protest regarding the size or eligibility status of an entity selected by a mentor to be a protégé must be referred solely to Treasury's OSBD for resolution. Treasury, at its discretion, may seek an advisory opinion from the Small Business Administration (SBA).

1019.202–70–10 Application process for mentor firms to participate in the program.

(a) Firm interested in becoming a mentor firm may apply in writing to Treasury's OSBD. The application will be evaluated based upon the description of the nature and extent of technical and managerial support proposed as well as the extent of other developmental assistance in the form of equity investment, loans, joint-venture support, and traditional subcontracting support.

(b) A proposed mentor will submit the information listed in DTAR 1019.202–70–12 for inclusion in a mentor-protégé agreement.

1019.202–70–11 OSBD review and approval process of agreement.

(a) OSBD will review the information specified in DTAR 1019.202–70–12. The OSBD review will be completed no later than 30 calendar days after receipt.

(b) Upon completion of the review, the mentor may implement the developmental assistance program.

(c) An approved agreement will be incorporated into the mentor firm's contract(s) with Treasury.

(d) If the OSBD disapprove the agreement, the mentor may provide additional information for reconsideration. Upon finding deficiencies that the OSBD considers correctable, the OSBD will notify the mentor and provide a

list of defects. Any additional information or corrections requested will be provided within 30 calendar days. The review of any supplemental material will be completed within 30 days after receipt by the OSBD. When submission of additional data is required during a proposal evaluation for a new contract award, shorter timeframes for submission, review and re-evaluation for approval may be authorized by the OSBD.

(e) The agreement defines the relationship between the mentor and protégé firms only. The agreement itself does not create any privity of contract between the mentor or protégé and Treasury.

1019.202–70–12 Agreement contents.

The contents of the agreement will contain:

(a) Names and addresses of mentor and protégé firms and a point of contact within both firms who will oversee the agreement;

(b) Procedures for the mentor firm to notify the protégé firm, OSBD and the contracting officer, in writing, at least 30 days in advance of the mentor firm's intent to voluntarily withdraw from the program;

(c) Procedures for a protégé firm to notify the mentor firm in writing at least 30 days in advance of the protégé firm's intent to voluntarily terminate the mentor-protégé agreement. The mentor must notify the OSBD and the contracting officer immediately upon receipt of such notice from the protégé;

(d) Each proposed mentor-protégé relationship must include information on the mentor's ability to provide developmental assistance to the protégé and how that assistance will potentially increase contracting and subcontracting opportunities for the protégé firm;

(e) A description of the type of developmental Program that will be provided by the mentor firm to the protégé firm, to include a description of the potential subcontract work, and a schedule for providing assistance and criteria for evaluation of the protégés developmental success;

(f) A listing of the types and dollar amounts of subcontracts that may be awarded to the protégé form;

(g) Program participation term;

(h) Termination procedures;

(i) Plan for accomplishing work should the agreement be terminated; and,

(j) Other terms and conditions, as appropriate.

1019.202–70–13 Developmental assistance.

The forms of developmental assistance a mentor can provide to a protégé include:

(a) Management guidance relating to financial management, organizational management, overall business management/planning, business development, and technical assistance;

(b) Loans;

(c) Rent-free use of facilities and/or equipment;

(d) Property;

(e) Temporary assignment of personnel to protégé for purpose of training; and,

(f) Any other types of mutually beneficial assistance.

1019.202–70–14 Obligation.

(a) Mentor or protégé firms, may voluntarily withdraw from the Mentor-Protégé Program. However, such withdrawal will not impact the program mission and contract requirements under the prime contract.

(b) At the conclusion of each year in the Mentor-Protégé Program, the prime contractor and protégé must formally brief the Department of the Treasury team regarding program accomplishments as pertains to the approved agreement. Individual briefings may be conducted, at the request of either party. Treasury will evaluate these reports by considering the following:

(1) Specific actions taken by the mentor, during the evaluation period, to increase the participation of protégé as suppliers to the Federal government and to commercial entities;

(2) Specific actions taken by the mentor, during the evaluation period, to develop the technical and corporate administrative expertise of a protégé as defined in the agreement;

(3) To what extent the protégé has met the developmental objectives in the agreement; and,

(4) To what extent the mentor firm's participation in the Mentor-Protégé

Program resulted in the protégé receiving contract(s) and subcontract(s) from private firms and agencies other than the Department of the Treasury.

(c) Mentor and protégé firms must submit an evaluation to the OSBD at the conclusion of the mutually agreed upon program period, the conclusion of the contract, or the voluntary withdrawal by either party from the Mentor-Protégé Program, whichever comes first.

1019.202–70–16 Solicitation provisions and contract clauses.

(a) Insert the provision at DTAR 1052.219–73, Department of the Treasury Mentor-Protégé Program, in all unrestricted solicitations exceeding $500,000 ($1,000,000 for construction) that offer subcontracting possibilities.

(b) Insert the clause at DTAR 1052.219–75, Mentor Requirements and Evaluation, in contracts where the prime contractor is participant in the Treasury Mentor-Protégé Program.

Subpart 1019.7—The Small Business Subcontracting Program

1019.708 Contract clauses.

1019.708–70 Solicitation provisions and contract clauses.

(a) Insert the clause at DTAR 1052.219–70, SF 294 and SF 295 Reporting, in all solicitations and contracts requiring a subcontracting plan.

(b) Insert the provision at DTAR 1052.219–71, Subcontracting Plan, in all solicitations requiring a subcontracting plan.

Subpart 1019.8—Contracting With the Small Business Administration (The 8(a) Program)

1019.811 Preparing the contracts.

1019.811–3 Contract clauses.

(d)(3) Insert theclause at DTAR 1052.219–18, Notification of Competition Limited to Eligible 8(a) Concerns—Alternate III (Deviation), for paragraph (c) of FAR 52.219–18, Notification of Completion Limited to Eligible 8(a) Concerns, in all solicitations and contracts that exceed $100,000 and are processed under DTAR 1019.8.

(f) Insert the clause at DTAR 1052.219–72, Section 8(a) Direct Award, in solicitations and contracts that exceed $100,000 and are processed under DTAR 1019.8 for paragraph (c) of FAR 52.219–11, Special 8(a) Subcontract Conditions; FAR 52.219–12, Special 8(a) Subcontract Conditions; and FAR 52.219–17, Section 8(a) Award.

Subchapter E—GENERAL CONTRACTING REQUIREMENTS

PART 1028—BONDS AND INSURANCE

Subpart 1028.1—Bonds

Sec.
1028.106 Administration.
1028.106–6 Furnishing information.

Subpart 1028.3—Insurance

1028.307– Insurance under cost-reimbursement contracts.
1028.307–1 Group insurance plans.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1028.1—Bonds

1028.106 Administration.

1028.106–6 Furnishing information.

(b) COs must furnish certified copies and determine reasonable and appropriate costs, after consultation with legal counsel.

Subpart 1028.3—Insurance

1028.307 Insurance under cost-reimbursement contracts.

1028.307–1 Group insurance plans.

Plans must be submitted to the CO, who must obtain the advice of legal counsel.

PART 1033—PROTESTS, DISPUTES, AND APPEALS

Subpart 1033.2—Disputes and Appeals

Sec.
1033.201 Definitions.
1033.210 Contracting officer's authority.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1033.2—Disputes and Appeals

1033.201 Definitions.

Agency Board of Contract Appeals means the General Services Administration Board of Contract Appeals (GSBCA). The GSBCA is the authorized representative of the Secretary of the Treasury in hearing, considering, and determining all appeals of decisions of CO's filed by contractors pursuant to FAR subpart 33.2. Appeals must be governed by the Rules of the GSBCA (48 CFR chapter 61, part 6101).

1033.210 Contracting officer's authority.

It is Treasury's policy to encourage the use of Alternate Disputes Resolution (ADR) procedures. A decision to use ADR procedures requires review and approval by legal counsel.

Subchapter H—CLAUSES AND FORMS

PART 1052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 1052.2—Texts of Provisions and Clauses

Sec.

1052.210–70 Contracting Officer's Technical Representative (COTR) Designation and Authority.
1052.219–18 Notification of Competition Limited to Eligible 8(a) Concerns—Alternate III (Deviation).
1052.219–70 SF 294 and SF 295 Reporting.
1052.219–71 Subcontracting Plan.
1052.219–72 Section 8(a) Direct Awards.
1052.219–73 Department of the Treasury Mentor-Protégé Program.
1052.219–74 [Reserved]
1053.219–75 Mentor Requirements and Evaluation.

AUTHORITY: 41 U.S.C. 418b (a) and (b).

SOURCE: 68 FR 39855, July 3, 2003, unless otherwise noted.

Subpart 1052.2—Texts of Provisions and Clauses

1052.201–70 Contracting Officer's Technical Representative (COTR) Designation and Authority.

Per DTAR 1001.670–3, insert the following clause:

CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (COTR) DESIGNATION AND AUTHORITY (MAR 2002)

(a) The contracting officer's technical representative is _____ [insert name, address and telephone number].

(b) Performance of work under this contract is subject to the technical direction of the COTR identified above, or a representative designated in writing. The term ''technical direction'' includes, without limitation, direction to the contractor that directs or redirects the labor effort, shifts the work between work areas or locations, and/or fills in details and otherwise serves to ensure that tasks outlined in the work statement are accomplished satisfactorily.

(c) Technical direction must be within the scope of the contract specification(s)/work statement. The COTR does not have authority to issue technical direction that:

(1) Constitutes a change of assignment or additional work outside the contract specification(s)/work statement;

(2) Constitutes a change as defined in the clause entitled ''Changes'';

(3) In any manner causes an increase or decrease in the contract price, or the time required for contract performance;

(4) Changes any of the terms, conditions, or specification(s)/work statement of the contract;

(5) Interferes with the contractor's right to perform under the terms and conditions of the contract; or,

(6) Directs, supervises or otherwise controls the actions of the contractor's employees.

(d) Technical direction may be oral or in writing. The COTR must confirm oral direction in writing within five workdays, with a copy to the contracting officer.

(e) The contractor must proceed promptly with performance resulting from the technical direction issued by the COTR. In the opinion of the contractor, if any direction of the COTR or the designated representative falls within the limitations of (c) above, the contractor must immediately notify the contracting officer no later than the beginning of the next Government work day.

(f) Failure of the contractor and the contracting officer to agree that technical direction is within the scope of the contract will be subject to the terms of the clause entitled ''Disputes.''

(End of clause)

1052.219–18 Notification of Competition Limited to Eligible 8(a) Concerns—Alternate III (Deviation).

In accordance with DTAR 1019.811–3(d)(3), substitute the following for paragraph (c) in FAR 52.219–18:

(c) Any award resulting from this solicitation will be made directly by the contracting officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

1052.219–70 SF 294 and SF 295 Reporting.

Per DTAR 1019.708–70(a), insert the following clause:

SF 294 AND SF 295 REPORTING (MAR 2002)

In accordance with the clause entitled ''Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan'' in Section I and the contract schedule, SF

294 and SF 295 reports must be submitted to the following personnel:

Addressee	Submit SF 294	Submit SF 295
Contracting Officer (Address shown on front of contract)	Original	Original.
Small Business Specialist [Insert Bureau name and address]	Copy	Copy.
Department of the Treasury Office of Small Business Development (MMD) 1500 Pennsylvania Avenue, NW c/o 1310 G St., NW, Suite 400W Washington, DC 20220.	N/A	Copy.

(End of clause)

1052.219–71 Subcontracting Plan.

As prescribed in DTAR 1019.708–70(b), insert the following provision:

SUBCONTRACTING PLAN (MAR 2002)

As part of its initial proposal, each large business offeror must submit a contracting plan, as prescribed in FAR 52.219–9. Use of the subcontracting plan outlined containe in Section J of this solicitation is optional; however, plans must contain all elements included in the outline.

(End of provision)

1052.219–72 Section 8(a) Direct Awards.

As prescribed in DTAR 1019.811–3(f), insert the following clause:

SECTION 8(A) DIRECT AWARDS (MAR 2002)

(a) This purchase order or contract is issued as a direct award between the contracting activity and the 8(a) contractor pursuant to the Memorandum of Understanding between the Small Business Administration (SBA) and the Department of the Treasury. SBA retains responsibility for 8(a) certification, 8(a) eligibility determinations and related issues, and provides counseling and assistance to the 8(a) contractor under the 8(a) program. The cognizant SBA district office is: [To be completed by the contracting officer at the time of award]

(b) The contracting officer is responsible for administering the purchase order or contact and taking any action on behalf of the Government under the terms and conditions of the purchase order or contract. However, the contracting officer shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the purchase order or contract. The contracting officer shall also coordinate with SBA prior to processing any novation agreement. The contracting officer may assign contract administration functions to a contract administration office.

(c) The contractor agrees:

(1) To notify the contracting officer, simultaneously with its notification to SBA (as required by SBA's 8(a) regulations), when the owner(s) upon whom 8(a) eligibility is based, plan to relinquish ownership or control of the concern. Consistent with 15 U.S.C. 637(a)21), transfer of ownership or control must result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of control; and

(2) To adhere to the requirements of FAR 52.219–14, Limitations on Subcontracting.

(End of clause)

1052.219–73 Department of the Treasury Mentor-Protégé Program.

As described in DTAR 1019.202–70, insert the following provision:

DEPARTMENT OF THE TREASURY MENTOR-PROTÉGÉ PROGRAM (JAN 2000)

(a) Large and small businesses are encouraged to participate in the Department of the Treasury Mentor-Protégé Program. Mentor firms provide small business protégé with developmental assistance to enhance their capabilities and ability to obtain federal contracts.

Mentor firms are large prime contractors or eligible small businesses capable of providing developmental assistance. Protégé firms are small businesses as defined in 13 CFR parts 121, 124, and 126.

Developmental assistance is technical, managerial, financial, and other mutually beneficial assistance to aid protégés. Contractors interested in participating in the Program are encouraged to contact the Department of the Treasury OSBD or the Bureau of the OSBD for further information.

(End of provision)

1052.219–74 [Reserved]

1052.219–75 Mentor Requirements and Evaluation.

As prescribed in DTAR 1019.202–70, insert the following clause:

MENTOR REQUIREMENTS AND EVALUATION (JAN 2000)

(a) Mentor and protégé firms shall submit an evaluation to the Department of the Treasury's OSBD at the conclusion of the

mutally agreed upon Program period, or the voluntary withdrawal by either party from the Program, whichever occurs first. At the conclusion of each year in the Mentor-Protégé Program, the prime contractor and protégé will formally brief the Department of the Treasury Mentor-Protégé Program Manager regarding program accomplishments under their mentor-protégé agreements.

(b) A mentor or protégé must notify the OSBD and the contracting officer, in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the Program. A mentor firm must notify the OSBD and the contracting officer upon receipt of a protégé's notice of withdrawal from the Program.

(End of clause)

CHAPTER 12—DEPARTMENT OF TRANSPORTATION

SUBCHAPTER A—GENERAL

Part		*Page*
1201	Federal Acquisition Regulations System	565
1202	Definitions of words and terms	569
1203	Improper business practices and personal conflicts of interest	570
1204	Administrative matters	571

SUBCHAPTER B—ACQUISITION PLANNING

1205	Publicizing contract actions	573
1206	Competition requirements	573
1207	Acquisition planning	573
1208–1210	[Reserved]	
1211	Describing agency needs	574
1212	[Reserved]	

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

1213	Simplified acquisition procedures	575
1214	Sealed bidding	575
1215	Contracting by negotiation	576
1216	Types of contracts	577
1217	Special contracting methods	578
1218	[Reserved]	

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

1219	Small business programs	580
1220–1221	[Reserved]	
1222	Application of labor laws to government acquisitions	581
1223	Environment, energy and water efficiency, renewable energy technologies, occupational safety, and drug-free workplace	582
1224	Protection of privacy and freedom of information	582

Part *Page*
1225–1226 [Reserved]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

1227 Patents, data and copyrights 584
1228 Bonds and insurance 585
1229–1230 [Reserved]
1231 Contract cost principles and procedures 587
1232 Contract financing 587
1233 Protests, disputes and appeals 589

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

1234 [Reserved]
1235 Research and development contracting 591
1236 Construction and architect-engineer contracts 591
1237 Service contracting 591
1238 [Reserved]
1239 Acquisition of information technology 592
1240–1241 [Reserved]

SUBCHAPTER G—CONTRACT MANAGEMENT

1242 Contract administration and audit services 593
1243–1244 [Reserved]
1245 Government property 593
1246 Quality assurance 594
1247 Transportation 596
1248–1251 [Reserved]

SUBCHAPTER H—CLAUSES AND FORMS

1252 Solicitation provisions and contract clauses 597
1253 Forms 619

SUBCHAPTER A—GENERAL

PART 1201—FEDERAL ACQUISITION REGULATIONS SYSTEM

Subpart 1201.1—Purpose, Authority, Issuance

Sec.
1201.101 Purpose.
1201.104 Applicability.
1201.105 Issuance.
1201.105–1 Publication and code arrangement.
1201.105–2 Arrangement of regulations.
1201.105–3 Copies.
1201.106 OMB Approval under the Paperwork Reduction Act.

Subpart 1201.2—Administration

1201.201 Maintenance of the FAR.
1201.201–1 The two councils.

Subpart 1201.3—Agency Acquisition Regulations

1201.301 Policy.
1201.301–70 Amendment of (TAR) 48 CFR Chapter 12.
1201.301–71 Effective date.
1201.301–72 TAC or TN numbering.
1201.304 Agency control and compliance procedures.

Subpart 1201.4–70—Deviations From the FAR and TAR

1201.403 Individual deviations.
1201.404 Class deviations.

Subpart 1201.6—Career Development, Contracting Authority and Responsibilities

1201.602–3 Ratification of unauthorized commitments.
1201.603–1 General.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1201.1—Purpose, Authority, Issuance

1201.101 Purpose.

The Department of Transportation (DOT) Acquisition Regulation (TAR) establishes uniform acquisition policies and procedures, which implement and supplement the Federal Acquisition Regulation (FAR).

1201.104 Applicability.

(a) Statute, the (FAR) Title 48, Code of Federal Regulations (CFR) chapter 1, and (TAR) 48 CFR chapter 12 apply to all acquisitions within the Department unless otherwise excluded by statute, the (FAR) 48 CFR chapter 1, or (TAR) 48 CFR chapter 12.

(b) The following order of precedence applies to resolve any question of applicability concerning an acquisition regulation or a procedure found within (TAR) 48 CFR chapter 12 or the Transportation Acquisition Manual (TAM):

(1) Statute;

(2) (FAR) 48 CFR chapter 1 or other applicable regulation;

(3) (TAR) 48 CFR chapter 12;

(4) DOT Orders; and

(5) TAM.

(c) The Maritime Administration may depart from the requirements of the (FAR) 48 CFR chapter 1 and (TAR) 48 CFR chapter 12 as authorized by 40 U.S.C. 113(e)(15) but shall adhere to those regulations to the maximum extent practicable. Exceptions from the requirements of the (FAR) 48 CFR chapter 1 and/or (TAR) 48 CFR chapter 12 shall be documented according to Maritime Administration procedures or in each contract file, as appropriate.

(d) The (FAR) 48 CFR chapter 1, (TAR) 48 CFR chapter 12 and TAM do not apply to the Federal Aviation Administration as provided by the Department of Transportation and Related Agencies Appropriations Act, 1996, Public Law 104–50, unless otherwise directed by the Office of the Secretary of Transportation.

1201.105 Issuance.

1201.105–1 Publication and code arrangement.

(a) The (TAR) 48 CFR chapter 12 is published in:

(1) The FEDERAL REGISTER; and

(2) Cumulative form in the CFR.

(b) The TAR is issued as chapter 12 of Title 48 of the CFR.

1201.105–2 Arrangement of regulations.

(a) *General.* The (TAR) 48 CFR chapter 12, which encompasses both Department and Operating Administration (OA)-specific guidance (see (TAR) 48 CFR 1201.3), conforms with the arrangement and numbering system prescribed by (FAR) 48 CFR 1.104. Guidance that is OA-specific contains the OA's acronym directly after the heading. The following acronyms apply:

FHWA—Federal Highway Administration
FMCSA—Federal Motor Carrier Safety Administration
FRA—Federal Railroad Administration
FTA—Federal Transit Administration
MARAD—Maritime Administration
NHTSA—National Highway Traffic Safety Administration
OST—Office of the Secretary
PHMSA—Pipeline and Hazardous Materials Safety Administration
RITA—Research and Innovative Technology Administration
SLSDC—Saint Lawrence Seaway Development Corporation

(b) *Numbering.* (1) *Departmentwide guidance.* (i) The numbering illustrations at (FAR) 48 CFR 1.105–2 apply to (TAR) 48 CFR chapter 12.

(ii) Coverage within (TAR) 48 CFR chapter 12 is identified by the prefix ''12'' followed by the complete (FAR) 48 CFR chapter 1 cite. For example, (TAR) 48 CFR 1201.201–1(b)).

(iii) Coverage in (TAR) 48 CFR chapter 12 that supplements (FAR) 48 CFR chapter 1 will use part, subpart, section and subsection numbers ending in ''70'' through ''89'' (*e.g.*, (TAR) 48 CFR 1201.301–70). A series of numbers beginning with ''70'' is used for provisions and clauses.

(iv) Coverage in (TAR) 48 CFR chapter 12, other than that identified with a ''70'' or higher number, that implements the (FAR) 48 CFR chapter 1 uses the identical number sequence and caption of the (FAR) 48 CFR chapter 1 segment being implemented, which may be to the paragraph level. Paragraph numbers and letters are not always shown sequentially, but may be shown by the specific FAR paragraph implemented. For example, (TAR) 48 CFR 1201.201–1 contains only paragraph (b) because only this paragraph, correlated with FAR, implements (TAR) 48 CFR chapter 12.

(2) *Operating Administration-unique guidance.* Supplementary material for which there is no counterpart in (FAR) 48 CFR chapter 1 or (TAR) 48 CFR chapter 12 shall be identified using chapter, part, subpart, section, or subsection numbers of ''90'' and higher.

(c) *References and citations.* (TAR) 48 CFR chapter 12 may be referred to as the Department of Transportation Acquisition Regulation or the TAR. Cross reference to the FAR in (TAR) 48 CFR chapter 12 will be cited by ''FAR'' followed by the FAR numbered cite, and cross reference to the TAM in (TAR) 48 CFR chapter 12 will be cited by ''TAM'' followed by the TAM numbered cite. References to specific cites within (TAR) 48 CFR chapter 12 will be referenced by the numbered cite only.

[70 FR 6507, Feb. 7, 2005, as amended at 70 FR 76417, Dec. 27, 2005]

1201.105–3 Copies.

(a) Copies of the TAR in FEDERAL REGISTER, and CFR form may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. The electronic version of the FEDERAL REGISTER may be found at *http://www.nara.gov* and the CFR at *http://www.gpoaccess.gov*.

(b) The (TAR) 48 CFR chapter 12 and Transportation Acquisition Circulars (TACs) are available on the Internet at *http://www.dot.gov/ost/m60*.

1201.106 OMB Approval Under the Paperwork Reduction Act.

(a) *Data collection by regulation.* The information collection and recordkeeping requirements contained in (TAR) 48 CFR chapter 12 have been approved by the Office of Management and Budget (OMB).

(b) *Data collection under proposed contracts.* Under the regulations implementing the requirements of the Paperwork Reduction Act (5 CFR 1320), OMB must approve, prior to obligation of funds, proposed contracts which require the collection of information from ten or more non-Federal persons or entities. Solicitations requiring this level of information collection may be

released prior to OMB approval provided that:

(1) A statement is included in the solicitation to the effect that the contract will not be awarded until OMB approval of the information collection requirements of the proposed contract has been obtained; and

(2) Enough time is permitted to allow receipt of OMB approval prior to contract award.

Subpart 1201.2—Administration

1201.201 Maintenance of the FAR.

1201.201–1 The two councils.

(b) The SPE is responsible for providing a DOT representative to the Civilian Agency Acquisition Council (CAAC).

Subpart 1201.3—Agency Acquisition Regulations

1201.301 Policy.

(a)(1) *Acquisition regulations.* (i) *Departmentwide acquisition regulations.* The Department of Transportation's (DOT's) Senior Procurement Executive (SPE) is the individual having authority to issue or authorize the issuance of agency regulations that implement or supplement the FAR and to include agency-unique policies, etc. that govern the contracting process. This authority was re-delegated from the Assistant Secretary for Administration.

(ii) *Operating Administration (OA) acquisition regulations.* OA acquisition regulations, and any changes thereto, shall be reviewed and approved by the Senior Procurement Executive (SPE) for insertion into the (TAR) 48 CFR chapter 12 as a TAR supplemental regulation before the SPE submits the proposed coverage for publication in the FEDERAL REGISTER in accordance with (FAR) 48 CFR 1.501. OA regulations may be more restrictive or require higher approval levels than those permitted by (TAR) 48 CFR chapter 12 unless otherwise specified.

(2) *Acquisition procedures.* The SPE is the individual who issues or authorizes the issuance of internal agency guidance at any organizational level. DOT internal operating procedures are contained in the Transportation Acquisition Manual (TAM). OA procedures necessary to implement or supplement the (FAR) 48 CFR chapter 1, (TAR) 48 CFR chapter 12, or TAM may be issued by the Head of the Contracting Agency (HCA), who may delegate this authority to any organizational level deemed appropriate. OA procedures may be more restrictive or require higher approval levels than those permitted by the TAM unless otherwise specified.

(b) The authority of the agency head under (FAR) 48 CFR 1.301(b) to establish procedures to ensure that agency acquisition regulations are published for comment in the FEDERAL REGISTER in conformance with the procedures in FAR Subpart 1.5 is delegated to the Office of the General Counsel, Assistant General Counsel for Regulation and Enforcement (C–50).

1201.301–70 Amendment of (TAR) 48 CFR chapter 12.

(a) Changes to the regulation may be the result of recommendations from internal DOT personnel, other Government agencies, or the public. Changes shall be submitted in the following format to the Office of the Senior Procurement Executive (OSPE), 400 7th Street, SW., Washington, DC 20590:

(1) *Problem:* Succinctly state the problems created by current (TAR) 48 CFR chapter 12 language and describe the factual or legal reasons necessitating regulatory change.

(2) *Recommendation:* Identify the recommended change by using the current language (if applicable), and crossing out the deleted words with a horizontal line. Insert proposed language in brackets. If the change is extensive, deleted language may be displayed by forming a box with diagonal lines connecting the corners.

(3) *Discussion:* Explain why the change is necessary and how it will solve the problem. Address any cost or administrative impact on Government activities, offerors, and contractors. Provide any other information and documents such as statutes, legal decisions, regulations, reports, etc., that may be helpful.

(4) *Point of contact:* Provide a point of contact who can answer questions regarding the recommendation.

(b) The (TAR) 48 CFR chapter 12 is maintained by the SPE through the TAR/TAM change process. This process consists of input from various DOT elements including representatives from DOT OAs specifically designated to formulate Departmental acquisition policies and procedures.

(1) *Transportation Acquisition Circular (TAC).* TACs (*see* (TAR) 48 CFR 1201.301–72) will be used to amend (TAR) 48 CFR chapter 12.

(2) *TAR Notice (TN).* (i) TNs shall be issued when interim guidance is necessary and as often as may be necessary, under any of the following circumstances:

(A) To quickly promulgate selected material in a general or narrative manner, in advance of a TAC issuance;

(B) To disseminate other acquisition related information; or

(C) To issue guidance which may be effective for a period of 1 year or less.

(ii) Each TN will expire by a specific date.

1201.301–71 Effective date.

Unless otherwise stated, the following applies—

(a) Statements in TACs or TNs to the effect that the material therein is ''effective upon receipt,'' ''upon a specified date,'' or that changes set forth in the document are ''to be used upon receipt,'' mean that any new or revised provisions, clauses, procedures, or forms must be included in solicitations, contracts or modifications issued thereafter; and

(b) Unless expressly directed by statute or regulation, solicitations in process or completed negotiations when the TAC or TN is received, new information such as forms and clauses, need not be included if the chief of the contracting office determines that it would not be in the best interest of the Government to include the new information.

1201.301–72 TAC or TN numbering.

TACs and TNs will be numbered consecutively on a fiscal year basis beginning with number ''01'' prefixed by the last two digits of the fiscal year (*e.g.*, TNs 04–01 and 04–02 indicate the first two TNs issued in fiscal year 2004).

1201.304 Agency control and compliance procedures.

(a) DOT shall control the proliferation of acquisition regulations and any revisions thereto (except as noted in paragraph (b) of this section) by using an internal (TAR) 48 CFR chapter 12 change process that involves input from many DOT elements including OA representatives on the Procurement Management Council. The OA member shall represent their OA's viewpoint along with Departmentwide considerations in reaching a decision on (TAR) 48 CFR chapter 12 changes.

(b) OA-unique regulations will not be processed through the TAR/TAM change process, but shall be reviewed by OA legal counsel and submitted to the OSPE for review and approval. (See (TAR) 48 CFR 1252.101 for additional instructions pertaining to provisions and clauses.)

Subpart 1201.4–70—Deviations From the FAR and TAR

1201.403 Individual deviations.

The Head of the Contracting Activity, or designee with a rank that is no lower than that of Senior Executive Service (SES) official or that of a Flag Officer, may authorize individual deviations (unless (FAR) 48 CFR 1.405(e) applies). However, see TAM 1201.403.

1201.404 Class deviations.

The SPE may grant in writing class deviations from the (FAR) 48 CFR chapter 1 and (TAR) 48 CFR chapter 12, unless (FAR) 48 CFR 1.405(e) applies.

Subpart 1201.6—Career Development, Contracting Authority and Responsibilities

1201.602–3 Ratification of unauthorized commitments.

(b) *Policy*. DOT policy requires that all procurement decisions shall be made only by Government officials having authority to carry out such acquisitions. Procurement decisions made by other than authorized personnel are contrary to Departmental policy and may be considered matters of serious misconduct on the part of the employee making an unauthorized

commitment. Disciplinary action against an employee who makes an unauthorized commitment may be considered.

1201.603–1 General.

Each DOT OA is responsible for appointing its contracting officers.

PART 1202—DEFINITIONS OF WORDS AND TERMS

Subpart 1202.1—Definitions

Sec.
1202.1 Definitions.

Subpart 1202.70—Internet Links

1202.7000 General.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1202.1—Definitions

1202.1 Definitions.

Agency, Federal agency or *Executive agency* means the Department of Transportation.

Chief Information Officer means the Director of the Office of the Chief Information Officer (CIO) (S–80).

Chief of the Contracting Office (COCO) means the individual(s) responsible for managing the contracting office(s) within an Operating Administration.

Contracting activity includes all the contracting offices within an Operating Administration and is the same as the term ''procuring activity.''

Contracting officer (CO) means an individual authorized by virtue of their position or by appointment to perform the functions assigned by the Federal Acquisition Regulation (FAR), the Transportation Acquisition Regulation (TAR) and Transportation Acquisition Manual (TAM).

Department of Transportation means all of the Operating Administrations included within the Department of Transportation (DOT).

Head of the agency or *agency head* for Departmental procurement means the Deputy Secretary except for acquisition actions that, by the terms of a statute or delegation, must be done specifically by the Secretary of Transportation.

Head of the Contracting Activity (HCA) means the individual responsible for managing the contracting offices within an Operating Administration who is a member of the Senior Executive Service or a flag officer and is the same as the term ''Head of the Procuring Activity.''

Head of the Operating Administration (HOA) means the individual appointed by the President to manage the operating administration.

Operating Administration (OA) means the following components of DOT:

(1) Federal Aviation Administration (FAA); (FAA is exempt from FAR, TAR and TAM pursuant to the Department of Transportation and Related Agencies Appropriations Act, 1996, Public Law 104–50;

(2) Federal Highway Administration (FHWA);

(3) Federal Motor Carrier Safety Administration (FMCSA);

(4) Federal Railroad Administration (FRA);

(5) Federal Transit Administration (FTA);

(6) Maritime Administration (MARAD);

(7) National Highway Traffic Safety Administration (NHTSA);

(8) Office of the Secretary of Transportation (OST);

(9) Pipeline and Hazardous Materials Safety Administration (PHMSA).

(10) Research and Innovative Technology Administration (RITA).

(11) Saint Lawrence Seaway Development Corporation (SLSDC).

Senior Procurement Executive (SPE) means the Director of the Office of the Senior Procurement Executive (M–60).

Small Business Specialist (SBS) means the individual appointed by each HCA to assist the Director, Office of the Small and Disadvantaged Business Utilization in carrying out the purpose of the Small Business Act.

[70 FR 6507, Feb. 7, 2005, as amended at 70 FR 76417, Dec. 27, 2005]

Subpart 1202.70—Internet Links

1202.7000 General.

Most documents cited throughout (TAR) 48 CFR chapter 12, can be found

on the internet. (TAR) 48 CFR chapter 12 will cite the corresponding internet address.

PART 1203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 1203.1—Safeguards

Sec.
1203.101–3 Agency regulations.

Subpart 1203.2—Contractor Gratuities to Government Personnel

1203.203 Reporting suspected violations of the Gratuities clause.
1203.204 Treatment of violations.

Subpart 1203.3—Reports of Suspected Antitrust Violations

1203.301 General.
1203.303 Reporting suspected antitrust violations.

Subpart 1203.4—Contingent Fees

1203.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 1203.5—Other Improper Business Practices

1203.502 Subcontractor kickbacks.
1203.502–2 Subcontractor kickbacks.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1203.1—Safeguards

1203.101–3 Agency regulations.

(b) 5 CFR part 2635, Standards of Ethical Conduct for Employees of the Executive Branch, takes precedence over the DOT regulation at 49 CFR part 99.

Subpart 1203.2—Contractor Gratuities to Government Personnel

1203.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause shall be reported to the contracting officer responsible for the acquisition (or the COCO if the contracting officer is suspected of the violation). The contracting officer (or COCO) shall obtain from the person reporting the violation, and any witnesses to the violation, the following information:

(1) The date, time, and place of the suspected violation;

(2) The name and title (if known) of the individual(s) involved in the violation; and

(3) The details of the violation (*e.g.*, the gratuity offered or intended) to obtain a contract or favorable treatment under a contract.

(b) The person reporting the violation and witnesses (if any) should be requested to sign and date the information certifying that the information furnished is true and correct.

(c) The COCO shall report suspected violations to the Office of the Inspector General (OIG) (J–1), 400 7th Street, SW., Washington, DC 20590, with a copy to General Counsel (C–1) and the OA's Chief Counsel.

1203.204 Treatment of violations.

(a) The HCA is authorized to determine whether a Gratuities clause violation has occurred. If the HCA has been personally and substantially involved in the procurement, Government legal counsel advice should be sought to determine if a substitute for the HCA should be designated.

(b) The COCO shall ensure that the contractor is afforded the hearing procedures required by (FAR) 48 CFR 3.204(b). Government legal counsel should be consulted regarding the appropriateness of the hearing procedures.

(c) If the HCA determines that the alleged gratuities violation occurred during the ''conduct of an agency procurement'' the COCO shall consult with Government legal counsel regarding the approach for appropriate processing of either the Procurement Integrity Act violation and/or the Gratuities violation.

Subpart 1203.3—Reports of Suspected Antitrust Violations

1203.301 General.

(b) The same procedures contained in (TAR) 48 CFR 1203.203 shall also be followed for suspected antitrust violations, except reports of suspected antitrust violations shall be coordinated with legal counsel for referral to the Department of Justice, if deemed appropriate.

1203.303 Reporting suspected antitrust violations.

(b) The same procedures contained in (TAR) 48 CFR 1203.203 shall also be followed for suspected antitrust violations, except reports of suspected antitrust violations shall be coordinated with legal counsel for referral to the Department of Justice, if deemed appropriate.

Subpart 1203.4—Contingent Fees

1203.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) and (b)(4) The same procedures contained in (TAR) 48 CFR 1203.203 shall also be followed for misrepresentation or violations of the covenant against contingent fees, except reports of misrepresentation or violations of the covenant against contingent fees shall be coordinated with legal counsel for referral to the Department of Justice, if deemed appropriate.

Subpart 1203.5—Other Improper Business Practices

1203.502 Subcontractor kickbacks.

1203.502–2 Subcontractor kickbacks.

(g) The same procedures contained in (TAR) 48 CFR 1203.203 shall also be followed for subcontractor kickbacks.

PART 1204—ADMINISTRATIVE MATTERS

Subpart 1204.1—Contract Execution

Sec.

1204.103 Contract clause.

Subpart 1204.8—Government Contract Files

1204.804–5 Procedures for closing out contract.

1204.804–570 Supporting closeout documents.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1204.1—Contract Execution

1204.103 Contract clause.

The contracting officer shall insert the clause at (FAR) 48 CFR 52.204–1, Approval of Contract, filled in as appropriate, in solicitations and contracts when approval to award the resulting contract must be obtained from an official at a level above the contracting officer.

Subpart 1204.8—Government Contract Files

1204.804–5 Procedures for closing out contract files.

1204.804–570 Supporting closeout documents.

(a) When applicable (see paragraphs (a)(1) through (4) of this section) and prior to contract closeout, the contracting officer shall obtain the listed DOT and Department of Defense (DOD) forms from the contractor to facilitate contract closeout.

(1) Form DOT F 4220.4, Contractor's Release, see (FAR) 48 CFR 52.216–7;

(2) Form DOT F 4220.45, Contractor's Assignment of Refunds, Rebates, Credits and Other Amounts, (FAR) 48 CFR 52.216–7;

(3) Form DOT F 4220.46, Cumulative Claim and Reconciliation Statement, see (FAR) 48 CFR 4.804–5(a)(13); and

(4) DD Form 882, Report of Inventions and Subcontracts *http://www.dior.whs.mil/forms/DD0882.PDF*, see (FAR) 48 CFR 52.227–14.

(b) The forms listed in paragraph (a) of this section are used primarily for the closeout of cost-reimbursement, time-and-materials, and labor-hour contracts. However, the forms may

also be used for closeout of other contract types or when necessary to protect the Government's interest.

SUBCHAPTER B—ACQUISITION PLANNING

PART 1205—PUBLICIZING CONTRACT ACTIONS

Subpart 1205.1—Dissemination of Information

Sec.
1205.101 Methods of disseminating information.

Subpart 1205.4—Release of Information

1205.402 General public.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1205.1—Dissemination Of Information

1205.101 Methods of disseminating information.

(b) The DOT Office of Small and Disadvantaged Business Utilization (S–40), 400 7th Street, SW., Washington, DC 20590 publishes a Procurement Forecast of planned procurements each fiscal year on their Web site at: *http://osdbuweb.dot.gov/business/procurement/forecast.html*.

Subpart 1205.4—Release of Information

1205.402 General public.

(a) Upon request, DOT will furnish the general public with the following information on proposed contracts and contract awards:

(1) Prior to the opening of sealed bids or the closing date for receipt of proposals, the names of firms invited to submit sealed bids or proposals;

(2) Prior to the opening of sealed bids or the closing date for receipt of proposals, the names of firms which attended pre-proposal or pre-bid conferences, if any;

(3) After the opening of sealed bids, names of firms which submitted bids; and

(4) After contract award, the names of firms which submitted proposals.

(b) Requests for other specific information shall be processed in accordance with the DOT Freedom of Information Act rules and regulations ((TAR) 48 CFR 1224.203).

PART 1206—COMPETITION REQUIREMENTS

Subpart 1206.5—Competition Advocates

Sec.
1206.501 Requirement.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1206.5—Competition Advocates

1206.501 Requirement.

The DOT Senior Competition Advocate (SCA) is the Deputy Assistant Secretary for Administration.

PART 1207—ACQUISITION PLANNING

Subpart 1207.3—Contractor Versus Government Performance

Sec.
1207.302 General.
1207.305 Solicitation provisions and contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1207.3—Contractor Versus Government Performance

1207.302 General.

DOT follows OMB Circular A–76, Performance of Commercial Activities, and (FAR) 48 CFR 7.3 when cost comparisons between Government and contractor performance are conducted.

1207.305 Solicitation provisions and contract clause.

The contracting officer may insert clause (TAR) 48 CFR 1252.237–73, Key

Personnel, in solicitations and contracts when the acquisition is conducted pursuant to OMB Circular A–76 and meets the clause prescription requirements at (TAR) 48 CFR 1237.110(b).

PART 1211—DESCRIBING AGENCY NEEDS

Subpart 1211.1—Selecting and Developing Requirements Documents

Sec.

1211.101 Order of precedence for requirements documents.

Subpart 1211.2—Using and Maintaining Requirements Documents

1211.204–70 Solicitation provisions and contract clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1211.1—Selecting and Developing Requirements Documents

1211.101 Order of precedence for requirements documents.

Safeguards to ensure safety, security (including sensitive information and information technology security) and environmental protection shall be included, as applicable, in requirements documents.

Subpart 1211.2—Using and Maintaining Requirements Documents

1211.204–70 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at (TAR) 48 CFR 1252.211–70, Index for Specifications, when an index or table of contents may be furnished with the specification.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 1213—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 1213.71—Department of Transportation Procedures for Acquiring Training Services

Sec.
1213.7100 Applicability.
1213.7101 Solicitation provision and contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1213.71—Department of Transportation Procedures for Acquiring Training Services

1213.7100 Applicability.

(a) DOT policy at (TAR) 48 CFR 1237.7000 also applies to the Standard Form (SF) 182, Request, Authorization, Agreement and Certification of Training, which may be used to acquire training services; however, the policy does not apply to training services acquired by the Government purchase/credit card. The Government purchase/credit card can only be used to acquire training services valued at $2,500 or less.

(b) As reflected in (TAR) 48 CFR 1237.7002, this policy does not apply to training attended by DOT employees which is scheduled and conducted by Government sources of supply, educational institutions, or private entities where DOT does not control or sponsor the training. Examples of when the policy does and does not apply include:

(1) When SF 182s are issued for three DOT employees to attend a one week course at a university or other private entity, the policy does not apply. DOT does not control this course because the university or private entity has a contract in place with the training provider and DOT is placing an order under an existing contract; and

(2) When DOT awards a contract to a university or other private entity to provide training for DOT and/or other Government personnel, the policy applies. DOT controls this course; therefore, no soliciting or advertising of private non-Government training while conducting the contracted-for training is permitted.

1213.7101 Solicitation provision and contract clause.

(a) Contracting officers shall insert the provision at (TAR) 48 CFR 1252.237–71, Certification of Data, in all solicitations and requests for quotations, and the clause at (TAR) 48 CFR 1252.237–72, Prohibition on Advertising, in solicitations, requests for quotations, and all contracts (*e.g.*, purchase orders, SF 182s) for training services when the content and/or presentation of the training is controlled by DOT. (NOTICE: The Secretary of Transportation has determined that the certification required by (TAR) 48 CFR 1252.237–71 shall be retained in accordance with Section 4301(b)(1)(B)(i)(II) of the Federal Acquisition Reform Act (Public Law 104–106, 41 U.S.C. 425, note) and *DOT Memorandum dated July 17, 1996.*)

(b) Contracting officers shall incorporate the successful offeror's certified data into any resultant contract(s). Certified data may be adopted by reference, if the contracting officer determines it contains information sufficient to reliably describe the certified data submitted. For example, this type of information includes dated material such as resumes and company or personnel qualifications.

PART 1214—SEALED BIDDING

Subpart 1214.3—Submission of Bids

Sec.
1214.302 Bid submission.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

Subpart 1214.3—Submission of Bids

1214.302 Bid submission.

(b)(1) Contracting officers may permit telegraphic bids to be communicated by means of a telephone call from the telegraph office to the designated office provided that procedures and controls have been established by the COCO for receiving and safeguarding these incoming bids.

PART 1215—CONTRACTING BY NEGOTIATION

Subpart 1215.2—Solicitation and Receipt of Proposals and Information

Sec.
1215.207 Handling proposals and information.

Subpart 1215.4—Contract Pricing

1215.404 Proposal analysis.
1215.404–470 Payment of profit or fee.

Subpart 1215.6—Unsolicited Proposals

1215.602 Policy.
1215.603 General.
1215.604 Agency points of contact.
1215.606 Agency procedures.
1215.606–1 Receipt and initial review.
1215.606–2 Evaluation.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1215.2—Solicitation and Receipt of Proposals and Information

1215.207 Handling proposals and information.

(a) Offeror's proposals and information received in response to a request for information shall be marked as required by TAM 1203.104–4, as applicable.

(b) Proposals may be released outside the Government whenever it is the only means of receiving the most competent technical and/or management evaluation available.

Subpart 1215.4—Contract Pricing

1215.404 Proposal analysis.

1215.404–470 Payment of profit or fee.

The contracting officer shall not pay profit or fee on undefinitized contracts or undefinitized contract modifications. Any profit or fee earned shall be paid after the contract or modification is definitized.

Subpart 1215.6—Unsolicited Proposals

1215.602 Policy.

DOT's policy encourages submission of new and innovative ideas that will support DOT's mission. Through the various Operating Administrations (OAs), DOT is responsible for transportation safety improvements, international transportation agreements and the continuity of transportation services in the public interest.

1215.603 General.

DOT will accept unsolicited proposals from any entity for review and consideration. However, DOT will not pay any costs associated with the preparation of these proposals. Proposals that do not meet the definition and applicable content and marking requirements of (FAR) 48 CFR 15.6 will not be considered under any circumstances and will be returned to the submitter.

1215.604 Agency points of contact.

(a) The DOT does not have a centralized location to receive unsolicited proposals. The type of effort submitted in the proposal determines which DOT OA should receive and evaluate the proposal.

(b) Unsolicited proposals should be submitted to the responsible OA contracting office for appropriate handling. Specific information concerning the mission of each DOT OA is available on the worldwide web at *http://www.dot.gov*. Prospective contractors are urged to contact these contracting/procurement offices prior to submitting a proposal to ensure that the unsolicited proposal reaches the correct

contracting office for action. This action will reduce unnecessary paperwork and wasted time for both the Government and the prospective contractors.

1215.606 Agency procedures.

(a) The Chief of the Contracting Office is responsible for establishing procedures for controlling unsolicited proposals received in the contracting office. Within ten working days after receipt of an unsolicited proposal, the contracting office shall review the proposal and determine whether the proposal meets the content and marking requirements of (FAR) 48 CFR 15.6. If the proposal does not meet these requirements, it shall be returned to the submitter giving the reasons for noncompliance.

(b) The OA contracting office is the designated point of contact for receipt and handling of unsolicited proposals. Persons within DOT who receive unsolicited proposals, such as technical personnel, shall forward the document to their responsible contracting office.

1215.606–1 Receipt and initial review.

(a) The agency contact point must make an initial review determination within seven calendar days after receiving a proposal.

(b) If the proposal meets the requirements at (FAR) 48 CFR 15.606–1(a), the agency contact point must acknowledge receipt within three calendar days after making the initial review determination and advise the offeror of the general timeframe for completing the evaluation.

(c) If the proposal does not meet the requirements of (FAR) 48 CFR 15.606–1(a), the agency contact point must return the proposal within three calendar days after making the determination. The agency point of contact must inform the offeror, in writing, of the reasons for returning the proposal.

1215.606–2 Evaluation.

(a) Comprehensive evaluations should be completed within sixty calendar days after making the initial review determination. If additional time is needed, then the agency contact point shall advise the offeror accordingly and provide a new evaluation completion date. The evaluating office must neither reproduce nor disseminate the proposal to other offices without the consent of the contracting office from which the proposal was received for evaluation. If additional information from the offeror is required by the evaluating office, the evaluator must convey this request to the responsible contracting office. The evaluator shall not directly contact the proposal originator.

(b) If the evaluator recommends acceptance of the proposal, the responsible contracting officer shall ensure compliance with all of the requirements of (FAR) 48 CFR 15.607.

PART 1216—TYPES OF CONTRACTS

Subpart 1216.2—Fixed-Price Contracts

Sec.

1216.203 Fixed-price contracts with economic price adjustment.
1216.203–4 Contract clauses.
1216.203–470 Solicitation provision.

Subpart 1216.4—Incentive Contracts

1216.406–70 DOT contract clauses.

Subpart 1216.5—Indefinite-Delivery Contracts

1216.505 Ordering.

Subpart 1216.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1216.603 Letter contracts.
1216.603–4 Contract clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1216.2—Fixed-Price Contracts

1216.203 Fixed-price contracts with economic price adjustment.

1216.203–4 Contract clauses.

1216.203–470 Solicitation provision.

The contracting officer shall insert the provision at (TAR) 48 CFR 1252.216–70, Evaluation of Offers Subject to an Economic Price Adjustment Clause, in solicitations containing an economic price adjustment clause.

Subpart 1216.4—Incentive Contracts

1216.406–70 DOT contract clauses.

(a) As authorized by (FAR) 48 CFR 16–406(e), the contracting officer shall insert the clause at (TAR) 48 CFR 1252.216–71, Determination of Award Fee, in all cost-plus-award-fee solicitations and contracts.

(b) The contracting officer shall insert the clause at (TAR) 48 CFR 1252.216–72, Performance Evaluation Plan, in all cost-plus-award-fee solicitations and contracts.

(c) The contracting officer shall insert the clause at (TAR) 48 CFR 1252.216–73, Distribution of Award Fee, in all cost-plus-award-fee solicitations and contracts.

Subpart 1216.5—Indefinite-Delivery Contracts

1216.505 Ordering.

(b)(5) Unless otherwise designated by the Head of the Operating Administration, the Competition Advocate for the Operating Administration (OA) is designated as the OA Task and Delivery Order Ombudsman. If any corrective action is needed after reviewing complaints from contractors on task and delivery order contracts, the OA Ombudsman shall provide a written determination of such action to the contracting officer. Issues that cannot be resolved within the OA, shall be forwarded to the DOT Task and Delivery Order Ombudsman for review and resolution. The DOT Task and Delivery Order Ombudsman is located in the Office of the Senior Procurement Executive.

Subpart 1216.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1216.603 Letter contracts.

1216.603–4 Contract clauses.

The contracting officer shall insert the clause at (TAR) 48 CFR 1252.216–74, Settlement of Letter Contract, in all definitized letter contracts.

PART 1217—SPECIAL CONTRACTING METHODS

Subpart 1217.70—Fixed Price Contracts for Vessel Repair, Alteration or Conversion

Sec.

1217.7000 Definition.
1217.7001 Clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1217.70—Fixed Price Contracts for Vessel Repair, Alteration or Conversion

1217.7000 Definition.

Lay Days means the time allowed to the master of a vessel for loading and unloading the same.

1217.7001 Clauses.

(a) The clause at (TAR) 48 CFR 1252.217–70, Guarantee, shall be used where general guarantee provisions are deemed desirable by the contracting officer.

(1) When inspection and acceptance tests will afford full protection to the Government in ascertaining conformance to specifications and the absence of defects and deficiencies, no guarantee clause for that purpose shall be included in the contract.

(2) The customary guarantee period, to be inserted in the first sentence of the clause at (TAR) 48 CFR 1252.217–70, Guarantee, is 60 days. In certain instances, it may be advisable for the contracting officer to include a contract clause for a guarantee period longer than 60 days. These instances are as follows:

(i) If, as result of a full inquiry, the contracting officer determines that there will be no increased costs as a result of a longer guarantee period, the contracting officer may substitute guarantee longer than the usual 60 days; or

(ii) When the contracting officer's inquiry discloses that increased costs will result or are expected to result from a longer guarantee period, the

contracting officer shall submit a letter to the Chief of the Contracting Office, requesting approval for use of guarantee period in excess of 60 days. The letter must contain sufficient facts to justify the use of a longer guarantee period. Upon approval, the contracting officer may insert a longer period in the first sentence of the clause at (TAR) 48 CFR 1252.217–70, Guarantee.

(b) The following clauses are required:

(1) (TAR) 48 CFR 1252.217–71 through (TAR) 48 CFR 1252.217–74; and,

(2) (TAR) 48 CFR 1252.217–76 through (TAR) 48 CFR 1252.217–80.

(c) (TAR) 48 CFR 1252.217–75 may be included in sealed bid fixed-price solicitations and contracts for vessel repair, alteration, or conversion which are to be performed within the United States, its possessions, or Puerto Rico.

(d) Unless inappropriate, the clauses set forth in (TAR) 48 CFR 1252.217–71 through (TAR) 48 CFR 1252.217–74 and (TAR) 48 CFR 1252.217–76 through (TAR) 48 CFR 1252.217–80 shall be included.

(e) (TAR) 48 CFR 1252.217–75 may be included in negotiated solicitations and contracts to be performed outside the United States.

[70 FR 6507, Feb. 7, 2005, as amended at 70 FR 76417, Dec. 27, 2005]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1219—SMALL BUSINESS PROGRAMS

Subpart 1219.2—Policies

Sec.
1219.201 General policy.

Subpart 1219.8—Contracting with the Small Business Administration (The 8(a) Program)

1219.800 General.
1219.811–3 Contract clauses.
1219.812 Contract administration.

Subpart 1219.10—Small Business Competitiveness Demonstration Program

1219.1003 Purpose.
1219.1005 Applicability.

APPENDIX A TO PART 1219—TARGETED INDUSTRY CATEGORIES

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1219.2—Policies

1219.201 General policy.

(c) The Director, Office of Small and Disadvantaged Business Utilization (S–40), is responsible for carrying out the functions and duties in sections 8, 15, and 31 of the Small Business Act, as amended. (15 U.S.C. 637, 644, and 657.)

Subpart 1219.8—Contracting with the Small Business Administration (The 8(a) Program)

1219.800 General.

(f) The Small Business Administration (SBA) and DOT have entered into a Partnership Agreement (PA) authorizing DOT contracting officers to enter into direct 8(a) contracts on behalf of SBA.

1219.811–3 Contract clauses.

(d)(3) When an acquisition is processed pursuant to the DOT/SBA Partnership Agreement, the contracting officer shall use the clause at (FAR) 48 CFR 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, with its Alternate III, (TAR) 48 CFR 1252.219–72.

(f) The contracting officer shall insert the clause at 1252.219–71, Section 8(a) Direct Awards, in all solicitations and contracts processed under the PA. In accordance with the CAAC Letter 98–3, the following FAR clauses shall not be used when processing a Direct 8(a) award under the MOU: (FAR) 48 CFR 52.219–11, Special 8(a) Contract Conditions, (FAR) 48 CFR 52.219–12, Special 8(a) Subcontract Conditions, and (FAR) 48 CFR 52.219–17, Section 8(a) Award.

1219.812 Contract administration.

(d) All direct 8(a) awards made pursuant to the PA are subject to 15 U.S.C. 637(a) (21). These contracts contain the clause at (TAR) 48 CFR 1252.219–71, Section 8(a) Direct Award, which requires the 8(a) contractor to notify the SBA and the contracting officer when ownership of the firm is being transferred.

Subpart 1219.10—Small Business Competitiveness Demonstration Program

1219.1003 Purpose.

(b) Contracting officers shall use the targeted industry categories listed at (TAR) 48 CFR 1219.1005(b) to expand small business participation in the small business competitive demonstration program.

1219.1005 Applicability.

(b) *Targeted industry categories.* DOT's targeted industry categories are shown in Appendix A to this part.

APPENDIX A TO PART 1219

Targeted industry categories*	FPDS products and service code
(1) Engineering Development	AT94
(2) Systems Engineering Services (Only).	R414
(3) Radio/TV Communication Equipment (except airborne).	5820

Targeted industry categories*	FPDS products and service code
(4) Maintenance, Repair, and Rebuilding of engines, turbines, components and weapons equipment.	J028/J010
(5) ADP Central Processing Units:	
Analog	7020
Digital	7021
Hybrid	7022
(6) ADP Support Equipment	7035
(7) ADP Components	7050
(8) ADP Development Services and ADP Teleprocessing and Timesharing Services.	D302/D305
(9) Gas Turbines and Jet Engines, Aircraft; and Components.	2840
(10) Radar Equipment (except airborne) and Navigation and Navigational Aids (basic research).	5840/AT31

*The industry categories were derived from Federal Procurement Data System Product and Service Codes Manual.

PART 1222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 1222.1—Basic Labor Policies

Sec.
1222.101 Labor relations.
1222.101–70 Admittance of union representatives to DOT installations.
1222.101–71 Contract clauses.

Subpart 1222.4—Labor Standards for Contracts Involving Construction

1222.406 Administration and enforcement.
1222.406–9 Withholding from or suspension of contract payments.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1222.1—Basic Labor Policies

1222.101 Labor relations.

1222.101–70 Admittance of union representatives to DOT installations.

(a) It is DOT policy to admit labor union representatives of contractor employees to DOT installations to visit work sites and transact labor union business with contractors, their employees, or union stewards pursuant to existing union collective bargaining agreements. Their presence shall not interfere with the contractor's work progress under a DOT contract nor violate the safety or security regulations that may be applicable to persons visiting the installation. The union representatives will not be permitted to conduct meetings, collect union dues, or make speeches concerning union matters while visiting a work site.

(b) Whenever a union representative is denied entry to a work site, the person denying entry shall make a written report to the DOT labor coordinator, the Office of the General Counsel, Office of Environmental Law, Civil Rights and General Law (C–10), within the Office of the Secretary of Transportation or corresponding OA labor advisor, within two working days after the request for entry is denied. The report shall include the reason(s) for the denial, the name of the representative denied entry, the union affiliation and number, and the name and title of the person that denied the entry.

1222.101–71 Contract clauses.

(a) When applicable, the contracting officer may insert the clause at (TAR) 48 CFR 1252.222–70, Strikes or Picketing Affecting Timely Completion of the Contract Work, in solicitations and contracts.

(b) When applicable the contracting officer may insert the clause at (TAR) 48 CFR 1252.222–71, Strikes or Picketing Affecting Access to a DOT Facility, in solicitations and contracts.

Subpart 1222.4—Labor Standards for Contracts Involving Construction

1222.406 Administration and enforcement.

1222.406–9 Withholding from or suspension of contract payments.

(c) *Disposition of contract payments withheld or suspended*—(1) *Forwarding wage underpayments to the Secretary of the Treasury.* The contracting officer shall ensure that a completed Form DOT F 4220.7, Employee Claim for Wage Restitution, is obtained from each employee claiming restitution under the

contract. The Comptroller General (Claims Division) must receive this form with a completed Standard Form (SF) 1093, Schedule of Withholding Under the Davis-Bacon Act or the Contract Work Hours and Safety Standards Act, before payment can be made to the employee.

PART 1223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 1223.3—Hazardous Material Identification and Material Safety Data

Sec.
1223.303 Contract clause.

Subpart 1223.70—Safety Requirements for Selected DOT Contracts

1223.7000 Contract clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1223.3—Hazardous Material Identification and Material Safety Data

1223.303 Contract clause.

The contracting officer shall insert the clause at (TAR) 48 CFR 1252.223–70, Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits, in solicitations and contracts involving the removal or disposal of hazardous waste material.

Subpart 1223.70—Safety Requirements for Selected DOT Contracts

1223.7000 Contract clauses.

(a) Where all or part of a contract will be performed on Government-owned or leased property, the contracting officer shall insert the clause at (TAR) 48 CFR 1252.223–71, Accident and Fire Reporting.

(b) For all solicitations and contracts under which human test subjects will be utilized, the contracting officer shall insert the clause at (TAR) 48 CFR 1252.223–72, Protection of Human Subjects. Upon written request, copies of the applicable National Highway Traffic Safety Administration (NHTSA) policies and procedures may be obtained from NHTSA's Associate Administrator for Administration (NPO–200), 400 7th Street, SW., Washington DC 20590.

(c) Pursuant to Executive Order 13043, Increasing Seat Belt Use in the United States, the contracting officer shall insert the clause at (TAR) 48 CFR 1252.223–73, Seat Belt Use Policies and Programs in all solicitations and contracts, exceeding the simplified acquisition threshold.

PART 1224—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 1224.1—Protection of Individual Privacy

Sec.
1224.102–70 General.
1224.103 Procedures.

Subpart 1224.2—Freedom of Information Act

1224.203 Policy.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1224.1—Protection of Individual Privacy

1224.102–70 General.

(a) Systems of records to which the Privacy Act applies shall not be released except by the Government regardless of whether the Government or a contractor acting on behalf of the Government is maintaining the records. Examples of systems of records are:

(1) Personnel, payroll and background records personal to any officer or employee of DOT, or other person, including his or her residential address;

(2) Medical histories and medical records concerning individuals, including applications for licenses; and

(3) Any other detailed record containing information identifiable with a particular person.

(b) Examples of systems of records to which the Privacy Act does not apply are:

(1) Records that are maintained by a contractor on individuals employed by the contractor in the process of providing goods and services to the Federal government; and

(2) Records generated on contract students pursuant to their attendance (*e.g.*, admission forms, grade reports) when contracting with an educational institution. These records must be similar to those maintained on other students, must not reveal their identities, and must not be commingled with records of other students.

1224.103 Procedures.

DOT rules and regulations implementing the Privacy Act of 1974 are located at 49 CFR part 10.

Subpart 1224.2—Freedom of Information Act

1224.203 Policy.

DOT rules and regulations implementing the Freedom of Information Act (FOIA) and the names and addresses of the OA FOIA offices are located in 49 CFR Part 7. Specific contract award information shall be requested from the FOIA office of the OA making the contract award.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 1227—PATENTS, DATA, AND COPYRIGHTS

Subpart 1227.3—Patent Rights Under Government Contracts

Sec.
1227.304 Procedures.
1227.304–5 Appeals.
1227.305 Administration of patent rights clauses.
1227.305–4 Conveyance of invention rights acquired by the Government.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1227.3—Patent Rights Under Government Contracts

1227.304 Procedures.

1227.304–5 Appeals.

(b) Agency actions listed at (FAR) 48 CFR 27.304–5(a)(1) and (a)(3) through (a)(5) may be appealed to the Head of the Contracting Activity (HCA). Actions under this section shall be coordinated with the legal counsel of the responsible office.

(1) Actions must be appealed within 30 days of receipt of the written statement required by (FAR) 48 CFR 27.304–5(a). The contractor must present all pertinent arguments in the appeal along with documentary evidence, if any.

(2) The HCA shall issue a determination within 45 days from the date the contractor's appeal is received.

(c) Appeals of decisions rendered under (FAR) 48 CFR 27.304–5(a)(2) are subject to the following requirements:

(1) Actions must be appealed within 30 days of receipt of the written statement required by (FAR) 48 CFR 27.304–5(a). The contractor must present all pertinent arguments in the appeal along with documentary evidence, if any.

(2) The HCA may hold an informal hearing if deemed appropriate or at the request of the contractor. The informal hearing shall be held after all fact-finding is completed.

(i) If a hearing is held, there shall be a transcribed record of the same. A copy of the transcript shall be available to the contractor at cost.

(ii) Transcription of the hearing may be waived by mutual agreement of the parties.

(3) The HCA shall designate an impartial fact-finding official. The official conducting the fact-finding shall prepare findings of fact and transmit them to the HCA promptly after the conclusion of the fact-finding proceeding along with a recommended determination.

(i) A copy of the findings of fact shall be sent to the contractor (assignee or exclusive licensee) by registered or certified mail. The contractor (assignee or exclusive licensee) and agency representatives will be given 30 days to submit written arguments to the HCA; and, upon request by the contractor oral arguments will be held before the HCA as part of an informal hearing. The HCA will make the final determination as to whether the initial agency action was appropriate under the relevant laws and procedures (*See* 1227.304–5(c)(4)).

(ii) Any portion of the informal hearing that involves testimony or evidence shall be closed to the public. Agencies shall not disclose any such information obtained in the course of the appeal to persons outside the government except when such release is authorized by the contractor (assignee or licensee).

(4) The HCA's final determination shall be based on the findings of facts, together with any other information and written or oral arguments submitted by the contractor (assignee or exclusive licensee) and agency representatives, and any other information in the administrative record. The HCA may reject only those facts that have been found clearly erroneous and must explicitly state the rejection and the basis for the contrary finding. The HCA shall provide the contractor (assignee or exclusive licensee) a written determination by certified or registered mail no later than 90 days after fact-finding is completed or no later

than 90 days after oral arguments, whichever is later.

1227.305 Administration of patent rights clauses.

1227.305–4 Conveyance of invention rights acquired by the Government.

Solicitations and contracts that include a patent rights clause must provide the contractor the means to report inventions made in the course of contract performance and at contract completion. This requirement may be fulfilled by requiring the contractor to submit a DD Form 882, Report of Inventions and Subcontracts.

PART 1228—BONDS AND INSURANCE

Subpart 1228.1—Bonds and Other Financial Protections

Sec.
1228.106 Administration.
1228.106–1 Bonds and bond-related forms.
1228.106–6 Furnishing of information.
1228.106–70 Execution and administration of bonds.
1228.106–71 Performance and payment bonds for certain contracts.
1228.106–7100 Waiver.
1228.106–7101 Exception.
1228.106–470 Contract clause.

Subpart 1228.3—Insurance

1228.306 Insurance under fixed-price contracts.
1228.306–70 Contracts for lease of aircraft.
1228.307–1 Group insurance plans.
1228.311–1 Contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1228.1—Bonds and Other Financial Protections

1228.106 Administration.

1228.106–1 Bonds and bond-related forms.

(b) Standard Form (SF) 25, Performance Bond, prescribed at (FAR) 48 CFR 28.106–1(b), shall provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor. Forms other than the SF 25 (*e.g.*, a commercial form) shall not be used by contractors when a performance bond is required.

1228.106–6 Furnishing of information.

(b) When furnishing surety information, the inquirer should also be informed that:

(1) Persons believing that they have legal remedies under the Miller Act (40 U.S.C. 3131–3134) are cautioned to consult their own legal advisor regarding the proper steps to take to obtain remedies.

(2) On construction contracts exceeding $2,000, if the contracting officer is informed (through routine compliance checking, a complaint, or a request for information) that a laborer, mechanic, apprentice, trainee, watchman, or guard employed by the contractor or subcontractor at any tier may have been paid wages less than those required by the applicable labor standards provisions of the contract, the contracting officer shall promptly initiate an investigation in accordance with (FAR) 48 CFR subpart 22.4, irrespective of the employee's rights under the Miller Act. When an employee's request for information is involved, the contracting officer shall inform the inquirer that such investigation will be made. To insure proper payment to such employees, this investigation is required pursuant to the provisions of the Davis-Bacon Act, Contract Work Hours and Safety Standards Act (40 U.S.C. 3141), and Copeland (Anti-Kickback) Act (41 U.S.C. 51–58).

(c) When furnishing a copy of a payment bond and contract in accordance with (FAR) 48 CFR 28.106–6(b), the requirement for a copy of the contract may be satisfied by furnishing a machine-duplicate copy of the contractor's first pages which show the contract number and date, the contractor's name and signature, the contracting officer's signature, and the description of the contract work. The contracting officer furnishing the copies shall place the statement ''Certified to be a true and correct copy'' followed by his/her signature, title and name of the OA. The fee for furnishing the requested certified copies shall be determined in accordance with the DOT

Freedom of Information Act regulation, 49 CFR part 7, (TAR) 48 CFR 1224.203).

1228.106–70 Execution and administration of bonds.

(a) The contracting officer shall notify the surety within 30 days, of the contractor's failure to perform in accordance with the terms of the contract.

(b) When a partnership is a principal on a bond, the names of all the members of the firm shall be listed in the bond following the name of the firm, and the phrase ''a partnership composed of.'' If a principal is a corporation, the state of incorporation must also appear on the bond.

(c) Performance or payment bond(s), other than an annual bond, shall not predate the contract to which it pertains.

(d) Bonds may be filed with the original contract to which they apply, or all bonds can be separately maintained and reviewed quarterly for validity. If separately maintained, each contract file shall cross-reference the applicable bonds.

1228.106–71 Performance and payment bonds for certain contracts.

1228.106–7100 Waiver.

(a) Pursuant to the authority vested in the Secretary of Transportation by the Miller Act, the requirements of 40 U.S.C. 3131 *et seq.* are waived, to the extent authorized in 40 U.S.C. 3134(b), with respect to contracts for the construction, alteration, or repair of vessels when the contract is made under sections 1535 and 1536 of Title 31, the Merchant Marine Act 1936 (46 App. U.S.C. 1101 *et seq.*), or the Merchant Ship Sales Act of 1946 (50 App. U.S.C. 1735 *et seq.*), regardless of the terms of the contracts as to payment or title.

(b) The Miller Act's requirement that certain contracts have payment bonds in place in order to protect the public, including the Government, material, men and laborers is not generally necessary with respect to the classes of contracts described under (TAR) 48 CFR 1228.106–7100(a). Inasmuch as the Government would directly or indirectly bear the burden of premiums for performance and payment bonds obtained in connection with such contracts, a substantial savings can be made by waiving the requirement that they be obtained. However, unusual circumstances may arise in which either payment or performance bonds, or both, will be advantageous in connection with certain such contracts.

1228.106–7101 Exception.

A performance and payment bond for the contracts described under (TAR) 48 CFR 1228.106–7100(a) may be advantageous in view of unusual circumstances arising in connection with such contracts. Requests for the authority to include the requirement for either a performance or payment bond, or both in the contracts described under (TAR) 48 CFR 1228.106–7100(a) shall be submitted by the contracting officer to the HCA, before a solicitation is issued.

1228.106–470 Contract clause.

The contracting officer must insert the clause at (TAR) 48 CFR 1252.228–73, Notification of Miller Act Payment Bond Protection, in solicitations and contracts when payment bonds are required.

Subpart 1228.3—Insurance

1228.306 Insurance under fixed-price contracts.

1228.306–70 Contracts for lease of aircraft.

(a) The contracting officer shall insert the clauses at (TAR) 48 CFR 1252.228–70 through 1252.228–72, unless otherwise indicated by the specific instructions for their use, in any contract for the lease of aircraft (including aircraft used in out-service flight training).

(b) The contracting officer shall insert the clause at (TAR) 48 CFR 1252.228–70, Loss of or Damage to Leased Aircraft, in any contract for the lease of aircraft, except in the following circumstances:

(1) When the hourly rental rate does not exceed $250 and the total rental cost for any single transaction is not in excess of $2,500:

(2) When the cost of hull insurance does not exceed 10 percent of the contract rate; or

(3) When the lessor's insurer does not grant a credit for uninsured hours, thereby preventing the lessor from granting the same to the Government.

(c) The contracting officer must insert the clause at (TAR) 48 CFR 1252.228–71, Fair Market Value of Aircraft, when fair market value of the aircraft can be determined.

(d) 49 U.S.C. provides that an aircraft lessor under a lease of 30 days or more is not liable for injury or death of persons, or damage or loss of property unless the aircraft is in the actual possession or control of the lessor and the damage occurs because of the aircraft engine, propeller or the flight of, or an object falling from the aircraft, engine or propeller.

[70 FR 6507, Feb. 7, 2005, as amended at 70 FR 76418, Dec. 27, 2005]

1228.307–1 Group insurance plans.

(a) *Prior approval requirements.* The contracting officer shall instruct the contractor on a contract-by-contract basis on proposed purchases of group insurance plans. Legal advice should be sought where necessary on the advantages to the Government.

1228.311–1 Contract clause.

The contracting officer shall insert the clause at (FAR) 48 CFR 52.228–7, Insurance Liability to Third Persons, as prescribed in FAR 28.311–1 unless it is waived by an official one level above the contracting officer.

PART 1231—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 1231.2—Contracts With Commercial Organizations

Sec.
1231.205 Selected costs.
1231.205–32 Precontract costs.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1231.2—Contracts With Commercial Organizations

1231.205 Selected costs.

1231.205–32 Precontract costs.

(a) The decision to incur precontract costs is that of the contractor. No DOT employee can authorize, demand, or require a contractor to incur precontract costs. The contracting officer may advise the prospective contractor that any costs incurred before contract award are at the contractor's sole risk and that if negotiations fail to result in a binding contract, payment of these costs may not be made by the Government.

(b) When the contracting officer determines that incurring precontract costs was necessary to meet the proposed contract delivery schedule of a cost-reimbursement contract, the clause at (TAR) 48 CFR 1252.231–70, Date of Incurrence of Costs, may be inserted in the resultant contract.

PART 1232—CONTRACT FINANCING

Subpart 1232.70—Contract Payments

Sec.
1232.7002 Invoice and voucher review and approval.
APPENDIX A TO PART 1232—INSTRUCTIONS FOR COMPLETING THE SF 1034
APPENDIX B TO PART 1232—INSTRUCTIONS FOR COMPLETING THE SF 1035

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1232.70—Contract Payments

1232.7002 Invoice and voucher review and approval.

(a) Under fixed-price contracts, the contracting officer shall require the contractor to submit an invoice or voucher in order to receive payment under the contract. The invoice or voucher may be on a form or company letterhead as long as it meets the requirements of the Management and Budget (OMB) regulation at 5 CFR part

1315 as implemented by (FAR) 48 CFR Subpart 32.9, and the contract.

(b) Under other than fixed-price contracts, the contracting office shall require the contractor to submit the SF 1034, Public Voucher for Purchases and Services Other Than Personal, and the SF 1035, Public Voucher for Purchases and Services Other Than Personal (Continuation Sheet), to request payments. The forms must be completed as required by Appendix A to this part, Instructions for Completing the SF 1034, and Appendix B to this part, Instructions for Completing the SF 1035.

APPENDIX A TO PART 1232—INSTRUCTIONS FOR COMPLETING THE SF 1034

[The SF 1034, Public Voucher for Purchases and Services Other Than Personal, shall be completed in accordance with the below instructions. The numbered items correspond to the entries on the form.]

Caption on the SF 1034	Data to be inserted in the block
1. U.S. Department, Bureau, or establishment and location.	Name and address of the contracting office which issued the contract.
2. Date voucher prepared	Date voucher submitted to the designated billing office cited under the contract or order.
3. Contract No. and date	Contract No. and, when applicable, the Order No. and date as shown on the award document.
4. Requisition No. and date	Leave blank or fill-in in accordance with the instructions in the contract.
5. Voucher No.	Start with ''1'' and number consecutively. A separate series of consecutive numbers must be used beginning with ''1'' for each contract number or order number (when applicable). Note: Insert the word ''FINAL'' if this is the last voucher.
6. Schedule No.; paid by; date invoice received; discount terms; payee's account No.; shipped from/to; weight; government B/L.	Leave all these blocks blank.
7. Payee's name and address	Name and address of contractor as it appears on the contract. If the contract is assigned to a bank, also show ''CONTRACT ASSIGNED'' below the name and address of the contractor.
8. Number and date or order	Leave blank. (See #3 above.)
9. Date of delivery or service	The period for which the incurred costs are being claimed (e.g., month and year; beginning and ending date of services, etc.).
10. Articles or services	Insert the following: ''For detail, see the total amount of the claim transferred from the attached SF 1035, page X of X.'' One space below this line, insert the following: ''COST REIMBURSABLE-PROVISIONAL PAYMENT.''
11. Quantity; unit price; (cost; per)	Leave blank.
12. Amount	Insert the total amount claimed from the last page of the SF 1035.
Payee must NOT use the space below	Do NOT write or type below this line.

APPENDIX B TO PART 1232—INSTRUCTIONS FOR COMPLETING THE SF 1035

The SF 1035, Public Voucher for Purchases and Services Other Than Personal (Continuation Sheet), shall be completed in accordance with the below instructions.

1. Use the same basic instructions for the SF 1035 as used for the SF 1034. Ensure that the contract and, if applicable, order number, are shown on each continuation sheet. Use as many sheets as necessary to show the information required by the contract, contracting officer, or responsible audit agency; however, if more than one sheet of SF 1035 is used, each sheet shall be in numerical sequence.

2. The following items are generally entered below the line with Number and Date of Order; Date of Delivery or Service; Articles or Services; Quantity; Unit Price; and Amount (but do not necessarily tie to these captions).

3. Description of data to be inserted as it applies to the contract or order number.

a. Show, as applicable, the target or estimated costs, target or fixed-fee, and total contract value, as adjusted by any modifications to the contract or order. The FAR permits the contracting officer to withhold a percentage of fixed fee until a reserve is set aside in an amount that is considered necessary to protect the Government's interest.

b. Show the following costs and supporting data (as applicable) to the contract or order:

(1) *Direct Labor.* List each labor category, rate per labor hour, hours worked, and extended total labor dollars per labor category.

(2) *Premium Pay/Overtime.* List each labor category, rate per labor hour, hours worked, and the extended total labor dollars per labor category. Note: Advance written authorization must be received from the contracting officer to work overtime or to pay premium rates; therefore, identify the contracting officer's written authorization to the contractor.

(3) *Fringe Benefits.* If fringe benefits are included in the overhead pool, no entry is required. If the contract allows for a separate fringe benefit pool, cite the formula (rate and base) in effect during the time the costs were incurred. If the contract allows for billing fringe benefits as a direct expense, show the actual fringe benefit costs.

(4) *Materials, Supplies, Equipment.* Show those items normally treated as direct costs. Expendable items need not be itemized and may be grouped into major classifications such as office supplies. However, items valued at $5,000 or more must be itemized. See (FAR) 48 CFR part 45, Government Property, for reporting of property.

(5) *Travel.* List the name and title of traveler, place of travel, and travel dates. If the travel claim is based on the actual costs expended, show the amount for the mode of travel (i.e., airline, private auto, taxi, etc.), lodging, meals, and other incidental expenses separately, on a daily basis. These actual costs must be supported with receipts to substantiate the costs paid. Travel costs for consultants must be shown separately and also supported.

(6) *Other Direct Costs.* Itemize those costs that cannot be placed in categories (1) through (5) above. Categorize these costs to the extent possible.

(7) *Total Direct Costs.* Cite the sum of categories (1) through (6) above.

(8) *Overhead.* Cite the rate, base, and extended amount.

(9) *G&A Expense.* Cite the rate, base, and extended amount.

(10) *Total Costs.* Cite the sum of categories (7) through (9) above.

(11) *Fee.* Cite the rate, base, and extended amount.

(12) *Total Cost and Fee Claimed.* Enter this amount on the SF 1034.

COMPLETION VOUCHER

The completion (final) voucher is the last voucher to be submitted for incurred, allocable, and allowable costs expended to perform the contract or order. This voucher should include all contract reserves, allowable cost withholdings, balance of fixed fee, etc. However, the amount of the completion voucher when added to the total amount previously paid cannot exceed the total amount of the contract.

PART 1233—PROTESTS, DISPUTES, AND APPEALS

Subpart 1233.1 Protests

Sec.

1233.103 Protests to the agency.
1233.104 Protests to GAO.

Subpart 1233.2—Disputes and Appeals

1233.211 Contracting officer's decision.
1233.214 Alternative dispute resolution (ADR).

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1233.1—Protests

1233.103 Protests to the agency.

(c) DOT Operating Administrations (OAs) shall consider the use of Alternate Dispute Resolution (ADR) in all agency protest actions.

1233.104 Protests to GAO.

The protest process at the Government Accountability Office (GAO) may include ADR assistance by GAO. The contracting officer shall, with advice of counsel, explore the possibility of using ADR for all GAO protests.

Subpart 1233.2—Disputes and Appeals

1233.211 Contracting officer's decision.

For DOT contracts, the Board of Contract Appeals (BCA) referenced at (FAR) 48 CFR 33.211 is the Department of Transportation Board of Contract Appeals (S–20), 400 7th Street, SW., Washington, DC 20590. The DOTBCA Rules of Procedure are contained in 48 CFR chapter 63, part 6301.

1233.214 Alternative dispute resolution (ADR).

(c) The Administrative Dispute Resolution Act (ADRA) of 1990, Public Law 101–552, as reauthorized by the Administrative Dispute Resolution Act (ADRA) of 1996, Public Law 104–320, authorizes and encourages agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, either before or after appeal, and for other purposes. ADR procedures may be used when:

(1) There is mutual consent by the parties to participate in the ADR process (with consent being obtained either before or after an issue in controversy has arisen);

(2) Prior to the submission of a claim; and

(3) In resolution of a formal claim. Use of ADR shall be coordinated with counsel. For all matters filed with the DOTBCA, the DOTBCA Alternate Dispute Resolution (ADR) procedures contained in 48 CFR Chapter 63, Section 6302.30, ADR Methods (Rule 30), will be distributed to the parties, if ADR procedures are used.

(d) Pursuant to the ADRA, DOT has appointed a Dispute Resolution Specialist, who is responsible for the operations of the Center for Alternative Dispute Resolution, (C–4). The Center may provide an internal DOT neutral agreeable to the parties to conduct any of the alternative means of dispute resolution set forth in the ADRA, 5 U.S.C. 571(3) on a non-reimbursable basis for DOT operating administrations and their contracting partners. Alternative means of dispute resolution include settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration, or any combination of these methods. The Center may also arrange for an external public or private neutral at the parties' expense.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

1234 [RESERVED]

PART 1235—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
1235.003 Policy.

Subpart 1235.70—Research Misconduct

1235.7000 Contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

1235.003 Policy.

(b) Cost sharing. DOT cost sharing policies shall be in accordance with (FAR) 48 CFR 16.303, (FAR) 48 CFR 42.707(a), and Operating Administration (OA) procedures.

Subpart 1235.70—Research Misconduct

1235.7000 Contract clause.

The contracting officer shall insert the clause at (TAR) 48 CFR 1252.235–70, Research Misconduct, in all solicitations and contracts for research and development. For further information, see DOT's Implementation Guidance for Executive Office of the President, Office of Science and Technology Policy, ''Federal Policy on Research Misconduct,'' dated February 2002.

PART 1236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 1236.5—Contract Clauses

Sec.
1236.570 Special precautions for work at operating airports.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

Subpart 1236.5—Contract Clauses

1236.570 Special precautions for work at operating airports.

Where any acquisition will require work at an operating airport, insert the clause at (TAR) 48 CFR 1252.236–70, Special Precautions for Work at Operating Airports, in solicitations and contracts.

[70 FR 6507, Feb. 7, 2005]

PART 1237—SERVICE CONTRACTING

Subpart 1237.1—Service Contracts—General

Sec.
1237.110 Solicitation provisions and contract clauses.

Subpart 1237.70—Department of Transportation Procedures for Acquiring Training Services

1237.7000 Policy.
1237.7001 Certification of data.
1237.7002 Applicability.
1237.7003 Solicitation provisions and contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1237.1—Service Contracts—General

1237.110 Solicitation provisions and contract clauses.

(a) Contracting officers shall insert the clause at (TAR) 48 CFR 1252.237–70, Qualifications of Contractor Employees, in all solicitations and contracts for supplies and/or services where contractor employees will have access to Government facilities, sensitive information, including proprietary data and/or resources.

(b) The contracting officer shall insert the clause at (TAR) 48 CFR 1252.237–73, Key Personnel, in solicitations and contracts for services when the selection for award is substantially based on the offeror's possession of special capabilities regarding personnel.

Subpart 1237.70—Department of Transportation Procedures for Acquiring Training Services

1237.7000 Policy.

When training services are provided under contract, DOT policy requires that all prospective contractors:

(a) Certify that the data provided concerning company qualifications, background statements, etc., is current, accurate, and complete; and

(b) Agree to not solicit or advertise private, non-Government training while conducting a training course.

1237.7001 Certification of data.

Towards fulfilling DOT's policy at (TAR) 48 CFR 1237.7000(a), contracting officers shall request information from prospective contractors for certification purposes. The type of information requested is dependent upon the criticality of the service and/or any unique or essential qualification requirements.

1237.7002 Applicability.

The policy at (TAR) 48 CFR 1237.7000 applies to all contracts (as defined in FAR 2.101) awarded by DOT for training services when DOT controls the content and/or presentation of the course. This policy does not apply to courses attended by DOT employees that are offered and sponsored by Government sources of supply, educational institutions, or private entities where DOT does not control the course content or presentation. (See (TAR) 48 CFR 1213.7100 for examples.)

1237.7003 Solicitation provisions and contact clause.

(a) The contracting officer shall insert the provision at (TAR) 48 CFR 1252.237–71, Certification of Data, in solicitations and the clause at (TAR) 48 CFR 1252.237–72, Prohibition on Advertising, in solicitations and contracts for training services when the content and/or presentation of the course is controlled by DOT.

(b) Contracting officers shall incorporate the successful offeror's certified data into any resultant contract(s). Certified data may be adopted by reference, if the contracting officer determines it contains sufficient descriptive information (*i.e.*, dated material such as resumes, company and/or personnel qualifications) to reliably describe the certified data submitted.

PART 1239—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 1239.1—General

Sec.

1239.70 Solicitation provision and contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

Subpart 1239.1—General

1239.70 Solicitation provision and contract clause.

The contracting officer shall insert the provision at (TAR) 48 CFR 1252.239–71, Information Technology Security Plan and Accreditation, and the clause at (TAR) 48 CFR 1252.239–70, Security Requirements for Unclassified Information Technology Resources, in all solicitations and contracts, exceeding the micro-purchase threshold, that include information technology services.

[70 FR 6507, Feb. 7, 2005]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 1242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 1242.70—Contract Administration Clauses

Sec.
1242.7000 Contract clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

Subpart 1242.70—Contract Administration Clauses

1242.7000 Contract clauses.

(a) The contracting officer may use the clause at (TAR) 48 CFR 1252.242–70, Dissemination of Information—Educational Institutions, in lieu of the clause at (TAR) 48 CFR 1252.242–72, Dissemination of Contract Information, in DOT research contracts with educational institutions that require the release or coordination of information.

(b) The contracting officer shall insert the clause at (TAR) 48 CFR 1252.242–71, Contractor Testimony, in all solicitations and contracts issued by National Highway Traffic Safety Administration (NHTSA). Other Operating Administrations (OAs) may use the clause as deemed appropriate.

(c) The contracting officer may insert the clause at (TAR) 48 CFR 1252.242–72, Dissemination of Contract Information, in all DOT contracts, except contracts that require the release or coordination of information.

(d) The contracting officer shall insert the clause at (TAR) 48 CFR 1252.242–73, Contracting Officer's Technical Representative, in solicitations and contracts when it is intended that a representative will be assigned to the contract to perform functions of a technical nature.

[70 FR 6507, Feb. 7, 2005]

PART 1245—GOVERNMENT PROPERTY

Subpart 1245.5—Management of Government Property in the Possession of Contractors

Sec.
1245.505 Records and reports of Government property.
1245.505–14 Reports of Government property.
1245.505–70 Contract clauses.
1245.508–2 Reporting results of inventories.
1245.511 Audit of property control system.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1245.5—Management of Government Property in the Possession of Contractors

1245.505 Records and reports of Government Property.

1245.505–14 Reports of Government property.

When Government property is furnished to or acquired by the contractor to perform the contract, the contract shall require the contractor to submit annual reports (see (FAR) 48 CFR 45.505–14) to the contracting officer not later than September 15 of each year. The contractor's report shall be submitted on Form DOT F 4220.43, Contractor Report of Government Property.

1245.505–70 Contract clauses.

Contracting officers shall insert the clause at (TAR) 48 CFR 1252.245–70 in solicitations and contracts when the contract will require Government provided or contractor acquired property.

1245.508–2 Reporting results of inventories.

The inventory report shall also include the following:

(a) Name and title of the individual(s) that performed the physical inventory;

(b) An itemized, categorized listing of all property capitalized:

(1) Land and rights therein;

(2) Other real property;

(3) Plant equipment;

(4) Special test equipment; agency peculiar property; and

(5) Special tooling; and

(c) An itemized listing of the property lost, damaged, destroyed, or stolen, the circumstances surrounding each incident, and the resolution of the incident.

1245.511 Audit of property control system.

(a) The property administrator (or other Government official authorized by the contracting officer) shall audit the contractor's property control system whenever there are indications that the contractor's property control system may be deficient. Examples of deficiencies are:

(1) Failure of the contractor to acknowledge receipt of Government-furnished property;

(2) Failure of the contractor to submit the annual property reports required by (TAR) 48 CFR 1245.505–14;

(3) Failure of the contractor to reconcile its physical inventory with its property control record; or

(4) Failure of the contractor to submit a Government property listing when requested by the property administrator.

(b) When it is determined that the contractor's property control system is deficient, the property administrator, in coordination with the contracting officer, shall discuss the deficiencies with the contractor. If the contractor does not take action to correct the deficiencies, the contracting officer shall provide the contractor with a written notice of the deficiencies and the date all deficiencies must be corrected.

PART 1246—QUALITY ASSURANCE

Subpart 1246.1—General

Sec.

1246.101 Definitions.
1246.101–70 Additional definitions.

Subpart 1246.7—Warranties

1246.705 Limitations.
1246.706 Warranty terms and conditions.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1246.1—General

1246.101 Definitions.

1246.101–70 Additional definitions.

At no additional cost to the Government means at no increase in price for firm-fixed-price contracts, at no increase in target or ceiling price for fixed price incentive contracts (see (FAR) 48 CFR 46.707), or at no increase in estimated cost or fee for cost-reimbursement contracts.

Defect means any condition or characteristic in any supplies or services furnished by the contractor under the contract that is not in compliance with the requirements of the contract.

Major acquisition means an acquisition or project as defined by TAM Chapter 1234, Major System Acquisition.

Performance requirements means the operating capabilities, maintenance, and reliability characteristics of a system that are determined to be necessary for it to fulfill the requirement for which the system is designed.

Subpart 1246.7—Warranties

1246.705 Limitations.

(a) The following restrictions are applicable to DOT contracts:

(1) The contractor shall not be required to honor the warranty on any property furnished by the Government except for:

(i) Defects in installation; and

(ii) Installation or modification in such a manner that invalidates a warranty provided by the manufacturer of the property.

(2) Any warranty obtained shall specifically exclude coverage of damage in time of war (combat damage) or national emergency.

(3) Contracting officers shall not include in a warranty clause any terms that require the contractor to incur liability for loss, damage, or injury to third parties.

(b) [Reserved]

1246.706 Warranty terms and conditions.

(a) When appropriate and cost effective, the contracting officer shall comply with the following requirements when developing the warranty terms and conditions:

(1) Identify the affected line item(s) and the applicable specification(s);

(2) Require that the line item's design and manufacture will conform to:

(i) An identified revision of a top-level drawing; and/or

(ii) An identified specification or revision thereof;

(3) Require that the line item conform to the specified Government performance requirements;

(4) Require that all line items and components delivered under the contract will be free from defects in materials and workmanship;

(5) State that if the contractor fails to comply with specification or there are defects in material and workmanship, the contractor will bear the cost of all work necessary to achieve the specified performance requirements, including repair and/or replacement of all parts;

(6) Require the timely replacement/repair of warranted items and specify lead times for replacement/repair where possible;

(7) Identify the specific paragraphs containing Government performance requirements that the contractor must meet;

(8) Ensure that any performance requirements identified as goals or objectives beyond specification requirements are excluded from the warranty provision;

(9) Specify what constitutes the start of the warranty period (*e.g.*, delivery, acceptance, in-service date), the ending of the warranty (*e.g.*, passing a test or demonstration, or operation without failure for a specified time period), and circumstances requiring an extension of warranty duration (*e.g.*, extending the warranty period as a result of mass defect correction during warranty period);

(10) Identify what transportation costs will be paid by the contractor in relation to the warranty coverage;

(11) In addition to combat damage, identify any conditions which will not be covered by the warranty, and

(12) Identify any limitation on the total dollar amount of the contractor's warranty exposure, or agreement to share costs after a certain dollar threshold to avoid unnecessary warranty returns.

(b) In addition to the terms and conditions listed in paragraph (a) of this section, the contracting officer shall consider the following when a warranty clause is being used for a major acquisition:

(1) For line items or components which are commercially available, obtaining a warranty as is normally provided by the manufacturer or supplier, in accordance with (FAR) 48 CFR 46.703(d) and (FAR) 48 CFR 46.710(b)(2).

(2) Obtaining a warranty of compliance with the stated requirements for line items or components provided in accordance with either design and manufacturing or performance requirements as specified in the contract or any modification to that contract.

(3) The warranty provided under paragraph (b)(2) of this section shall provide that in the event the line items or any components thereof fails to meet the terms of the warranty provided, the contracting officer may:

(i) Require the contractor to promptly take such corrective action as the contracting officer determines to be necessary at no additional cost to the Government, including repairing or replacing all parts necessary to achieve the requirements set forth in the contract;

(ii) Require the contractor to pay costs reasonably incurred by the United States in taking necessary corrective action; or

(iii) Equitably reduce the contract price.

(4) Inserting remedies, exclusions, limitations and durations, provided these are consistent with the specific requirements of this subpart and (FAR) 48 CFR 46.706.

(5) Excluding from the terms of the warranty certain defects for specified supplies (exclusions) and limiting the contractor's liability under the terms

of the warranty (limitations), as appropriate, if necessary to derive a cost-effective warranty in light of the technical risk, contractor financial risk, or other program uncertainties.

(6) Structuring of a broader and more comprehensive warranty where such is advantageous. Likewise, the contracting officer may narrow the scope of a warranty when appropriate (*e.g.*, where it would be inequitable to require a warranty of all performance requirements because a contractor had not designed the system).

(c) Any contract that contains a warranty clause must contain warranty implementation procedures, including warranty notification content and procedures, and identify the individuals responsible for implementation of warranty provisions. The contract may also permit the contractor's participation in investigation of system failures, providing that the contractor is reimbursed at established rates for fault isolation work, and that the Government receive credit for any payments where equipment failure is covered by warranty provisions.

PART 1247—TRANSPORTATION

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1247.5—Ocean Transportation by U.S.-Flag Vessels

1247.506 Procedures.

(a) The Maritime Administration (MARAD) is the enforcing agency of the cargo preference statutes. MARAD can assist contractors in locating U.S.-flag carriers and determine when such services are not available and they can assist contracting officers in evaluating costs, services, and other matters regarding ocean transportation.

(d) If no transportation officer is available, the contracting officer shall submit a copy of the rated ''on board'' bill of lading, for each shipment, no later than 20 days after the vessel's loading date for exports and 30 days for imports as stated in 46 CFR 381.3. All non-vessel ocean common carrier bills of lading should be accompanied by the underlying carrier's ocean bill of lading. The documents shall be sent to the Maritime Administration, Office of Cargo Preference, MAR–590, 400 Seventh Street, SW., Washington, DC 20590. The bill of lading shall contain the following information:

(1) Name of sponsoring Government agency or department;
(2) Name of vessel;
(3) Vessel flag of registry;
(4) Date of loading;
(5) Port of loading;
(6) Port of final discharge;
(7) Commodity description;
(8) Gross weight in kilos;
(9) Total ocean freight revenue in U.S. dollars.

SUBCHAPTER H—CLAUSES AND FORMS

PART 1252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 1252.1—Instructions for Using Provisions and Clauses

Sec.
1252.101 Using Part 1252.

Subpart 1252.2—Text of Provisions and Clauses

1252.211–70 Index for specifications.
1252.216–70 Evaluation of offers subject to an economic price adjustment clause.
1252.216–71 Determination of award fee.
1252.216–72 Performance evaluation plan.
1252.216–73 Distribution of award fee.
1252.216–74 Settlement of letter contract.
1252.217–70 Guarantee.
1252.217–71 Delivery and shifting of vessel.
1252.217–72 Performance.
1252.217–73 Inspection and manner of doing work.
1252.217–74 Subcontracts.
1252.217–75 Lay days.
1252.217–76 Liability and insurance.
1252.217–77 Title.
1252.217–78 Discharge of liens.
1252.217–79 Delays.
1252.217–80 Department of Labor Safety and Health Regulations for Ship Repairing.
1252.219–71 Section 8(a) Direct Awards.
1252.219–72 Notification of Competition Limited to Eligible 8(a) Concerns—Alternate III.
1252.222–70 Strikes or picketing affecting timely completion of the contract work.
1252.222–71 Strikes or picketing affecting access to a DOT facility.
1252.223–70 Removal or disposal of hazardous substances—applicable licenses and permits.
1252.223–71 Accident and fire reporting.
1252.223–72 Protection of human subjects.
1252.223–73 Seat belt use policies and programs.
1252.228–70 Loss of or damage to leased aircraft.
1252.228–71 Fair market value of aircraft
1252.228–72 Risk and indemnities.
1252.228–73 Notification of Miller Act payment bond protection.
1252.231–70 Date of incurrence of costs.
1252.235–70 Research misconduct.
1252.236–70 Special precautions for work at operating airports.
1252.237–70 Qualifications of contractor employees.
1252.237–71 Certification of data.
1252.237–72 Prohibition on advertising.
1252.237–73 Key personnel.
1252.239–70 Security requirements for unclassified information technology resources.
1252.239–71 Information technology security plan and accreditation.
1252.242–70 Dissemination of information—educational institutions.
1252.242–71 Contractor testimony.
1252.242–72 Dissemination of contract information.
1252.242–73 Contracting officer's technical representative.
1252.245–70 Government property reports.
APPENDIX TO PART 1252—TAR MATRIX

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1252.1—Instructions for Using Provisions and Clauses

1252.101 Using Part 1252.

(b) *Numbering.*

(2)(i) *Provisions or clauses that supplement the FAR.*

(A) Agency-prescribed provisions and clauses permitted by TAR and used on a standard basis (*i.e.*, normally used in two or more solicitations or contracts regardless of contract type) shall be prescribed and contained in the TAR. Operating Administrations (OAs) desiring to use a provision or a clause on a standard basis shall submit a request containing a copy of the clause(s), justification for its use, and evidence of legal counsel review to the Office of the Senior Procurement Executive in accordance with (TAR) 48 CFR 1201.304 for possible inclusion in the TAR.

(B) Provisions and clauses used on a one-time basis (*i.e.*, non-standard provisions and clauses) may be approved by the contracting officer, unless a higher level is designated by the OA. This authority is permitted subject to:

(*1*) Evidence of legal counsel review in the contract file;

(*2*) Inserting these clauses in the appropriate sections of the uniform contract format; and

(*3*) Ensuring the provisions and clauses do not deviate from the requirements of the FAR and TAR.

Subpart 1252.2—Text of Provisions and Clauses

1252.211–70 Index for specifications.

As prescribed in (TAR) 48 CFR 1211.204–70, insert the following clause:

INDEX FOR SPECIFICATIONS (APR 2005)

If an index or table of contents is furnished in connection with specifications, such index or table of contents is for convenience only. Its accuracy and completeness is not guaranteed, and it is not a part of the specification. In case of discrepancy between the index or table of contents and the specifications, the specifications shall govern.

(End of clause)

1252.216–70 Evaluation of offers subject to an economic price adjustment clause.

As prescribed in (TAR) 48 CFR 1216.203–470, insert the following provision:

EVALUATION OF OFFERS SUBJECT TO AN ECONOMIC PRICE ADJUSTMENT CLAUSE (OCT 1994)

Offers shall be evaluated without an amount for an economic price adjustment being added. Offers will be rejected which: (1) Increase the ceiling stipulated; (2) limit the downward adjustment; or (3) delete the economic price adjustment clause. If the offer stipulates a ceiling lower than that included in the solicitation, the lower ceiling will be incorporated into any resulting contract.

(End of provision)

1252.216–71 Determination of award fee.

As prescribed in (TAR) 48 CFR 1216.406, insert the following clause:

DETERMINATION OF AWARD FEE (APR 2005)

(a) The Government shall evaluate contractor performance at the end of each specified evaluation period to determine the amount of award. The contractor agrees that the amount of award and the award fee methodology are unilateral decisions to be made at the sole discretion of the Government.

(b) Contractor performance shall be evaluated according to a Performance Evaluation Plan. The contractor shall be periodically informed of the quality of its performance and areas in which improvements are expected.

(c) The contractor shall be promptly advised, in writing, of the determination and reasons why the award fee was or was not earned. The contractor may submit a performance self-evaluation for each evaluation period. The amount of award is at the sole discretion of the Government but any self-evaluation received within _____ (*insert number*) days after the end of the current evaluation period will be given such consideration, as may be deemed appropriate by the Government.

(d) The amount of award fee which can be awarded in each evaluation period is limited to the amounts set forth at (*identify location of award fee amounts*). Award fee which is not earned in an evaluation period cannot be reallocated to future evaluation periods.

(End of clause)

1252.216–72 Performance evaluation plan.

As prescribed in (TAR) 48 CFR 1216.406(b), insert the following clause:

PERFORMANCE EVALUATION PLAN (OCT 1994)

(a) A Performance Evaluation Plan shall be unilaterally established by the Government based on the criteria stated in the contract and used for the determination of award fee. This plan shall include the criteria used to evaluate each area and the percentage of award fee (if any) available for each area. A copy of the plan shall be provided to the contractor _____ (*insert number*) calendar days prior to the start of the first evaluation period.

(b) The criteria contained within the Performance Evaluation Plan may relate to: (1) Technical (including schedule) requirements, if appropriate; (2) Management; and (3) Cost.

(c) The Performance Evaluation Plan may, consistent with the contract, be revised unilaterally by the Government at any time during the period of performance. Notification of such changes shall be provided to the contractor _____ (*insert number*) calendar days prior to the start of the evaluation period to which the change will apply.

(End of clause)

1252.216–73 Distribution of award fee.

As prescribed in (TAR) 48 CFR 1216.406(c), insert the following clause:

DISTRIBUTION OF AWARD FEE (APR 2005)

(a) The total amount of award fee available under this contract is assigned according to the following evaluation periods and amounts:

Evaluation Period:

Available Award Fee: (*insert appropriate information*)

(b) After the contractor has been paid 85 percent of the base fee and potential award fee, the Government may withhold further

payment of the base fee and award fee until a reserve is set aside in an amount that the Government considers necessary to protect its interest. This reserve shall not exceed 15 percent of the total base fee and potential award fee or $100,000, whichever is less. Thereafter, base fee and award fee payments may continue.

(c) In the event of contract termination, either in whole or in part, the amount of award fee available shall represent a prorata distribution associated with evaluation period activities or events as determined by the Government.

(d) The Government will promptly make payment of any award fee upon the submission by the contractor to the contracting officer's authorized representative, of a public voucher or invoice in the amount of the total fee earned for the period evaluated. Payment may be made without using a contract modification.

(End of clause)

1252.216–74 Settlement of letter contract.

As prescribed in (TAR) 48 CFR 1216.603–4, insert the following clause:

SETTLEMENT OF LETTER CONTRACT (OCT 1994)

(a) This contract constitutes the definitive contract contemplated by issuance of letter contract _____ (*insert number*) dated _____ (*insert effective date*). It supersedes the letter contract and its modification number(s) _____ (*insert number(s)*) and, to the extent of any inconsistencies, governs.

(b) The cost(s) and fee(s), or price(s), established in this definitive contract represents full and complete settlement of letter contract (*insert number and modification number(s)* _____ (*insert number(s)*). Payment of the agreed upon fee or profit withheld pending definitization of the letter contract, may commence immediately at the rate and times stated within this contract.

(End of clause)

1252.217–70 Guarantee.

As prescribed at (TAR) 48 CFR 1217.7001(a), insert the following clause:

GUARANTEE (APR 2005)

(a) In the event any work performed or materials furnished by the contractor prove defective or deficient within 60 days from the date of redelivery of the vessel(s), the Contractor, as directed by the Contracting Officer and at its own expense, shall correct and repair the deficiency to the satisfaction of the Contracting Officer.

(b) If the Contractor or any subcontractor has a guarantee for work performed or materials furnished that exceeds the 60 day period, the Government shall be entitled to rely upon the longer guarantee until its expiration.

(c) With respect to any individual work item identified as incomplete at the time of redelivery of the vessel(s), the guarantee period shall run from the date the item is completed.

(d) If practicable, the Government shall give the Contractor an opportunity to correct the deficiency.

(1) If the Contracting Officer determines it is not practicable or is otherwise not advisable to return the vessel(s) to the Contractor, or the Contractor fails to proceed with the repairs promptly, the Contracting Officer may direct that the repairs be performed elsewhere, at the Contractor's expense.

(2) If correction and repairs are performed by other than the Contractor, the Contracting Officer may discharge the Contractor's liability by making an equitable deduction in the price of the contract.

(e) The Contractor's liability shall extend for an additional 90 day guarantee period on those defects or deficiencies that the Contractor corrected.

(f) At the option of the Contracting Officer, defects and deficiencies may be left uncorrected. In that event, the Contractor and Contracting Officer shall negotiate an equitable reduction in the contract price. Failure to agree upon an equitable reduction shall constitute a dispute under the Disputes clause of this contract.

(End of clause)

1252.217–71 Delivery and shifting of vessel.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

DELIVERY AND SHIFTING OF VESSEL (OCT 1994)

The Government shall deliver the vessel to the Contractor at his place of business. Upon completion of the work, the Government shall accept delivery of the vessel at the Contractor's place of business. The Contractor shall provide, at no additional charge, upon 24 hours' advance notice, a tug or tugs and docking pilot, acceptable to the Contracting Officer, to assist in handling the vessel between (to and from) the Contractor's plant and the nearest point in a waterway regularly navigated by vessels of equal or greater draft and length. While the vessel is in the hands of the Contractor, any necessary towage, cartage, or other transportation between ship and shop or elsewhere, which may be incident to the work herein

specified, shall be furnished by the Contractor without additional charge to the Government.

(End of clause)

1252.217–72 Performance.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

PERFORMANCE (OCT 1994)

(a) Upon the award of the contract, the Contractor shall promptly start the work specified and shall diligently prosecute the work to completion. The Contractor shall not start work until the contract has been awarded except in the case of emergency work ordered by the Contracting Officer in writing.

(b) The Government shall deliver the vessel described in the contract at the time and location specified in the contract. Upon completion of the work, the Government shall accept delivery of the vessel at the time and location specified in the contract.

(c) The Contractor shall without charge—

(1) Make available to personnel of the vessel while in dry dock or on a marine railway, sanitary lavatory and similar facilities at the plant acceptable to the Contracting Officer;

(2) Supply and maintain suitable brows and gangways from the pier, dry dock, or marine railway to the vessel;

(3) Treat salvage, scrap or other ship's material of the Government resulting from performance of the work as items of Government-furnished property, in accordance with the Government Property (Fixed Price Contracts) clause;

(4) Perform, or pay the cost of, any repair, reconditioning or replacement made necessary as the result of the use by the Contractor of any of the vessel's machinery, equipment or fittings, including, but not limited to, winches, pumps, rigging, or pipe lines; and

(5) Furnish suitable offices, office equipment and telephones at or near the site of the work for the Government's use.

(d) The contract will state whether dock and sea trials are required to determine whether or not the Contractor has satisfactorily performed the work.

(1) If dock and sea trials are required, the vessel shall be under the control of the vessel's commander and crew.

(2) The Contractor shall not conduct dock and sea trials not specified in the contract without advance approval of the Contracting Officer. Dock and sea trials not specified in the contract shall be at the Contractor's expense and risk.

(3) The Contractor shall provide and install all fittings and appliances necessary for dock and sea trials. The Contractor shall be responsible for care, installation, and removal of instruments and apparatus furnished by the Government for use in the trials.

(End of clause)

1252.217–73 Inspection and manner of doing work.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

INSPECTION AND MANNER OF DOING WORK (OCT 1994)

(a) The Contractor shall perform work in accordance with the contract, any drawings and specifications made a part of the job order, and any change or modification issued under the Changes clause.

(b)(1) Except as provided in paragraph (b)(2) of this clause, and unless otherwise specifically provided in the contract, all operational practices of the Contractor and all workmanship, material, equipment, and articles used in the performance of work under this contract shall be in accordance with the best commercial marine practices and the rules and requirements of all appropriate regulatory bodies including, but not limited to the American Bureau of Shipping, the U.S. Coast Guard, and the Institute of Electrical and Electronic Engineers, in effect at the time of Contractor's submission of offer, and shall be intended and approved for marine use.

(2) When Navy specifications are specified in the contract, the Contractor shall follow Navy standards of material and workmanship. The solicitation shall prescribe the Navy standard whenever applicable.

(c) The Government may inspect and test all material and workmanship at any time during the Contractor's performance of the work.

(1) If, prior to delivery, the Government finds any material or workmanship is defective or not in accordance with the contract, in addition to its rights under the Guarantee clause, the Government may reject the defective or nonconforming material or workmanship and require the Contractor to correct or replace it at the Contractor's expense.

(2) If the Contractor fails to proceed promptly with the replacement or correction of the material or workmanship, the Government may replace or correct the defective or nonconforming material or workmanship and charge the Contractor the excess costs incurred.

(3) As specified in the contract, the Contractor shall provide and maintain an inspection system acceptable to the Government.

(4) The Contractor shall maintain complete records of all inspection work and shall

make them available to the Government during performance of the contract and for 90 days after the completion of all work required.

(d) The Contractor shall not permit any welder to work on a vessel unless the welder is, at the time of the work, qualified to the standards established by the U.S. Coast Guard, American Bureau of Shipping, or Department of the Navy for the type of welding being performed. Qualifications of a welder shall be as specified in the contract.

(e) The Contractor shall—

(1) Exercise reasonable care to protect the vessel from fire;

(2) Maintain a reasonable system of inspection over activities taking place in the vicinity of the vessel's magazines, fuel oil tanks, or storerooms containing flammable materials.

(3) Maintain a reasonable number of hose lines ready for immediate use on the vessel at all times while the vessel is berthed alongside the Contractor's pier or in dry dock or on a marine railway;

(4) Unless otherwise provided in the contract, provide sufficient security patrols to reasonably maintain a fire watch for protection of the vessel when it is in the Contractor's custody;

(5) To the extent necessary, clean, wash, and steam out or otherwise make safe, all tanks under alteration or repair.

(6) Furnish the Contracting Officer a ''gas-free'' or ''safe-for-hotwork'' certificate before any hot work is done on a tank;

(7) Treat the contents of any tank as Government property in accordance with the Government Property (Fixed-Price Contracts) clause; and

(8) Dispose of the contents of any tank only at the direction, or with the concurrence, of the Contracting Officer.

(9) Be responsible for the proper closing of all openings to the vessel's underwater structure upon which work has been performed. The contractor additionally must advise the COTR of the status of all valves closures and openings for which the contractor's workers were responsible.

(f) Except as otherwise provided in the contract, when the vessel is in the custody of the Contractor or in dry dock or on a marine railway and the temperature is expected to go as low as 35 Fahrenheit, the Contractor shall take all necessary steps to—

(1) Keep all hose pipe lines, fixtures, traps, tanks, and other receptacles on the vessel from freezing; and

(2) Protect the stern tube and propeller hubs from frost damage.

(g) The Contractor shall, whenever practicable—

(1) Perform the required work in a manner that will not interfere with the berthing and messing of Government personnel attached to the vessel; and

(2) Provide Government personnel attached to the vessel access to the vessel at all times.

(h) Government personnel attached to the vessel shall not interfere with the Contractor's work or workers.

(i)(1) The Government does not guarantee the correctness of the dimensions, sizes, and shapes set forth in any contract, sketches, drawings, plans, or specifications prepared or furnished by the Government, unless the contract requires that the Contractor perform the work prior to any opportunity to inspect.

(2) Except as stated in paragraph (i)(1) of this clause, and other than those parts furnished by the Government, and the Contractor shall be responsible for the correctness of the dimensions, sizes, and shapes of parts furnished under this agreement.

(j) The Contractor shall at all times keep the site of the work on the vessel free from accumulation of waste material or rubbish caused by its employees or the work. At the completion of the work, unless the contract specifies otherwise, the Contractor shall remove all rubbish from the site of the work and leave the immediate vicinity of the work area ''broom clean.''

(End of clause)

1252.217–74 Subcontracts.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

SUBCONTRACTS (OCT 1994)

(a) Nothing contained in the contract shall be construed as creating any contractual relationship between any subcontractor and the Government. The divisions or sections of the specifications are not intended to control the Contractor in dividing the work among subcontractors or to limit the work performed by any trade.

(b) The Contractor shall be responsible to the Government for acts and omissions of its own employees, and of subcontractors and their employees. The Contractor shall also be responsible for the coordination of the work of the trades, subcontractors, and material men.

(c) The Contractor shall, without additional expense to the Government, employ specialty subcontractors where required by the specifications.

(d) The Government or its representatives will not undertake to settle any differences between the Contractor and its subcontractors, or between subcontractors.

(End of clause)

1252.217–75 Lay days.

As prescribed at (TAR) 48 CFR 1217.7001(c) and (e), insert the following clause:

LAY DAYS (OCT 1994)

(a) Lay day time will be paid by the Government at the Contractor's stipulated bid price for this item of the contract when the vessel remains on the dry dock or marine railway as a result of any change that involves work in addition to that required under the basic contract.

(b) No lay day time shall be paid until all items of the basic contract for which a price was established by the Contractor and for which docking of the vessel was required have been satisfactorily completed and accepted.

(c) Days of hauling out and floating, whatever the hour, shall not be paid as lay day time, and days when no work is performed by the Contractor shall not be paid as lay day time.

(d) Payment of lay day time shall constitute complete compensation for all costs, direct and indirect, to reimburse the Contractor for use of dry dock or marine railway.

(End of clause)

[70 FR 6507, Feb. 7, 2005, as amended at 70 FR 76418, Dec. 27, 2005]

1252.217–76 Liability and insurance.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

LIABILITY AND INSURANCE (OCT 1994)

(a) The Contractor shall exercise its best efforts to prevent accidents, injury, or damage to all employees, persons, and property, in and about the work, and to the vessel or part of the vessel upon which work is done.

(b) *Loss or damage to the vessel, materials, or equipment.* (1) Unless otherwise directed or approved in writing by the Contracting Officer, the Contractor shall not carry insurance against any form of loss or damage to the vessel(s) or to the materials or equipment to which the Government has title or which have been furnished by the Government for installation by the Contractor. The Government assumes the risks of loss of and damage to that property.

(2) The Government does not assume any risk with respect to loss or damage compensated for by insurance or otherwise or resulting from risks with respect to which the Contractor has failed to maintain insurance, if available, as required or approved by the Contracting Officer.

(3) The Government does not assume risk of and will not pay for any costs of the following:

(i) Inspection, repair, replacement, or renewal of any defects in the vessel(s) or material and equipment due to—

(A) Defective workmanship performed by the Contractor or its subcontractors;

(B) Defective materials or equipment furnished by the Contractor or its subcontractors; or

(C) Workmanship, materials, or equipment which do not conform to the requirements of the contract, whether or not the defect is latent or whether or not the nonconformance is the result of negligence.

(ii) Loss, damage, liability, or expense caused by, resulting from, or incurred as a consequence of any delay or disruption, willful misconduct or lack of good faith by the Contractor or any of its representatives that have supervision or direction of—

(A) All or substantially all of the Contractor's business; or

(B) All or substantially all of the Contractor's operation at any one plant.

(4) As to any risk that is assumed by the Government, the Government shall be subrogated to any claim, demand or cause of action against third parties that exists in favor of the Contractor. If required by the Contracting Officer, the Contractor shall execute a formal assignment or transfer of the claim, demand, or cause of action.

(5) No party other than the Contractor shall have any right to proceed directly against the Government or join the Government as a codefendant in any action.

(6) Notwithstanding the foregoing, the Contractor shall bear the first $5,000 of loss or damage from each occurrence or incident, the risk of which the Government would have assumed under the provision of this paragraph (b).

(c) *Indemnification.* The Contractor indemnifies the Government and the vessel and its owners against all claims, demands, or causes of action to which the Government, the vessel or its owner(s) might be subject as a result of damage or injury (including death) to the property or person of anyone other than the Government or its employees, or the vessel or its owner, arising in whole or in part from the negligence or other wrongful act of the Contractor, or its agents or employees, or any subcontractor, or its agents or employees.

(1) The Contractor's obligation to indemnify under this paragraph shall not exceed the sum of $300,000 as a consequence of any single occurrence with respect to any one vessel.

(2) The indemnity includes, without limitation, suits, actions, claims, costs, or demands of any kind, resulting from death,

personal injury, or property damage occurring during the period of performance of work on the vessel or within 90 days after redelivery of the vessel. For any claim, etc., made after 90 days, the rights of the parties shall be as determined by other provisions of this contract and by law. The indemnity does apply to death occurring after 90 days where the injury was received during the period covered by the indemnity.

(d) *Insurance.* (1) The Contractor shall, at its own expense, obtain and maintain the following insurance—

(i) Casualty, accident, and liability insurance, as approved by the Contracting Officer, insuring the performance of its obligations under paragraph (c) of this clause.

(ii) Workers Compensation Insurance (or its equivalent) covering the employees engaged on the work.

(2) The Contractor shall ensure that all subcontractors engaged on the work obtain and maintain the insurance required in paragraph (d)(1) of this clause.

(3) Upon request of the Contracting Officer, the Contractor shall provide evidence of the insurance required by paragraph (d) of this clause.

(e) The Contractor shall not make any allowance in the contract price for the inclusion of any premium expense or charge for any reserve made on account of self-insurance for coverage against any risk assumed by the Government under this clause.

(f) The Contractor shall give the Contracting Officer written notice as soon as practicable after the occurrence of a loss or damage for which the Government has assumed the risk.

(1) The notice shall contain full details of the loss or damage.

(2) If a claim or suit is later filed against the Contractor as a result of the event, the Contractor shall immediately deliver to the Government every demand, notice, summons, or other process received by the Contractor or its employees or representatives.

(3) The Contractor shall cooperate with the Government and, upon request, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits. The Government shall reimburse the Contractor for expenses incurred in this effort, other than the cost of maintaining the Contractor's usual organization.

(4) The Contractor shall not, except at its own expense, voluntarily make any payments, assume any obligation, or incur any expense other than what would be imperative for the protection of the vessel(s) at the time of the event.

(g) In the event of loss of or damage to any vessel(s), material, or equipment which may result in a claim against the Government under the insurance provisions of this contract, the Contractor shall promptly notify the Contracting Officer of the loss or damage. The Contracting Officer may, without prejudice to any right of the Government, either—

(1) Order the Contractor to proceed with replacement or repair, in which event the Contractor shall effect the replacement or repair;

(i) The Contractor shall submit to the Contracting Officer a request for reimbursement of the cost of the replacement or repair together with whatever supporting documentation the Contracting Officer may reasonably require, and shall identify the request as being submitted under the Insurance clause of this contract.

(ii) If the Government determines that the risk of the loss or damage is within the scope of the risks assumed by the Government under this clause, the Government will reimburse the Contractor for the reasonable allowable cost of the replacement or repair, plus a reasonable profit (if the work or replacement or repair was performed by the Contractor) less the deductible amount specified in paragraph (b) of this clause.

(iii) Payments by the Government to the Contractor under this clause are outside the scope of and shall not affect the pricing structure of the contract, and are additional to the compensation otherwise payable to the Contractor under this contract; or

(2) Decide that the loss or damage shall not be replaced or repaired and in that event, the Contracting Officer shall—

(i) Modify the contract appropriately, consistent with the reduced requirements reflected by the unreplaced or unrepaired loss or damage; or

(ii) Terminate the repair of any part or all of the vessel(s) under the Termination for Convenience of the Government clause of this contract.

(End of clause)

1252.217–77 Title.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

TITLE (OCT 1994)

(a) Unless otherwise provided, title to all materials and equipment to be incorporated in a vessel in the performance of this contract shall vest in the Government upon delivery at the location specified for the performance of the work.

(b) Upon completion of the contract, or with the approval of the Contracting Officer during performance of the contract, all Contractor-furnished materials and equipment not incorporated in, or placed on, any vessel, shall become the property of the Contractor, unless the Government has reimbursed the

Contractor for the cost of the materials and equipments.

(c) The vessel, its equipment, movable stores, cargo, or other ship's materials shall not be considered Government-furnished property.

(End of clause)

1252.217–78 Discharge of liens.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

DISCHARGE OF LIENS (OCT 1994)

(a) The Contractor shall immediately discharge or cause to be discharged, any lien or right in rem of any kind, other than in favor of the Government, that exists or arises in connection with work done or materials furnished under this contract.

(b) If any such lien or right *in rem* is not immediately discharged, the Government, at the expense of the Contractor, may discharge, or cause to be discharged, the lien or right.

(End of clause)

1252.217–79 Delays.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

DELAYS (OCT 1994)

When during the performance of this contract the Contractor is required to delay work on a vessel temporarily, due to orders or actions of the Government respecting stoppage of work to permit shifting the vessel, stoppage of hot work to permit bunkering, stoppage of work due to embarking or debarking passengers and loading or discharging cargo, and the Contractor is not given sufficient advance notice or is otherwise unable to avoid incurring additional costs on account thereof, an equitable adjustment shall be made in the price of the contract pursuant to the ''Changes'' clause.

(End of clause)

1252.217–80 Department of Labor Safety and Health Regulations for Ship Repairing.

As prescribed at (TAR) 48 CFR 1217.7001(b) and (c), insert the following clause:

DEPARTMENT OF LABOR SAFETY AND HEALTH REGULATIONS FOR SHIP REPAIR (APR 2005)

Nothing contained in this contract shall relieve the Contractor of any obligations it may have to comply with—

(a) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*);

(b) The Occupational Safety and Health Standards for Shipyard Employment (29 CFR part 1915); or

(c) Any other applicable Federal, State, and local laws, codes, ordinances, and regulations.

(End of clause)

1252.219–71 Section 8(a) Direct Awards.

As prescribed in (TAR) 48 CFR 1219.811–3(f), insert the following clause:

SECTION 8(A) DIRECT AWARDS (APR 2005)

(a) This contract is issued as a direct award between the contracting activity and the 8(a) contractor pursuant to the Partnership Agreement between the Small Business Administration (SBA) and the Department of Transportation. SBA does retain responsibility for 8(a) certification, 8(a) eligibility determinations and related issues, and providing counseling and assistance to the 8(a) contractor under the 8(a) program. The responsible SBA district office is: [To be completed by Contracting Officer at time of award]

(b) The contracting activity is responsible for administering the contract and taking any action on behalf of the Government under the terms and conditions of the contract. However, the contracting activity shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the contract. The contracting activity shall also coordinate with SBA prior to processing any novation agreement. The contracting activity may assign contract administration functions to a contract administration office.

(c) The contractor agrees:

(1) To notify the Contracting Officer, simultaneous with its notification to SBA (as required by SBA's 8 (a) regulations), when the owner or owners upon whom 8(a) eligibility is based plan to relinquish ownership or control of the concern. Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of ownership and control.

(2) To adhere to the requirements of 52.219–14, Limitations on Subcontracting.

(End of clause)

1252.219–72 Notification of Competition Limited to Eligible 8(a) Concerns—Alternate III.

As prescribed in (TAR) 48 CFR 1219.811–3(d)(3), substitute the following paragraph for paragraph (c) of the basic FAR clause 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns.

NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(A) CONCERNS—ALTERNATE III (APR 2005)

(c) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

(End of clause)

1252.222–70 Strikes or picketing affecting timely completion of the contract work.

As prescribed in (TAR) 48 CFR 1222.101–71(a), insert the following clause:

STRIKES OR PICKETING AFFECTING TIMELY COMPLETION OF THE CONTRACT WORK (OCT 1994)

Notwithstanding any other provision hereof, the Contractor is responsible for delays arising out of labor disputes, including but not limited to strikes, if such strikes are reasonably avoidable. A delay caused by a strike or by picketing which constitutes an unfair labor practice is not excusable unless the Contractor takes all reasonable and appropriate action to end such a strike or picketing, such as the filing of a charge with the National Labor Relations Board, the use of other available Government procedures, and the use of private boards or organizations for the settlement of disputes.

(End of clause)

1252.222–71 Strikes or picketing affecting access to a DOT facility.

As prescribed in (TAR) 48 CFR 1222.101–71(b), insert the following clause:

STRIKES OR PICKETING AFFECTING ACCESS TO A DOT FACILITY (OCT 1994)

If the Contracting Officer notifies the Contractor in writing that a strike or picketing: (a) Is directed at the Contractor or subcontractor or any employee of either; and (b) impedes or threatens to impede access by any person to a DOT facility where the site of the work is located, the Contractor shall take all appropriate action to end such strike or picketing, including, if necessary, the filing of a charge of unfair labor practice with the National Labor Relations Board or the use of other available judicial or administrative remedies.

(End of clause)

1252.223–70 Removal or disposal of hazardous substances—applicable licenses and permits.

As prescribed in (TAR) 48 CFR 1223.303, insert the following clause:

REMOVAL OR DISPOSAL OF HAZARDOUS SUBSTANCES—APPLICABLE LICENSES AND PERMITS (DEC 1997)

The Contractor has _____ does not have _____ all licenses and permits required by Federal, state, and local laws to perform hazardous substance(s) removal or disposal services. If the Contractor does not currently possess these documents, it must obtain all requisite licenses and permits within _____ days after date of award. The Contractor shall provide evidence of said documents to the Contracting Officer or designated Government representative prior to commencement of work under the contract.

(End of clause)

1252.223–71 Accident and fire reporting.

As prescribed in (TAR) 48 CFR 1223.7000(a), insert the following clause:

ACCIDENT AND FIRE REPORTING (APR 2005)

(a) The Contractor shall report to the Contracting Officer any accident or fire occurring at the site of the work which causes:

(1) A fatality or as much as one lost workday on the part of any employee of the Contractor or subcontractor at any tier;

(2) Damage of $1,000 or more to Government-owned or leased property, either real or personal;

(3) Damage of $1,000 or more to Contractor or subcontractor owned or leased motor vehicles or mobile equipment; or

(4) Damage for which a contract time extension may be requested.

(b) Accident and fire reports required by paragraph (a) above shall be accomplished by the following means:

(1) Accidents or fires resulting in a death, hospitalization of five or more persons, or destruction of Government-owned or leased property (either real or personal), the total value of which is estimated at $100,000 or more, shall be reported immediately by telephone to the Contracting Officer or his/her

authorized representative and shall be confirmed by telegram or facsimile transmission within 24 hours to the Contracting Officer. Such telegram or facsimile transmission shall state all known facts as to extent of injury and damage and as to cause of the accident or fire.

(2) Other accident and fire reports required by paragraph (a) above may be reported by the Contractor using a state, private insurance carrier, or Contractor accident report form which provides for the statement of:

(i) The extent of injury; and

(ii) The damage and cause of the accident or fire.

Such report shall be mailed or otherwise delivered to the Contracting Officer within 48 hours of the occurrence of the accident or fire.

(c) The Contractor shall assure compliance by subcontractors at all tiers with the requirements of this clause.

(End of clause)

1252.223–72 Protection of human subjects.

As prescribed in (TAR) 48 CFR 1223.7000(b), insert the following clause:

PROTECTION OF HUMAN SUBJECTS (APR 2005)

The Contractor shall comply with the National Highway Traffic Safety Administration (NHTSA) policies and procedures for the protection of human subjects participating in activities supported directly or indirectly by contracts from DOT. A copy of the applicable NHTSA policies and procedures shall be provided to offerors and/or contractors upon request. In fulfillment of its assurance:

(a) A committee competent to review projects and activities that involve human subjects shall be established and maintained by the Contractor.

(b) The committee shall be assigned responsibility to determine for each activity planned and conducted that:

(1) The rights and welfare of subjects are adequately protected;

(2) The risks to subjects are outweighed by potential benefits; and

(3) The informed consent of subjects shall be obtained by methods that are adequate and appropriate.

(c) Committee reviews shall be conducted with objectivity and in a manner to ensure the exercise of independent judgment of the members. Members shall be excluded from review of projects or activities in which they have an active role or a conflict of interests.

(d) Continuing constructive communication between the committee and the project directors must be maintained as a means of safeguarding the rights and welfare of subjects.

(e) Facilities and professional attention required for subjects who may suffer physical, psychological, or other injury as a result of participating in an activity shall be provided.

(f) The committee shall maintain records of committee review of applications and active projects, of documentation of informed consent, and of other documentation that may pertain to the selection, participation, and protection of subjects. Detailed records shall be maintained of circumstances of any review that adversely affects the rights or welfare of the individual subjects. Such materials shall be made available to DOT upon request.

(g) The retention period of such records and materials shall be as specified at (FAR) 48 CFR 4.703.

(h) Periodic reviews shall be conducted by the Contractor to assure, through appropriate administrative overview, that the practices and procedures designed for the protection of the rights and welfare of subjects are being effectively applied.

(Note: If the Contractor has or maintains a relationship with a Department of Health and Human Services approved Institutional Review Board (IRB) which can appropriately review this contract in accordance with the technical requirements and applicable NHTSA policies and procedures, that IRB will be considered acceptable for the purposes of this contract).

(End of clause)

1252.223–73 Seat belt use policies and programs.

As prescribed in (TAR) 48 CFR 1223.7000(c), insert the following clause:

SEAT BELT USE POLICIES AND PROGRAMS (APR 2005)

In accordance with Executive Order 13043, Increasing Seat Belt Use in the United States, dated April 16, 1997, the contractor is encouraged to adopt and enforce on-the-job seat belt use policies and programs for its employees when operating company-owned, rented, or personally-owned vehicles. The National Highway Traffic Safety Administration (NHTSA) is responsible for providing leadership and guidance in support of this Presidential initiative. For information on how to implement such a program or for statistics on the potential benefits and cost-savings to your company or organization, please visit the Buckle Up America section of NHTSA's Web site at *www.nhtsa.dot.gov*. Additional resources are available from the Network of Employers for Traffic Safety (NETS), a public-private partnership headquartered in the Washington, DC metropolitan area, and dedicated to improving the

traffic safety practices of employers and employees. NETS is prepared to help with technical assistance, a simple, user friendly program kit, and an award for achieving the President's goal of 90 percent seat belt use. NETS can be contacted at 1–888–221–0045 or visit its Web site at *www.trafficsafety.org.*

(End of clause)

1252.228–70 Loss of or damage to leased aircraft.

As prescribed in (TAR) 48 CFR 1228.306–70(a) and (b), insert the following clause:

LOSS OF OR DAMAGE TO LEASED AIRCRAFT (DEC 1997)

(a) Except normal wear and tear, the Government assumes all risk of loss of, or damage to, the leased aircraft during the term of this lease while the aircraft is in the possession of the Government.

(b) In the event of damage to the aircraft, the Government, at its option, shall make the necessary repairs with its own facilities or by contract, or pay the Contractor the reasonable cost of repair of the aircraft.

(c) In the event the aircraft is lost or damaged beyond repair, the Government shall pay the Contractor a sum equal to the fair market value of the aircraft at the time of such loss or damage, which value may be specifically agreed to in clause 1252.228–71, ''Fair Market Value of Aircraft,'' less the salvage value of the aircraft. However, the Government may retain the damaged aircraft or dispose of it as it wishes. In that event, the Contractor will be paid the fair market value of the aircraft as stated in the clause.

(d) The Contractor agrees that the contract price does not include any cost attributable to hull insurance or to any reserve fund it has established to protect its interest in the aircraft. If, in the event of loss or damage to the leased aircraft, the Contractor receives compensation for such loss or damage in any form from any source, the amount of such compensation shall be:

(1) Credited to the Government in determining the amount of the Government's liability; or

(2) For an increment of value of the aircraft beyond the value for which the Government is responsible.

(e) In the event of loss of or damage to the aircraft, the Government shall be subrogated to all rights of recovery by the Contractor against third parties for such loss or damage and the Contractor shall promptly assign such rights in writing to the Government.

(End of clause)

1252.228–71 Fair market value of aircraft.

As prescribed in (TAR) 48 CFR 1228.306–70(a) and (c), insert the following clause:

FAIR MARKET VALUE OF AIRCRAFT (OCT 1994)

For purposes of the clause entitled ''Loss of or Damage to Leased Aircraft,'' the fair market value of the aircraft to be used in the performance of this contract shall be the lesser of the two values set out in paragraphs (a) and (b) below:

(a) $_____; or

(b) If the contractor has insured the same aircraft against loss or destruction in connection with other operations, the amount of such insurance coverage on the date of the loss or damage for which the Government may be responsible under this contract.

(End of clause)

1252.228–72 Risk and indemnities.

As prescribed in (TAR) 48 CFR 1228.306–70(a) and (d), insert the following clause:

RISK AND INDEMNITIES (DEC 1997)

The Contractor hereby agrees to indemnify and hold harmless the Government, its officers and employees from and against all claims, demands, damages, liabilities, losses, suits and judgments (including all costs and expenses incident thereto) which may be suffered by, accrue against, be charged to or recoverable from the Government, its officers and employees by reason of injury to or death of any person other than officers, agents, or employees of the Government or by reason of damage to property of others of whatsoever kind (other than the property of the Government, its officers, agents or employees) arising out of the operation of the aircraft. In the event the Contractor holds or obtains insurance in support of this covenant, evidence of insurance shall be delivered to the Contracting Officer.

(End of clause)

1252.228–73 Notification of Miller Act payment bond protection.

As prescribed in guidance at (TAR) 48 CFR 1228.106–470, insert the following clause:

NOTIFICATION OF MILLER ACT PAYMENT BOND PROTECTION (APR 2005)

This notice clause shall be inserted by first tier subcontractors in all their subcontracts and shall contain information pertaining to

the surety that provided the payment bond under the prime contract.

(a) The prime contract is subject to the Miller Act, (40 U.S.C. 3131 et al), under which the prime contractor has obtained a payment bond. This payment bond may provide certain unpaid employees, suppliers, and subcontractors a right to sue the bonding surety under the Miller Act for amounts owed for work performed and materials delivery under the prime contract.

(b) Persons believing that they have legal remedies under the Miller Act should consult their legal advisor regarding the proper steps to take to obtain these remedies. This notice clause does not provide any party any rights against the Federal Government, or create any relationship, contractual or otherwise, between the Federal Government and any private party.

(c) The surety which has provided the payment bond under the prime contract is:

_____
(Name)

_____
(Street Address)

_____
(City, State, Zip Code)

_____
(Contact & Tel. No.)

(End of clause)

1252.231–70 Date of incurrence of costs.

As prescribed in (TAR) 48 CFR 1231.205–32(b), insert the following clause:

DATE OF INCURRENCE OF COSTS (OCT 1994)

The Contractor shall be entitled to reimbursement for costs incurred on or after _____ in an amount not to exceed $_____ that, if incurred after this contract had been entered into, would have been reimbursable under this contract.

(End of clause)

1252.235–70 Research misconduct.

As prescribed in (TAR) 48 CFR 1235.7000, insert the following clause:

RESEARCH MISCONDUCT (APR 2005)

(a) *Definitions.* As used in this clause—

Adjudication means the process of reviewing recommendations from the investigation phase and determining appropriate corrective actions.

Complainant is the person who makes an allegation of research misconduct or the person who cooperates with an inquiry or investigation.

DOT Oversight Organization is the DOT operating administration or secretarial office sponsoring or managing Federally funded research.

Evidence includes, but is not limited to, research records, transcripts, or recordings of interviews, committee correspondence, administrative records, grant applications and awards, manuscripts, publications, expert analyses, and electronic data.

Fabrication is making up data or results and recording or reporting them.

Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Inquiry is preliminary information gathering and fact finding to determine if an allegation, or apparent instance of research misconduct, warrants an investigation.

Investigation is formal collection and evaluation of information and facts to determine if research misconduct can be established, to assess its extent and consequences, and to recommend appropriate action.

Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit. Research misconduct does not include honest error or differences of opinion.

Research and Technology Coordinating Council (RTCC) is the lead DOT entity for coordination of all actions related to allegations of research misconduct. The respondent in a research misconduct finding may appeal through the RTCC to the Deputy Secretary of Transportation.

Research Institution includes any contractor conducting research under DOT funded contractual instruments, agreements and similar instruments.

Research misconduct means fabrication, falsification, or plagiarism, in proposing, performing, or reviewing research, or in reporting research results.

Research record is the record of data or results that embody the facts resulting from scientific inquiry, and includes, but is not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

Respondent is the person against whom an allegation of research misconduct has been made, or the person whose actions are the focus of the inquiry or investigation.

(b) *General Guidelines.* (1) Confidentiality. DOT organizations, including research organizations, are required to safeguard the confidentiality of the inquiry, investigation and decision-making processes, including maintaining complete confidentiality of all records and identities of respondents and complainants.

(2) Retaliation prohibited. If a complainant who has reported possible research misconduct alleges retaliation on the part of

DOT organization management, the report will be addressed by management officials who will conduct an inquiry into the allegations followed by an appropriate management action.

(3) Separation of Phases. DOT organizations and research organizations must ensure the separation of the Inquiry, Investigation and Determination Phases of this process.

(4) In general, DOT organizations must strive to protect the interests of the Federal Government and the public in carrying out this process.

(c) *Elements to support a finding of research misconduct.* Research institutions (including contractors) that receive Department of Transportation (DOT) funds shall respond to allegations of research misconduct. The following elements describe the type of behavior, level of intent and burden of proof required to support a finding of research misconduct:

(1) There must be a significant departure from the accepted practices of the relevant research community;

(2) The misconduct must have been committed intentionally, or knowingly, or recklessly and;

(3) The allegation must be proven by a preponderance of the evidence.

(d) *DOT Oversight Organization Investigation.* The DOT oversight organization may proceed with its own investigation at any time if:

(1) DOT determines the institution is not prepared to handle the allegation in a manner consistent with this policy;

(2) DOT involvement is needed to protect the public interest, including public health and safety;

(3) The allegation involves an entity of sufficiently small size (or an individual) that it cannot sufficiently conduct the investigation itself.

(4) The DOT oversight organization may take, or cause to be taken, interim administrative actions (including special certifications, assurances, or other administrative actions) when deemed appropriate to protect the welfare of human and animal subjects of research, prevent inappropriate use of Federal funds, or otherwise protect the public interest and safety.

(e) *Investigating research misconduct.* Research Institutions, or in limited circumstances discussed in Section b, the DOT Oversight Organization, shall use the following procedures to investigate allegations of research misconduct:

(1) Inquire promptly into the research misconduct allegation and complete an initial inquiry within 60 calendar days after receipt of the allegation.

(2) Notify the contracting officer immediately, in writing, when an inquiry results in a determination that an investigation is warranted, and promptly begin an investigation.

(3) Ensure the objectivity and expertise of the individuals selected to review allegations and conduct investigations.

(4) Conduct the investigation according to established internal procedures and complete it within 120 calendar days of completing the initial inquiry.

(5) Document the investigation. Include documentation that:

(i) Describes the allegation(s);

(ii) Lists the investigators;

(iii) Describes the methods and procedures used to gather information and evaluate the allegation(s);

(iv) summarizes the records and data compiled, states the findings, and explains the supporting reasons and evidence;

(v) states the potential impact of any research misconduct; and

(vi) describes and explains any institutional sanctions or corrective actions recommended, or imposed as appropriate within its jurisdiction and as consistent with other relevant laws.

(6) Provide the respondent (the person against whom an allegation of research misconduct has been made) with a reasonable opportunity (*e.g.*, 30 calendar days) to review and respond to the investigation report. The respondent's written comments or rebuttal will be made part of the investigative record.

(7) Within 30 calendar days after completion of an investigation, forward investigative reports, documentation, and respondent's response to the contracting officer who will coordinate with the oversight organization(s) sponsoring and/or monitoring the federally funded research.

(8) Time extensions. Contractors should request time extensions as needed, from the contracting officer of the appropriate DOT oversight organization. The contracting officer has discretion to waive time requirements for good cause.

(f) *Activity sanctions or corrective actions.* Upon receipt of the investigative reports from the contractor, the DOT oversight organization, in conjunction with the contracting officer, will review the report and determine the appropriate administrative action to be taken. In deciding what actions to take, the oversight organizations should consider: the severity of the misconduct; the degree to which the misconduct was knowing, intentional or reckless; and whether it was an isolated event or part of a pattern. Sanctions or corrective actions may range as follows:

(1) *Minimal restrictions*—such as a letter of reprimand, additional conditions on awards, requiring third-party certification of accuracy or compliance with particular policies, regulations, guidelines, or special terms and conditions;

(2) *Moderate restrictions*—such as limitations on certain activities or expenditures under an active award, or special reviews of requests for funding;

(3) *More severe restrictions*—such as termination of an active award, or government-wide suspension or debarment.

(i) When the DOT oversight organization concludes an investigation with a determination of research misconduct, the DOT Office of the Senior Procurement Executive may notify any other sources of research that provide support to the respondent that a finding of research misconduct has been made.

(ii) If there are reasonable indications that criminal violations may have occurred, the DOT oversight organization shall consult with the Office of Inspector General to determine an appropriate course of action, including disbarment or suspension. The DOT oversight organization will notify the respondent in writing of its action, sanctions to be imposed if applicable, and the DOT appeal procedures.

(g) *Appeals and Final Administrative Action.* (1) The Federal Acquisition Regulation (FAR) governs in all matters pertaining to termination of the contract, and suspension/debarment.

(2) In all other cases, the contractor may appeal the sanction or corrective action through the DOT Research and Technology Coordinating Council (RTCC) to the Deputy Secretary of Transportation, in writing within 30 calendar days after receiving written notification of the research misconduct finding and associated administrative action(s). The contractor shall mail a copy of the appeal to the contracting officer.

(3) If there is no request for appeal within 30 calendar days, the administrative actions of the oversight organization shall be final.

(4) If a request for appeal is received by the RTCC within the 30 calendar day limit, the Deputy Secretary may have the RTCC review the appeal and make recommendations.

(5) The RTCC on behalf of the Deputy Secretary will normally inform the appellant of the final decision on an appeal within 60 calendar days of receipt. This decision will then be the final DOT administrative action.

(h) *Criminal or Civil Fraud Violations.* When the oversight organization concludes an investigation with a determination of research misconduct, the DOT Office of the Senior Procurement Executive may notify any other sources of research that provide support to the respondent. If criminal or civil fraud violations may have occurred, the oversight organization should promptly refer the matter to the DOT Inspector General, the Department of Justice or other appropriate investigative body.

(End of clause)

1252.236–70 Special precautions for work at operating airports.

As prescribed in (TAR) 48 CFR 1236.570, insert the following clause:

SPECIAL PRECAUTIONS FOR WORK AT OPERATING AIRPORTS (OCT 1994)

(a) When work is to be performed at an operating airport, the Contractor must arrange its work schedule so as not to interfere with flight operations. Such operations will take precedence over construction convenience. Any operations of the Contractor which would otherwise interfere with or endanger the operations of aircraft shall be performed only at times and in the manner directed by the Contracting Officer. The Government will make every effort to reduce the disruption of the Contractor's operation.

(b) Unless otherwise specified by local regulations, all areas in which construction operations are underway shall be marked by yellow flags during daylight hours and by red lights at other times. The red lights along the edge of the construction areas within the existing aprons shall be the electric type of not less than 100 watts intensity placed and supported as required. All other construction markings on roads and adjacent parking lots may be either electric or battery type lights. These lights and flags shall be placed so as to outline the construction areas and the distance between any two flags or lights shall not be greater than 25 feet. The Contractor shall provide adequate watch to maintain the lights in working condition at all times other than daylight hours. The hour of beginning and the hour of ending of daylight will be determined by the Contracting Officer.

(c) All equipment and material in the construction areas or when moved outside the construction area shall be marked with airport safety flags during the day and when directed by the Contracting Officer, with red obstruction lights at nights. All equipment operating on the apron, taxiway, runway, and intermediate areas after darkness hours shall have clearance lights in conformance with instructions from the Contracting Officer. No construction equipment shall operate within 50 feet of aircraft undergoing fuel operations. Open flames are not allowed on the ramp except at times authorized by the Contracting Officer.

(d) Trucks and other motorized equipment entering the airport or construction area shall do so only over routes determined by the Contracting Officer. Use of runways, aprons, taxiways, or parking areas as truck or equipment routes will not be permitted unless specifically authorized for such use. Flag personnel shall be furnished by the Contractor at points on apron and taxiway for

safe guidance of its equipment over these areas to assure right of way to aircraft. Areas and routes used during the contract must be returned to their original condition by the Contractor. The maximum speed allowed at the airport shall be established by airport management. Vehicles shall be operated so as to be under safe control at all times, weather and traffic conditions considered. Vehicles must be equipped with head and tail lights during the hours of darkness.

(End of clause)

1252.237–70 Qualifications of contractor employees.

As prescribed in (TAR) 48 CFR 1237.110(a), insert the following clause:

QUALIFICATIONS OF CONTRACTOR EMPLOYEES (APR 2005)

a. Definitions. As used in this clause—''Sensitive Information'' is any information that, if subject to unauthorized access, modification, loss, or misuse, or is proprietary data, could adversely affect the national interest, the conduct of Federal programs, or the privacy of individuals specified in The Privacy Act, 5 U.S.C. 552a, but has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

b. Work under this contract may involve access to sensitive information which shall not be disclosed by the contractor unless authorized in writing by the contracting officer. To protect sensitive information, the contractor shall provide training to any contractor employees authorized to access sensitive information, and upon request of the Government, provide information as to an individual's suitability to have authorization.

c. The Contracting Officer may require dismissal from work those employees deemed incompetent, careless, insubordinate, unsuitable, or otherwise objectionable, or whose continued employment is deemed contrary to the public interest or inconsistent with the best interest of national security.

d. Contractor employees working on this contract must complete such forms, as may be necessary for security or other reasons, including the conduct of background investigations to determine suitability. Completed forms shall be submitted as directed by the Contracting Officer. Upon the Contracting Officer's request, the Contractor's employees shall be fingerprinted, or subject to other investigations as required.

e. The Contractor shall ensure that contractor employees are:

(1) Citizens of the United States of America or an alien who has been lawfully admitted for permanent residence or employment (indicated by immigration status) as evidenced Bureau of Citizenship and Immigration Services documentation; and

(2) Have background investigations according to DOT Order 1630.2B, Personnel Security Management.

f. The Contractor shall immediately notify the contracting officer when an employee no longer requires access to DOT computer systems due to transfer, completion of a project retirement or termination of employment.

g. The Contractor shall include the substance of this clause in all subcontracts at any tier where the subcontractor may have access to Government facilities, sensitive information, or resources.

(End of clause)

1252.237–71 Certification of data.

As prescribed in (TAR) 48 CFR 1213.7101 and 1237.7003, insert the following provision:

CERTIFICATION OF DATA (APR 2005)

NOTICE: The Secretary of Transportation has determined that this certification shall be retained in accordance with Section 4301(b)(1)(B)(i)(II) of the Federal Acquisition Reform Act (Public Law 104–106, 41 U.S.C. 425, note) and DOT Memorandum dated July 17, 1996.

(a) The offeror represents and certifies that to the best of its knowledge and belief, the information and/or data (*e.g.*, company profile; qualifications; background statements; brochures) submitted with its offer is current, accurate, and complete as of the date of its offer.

(b) The offeror understands that any inaccurate data provided to the Department of Transportation may subject the offeror, its subcontractors, its employees, or its representatives to: (1) prosecution for false statements pursuant to 18 U.S.C. 1001 and/or; (2) enforcement action for false claims or statements pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812 and 49 CFR part 31 and/or; (3) termination for default under any contract resulting from its offer and/or; (4) debarment or suspension.

(c) The offeror agrees to obtain a similar certification from its subcontractors.

Signature: _____

Date: _____

Typed Name and Title:

_____

_____

Company Name:

_____

This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the

maker subject to prosecution under 18 U.S.C. 1001.

(End of provision)

1252.237–72 Prohibition on advertising.

As prescribed in (TAR) 48 CFR 1213.7101 and 1237.7003, insert the following clause:

PROHIBITION ON ADVERTISING (JAN 1996)

The contractor or its representatives (including training instructors) shall not advertise or solicit business from attendees for private, non-Government training during contracted-for training sessions. This prohibition extends to unsolicited oral comments, distribution or sales of written materials, and/or sales of promotional videos or audio tapes. The contractor agrees to insert this clause in its subcontracts.

(End of clause)

1252.237–73 Key personnel.

As prescribed in (TAR) 48 CFR 1237.110(b), insert the following clause:

KEY PERSONNEL (APR 2005)

(a) The personnel as specified below are considered essential to the work being performed under this contract and may, with the consent of the contracting parties, be changed from time to time during the course of the contract by adding or deleting personnel, as appropriate.

(b) Before removing, replacing, or diverting any of the specified individuals, the Contractor shall notify the contracting officer, in writing, before the change becomes effective. The Contractor shall submit information to support the proposed action to enable the contracting officer to evaluate the potential impact of the change on the contract. The Contractor shall not remove or replace personnel under this contract until the Contracting Officer approves the change.

The Key Personnel under this Contract are: (*specify key personnel*)

(End of clause)

1252.239–70 Security requirements for unclassified information technology resources.

As prescribed in (TAR) 48 CFR 1239.70, insert the following clause:

SECURITY REQUIREMENTS FOR UNCLASSIFIED INFORMATION TECHNOLOGY RESOURCES (APR 2005)

(a) The Contractor shall be responsible for Information Technology security for all systems connected to a Department of Transportation (DOT) network or operated by the Contractor for DOT, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the Contractor has physical or electronic access to DOT's sensitive information that directly supports the mission of DOT. The term ''information technology,'' as used in this clause, means any equipment or interconnected system or subsystem of equipment, including telecommunications equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. This includes both major applications and general support systems as defined by OMB Circular A–130. Examples of tasks that require security provisions include:

(1) Hosting of DOT e-Government sites or other IT operations;

(2) Acquisition, transmission or analysis of data owned by DOT with significant replacement cost should the contractor's copy be corrupted; and

(3) Access to DOT general support systems/major applications at a level beyond that granted the general public, *e.g.* bypassing a firewall.

(b) The Contractor shall develop, provide, implement, and maintain an IT Security Plan. This plan shall describe the processes and procedures that will be followed to ensure appropriate security of IT resources that are developed, processed, or used under this contract. The plan shall describe those parts of the contract to which this clause applies. The Contractor's IT Security Plan shall comply with applicable Federal Laws that include, but are not limited to, 40 U.S.C. 11331, the Federal Information Security Management Act (FISMA) of 2002 and the E-Government Act of 2002. The plan shall meet IT security requirements in accordance with Federal and DOT policies and procedures, as they may be amended from time to time during the term of this contract that include, but are not limited to:

(1) OMB Circular A–130, Management of Federal Information Resources, Appendix III, Security of Federal Automated Information Resources;

(2) National Institute of Standards and Technology (NIST) Guidelines;

(3) Departmental Information Resource Management Manual (DIRMM) and associated guidelines; and

(4) DOT Order 1630.2B, Personnel Security Management

(c) Within 30 days after contract award, the contractor shall submit the IT Security Plan to the DOT Contracting Officer for acceptance. This plan shall be consistent with and further detail the approach contained in

the offeror's proposal or sealed bid that resulted in the award of this contract and in compliance with the requirements stated in this clause. The plan, as accepted by the Contracting Officer, shall be incorporated into the contract as a compliance document. The Contractor shall comply with the accepted plan.

(d) Within 6 months after contract award, the contractor shall submit written proof of IT Security accreditation to the DOT for acceptance by the DOT Contracting Officer. Such written proof may be furnished either by the Contractor or by a third party. Accreditation must be in accordance with DOT Order 1350.2, which is available from the Contracting Officer upon request. This accreditation will include a final security plan, risk assessment, security test and evaluation, and disaster recovery plan/continuity of operations plan. This accreditation, when accepted by the Contracting Officer, shall be incorporated into the contract as a compliance document, and shall include a final security plan, a risk assessment, security test and evaluation, and disaster recovery/continuity of operations plan. The contractor shall comply with the accepted accreditation documentation.

(e) On an annual basis, the contractor shall submit verification to the Contracting Officer that the IT Security Plan remains valid.

(f) The contractor will ensure that the following banners are displayed on all DOT systems (both public and private) operated by the contractor prior to allowing anyone access to the system:

GOVERNMENT WARNING

WARNINGWARNING**WARNING**

Unauthorized access is a violation of U.S. Law and Department of Transportation policy, and may result in criminal or administrative penalties. Users shall not access other user's or system files without proper authority. Absence of access controls IS NOT authorization for access! DOT information systems and related equipment are intended for communication, transmission, processing and storage of U.S. Government information. These systems and equipment are subject to monitoring by law enforcement and authorized Department officials. Monitoring may result in the acquisition, recording, and analysis of all data being communicated, transmitted, processed or stored in this system by law enforcement and authorized Department officials. Use of this system constitutes consent to such monitoring.

WARNINGWARNING**WARNING**

(g) The contractor will ensure that the following banner is displayed on all DOT systems that contain Privacy Act information operated by the contractor prior to allowing anyone access to the system:

This system contains information protected under the provisions of the Privacy Act of 1974 (Public Law 93–579). Any privacy information displayed on the screen or printed shall be protected from unauthorized disclosure. Employees who violate privacy safeguards may be subject to disciplinary actions, a fine of up to $5,000, or both.

(h) Contractor personnel requiring privileged access or limited privileged access to systems operated by the Contractor for DOT or interconnected to a DOT network shall be screened at an appropriate level in accordance with DOT Order 1630.2B, Personnel Security Management, as it may be amended from time to time during the term of this contract.

(i) The Contractor shall ensure that its employees, in performance of the contract performing under this contract, receive annual IT security training in accordance with OMB Circular A–130, FISMA, and NIST requirements, as they may be amended from time to time during the term of this contract, with a specific emphasis on rules of behavior.

(j) The Contractor shall afford the Government access to the Contractor's and subcontractors' facilities, installations, operations, documentation, databases and personnel used in performance of the contract. Access shall be provided to the extent required to carry out a program of IT inspection (to include vulnerability testing), investigation and audit to safeguard against threats and hazards to the integrity, availability and confidentiality of DOT data or to the function of information technology systems operated on behalf of DOT, and to preserve evidence of computer crime.

(k) The Contractor shall incorporate the substance of this clause in all subcontracts that meet the conditions in paragraph (a) of this clause.

(l) The contractor shall immediately notify the contracting officer when an employee terminates employment that has access to DOT information systems or data.

(End of clause)

1252.239–71 Information technology security plan and accreditation.

As prescribed in (TAR) 48 CFR 1239.70, insert the following provision:

INFORMATION TECHNOLOGY SECURITY PLAN AND ACCREDITATION (APR 2005)

All offers submitted in response to this solicitation must address the approach for completing the security plan and accreditation requirements in TAR clause 1252.239–70.

(End of provision)

1252.242–70 Dissemination of information—educational institutions.

As prescribed in (TAR) 48 CFR 1242.7000(a), insert the following clause:

DISSEMINATION OF INFORMATION—EDUCATIONAL INSTITUTIONS (OCT 1994)

(a) The Department of Transportation (DOT) desires widespread dissemination of the results of funded transportation research. The Contractor, therefore, may publish (subject to the provisions of the ''Data Rights'' and ''Patent Rights'' clauses of the contract) research results in professional journals, books, trade publications, or other appropriate media (a thesis or collection of theses should not be used to distribute results because dissemination will not be sufficiently widespread). All costs of publication pursuant to this clause shall be borne by the Contractor and shall not be charged to the Government under this or any other Federal contract.

(b) Any copy of material published under this clause must contain acknowledgment of DOT's sponsorship of the research effort and a disclaimer stating that the published material represents the position of the author(s) and not necessarily that of DOT. Articles for publication or papers to be presented to professional societies do not require the authorization of the Contracting Officer prior to release. However, two copies of each article shall be transmitted to the Contracting Officer at least two weeks prior to release or publication.

(c) Press releases concerning the results or conclusions from the research under this contract shall not be made or otherwise distributed to the public without prior written approval of the Contracting Officer.

(d) Publication under the terms of this clause does not release the Contractor from the obligation of preparing and submitting to the Contracting Officer a final report containing the findings and results of research, as set forth in the schedule of the contract.

(End of clause)

1252.242–71 Contractor testimony.

As prescribed in (TAR) 48 CFR 1242.7000(b), insert the following clause:

CONTRACTOR TESTIMONY (OCT 1994)

All requests for the testimony of the Contractor or its employees, and any intention to testify as an expert witness relating to: (a) Any work required by, and/or performed under, this contract; or (b) any information provided by any party to assist the Contractor in the performance of this contract, shall be immediately reported to the Contracting Officer. Neither the Contractor nor its employees shall testify on a matter related to work performed or information provided under this contract, either voluntarily or pursuant to a request, in any judicial or administrative proceeding unless approved, in advance, by the Contracting Officer or required by a judge in a final court order.

(End of clause)

1252.242–72 Dissemination of contract information.

As prescribed in (TAR) 48 CFR 1242.7000(c), insert the following clause:

DISSEMINATION OF CONTRACT INFORMATION (OCT 1994)

The Contractor shall not publish, permit to be published, or distribute for public consumption, any information, oral or written, concerning the results or conclusions made pursuant to the performance of this contract, without the prior written consent of the Contracting Officer. Two copies of any material proposed to be published or distributed shall be submitted to the Contracting Officer.

(End of clause)

1252.242–73 Contracting officer's technical representative.

As prescribed in (TAR) 48 CFR 1242.7000(d), insert the following clause:

CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (OCT 1994)

(a) The Contracting Officer may designate Government personnel to act as the Contracting Officer's Technical Representative (COTR) to perform functions under the contract such as review and/or inspection and acceptance of supplies, services, including construction, and other functions of a technical nature. The Contracting Officer will provide a written notice of such designation to the Contractor within five working days after contract award or for construction, not less than five working days prior to giving the contractor the notice to proceed. The designation letter will set forth the authorities and limitations of the COTR under the contract.

(b) The Contracting Officer cannot authorize the COTR or any other representative to sign documents (*i.e.*, contracts, contract modifications, etc.) that require the signature of the Contracting Officer.

(End of clause)

1252.245–70 Government property reports.

As prescribed in (TAR) 48 CFR 1245.505–70, insert the following clause:

GOVERNMENT PROPERTY REPORTS (OCT 1994)

(a) The Contractor shall prepare an annual report of Government property in its possession and the possession of its subcontractors.

(b) The report shall be submitted to the Contracting Officer not later than September 15 of each calendar year on Form DOT F 4220.43, Contractor Report of Government Property.

(End of clause)

APPENDIX TO PART 1252—TAR MATRIX

TAR MATRIX

Key:		Principle type and/or purpose of contract:			
		FP SUP =	Fixed-Price Supply	COM SVC =	Communication Services
P or C =	Provision or Clause	CR SUP =	Cost-Reimbursement Supply	DDR =	Dismantling, Demolition, or Removal of Improvements
BR =	Is Incorporation By Reference authorized?	FP R&D =	Fixed-Price Research & Development		
UCF =	Uniform Contract Format Section, when applicable	CR R&D =	Cost-Reimbursement Research & Development	A-E =	Architect-Engineering
		FP SVC =	Fixed-Price Service	FAC =	Facilities
		CR SVC =	Cost Reimbursement Service	IND DEL =	Indefinite Delivery
R =	Required	FP CON =	Fixed-Price Construction	TRN =	Transportation
A =	Required-When-Applicable	CR CON =	Cost Reimbursement Construction	SP =	Small Purchases
O =	Optional	T&M LH =	Time & Material/Labor Hours	UTL SVC =	Utility Services
X =	Revision	LMV =	Leasing of Motor Vehicles	CI =	Commercial Items

Provision or Clause	Prescribed In	P or C	IBR	UCF	FP SUP	CR SUP	FP R&D	CR R&D	FP SVC	CR SVC	FP CON	CR CON	T&M LH	LMV	COM SVC	DDR	A&E	FAC	IND DEL	TRN	SP	UTL SVC	CI
1252.211-70 Index for Specifications	1211.204-70	C	YES	I	A	A	A				A	A				A		A	A		A		
1252.216-70 Evaluation of Offers Subject to an Economic Price Adjustment Clause	1216.203-470	P	YES	M	A		A		A		A		A	A	A	A	A	A	A	A		A	
1252.216-71 Determination of Award Fee	1216.406-70(a)	C	YES	I		A		A		A		A	A		A	A			A	A			
1252.216-72 Performance Evaluation Plan	1216.406-70(b)	C	YES	I		A		A		A		A	A		A	A			A	A			
1252.216-73 Distribution of Award Fee	1216.406-70(c)	C	YES	I		A		A		A		A	A		A	A			A	A			
1252.216-74 Settlement of Letter Contract	1216.603-4	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A		A	
1252.217-70 Guarantee	1217.7000(a)	C	YES	I					A														
1252.217-71 Delivery & Shifting of Vessel	1217.7000(b)(i)	C	YES	I					A														
1252.217-72 Performance	1217.7000(b)(ii)	C	YES	I					A														
1252.217-73 Inspection and Manner of Doing Work	1217.7000(b)(i)	C	YES	I					A														
1252.217-74 Subcontracts	1217.7000(b)(ii)	C	YES	I					A														
1252.217-75 Lay Days	1217.7000(c)	C	YES	I					A														
1252.217-76 Liability and Insurance	1217.7000(b)(ii)	C	YES	I					A														

Provision or Clause	Prescribed in	P or C	IBR	UCF	FP SUP	CR SUP	FP R&D	CR R&D	FP SVC	CR SVC	FP CON	CR CON	T&M LH	LMV	COM SVC	DDR	A&E	FAC	IND DEL	TRN	SP	UTL SVC	CI
1252.217-77 Title	1217.7000(b)(ii)	C	YES	I					A														
1252.217-78 Discharge of Liens	1217.7000(b)(ii)	C	YES	I					A														
1252.217-79 Delays	1217.7000(b)(ii)	C	YES	I					A														
1252.217-80 Department of Labor Safety and Health Regulations for Ship Repair	1217.7000(b)(ii)																						
1252.219-70 Small Business and Small Disadvantaged Business Subcontracting Report	1219.708-70	C	YES	I					A														
1252.219-71 Section 8(a) Direct Award	1219.811-3(f)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A		A	
1252.219-72 Notification of Competition Limited to Eligible 8(a) Concerns Alternate III	1219.811-3(d)(3)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A		A	
1252.222-70 Strikes or Picketing Affecting Timely Completion of the Contract Work	1222.101-71(a)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	
1252.222-71 Strikes or Picketing Affecting Access to a DOT Facility	1222.101-71(b)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	
1252.223-70 Removal or Disposal of Hazardous Substances - Applicable Licenses and Permits	1223.303	C	YES	I					A	A	A	A	A			A		A			A		
1252.223-71 Accident and Fire Reporting	1223.7000(a)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	
1252.223-72 Protection of Human Subjects	1223.7000(b)	C	YES	I	A	A	A	A	A	A			A						A		A		
1252.223-73 Seat Belt Use Policies and Programs	1223.7000(c)	C	YES	I	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R		R	
1252.228-70 Loss of or Damage to Leased Aircraft	1228.306-70(a)	C	YES	I					A	A			A								A		
1252.228-71 Fair Market Value of Aircraft	1228.306-70(a)	C	YES	I					A	A			A								A		
1252.228-72 Risk and Indemnities	1228.306-70(a)	C	YES	I					A	A			A								A		

Provision or Clause	Prescribed In	P or C	IBR	UCF	FP SUP	CR SUP	FP R&D	CR R&D	FP SVC	CR SVC	FP CON	CR CON	T&M LH	LMV	COM SVC	DDR	A&E	FAC	IND DEL	TRN	SP	UTL SVC	CI
1252.228-73 Notification of Miller Act Payment Bond Protection	1228.106-470	C	YES	I							A	A											
1252.231-70 Date of Incurrence of Costs	1231.205-32(b)	C	YES	I		A		A		A		A											
1252.235-70 Research Misconduct	1235.7000	C	YES	I			R	R															
1252.236-70 Special Precautions for Work at Operating Airports	1236.570	C	YES	I							A	A	A			A	A	A			A	A	
1252.237-70 Qualifications of Contractor Employees	1237.110(a)	C	YES	I					A	A					A							A	
1252.237-71 Certification of Data	1213.7101 1237.7003(a)	P	YES	K					A	A					A				A		A		
1252.237-72 Prohibition on Advertising	1213.7101 1237.7003(a)	C	YES	I					A	A					A				A		A		
1252.237-73 Key Personnel	1237.110(b)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A		A	A	
1252.239-70 Security Requirements for Unclassified Information Technology Resources	1239.70	C	YES	I	A	A	A	A	A	A	A	A	A		A		A	A	A	A		A	
1252.239-71 Information Technology Security Plan and Accreditation	1239.70	P	YES	L	A	A	A	A	A	A	A	A	A		A		A	A	A	A		A	
1252.242-70 Dissemination of Information—Educational Institutions	1242.7000(a)	C	YES	I			A	A															
1252.242-71 Contractor Testimony	1242.7000(b)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
1252.242-72 Dissemination of Contract Information	1242.7000(c)	C	YES	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A		A	
1252.242-73 Contracting Officers Technical Representative	1242.7000(d)	C	YES	I	A	A	A	A	A	A	A	A	A		A	A	A	A	A	A			
1252.245-70 Government Property Reports	1245.505-70	C	YES	I	A	A	A	A	A	A	A	A	A		A	A	A	A	A	A			

[70 FR 76418, Dec. 27, 2005]

PART 1253—FORMS

Subpart 1253.2—Prescription of Forms

Sec.
1253.204 Administrative matters.
1253.222 Application of labor laws to Government acquisitions.
1253.222–70 Conveyance of invention rights acquired by the Government.
1253.245–70 Report of Government property.

Subpart 1253.3—Illustration of Forms

1253.303 Agency forms.

APPENDIX TO SUBPART 1253.3

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 418b; (FAR) 48 CFR 1.3.

SOURCE: 70 FR 6507, Feb. 7, 2005, unless otherwise noted.

Subpart 1253.2—Prescription of Forms

1253.204 Administrative matters.

The following forms are prescribed for use in the closeout of applicable contracts, as specified in (TAR) 48 CFR 1204.804–570:

(a) *Form DOT F 4220.4, Contractor's Release.* (*See* (TAR) 48 CFR 1204.804–570.) Form DOT F 4220.4 is authorized for local reproduction and a copy is furnished for this purpose in the Appendix to subpart 1253.3.

(b) *Form DOT 4220.45, Contractor's Assignment of Refunds, Rebates, Credits, and Other Amounts.* (*See* (TAR) 48 CFR 1204.804–570.) Form DOT F 4220.45 is authorized for local reproduction and a copy is furnished for this purpose in the Appendix to subpart 1253.3.

(c) *Form DOT F 4220.46, Cumulative Claim and Reconciliation Statement.* (See (TAR) 48 CFR 1204.804–570.) Form DOT F 4220.46 is authorized for local reproduction and a copy is furnished for this purpose in the Appendix to subpart 1253.3.

(d) *DD Form 882, Report of Inventions and Subcontracts.* (See (TAR) 48 CFR 1204.804–570.) DD Form 882 can be found at *http://www.aro.army.mil/forms/d882.pdf.*

1253.222 Application of labor laws to Government acquisitions.

The following form is prescribed for use in connection with the application of labor laws, as specified in (TAR) 48 CFR 1222.406–9:

Form DOT F 4220.7, Employee Claim for Wage Restitution. (See (TAR) 48 CFR 1222.406–9(c)(1).) Form DOT F 4220.7 is authorized for local reproduction and a copy is furnished for this purpose in the Appendix to for subpart 1253.3.

1253.227–70 Conveyance of invention rights acquired by the Government.

The following form is prescribed as a means for contractors to report inventions made in the course of contract performance, as specified in 1227.305–4:

DD Form 882, Report of Inventions and Subcontracts. DD Form 882 can be found at *http://www.aro.army.mil/forms/d882.pdf.*

1253.245–70 Report of Government property.

The following form is prescribed for use by contractors to report Government property, as specified in (TAR) 48 CFR 1245.505–1470:

Form DOT F 4220.43, Contractor Report of Government Property. See 1245.505–1470.) Form DOT F 4220.43 is authorized for local reproduction and a copy is furnished for this purpose in the Appendix to subpart 1253.3.

Subpart 1253.3—Illustration of Forms

1253.303 Agency forms.

This subpart contains illustrations of DOT and other agency forms specified by the TAR for use in DOT acquisitions.

Form Name	Form Number	Adobe .pdf files	Microsoft Word files
Contractor's Release Form	4220.4	4220_4.pdf	4220_4.doc
Employee Claim for Wage Restitution	4220.7	4220_7.pdf	4220_7.doc
Contractor Report of Government Property	4220.43	4220_43.pdf	4220_43.doc
Contractor's Assignment of Refunds, Rebates, Credits, and other Amounts.	4220.45	4220_45.pdf	4220_45.doc
Cumulative Claim and Reconciliation Statement	4220.46	4220_46.pdf	4220_46.doc

APPENDIX TO SUBPART 1253.3

DEPARTMENT OF TRANSPORTATION
CONTRACTOR'S RELEASE

CONTRACTOR (Name and Address)	**ENTER SUM OF TOTAL OF AMOUNTS PAID AND PAYABLE**
CONTRACT NO.	**$**

Pursuant to the terms of the above numbered contract and in consideration of the sum stated above, which has been paid or is to be paid to the Contractor, or its assignees, the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA (hereinafter called the Government), does remise, release, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

1. Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: (or state "None")

2. Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties arising out of the performance of this contract, which are not known to the Contractor on the date of the execution of this release and of which the Contractor gives notice in writing to the Contracting Officer within the period specified in the said contract; and

3. Claims for reimbursement of costs (other than expenses of the Contractor by reason of his indemnification of the Government against patent liability) including reasonable expenses incidental thereto, incurred by the Contractor under any provisions of the said contract relating to patents.

The Contractor agrees, in connection with patent matters and with claims which are not released as set forth above, that it will comply with all provisions of the said contract, provisions of the said contract, including without limitation those provisions relating to notification to the Contracting Officer and relating to the defense or prosecution of litigation.

IN WITNESSES WHEREOF, this release has been executed this _____ day of _____, 19 ___.

WITNESSES

_____ (Contractor)

_____ BY _____

_____ TITLE _____

NOTE: In the case of a corporation, witnesses are not required but the below statement must be completed.

I, _____, am the _____ secretary of the corporation named as Contractor in the foregoing release; that _____ who signed said release on behalf of the Contractor was then _____ of said corporation; release was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

_____
Signature

DEPARTMENT OF TRANSPORTATION
EMPLOYEE CLAIM FOR WAGE RESTITUTION

TO: The Government Accountability Office Claims Division Washington, DC 20548	**CONTRACT NUMBER**
	DATE OF CLAIM
	EMPLOYEE'S FULL NAME
	SSN:

I hereby make claim for payment of unpaid wages due me in the amount of $_____

as an employee of _____ performing work
(Name of Contractor and/or Subcontractor)

under the above number at _____
(location of work)

_____. I was employed as

_____ during the period from _____
(job title) *(month/day/year)*

to _____.
(month/day/year)

This claim constitutes the total amount claimed due and unpaid for the period of employment indicated.

ADDRESS OF EMPLOYEE	**SIGNATURE OF EMPLOYEE**

DEPARTMENT OF TRANSPORTATION
CONTRACTOR REPORT OF GOVERNMENT PROPERTY

OMB Control No. 2105-0517
Expiration Date: January 31, 2007

This collection of information is mandatory and will be used to fulfill the requirements of the Transportation Acquisition Regulation (TAR). Public reporting burden is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Information and Regulatory Offices, 725 17th Street, NW, Washington, DC 20503. Please note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection is 2105-0517.

1. Contract Number: _____

2. Report Period Ending: _____

3. Contractor (Name and Address)	**4. Contracting Office (Name and Address)**

5. Name and location of Government-Owned, Contractor-Operated Plant (if applicable)

6. Any Government property located at a subcontractor's plant? _____ Yes _____No. If yes, give the name and address of the subcontractor(s) on an attached sheet to this report.

7. Date contractor's property control system approved? _____

8. Approved by whom? _____
Name of Agency/Office

	Starting Balance				**Ending Balance**	
9. Property Class (See FAR 45.5)	Total Acquisition Cost (in dollars)	Total Quantity (in acres or units)	Items Added in $	Items Deleted in $	Total Acquisition Cost (in dollars)	Total Quantity (in acres or units)
a. Land & Rights Therein						
b. Other Real Property						
c. Plant Equipment						
d. Special Test Equipment						
e. Special Tooling						
f. Materials in Stock (when total value exceeds $50,000)						

NOTE: This report shall include all Government property (i.e., property furnished by the Government, or acquired or fabricated by the contractor or subcontractors). By signature hereon, the contractor's property administrator declares that the report was prepared from the contractor's records that are required by FAR 45.5.

10. Typed Name of Contractor Property Administrator	**11. Signature and Date**

DEPARTMENT OF TRANSPORTATION
CONTRACTOR ASSIGNMENT OF REFUNDS, REBATES, CREDITS, AND OTHER AMOUNTS

Pursuant to the terms of Contract No. _____ and in consideration of the reimbursement of costs and payment of fee, as provided in the said contract and any assignment thereunder, _____ (hereinafter called the Contractor) does hereby:

1. Assign, transfer, set over the release to the UNITED STATES OF AMERICA (hereinafter called the Government), all right, title and interest to all refunds, rebates, credits or other amounts (including any interest thereon) arising out of the performance of the said contract, together with all the rights of action accrued or which may hereafter accrue thereunder.

2. Agree to take whatever action may be necessary to effect prompt collection of all refunds, rebates, credits or other amounts (including any interest thereon) due or which may become due, and to promptly forward to the UNITED STATES TREASURER checks (made payable to the Treasurer of the United States) for any proceeds so collected. The reasonable costs of any such action to effect collection shall constitute allowable costs when approved by the Contracting Officer as stated in the said contract and may be applied to reduce any amounts otherwise payable to the Government under the terms hereof.

3. Agree to cooperate fully with the Government as to any claim or suit in connection with refunds, rebates, credits or other amounts due (including any interest thereon); to execute any protest, pleading, application, power of attorney or other papers in connection with; and to permit the Government to represent it at any hearing, trial, or other proceeding arising out of such claim or suit.

IN WITNESS WHEREOF, this assignment has been executed this _____ day of _____, _____.

BY: _____
(CONTRACTOR)

By signature hereon, I, _____, declare that I am the _____ (official title) of the corporation named as Contractor in the foregoing assignment; that _____ signed said assignment on behalf of the Contractor was then _____ of said corporation by authority of its governing body and is within the scope of its corporate powers.

_____
Signature

DEPARTMENT OF TRANSPORTATION
CUMULATIVE CLAIM AND RECONCILIATION STATEMENT

1. Name of Contractor : _____
2. Address of Contractor: _____
_____
_____
3. Contract No. _____
4. Delivery/Task Order No. _____

5. The total amount claimed under the above numbered contract, delivery order, or task order number is as follows:

a. Direct Labor	$	_____
b. Direct Material	$	_____
c. Other Direct Costs	$	_____
d. Overhead	$	_____
e. G&A	$	_____
f. Subcontract Cost	$	_____
g. Total Costs (5a through 5f)	$	_____
h. Fixed Fee	$	_____
i. Total Amount Claimed	$	_____

6. Total amount due under the above numbered contract, delivery order, task order is as follows:

a. Total Amount Claimed	$	_____
b. Total Amount Paid by the Government under Voucher Nos. _____ thru _____	$	_____
c. Total Amount (if any) Withheld, Disallowed, etc. (as explained on the attached sheet)	$	_____
d. Total Amount Due	$	_____

I, _____ (Full Name), as the _____ (Title)
to the best of my knowledge and belief, the above statements are correct in accordance with the records of the contractor.

_____
(Signature)

CHAPTER 13—DEPARTMENT OF COMMERCE

(Parts 1300 to 1399)

SUBCHAPTER A—GENERAL

Part		*Page*
1301	General	629
1302	[Reserved]	
1303	Improper business practices and personal conflicts of interest	630
1304	[Reserved]	

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

1305–1308	[Reserved]	
1309	Contractor qualifications	632

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

1313	Small purchase and other simplified purchase procedures	634
1314	[Reserved]	
1315	Contracting by negotiation	634
1316	Types of contracts	636
1317	Special contracting methods	636

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

1319	Small business and small disadvantaged business concerns	638
1322–1325	[Reserved]	

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

1331	[Reserved]	
1332	Contract financing	639
1333	Protests, disputes, and appeals	639

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

1334	[Reserved]	
1336	Construction and architect-engineer contracts	644

Part *Page*
1337 [Reserved]

SUBCHAPTER G—CONTRACT MANAGEMENT

1342 Contract administration 645
1345 [Reserved]
1349 Termination of contracts 645

SUBCHAPTER H—CLAUSES AND FORMS

1352 Solicitation provisions and contract clauses 647
1353 Forms 659

SUBCHAPTER A—GENERAL

PART 1301—GENERAL

Subpart 1301.1—Purpose, Authority, Issuance

Sec.
1301.100 Scope of subpart.
1301.101 Purpose.
1301.102 Authority.
1301.103 Applicability.
1301.104 Issuance.
1301.104–1 Publication and code arrangement.
1301.104–2 Arrangement of regulations.
1301.104–3 Copies.

Subparts 1301.2–1301.5 [Reserved]

Subpart 1301.6—Contracting Authority and Responsibilities

1301.603–70 Ratification of unauthorized contract awards.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486 (c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12956, Mar. 30, 1984, unless otherwise noted.

Subpart 1301.1—Purpose, Authority, Issuance

1301.100 Scope of subpart.

This subpart states the relationship of the Commerce Acquisition Regulation (CAR) to the Federal Acquisition Regulation (FAR). This subpart also explains the purpose, authority and issuance of the CAR.

1301.101 Purpose.

(a) Chapter 13 of Title 48 of the Code of Federal Regulations shall be known as the Commerce Acquisition Regulation (CAR).

(b) The purpose of the CAR is to implement and supplement the FAR within the Department of Commerce. Since the CAR is intended to supplement and implement the FAR without paraphrasing or duplicating FAR language, the CAR should be read in relation to the FAR.

[49 FR 12956, Mar. 30, 1984, as amended at 51 FR 15329, Apr. 23, 1986]

1301.102 Authority.

The CAR is prescribed by the Department Procurement Executive pursuant to a delegation initiating from the Secretary of Commerce in accordance with the Federal Property and Administrative Services Act of 1949, as amended, and other applicable law and regulation.

1301.103 Applicability.

The FAR and CAR apply to all acquisitions within the Department of Commerce.

1301.104 Issuance.

1301.104–1 Publication and code arrangement.

(a) The CAR is published in (1) daily issues of the FEDERAL REGISTER, (2) cumulative form in the Code of Federal Regulations (CFR), and (3) a separate loose-leaf edition.

(b) The CAR is issued as chapter 13 of title 48 of the CFR.

1301.104–2 Arrangement of regulations.

(a) *General.* The CAR is divided into the same parts, subparts, sections, subsections and paragraphs as the FAR. When FAR coverage is adequate by itself, there will be no corresponding CAR coverage.

(b) *Numbering.* Where the CAR implements the FAR, the CAR part, subpart, section or further subdivision will be numbered the same as the corresponding FAR part, subpart, section, or further subdivision except that the CAR implementation will be preceded by a 13 or 130 so that there are four numbers to the left of the first decimal. Where the CAR supplements the FAR, supplementing material will be assigned the number 70 and above. The placement of the sequence of 70 numbers in relation to the decimal point will depend on what division of the FAR is supplemented.

(c) *References and citations.* (2) This regulation may be referred to as the Commerce Acquisition Regulation (CAR).

(3) References to FAR materials will include FAR and the identifying number, for example, FAR 1.402. Reference to CAR materials will consist of the identifying number, for example 1301.402.

1301.104–3 Copies.

(a) Copies of the CAR in FEDERAL REGISTER or CFR form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402. Requests should reference the CAR as chapter 13 of title 48 of the Code of Federal Regulations.

(b) Loose-leaf copies of the CAR are distributed within the Department by the Procurement Executive.

[49 FR 12956, Mar. 30, 1984, as amended at 51 FR 15329, Apr. 23, 1986]

Subparts 1301.2–1301.5 [Reserved]

Subpart 1301.6—Contracting Authority and Responsibilities

1301.603–70 Ratification of unauthorized contract awards.

(a) The Department is not bound by any formal or informal type of agreement or contractual commitment which is made by persons who are not delegated contracting authority. When these unauthorized acts are discovered they shall be immediately reported to the Head of the Contracting Activity concerned. The Head of the Contracting Activity shall:

(1) Immediately inform any person who is performing work as a result of an unauthorized commitment that the work is being performed at that person's risk;

(2) Decide whether ratification of the unauthorized act is proper, and take appropriate action.

[49 FR 12956, Mar. 30, 1984, as amended at 60 FR 47309, Sept. 12, 1995]

PART 1302 [RESERVED]

PART 1303—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 1303.1—Safeguards

Sec.
1303.101–3 Agency regulations.

Subpart 1303.2—Contractor Gratuities to Government Personnel

1303.203 Reporting procedures.

Subpart 1303.3—Reports of Identical Bids and Suspected Antitrust Violations

1303.302–70 Reporting requirements.

Subpart 1303.4—Contingent Fees

1303.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 1303.5—Other Improper Business Practices

1303.502 Subcontractor kickbacks.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12959, Mar. 30, 1984, unless otherwise noted.

Subpart 1303.1—Safeguards

1303.101–3 Agency regulations.

The agency rules implementing Executive Order 11222 are contained in the Department Administrative Order on *Employee Responsibilities and Conduct* (DAO 202–735).

Subpart 1303.2—Contractor Gratuities to Government Personnel

1303.203 Reporting procedures.

Suspected violations of the Gratuities clause shall be reported to the head of the contracting office in writing detailing the circumstances. The head of the contracting office will evaluate the report and if the allegations appear to support a violation the matter will be referred to the Office of Inspector General in accordance with the Department Administrative Order

on *Inspector General Investigations* (DAO 207–10).

Subpart 1303.3—Reports of Identical Bids and Suspected Antitrust Violations

1303.302–70 Reporting requirements.

(a) Executive Order 12430 revoked the requirement of Executive Order 10936 to submit a report to the Attorney General on identical bids.

(b) Suspected anti-competitive practices and antitrust law violations as described in FAR 3.301 and FAR 3.303 shall be reported to the general counsel through the Head of the Contracting Activity. A copy of the report shall be sent to the Procurement Executive concurrently with the submission to the general counsel.

Subpart 1303.4—Contingent Fees

1303.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

Suspected violations of the Covenant Against Contingent Fees shall be reported to the Office of Inspector General in accordance with the Department Administrative Order on *Inspector General Investigations* (DAO 207–10).

Subpart 1303.5—Other Improper Business Practices

1303.502 Subcontractor kickbacks.

Suspected violations of the Anti-Kickback Act shall be reported to the Office of Inspector General in accordance with the Department Administrative Order on *Inspector General Investigations* (DAO 207–10).

PART 1304 [RESERVED]

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PARTS 1305–1308 [RESERVED]

PART 1309—CONTRACTOR QUALIFICATIONS

Subpart 1309.1—Responsible Prospective Contractors

Sec.
1309.106 Preaward surveys.
1309.106–70 Preaward surveys for ship construction, ship alteration, and ship repair.

Subpart 1309.4—Debarment, Suspension and Ineligibility

1309.470–4 Procedures on debarment.
1309.470–7 Procedures on suspension.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12960, Mar. 30, 1984, unless otherwise noted.

Subpart 1309.1—Responsible Prospective Contractors

1309.106 Preaward surveys.

[51 FR 15330, Apr. 23, 1986]

1309.106–70 Preaward surveys for ship construction, ship alteration, and ship repair.

(a) *General.* The contracting officer shall request a preaward survey of a prospective contractor for contracts involving ship construction, ship alteration, or ship repair, where the cost or price of the contract is anticipated to be in excess of $100,000, and the information on hand is not sufficient to make a determination regarding responsibility. The contracting officer may request a preaward survey of a prospective contractor for contracts involving ship construction, ship alteration, or ship repair, where the cost or price of the contract is anticipated to be $100,000 or less, if the circumstances justify the cost of the survey.

(b) *Extent of preaward survey.* The contracting officer shall determine the manner and extent of the preaward survey based upon the specific requirements of the contract. At a minimum, the contracting officer shall request a preaward survey for contracts involving ship construction, ship alteration, and ship repair where the contracting officer cannot affirmatively determine that the prospective contractor's facility is adequate for the work to be performed. For the purpose of this section, the prospective contractor's facility includes the land, buildings, shop spaces, dock facilities, drydock or marine railways, and plant security and safety.

(c) *Examples of specific concern.* The contracting officer shall coordinate efforts with technical and requirements personnel to identify areas of specific concern for the preaward survey. The following examples illustrate areas which may be of specific concern to the preaward survey team, depending on the nature of the work to be performed:

(1) Acceptable facilities and equipment for special production techniques (e.g., unique welding procedures, special test fixtures, or production equipment);

(2) Adequate size and lift capacity for the drydock or marine railway;

(3) Well maintained drydock and lifting equipment and acceptable preventative maintenance of these items;

(4) Acceptable dock master and crew who are experienced in operating the equipment and lifting a vessel of comparable size and weight;

(5) Adequate drydock or pier utilities to support the vessel, including electrical power, steam, potable water, fire fighting capability, sewage disposal, and telephone service;

(6) Responsible subcontractors;

(7) Contractor's demonstrated ability to monitor and coordinate subcontractor performance;

(8) Contractor's demonstrated ability to conduct dock and sea trials;

(9) Contractor's demonstrated ability to protect the vessel and yard and vessel personnel, including safety and security programs or individual plans;

(10) Adequate secure storage facilities for Government property; and

(11) The depth of water in the navigable waterway and the pier where the vessel will be berthed.

(d) *Preaward survey team.* The contracting officer may use any of the following individuals to form the preaward survey team:

(1) A cost or price analyst or cognizant audit agency for review of the contractor's financial and accounting systems;

(2) Technical or requirements personnel from the cognizant marine center or office of marine operations, for technical, production, or quality assurance evaluations; and

(3) Representatives of the contracting officer for management and administrative evaluations.

(e) *On-site survey.* If it is necessary to conduct a survey at the proposed site where the work is to be performed, the contracting officer shall coordinate the visit with the prospective contractor or subcontractor.

(f) *Reports.* The surveying team shall comply with the applicable reporting requirements of FAR 9.106–4. When using the short-form preaward survey report prescribed in FAR 9.106–4(d), the surveying team shall provide information on the following at a minimum:

(1) The depth of water in the navigable waterway and the pier where the vessel will be berthed;

(2) The condition of the drydock or marine railway where the work is to be performed;

(3) Availability of adequate utilities and services for the vessel;

(4) Evidence of prospective contractor or subcontractor financial problems or poor past performance.

(g) *Contracting officer determination.* Upon completion of the preaward survey, the contracting officer shall determine whether the prospective contractor and subcontractors are responsible.

[51 FR 15330, Apr. 23, 1986]

Subpart 1309.4—Debarment, Suspension and Ineligibility

1309.470–4 Procedures on debarment.

Decision making process. Upon receipt of a debarment recommendation, the Procurement Executive shall review all available evidence and shall promptly determine whether or not to proceed with debarment. The Procurement Executive may refer the matter to the Office of Inspector General for further investigation. After completion of any additional review or investigations, the Procurement Executive shall make a written determination. A copy of this determination shall be promptly sent to the initiating contracting office. (See FAR 9.406–3(b).)

[60 FR 47309, Sept. 12, 1995]

1309.470–7 Procedures on suspension.

Decision making process. Procedures for the decision making process of suspensions are the same as those contained in 1309.470–4 except that an initial decision for suspension results in immediate suspension. (See FAR 9.407–3(b).)

[60 FR 47309, Sept. 12, 1995]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 1313—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

Subpart 1313.1—General

1313.106–70 Technical evaluation and written or oral discussion procedure for negotiated small purchases.

(a) *Technical evaluation.* A technical evaluation may be requested for negotiated small purchases, at the discretion of the contracting officer. The manner and extent of the technical evaluation shall be determined by the contracting officer, except that the technical evaluation shall not be as formal or as extensive as required for procurements above the small purchase dollar threshold.

(b) *Written or oral discussions.* Written or oral discussions may be conducted with all qualified sources which submit quotations for negotiated small purchases. The contracting officer shall determine the manner, extent, and need for written or oral discussions, except that discussions shall not be as formal or as extensive as required for procurements above the small purchase dollar threshold.

[49 FR 12961, Mar. 30, 1984]

PART 1314 [RESERVED]

PART 1315—CONTRACTING BY NEGOTIATION

Subpart 1315.4—Solicitation and Receipt of Proposals and Quotations

Sec.
1315.413–2 Alternate II.

Subpart 1315.5—Unsolicited Proposals

1315.504 Advance guidance.
1315.506 Agency procedures.

Subpart 1315.6 [Reserved]

Subpart 1315.8—Price Negotiation

1315.805–70 Audit as an aid in proposal analysis.

Subpart 1315.9—Profit

1315.902 Policy.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12961, Mar. 30, 1984, unless otherwise noted.

Subpart 1315.4—Solicitation and Receipt of Proposals and Quotations

1315.413–2 Alternate II.

The procedures described in FAR 15.413–2 may be used if approved by the Head of the Contracting Activity or designee.

Subpart 1315.5—Unsolicited Proposals

1315.504 Advance guidance.

(a) When it appears that a person or firm is interested in making a proposal, that person or firm should be referred to the head of the contracting office concerned who will provide instructions for submission of an unsolicited proposal.

(b) Heads of contracting offices shall provide instructions for submission of unsolicited proposals to each person or firm which expresses an interest in submitting an unsolicited proposal.

[49 FR 12961, Mar. 30, 1984, as amended at 60 FR 47309, Sept. 12, 1995]

1315.506 Agency procedures.

(a) Promptly after receipt of an unsolicited proposal which conforms to this regulation, the head of the contracting office shall forward a copy of the proposal along with instructions for technical evaluation of unsolicited proposals to the appropriate program office for technical evaluation. If more than one Department activity has an interest in a proposal, copies of the proposal shall be circulated to each interested office.

(b) Program offices receiving unsolicited proposals for evaluation shall conduct the evaluation in accordance with this subpart 1315.5, FAR Subpart 15.5, and any additional guidance provided by the Office of Procurement and Federal Assistance.

(c) Program offices shall complete the recommendation and evaluations and submit them along with all copies of the unsolicited proposal, and a written justification for a noncompetitive procurement action if appropriate, to the head of the appropriate contracting office within 60 days of receipt of a proposal for evaluation.

(d) No part of an unsolicited proposal shall be duplicated or circulated outside of the evaluation office. Each unsolicited proposal shall be closely safeguarded to prevent disclosure of any restricted data. Only heads of contracting offices or their designees may duplicate unsolicited proposals and then only to facilitate evaluation by more than one technical evaluation office.

[49 FR 12961, Mar. 30, 1984, as amended at 60 FR 47309, Sept. 12, 1995]

Subpart 1315.6 [Reserved]

Subpart 1315.8—Price Negotiation

1315.805–70 Audit as an aid in proposal analysis.

(a) Preaward audits should not be routinely requested for actions below the dollar threshold specified in FAR 15.805–5. Before requesting audits below the dollar threshold, the contracting office should consider using price or cost analysis techniques, recent audit reports, price negotiation memoranda, and other relevant information regarding the offer to establish the reasonableness of price. However, audits should be considered for proposals below the specified dollar thresholds in the following circumstances:

(1) The contracting officer has reason to doubt the adequacy of the contractor's accounting policies or cost systems;

(2) The contractor has substantially changed its methods or levels of operation;

(3) Previous unfavorable experience indicates that the contractor's estimating, accounting, or purchasing methods may be unreliable; or

(4) The proposal concerns a new product for which cost experience is lacking.

[49 FR 12961, Mar. 30, 1984, as amended at 60 FR 47309, Sept. 12, 1995]

Subpart 1315.9—Profit

1315.902 Policy.

(a) Except as provided in (b) and (c) of this section, a structured approach for determining profit or fee prenegotiation objectives shall be used in the negotiation of all contracts, subcontracts, and contract modifications above $100,000 where adequate price competition does not exist. A structured approach for determining profit or fee prenegotiation objectives may be used at lower dollar thresholds.

(b) Regardless of whether price competition exists, the structured approach for determining profit or fee prenegotiation objectives is not required for negotiation of contracts, subcontracts, and contract modifications for the following:

(1) Architect—engineering contracts;

(2) Management contracts for operation or maintenance of Government facilities;

(3) Construction contracts;

(4) Contracts primarily requiring delivery of material supplied by subcontractors;

(5) Termination settlements;

(6) Cost-plus-award-fee contracts; and

(7) Unusual pricing situations where the structured approach has been determined to be unsuitable. This exception must be justified in writing and signed by the head of the contracting office.

(c) In many circumstances, an examination of cost and profits is not required. Where adequate price competition exists and in other situations where cost analysis is not required (e.g., established catalog or market prices of commercial items sold in substantial quantities to the general public or prices set by law or regulation), contracts may be awarded without regard to the amount of profit involved.

(d) Additional internal instruction on the use of the structured approach can be found in Procurement Letters or policy manuals issued by the Office of Procurement and Federal Assistance.

PART 1316—TYPES OF CONTRACTS

Subpart 1316.3 [Reserved]

Subpart 1316.4—Incentive Contracts

Sec.
1316.404–2 Cost-plus-award-fee contracts.

Subpart 1316.6 [Reserved]

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12962, Mar. 30, 1984, unless otherwise noted.

Subpart 1316.3 [Reserved]

Subpart 1316.4—Incentive Contracts

1316.404–2 Cost-plus-award-fee contracts.

(d) *Fee determination plans.* The award fee determination plan shall include both technical performance (including scheduling as appropriate) and business management consideration tailored to the needs of the particular situation. The goals and evaluation criteria should be results-oriented. The award fee should concentrate on the end product of the contract. However, equal employment opportunity, small business programs, and functional management areas, such as safety and security, cannot be disregarded and may be appropriately part of the criteria upon which to base the award fee. Specific goals or objectives should be established in relation to each performance evaluation criterion against which contractor performance is measured.

Subpart 1316.6 [Reserved]

PART 1317—SPECIAL CONTRACTING METHODS

Subparts 1317.4–1317.5 [Reserved]

Subpart 1317.70—Contracts for Ship Construction, Ship Alteration, and Ship Repair

Sec.
1317.7001 Solicitation provisions and contract clauses.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

Subparts 1317.4–1317.5 [Reserved]

Subpart 1317.70—Contracts for Ship Construction, Ship Alteration, and Ship Repair

1317.7001 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the following clauses in sealed bid fixed-price solicitations and contracts for ship construction, ship alteration, and ship repair.

(i) Inspection and Manner of Doing Work, 1352.217–90.

(ii) Delivery of the Vessel to the Contractor, 1352.217–91.

(iii) Performance, 1352.217–92.

(iv) Delays, 1352.217–93.

(v) Minimization of Delay Due to Government Furnished Property, 1352.217–94.

(vi) Additional Provisions Relating to Government Property, 1352.217–95.

(vii) Liability and Insurance, 1352.217–96.

(viii) Title, 1352.217–97.

(ix) Discharge of Liens, 1352.217–98.

(x) Department of Labor Occupational Safety and Health Standards for Ship Repairing, 1352.217–99.

(xi) Regulations Governing Asbestos Work, 1352.217–100.

(xii) Complete and Final Equitable Adjustments, 1352.217–101.

(xiii) Government Review, Comment, Acceptance, and Approval, 1352.217–102.

(xiv) Access to the Vessel, 1352.217–103.

(xv) Documentation of Requests for Equitable Adjustment, 1352.217–104.

(xvi) Change Proposals, 1352.217–105.

(xvii) Lay Days, 1352.217–106.

(xviii) Changes—Ship Repair, 1352.217–107.

(xix) Default—Ship Repair, 1352.217–108.

(2) Unless inappropriate due to contract type, the contracting officer shall insert the clauses listed above in negotiated solicitations and contracts for ship construction, ship alteration, and ship repair.

(b) The contracting officer shall insert a clause substantially the same as the clause at 1352.217–109, Insurance Requirements, in solicitations and contracts for ship construction, ship alteration, and ship repair, unless the contracting officer determines that the contract, or job order, requires work on parts of a vessel only and the work is to be performed at a plant other than the site of the vessel.

(c) The contracting officer shall insert the clause at 1352.217–110, Guarantees, unless the contracting officer determines that its use would be inappropriate under the circumstances.

(d) The contracting officer shall insert the clause at 1352.217–111, Temporary Services, in solicitations and contracts for ship construction, ship alteration, and ship repair, unless the contracting officer determines that its use would be inappropriate under the circumstances.

(e) The contracting officer shall insert the provision at 1352.217–112, Self-Insurance Information, in solicitations and contracts for ship construction, ship alteration, and ship repair, when the contracting officer determines that it is appropriate to allow offerors the opportunity to self-insure for any or all of the risks set forth in the applicable insurance clauses of the contract.

[52 FR 3807, Feb. 6, 1987]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1319—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

Subpart 1319.2—Policies

Sec.
1319.202–2 Locating small business sources.

Subpart 1319.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns [Reserved]

Subpart 1319.70—Contracting Opportunities for Women-Owned Small Businesses

1319.7002 Source identification and solicitation.
1319.7003 Subcontracting opportunities.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

Subpart 1319.2—Policies

1319.202–2 Locating small business sources.

(b) The contracting officer shall send a copy of the requisition form for all procurement actions expected to exceed $500,000 ($1,000,000 for construction) to the Office of Small and Disadvantaged Business Utilization, as promptly after receipt as possible. The Office of Small and Disadvantaged Business Utilization shall review the procurement actions and recommend action to the contracting officer. Orders under GSA schedule contracts, orders under Department or Government-wide indefinite delivery contracts, or actions within the scope of the changes, value engineering, or similar contract clauses are exempt from the requirements of this subsection.

[50 FR 19364, May 8, 1985, and 51 FR 1377, Jan. 13, 1986]

Subpart 1319.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns [Reserved]

Subpart 1319.70—Contracting Opportunities for Women-Owned Small Businesses

SOURCE: 51 FR 15331, Apr. 23, 1986, unless otherwise noted.

1319.7002 Source identification and solicitation.

(a) The contracting officer shall include women-owned small businesses on the mailing list for each solicitation which is expected to result in an award in excess of the small purchase dollar threshold whenever there are women-owned small businesses known to be potential suppliers.

[51 FR 15331, Apr. 23, 1986, as amended at 60 FR 47310, Sept. 12, 1995]

1319.7003 Subcontracting opportunities.

(a) Contracting officers shall provide assistance to prime contractors to identify potential women-owned small businesses. Such assistance is intended to aid prime contractors in placing a fair proportion of subcontracts with women-owned small businesses.

(b) The contracting officer shall insert the clause at 1352.219–1, Women-Owned Small Business Sources, in solicitations and contracts where the clause prescribed by FAR 19.708(b) is required (see FAR 52.219–9).

PARTS 1322–1325 [RESERVED]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 1331 [RESERVED]

PART 1332—CONTRACT FINANCING

Subpart 1332.1—General

Sec.
1332.102 Description of contract financing methods.

Subpart 1332.4 [Reserved]

Subpart 1332.6 [Reserved]

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12963, Mar. 30, 1984, unless otherwise noted.

Subpart 1332.1—General

1332.102 Description of contract financing methods.

(e)(2) Progress payments based on a percentage or stage of completion are authorized for use as a payment method under Department contracts and subcontracts for construction, alteration, repair, ship construction, ship alteration, and ship repair. For all other contracts, progress payments shall be based on costs except when the head of the contracting office determines that progress payments based on costs cannot be practically employed. In those cases, progress payments based on a percentage or stage of completion may be authorized when the head of the contracting office also determines that adequate safeguards are provided for the administration of those payments.

Subpart 1332.4 [Reserved]

Subpart 1332.6 [Reserved]

PART 1333—PROTESTS, DISPUTES, AND APPEALS

Subpart 1333.1—Protests

Sec.
1333.101 Definitions.
1333.102 General.
1333.103 Protests to the agency.
1333.104 Protests to GAO.
1333.105 Protests to GSBCA.
1333.106 Solicitation provision and contract clause.

Subpart 1333.2—Disputes and Appeals

1333.213 Obligation to continue performance.

Subpart 1333.70—Department Board of Contract Appeals

1333.70–1 Department Board of Contract Appeals.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 51 FR 15331, Apr. 23, 1986, unless otherwise noted.

Subpart 1333.1—Protests

1333.101 Definitions.

Agency protest, as used in this subpart, is one that may be filed with either the Contracting Officer or the Protest Decision Authority but not both.

Assistant General Counsel (AGC), as used in this subpart, means the Assistant General Counsel of the Department of Commerce for Finance and Litigation.

Protest Decision Authority, as used in this subpart, is the agency official above the level of the Contracting Officer who has been designated by the Procurement Executive to handle and issue the formal agency decision resolving the protest.

[64 FR 16652, Apr. 6, 1999]

1333.102 General.

(a) Protests must be received within ten work days after the basis for protest is known or should have been known unless good cause is shown to extend the time limit. However, protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing time for receipt of initial proposals shall be filed prior to bid opening or the closing time for receipt of initial proposals. Unless the time limit for receiving the protest is extended for good cause, a protest to the contracting activity which is received after the time limit will not be considered. When a timely protest is filed only with the contracting activity, the contracting officer shall take prompt action toward resolution after consulting with the AGC, and notify the protestor in writing of the action taken.

(b) When a protest is filed only with the contracting activity before award, an award shall not be made until the matter is resolved, unless the head of the contracting office makes the determination prescribed in FAR 33.103(f).

(c) When a protest is filed only with the contracting activity after award, the Contracting Officer need not notify the contractor, if the protest can be promptly resolved. If it appears likely that a protest will be filed with the General Accounting Office (GAO), or other administrative forum, the Contracting Officer should promptly notify the contractor in writing and consider suspending contract performance.

[64 FR 16652, Apr. 6, 1999]

1333.103 Protests to the agency.

(a) When a protester decides to file a protest at the agency level with the Protest Decision Authority, the guidelines set forth in these established agency level protest procedures above the Contracting Officer apply. These procedures are in addition to the existing protest procedures contained in the FAR Part 33.102 and 1333.102 of this subpart.

(1) For purposes of this subpart, a day is a calendar day. In computing a period of time for the purpose of these procedures, the day from which the period begins to run is not counted. When the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, when the Washington, DC offices of the Department of Commerce are closed for all or part of the last day, the period extends to the next day on which the Department is open.

(2) Protesters using these procedures may protest to the Protest Decision Authority who will make the final decision for the Department. Protests shall be addressed to: (Name, title of the person and address to be inserted by the Contracting Officer in the solicitation). The outside of the envelope or beginning of the FAX transmission must be marked ''Agency-level Protest''. The protester shall also provide a copy of the protest within 1 day to the responsible Contracting Officer and a copy to: Contract Law Division, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Room H5882, 14th Street and Constitution Avenue, NW, Washington, DC 20230, (FAX Number 202–482–5858).

(3) While a protest is pending at the agency level with the Protest Decision Authority, the protester agrees not to protest to the GAO or any other external fora. If the protester has already filed with the GAO or other external fora, the procedures described here may not be used.

(i) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or time set for receipt of proposals shall be filed prior to bid opening or the time set for receipt of proposals. If the contract has been awarded, protests must be filed within 10 days after contract award or 5 days after the date the protester was given the opportunity to be debriefed, whichever date is later. In cases other than those covered in the preceding two sentences, protests shall be filed not later than 14 days after the basis of the protest is known or should have been known, whichever is earlier.

(ii) To be filed on a given day, protests must be received by 4:30 PM current local time. Any protests received after that time will be considered to be

filed on the next day. Incomplete submissions will not be considered filed until all information is provided.

(iii) To be complete, protests must contain the following information:

(A) The protester's name, address, telephone number, and fax number.

(B) The solicitation or contract number, name of contracting office and the Contracting Officer.

(C) A detailed statement of all factual and legal grounds for protests, and an explanation of how the protester was prejudiced.

(D) Copies of relevant documents supporting protester's statement.

(E) A request for ruling by the agency.

(F) Statement as to form of relief requested.

(G) All information establishing that the protester is an interested party for the purpose of filing a protest.

(H) All information establishing the timeliness of the protest.

(iv) All protests must be signed by an authorized representative of the protestor.

(b) Within 14 days after the protest is filed, the Contracting Officer will prepare an administrative report that responds to the issues raised by the protester and addresses any other issues, which, even if not raised by the protester, that may have been identified by agency officials as being relevant to the fairness of the procurement process. The Contracting Officer shall forward this administrative report to the Contract Law Division, Office of the Assistant General Counsel for Finance and Litigation.

(1) For good cause shown, the Protest Decision Authority may grant an extension of time for filing the administrative report and for issuing the written decision. When an extension is granted, the Protest Decision Authority will notify the protester and all interested parties within 1 day of the decision to grant the extension.

(2) Unless an extension is granted, the Protest Decision Authority will issue a decision within 35 days of the protest. The protest decision authority's final decision will be binding on the Department of Commerce and not subject to further appeals.

(3) The Protest Decision Authority shall send a written ruling and a summary of the reasons supporting the ruling to the protester, by ''Certified Mail, Return Receipt Requested,'' and shall forward information copies to the applicable contracting office and the Procurement Executive, Office of Acquisition Management.

(c) Effect of protest on award and performance.

(1) When a protest is filed prior to award, a contract may not be awarded unless authorized by the Head of the Contracting Activity (HCA) based on a written finding that:

(i) The supplies or services are urgently required.

(ii) Delivery or performance would be unduly delayed by failure to make the award promptly.

(iii) A prompt award will be in the best interest of the Government.

(2) When a protest is filed within 10 days after contract award, or 5 days after a debriefing date was offered to the protester under a timely debriefing request in accordance with FAR 15.1004, whichever is later, the Contracting Officer shall immediately suspend performance pending the resolution of the protest within the agency, including any review by an independent higher official, unless continued performance is justified. The HCA may authorize continued contract performance, notwithstanding the protest, based on a written finding that:

(i) Contract performance would be in the best interest of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision.

(d) The Protest Decision Authority may grant one or more of the following remedies:

(1) Terminate the contract.

(2) Re-compete the requirement.

(3) Issue a new solicitation.

(4) Refrain from exercising options under the contract.

(5) Award a contract consistent with statutes and regulations.

(6) Amend the solicitation provisions which gave rise to the protest and continue with the procurement.

(7) Such other remedies as the decision-maker may determine are necessary to correct a defect.

[64 FR 16653, Apr. 6, 1999]

1333.104 Protests to GAO.

(a)(1) *General.* A protestor shall furnish a copy of its complete protest to the contracting officer designated in the solicitation and a copy of its complete protest to the Contract Law Division of the Office of the Assistant General Counsel for Finance and Litigation, no later than one day after the protest is filed with the GAO. The envelope containing the complete protest shall be clearly marked ''GAO Protest''.

(2) The GAO report shall be assembled and organized by the contracting office in accordance with rule 4(d) of the GSBCA Rules of Procedure (48 CFR part 6101) except where rule 4(d) may conflict with GAO procedures.

(b) *Protests before award.* When the contracting activity has received notice of a protest filed directly with GAO, a contract may not be awarded prior to a GAO decision on the protest, unless the Head of the Contracting Activity makes the written finding prescribed in FAR 33.104 (b)(1) after consulting with the AGC. The head of the contracting office shall notify the AGC when the written finding has been executed so that the AGC can notify GAO. The contracting activity is not authorized to award the affected contract until the AGC has notified GAO of the written finding.

(c) *Protests after award.* When the contracting activity receives notice of a protest filed directly with GAO within 10 calendar days after contract award, the contracting officer shall immediately suspend performance pending a GAO decision on the protest or terminate the awarded contract, unless the Head of the Contracting Activity makes the written finding prescribed in FAR 33.104 (c)(2) after consulting with the AGC. The head of the contracting office shall notify the AGC when the written finding has been executed so that the AGC can notify GAO. The contracting activity is not authorized to continue contract performance until the AGC has notified GAO of the written finding.

[51 FR 15331, Apr. 23, 1986, as amended at 60 FR 47310, Sept. 12, 1995]

1333.105 Protests to GSBCA.

(a)(1) A protestor shall furnish a copy of its complete protest to the contracting officer designated in the solicitation and a copy of its complete protest to the Contract Law Division of the Office of the Assistant General Counsel for Finance and Litigation, on the same day the protest is filed with the GSBCA. The envelope containing the complete protest shall be clearly marked ''GSBCA Protest''.

[51 FR 15331, Apr. 23, 1986, as amended at 60 FR 47310, Sept. 12, 1995]

1333.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 1352.233–2, Service of Protest (JAN 1985) (Deviation FAR 52.233–2), in lieu of the provision at FAR 52.233–2 in solicitations for other than small purchases.

Subpart 1333.2—Disputes and Appeals

1333.213 Obligation to continue performance.

(a) The contracting officer may use Alternate I to the clause at FAR 52.233–1, Disputes, only after the Head of the Contracting Activity has determined in writing that—

(1) Continued performance is necessary pending resolution of any claim arising under or relating to the contract because of unusual circumstances which make continued performance essential to the public health or welfare;

(2) Financing is or will be available for the continued performance; and

(3) The Government's interest is or will be properly secured.

Subpart 1333.70—Department Board of Contract Appeals

1333.70–1 Department Board of Contract Appeals.

The General Services Administration (GSA) Board of Contract Appeals

serves as the Board of Contract Appeals for the Department.

[49 FR 12964, Mar. 30, 1984]

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 1334 [RESERVED]

PART 1336—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 1336.2—Special Aspects of Contracting for Construction

Sec.

1336.209 Construction contracts with architect-engineer firms.

Subpart 1336.6—Architect-Engineer Services

1336.602–5 Short selection processes for contracts not to exceed $10,000.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12964, Mar. 30, 1984, unless otherwise noted.

Subpart 1336.2—Special Aspects of Contracting for Construction

1336.209 Construction contracts with architect-engineer firms.

The head of the contracting office is delegated the authority to approve the exceptional circumstance of awarding a contract for construction of a project to the firm that designed the project. Any approval of this type of award must be justified in writing and signed by the head of the contracting office.

Subpart 1336.6—Architect-Engineer Services

1336.602–5 Short selection processes for contracts not to exceed $10,000.

Both short selection processes prescribed in FAR 36.602–5 may be used for contracts not to exceed $10,000. However, in either case the contracting officer shall review the report, approve it and commence negotiations or return it for appropriate revision.

PART 1337 [RESERVED]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 1342—CONTRACT ADMINISTRATION

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

Subpart 1342.1—Interagency Contract Administration and Audit Services

1342.102–70 Post award audit reviews.

(a) Generally, the final invoice shall not be approved until a close-out audit has been performed and all outstanding issues have been negotiated or resolved on the following types of contracts of $100,000 and above:

(1) Cost-reimbursement type contracts;

(2) The cost-reimbursement portion of fixed-price contracts;

(3) Letter contracts which provide for reimbursement of costs;

(4) Time and materials contracts; and

(5) Labor-hour contracts.

(b) Even though the $100,000 postaward audit threshold generally applies, an audit may be requested regardless of the dollar amount when the contracting officer determines that an audit is justified under one of the following circumstances:

(1) There is some evidence of fraud or waste;

(2) The contractor's performance under the contract has been questionable;

(3) The contractor had a high incidence of unallowable costs under a previous contract;

(4) The contract is with a newly established firm, or a firm which has just begun dealing with the Government.

[49 FR 12965, Mar. 30, 1984; as amended at 60 FR 47310, Sept. 12, 1995]

PART 1345 [RESERVED]

PART 1349—TERMINATION OF CONTRACTS

Sec.

1349.001 Definitions.

Subpart 1349.4—Termination for Default

1349.402–7 Other damages.

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Sec'y of Commerce in Dept. Org. Order 10–5 and Dept. Adm. Order 208–2.

1349.001 Definitions.

(a) *Administrative costs,* as used in this part, means those costs other than excess costs, incurred by the Government as a result of the contractor's default. Administrative costs include but are not limited to:

(1) Salaries and fringe benefits paid to Government employees who are assigned to a work activity (e.g., reprocurement activities) as a result of the default;

(2) Preaward survey expenses incurred in qualifying reprocurement contractors; and

(3) Costs incurred in printing and distributing the reprocurement solicitation.

(b) *Excess costs,* as used in this part, means any costs, other than administrative costs, incurred by the Government in reprocuring similar supplies or services or performing similar services as a result of the contractor's default.

[51 FR 15332, Apr. 23, 1986]

Subpart 1349.4—Termination for Default

1349.402–7 Other damages.

(a) The contracting officer may recover administrative costs under the default clause when it is in the best interest of the Government. A contracting officer's decision to recover administrative costs must balance the expected cost to the Government of documenting and supporting the assessment with the expected recovery amount.

(b) Documents used to support an assessment of administrative costs must clearly demonstrate that the added costs incurred by the Government were a direct result of the default.

(1) To support administrative labor costs, the contracting officer should keep a record of:

(i) Name, position, and organization of each employee performing work activities as a consequence of the default;

(ii) Dates of work and time spent by each employee on the repurchase;

(iii) Specific tasks performed (e.g., solicitation preparation, clerical);

(iv) Hourly rates of pay (straight time or overtime); and

(v) Applicable fringe benefits.

(2) Travel vouchers, invoices, printing requisitions, and other appropriate evidence of expenditures may be used to support other administrative costs (e.g., travel, per diem, printing and distribution of the repurchase contract).

(c) If assessment of administrative costs is considered appropriate after review by the AGC, the contracting officer shall make a written demand on the contractor for administrative costs. The written demand shall describe the basis for the assessment and the cost computations. The same demand letter may be used to assess administrative costs and any excess costs. If the contractor fails to make payment after receiving a contracting officer's final decision, the contracting officer shall follow the procedures in subpart 1332.6 and FAR Subpart 32.6 to collect the amount owed the Government.

(d) The recovery of excess or administrative costs does not preclude the Government from exercising other rights or remedies which it may have by law or under the terminated contract.

[51 FR 15332, Apr. 23, 1986]

SUBCHAPTER H—CLAUSES AND FORMS

PART 1352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 1352.0—General

Sec.
1352.000 Scope of part.
1352.001 General policy.

Subpart 1352.1—Instructions for Using Provisions and Clauses

1352.100 Incorporation by reference.

Subpart 1352.2—Texts of Provisions and Clauses

1352.217–90 Inspection and manner of doing work.
1352.217–91 Delivery of vessel to the contractor.
1352.217–92 Performance.
1352.217–93 Delays.
1352.217–94 Minimization of delay due to Government furnished property.
1352.217–95 Additional provisions relating to Government property.
1352.217–96 Liability and insurance.
1352.217–97 Title.
1352.217–98 Discharge of liens.
1352.217–99 Department of Labor occupational safety and health standards for ship repairing.
1352.217–100 Regulations governing asbestos work.
1352.217–101 Complete and final equitable adjustments.
1352.217–102 Government review, comment, acceptance, and approval.
1352.217–103 Access to the vessel(s).
1352.217–104 Documentation of requests for equitable adjustment.
1352.217–105 Change proposals.
1352.217–106 Lay days.
1352.217–107 Changes—ship repair.
1325.217–108 Default—ship repair.
1352.217–109 Insurance requirements.
1352.217–110 Guarantees.
1352.217–111 Temporary services.
1352.217–112 Self-insurance information.
1352.233–2 Service of protest.

AUTHORITY: 41 U.S.C. 418b.

SOURCE: 49 FR 12965, Mar. 30, 1984, unless otherwise noted.

Subpart 1352.0—General

1352.000 Scope of part.

This part implements and supplements FAR Part 52 by prescribing specific modifications, alterations, and deviations to FAR solicitation provisions and contract clauses for Department-wide use.

1352.001 General policy.

The Department's policy is to use the FAR and CAR prescribed solicitation provisions and contract clauses unless specific authority for deviations has been obtained. (See 1301.4 for authority to deviate.) The use of uniform solicitation provisions and contract clauses should: provide a less burdensome way for potential contractors to respond to the Government's request for information concerning the evaluation of bids and proposals; expedite solicitation and contract preparation; and facilitate contract negotiation, administration and review. Each solicitation which incorporates contract clauses or solicitation provisions which deviate from those prescribed by the FAR and the CAR must be submitted to the Office of Procurement and Federal Assistance for prior review. The Office of Procurement and Federal Assistance will coordinate requests for approval of these solicitations by the Office of Management and Budget, in accordance with the Paperwork Reduction Act of 1980 and 5 CFR part 1320.

Subpart 1352.1—Instructions for Using Provisions and Clauses

1352.100 Incorporation by reference.

Contracting officers within the Department shall incorporate solicitation provisions and contract clauses by reference in solicitations and contracts to the maximum extent provided by applicable law and regulation. Incorporation by reference is the listing only by title, regulatory citation, and date of the provision or clause rather than the full text. The full text of the referenced solicitation provision or contract clause is contained in the Code of Federal

Regulations (CFR); chapter 1 of title 48 for FAR provisions and clauses; and chapter 13 of title 48 for CAR provisions and clauses.

Subpart 1352.2—Texts of Provisions and Clauses

SOURCE: 52 FR 3808, Feb. 6, 1987, unless otherwise noted.

1352.217–90 Inspection and manner of doing work.

As prescribed in 1317.7001(a), insert the following clause:

INSPECTION AND MANNER OF DOING WORK (CAR 1352.217–90) (JAN 1987)

(a) All work and material shall be subject to the approval of the Contracting Officer or his duly authorized representative. Work shall be performed in accordance with the plans and specifications of this contract as modified by any contract modification.

(b) Unless otherwise specifically provided for in the contract, all operational practices of the Contractor and all workmanship and material, equipment and articles used in the performance of work shall be in accordance with American Bureau of Shipping Rules for Building and Classing Steel Vessels, U.S. Coast Guard Marine Engineering Regulations and Material Specifications (Subchapter F 46 CFR), U.S. Coast Guard Electrical Engineering Regulations (Subchapter J 46 CFR) (APR 1982), and U.S.P.H.S., Handbook on Sanitation in Vessel Construction, in effect at the time of the Contractor's submission of bid (or acceptance of the contract, if negotiated), and the best commercial maritime practices, except where military specifications are specified, in which case such standards of material and workmanship shall be followed.

(c) All material and workmanship shall be subject to inspection and test at all times during the Contractor's performance of the work to determine their quality and suitability for the purpose intended and compliance with the contract. In case any material or workmanship furnished by the Contractor is found to be defective prior to redelivery of the vessel, or not in accordanoe with the requirements of the contract, the Government shall have the right prior to redelivery of the vessel to reject such material or workmanship, and to require its correction or replacement by the Contractor at the Contractor's cost and expense. This Government right is in addition to its rights under any Guarantee clause in this contract. If the Contractor fails to proceed promptly with the replacement or correction of such material or workmanship, as required by the Contracting Officer, the Government may, by contract or otherwise, replace or correct such material or workmanship and charge to the Contractor the excess cost to the Government. The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work specified in the contract. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of the contract and for a period of 2 years after delivery of the vessel to the Government.

(d) No welding, including tack welding and brazing, shall be permitted in connection with repairs, completions, alterations, or addition to hulls, machinery or components of vessels unless the welder is at the time, qualified to the standards established by the United States Coast Guard, the American Bureau of Shipping, or the Department of the Navy. The welder's qualifications shall be appropriate for the particular service application, filler material type, position of welding, and welding process involved in the work being undertaken. A welder may be required to requalify if the Contracting Officer believes there is a reasonable doubt concerning the welder's ability. Welder's qualifications for this purpose shall be outlined in ''Marine Engineering Regulations'' of the United States Coast Guard. When a welding process other than manual shielded arc is proposed or required, the contractor or fabricator shall submit procedure qualification tests for approval prior to production welding. Procedure qualification tests shall be conducted in accordance with the requirements of the ''Marine Engineering Regulations'' of the United States Coast Guard.

(e) The Contractor shall exercise reasonable care to protect the vessel from fire, and the Contractor shall maintain a reasonable system of inspection over the activities of welders, burners, riveters, painters, plumbers and similar workers, particularly where such activities are undertaken in the vicinity of the vessel's magazine, fuel oil tanks, or storerooms containing flammable material. A reasonable number of hose lines shall be maintained by the Contractor ready for immediate use on the vessel at all times while the vessel is berthed alongside the Contractor's pier or in drydock or on a marine railway. All tanks or bilge areas under alteration or repair shall be cleaned, washed, and steamed out or otherwise made safe by the Contractor if and to the extent necessary as required by good marine practice or by current OSHA Regulations. The Contracting Officer's Technical Representative (COTR) shall be furnished with a ''gas free'' or ''safe for hot work'' or ''safe for men'' certificate before any hot work or entry is done. Unless otherwise provided in this contract, the Contractor shall at all times maintain a reasonable fire watch about the vessel, including a

fire watch on the vessel while work is being performed thereon.

(f) The Contractor shall place proper safeguards and/or effect such safety precautions as necessary, including suitable and sufficient lighting, for the prevention of accidents or injury to persons or property during the prosecution of work under this contract and/or from time of receipt of the vessel until acceptance by the Government of the work performed.

(g) Except as otherwise provided in this contract, when the vessel is in the custody of the contractor or in drydock or on a marine railway and the temperature becomes as low as 35 degrees Fahrenheit, the Contractor shall keep all pipelines, fixtures, traps, tanks, and other receptacles on the vessel drained to avoid damage from freezing, or if this is not practicable, the vessel shall be kept heated to prevent such damage. The vessel's stern tube and propeller hubs shall be protected from frost damage by applied heat through the use of a salamander or other proper means, as approved by the COTR.

(h) Whenever practicable, the work shall be performed in a manner which does not interfere with the berthing and messing of personnel attached to the vessel. The Contractor shall ensure that assigned personnel have access to the vessel at all times. It is understood that such personnel will not interfere with the work or the Contractor's workers.

(i) The Government does not guarantee the correctness of the dimensions, sizes, and shapes given in any sketches, drawings, plans or specifications prepared or furnished by the Government. The Contractor shall be responsible for the correctness of the shape, sizes and dimensions of parts to be furnished hereunder, other than those furnished by the Government.

(j) The Contractor shall at all times keep the site of the work on the vessel free from accumulation of waste material or rubbish caused by Contractor employees or the work, and at the completion of the work shall remove all rubbish from and about the site of the work and shall leave the work and its immediate vicinity ''broom clean'' unless more exactly specified in this contract.

(k) While in drydock or on a marine railway, the Contractor shall be responsible for the closing before the end of working hours, of all valves and openings upon which work is being done by its workers when such closing is practicable. The Contractor shall keep the COTR cognizant of the closure status of all valves and openings upon which the Contractor's workers have been working.

(l) Without additional expense to the Government, the Contractor shall employ specialty subcontractors where required by the specifications or when necessary for satisfactory performance of the work.

(m) When requested by the COTR, the Contractor shall notify the COTR in advance:

(i) Prior to starting inspections or tests; and

(ii) When supplies will be ready for Government inspection.

(n) When advance notification is requested, the authorized COTR shall specify the period and method of notification.

(End of clause)

1352.217–91 Delivery of vessel to the contractor.

As prescribed in 1317.7001(a), insert the following clause:

DELIVERY OF VESSEL TO THE CONTRACTOR (CAR 1352.217–91) (JAN 1987)

(a) The Government shall deliver the vessel to the Contractor at the location specified in the contract.

(b) If the Contractor's plant is specified, it shall be understood to mean the fairway of the plant. The Contractor shall provide necessary tugs and pilot services to move the vessel from the fairway to the pier or dock and, upon completion of all work, from the pier or dock to the fairway of the plant.

(c) While the vessel is in the possession of the Contractor, any necessary movement of the vessel incidental to the work specified in the contract shall be furnished by the Contractor without additional charge to the Government.

(End of clause)

1352.217–92 Performance.

As prescribed in 1317.7001(a), insert the following clause:

PERFORMANCE (CAR 1352.217–92)(JAN 1987)

(a) Upon the issuance of the contract, the Contractor shall promptly commence the work specified in any plans and specifications made a part of the contract, and shall diligently prosecute the work to completion. The Contractor shall not commence work until the contract has been issued.

(b) The Government shall deliver the vessel described in the contract at such time and location as may be specified in the contract. Upon completion of the work, the Government shall accept delivery of the vessel at such time and location as may be specified in the contract.

(c) Without additional charge to the Government, and without specific requirement in the contract, the Contractor shall:

(1) Make available at the plant to personnel of the vessel while in drydock or on a marine railway, toilet and similar facilities acceptable to the Contracting Officer as adequate in number and sanitary standards;

(2) Supply and maintain, in such condition as the Contracting Officer may reasonably require, suitable brows and gangways from the pier, drydock or marine railway to the vessel;

(3) Treat salvage, scrap, or other ship's material of the Government resulting from performance of the work as items of Government furnished property in accordance with the Government Property clause;

(4) Perform, or pay the cost of, any repair, reconditioning or replacement made necessary as the result of the use by the Contractor of any of the vessel's machinery, equipment or fittings, including, but not limited to, winches, pumps, riggings, or pipe lines; and

(5) Furnish suitable offices, office equipment and telephones at or near the site of the work as the Contracting Officer reasonably requires for himself and his staff.

(d) Except as otherwise provided in the contract, the Contractor shall furnish all necessary material, labor, services, equipment, supplies, power, accessories, facilities, and other things and services necessary for accomplishing the work, subject to Government rights under the Government Property clause.

(e) The Contractor shall conduct dock and sea trials of the vessel as required by the contract. Unless otherwise expressly provided in the contract, during the conduct of these trials the vessel shall be under the control of the vessel's commander and crew with representatives of the Contractor and the Government on board to determine whether or not the work done by the Contractor has been satisfactorily performed. Dock and sea trials not speoified which the Contractor requires for his own benefit shall not be undertaken by the Contractor without prior notice to and approval of the Contracting Officer; any such dock or sea trial shall be conducted at the risk and expense of the Contractor. The Contractor shall provide and install all fittings and appliances which may be necessary for the dock and sea trials, to enable the representatives of the Government to determine whether the requirements of the contract plans and specifications have been met. The Contractor shall also be responsible for the care, installation and removal of any instruments and apparatus furnished by the Government for such trials.

(End of clause)

1352.217–93 Delays.

As prescribed in 1317.7001(a), insert the following clause:

DELAYS (CAR 1352.217–93) (JAN 1987)

When during the performance of this contract the Contractor is required to delay the work on a vessel temporarily, due to orders or actions of the Government respecting stoppage of work to permit shifting the vessel, stoppage of hot work to permit bunkering, fueling, stoppage of work due to embarking or debarking passengers and loading or discharging cargo, and the Contractor is not given sufficient advance notice or is otherwise unable to avoid incurring additional costs on account thereof, an equitable adjustment may be made in the contract price pursuant to the Changes clause.

(End of clause)

1352.217–94 Minimization of delay due to Government furnished property.

As prescribed in 1317.7001(a), insert the following clause:

MINIMIZATION OF DELAY DUE TO GOVERNMENT FURNISHED PROPERTY (CAR 1352.217–94) (JAN 1987)

(a) In order to assure timely delivery of the vessel under this contract, it is imperative that delay in delivery of such vessel resulting from late, damaged, or unsuitable Government furnished property be held to an absolute minimum. In order to achieve minimization of delay it is agreed that:

(1) Subject to adjustment as provided in paragraph (b) of this clause, the Government shall deliver each item of Government furnished property to the Contractor on or before the date specified in the contract or, if later, in sufficient time for the contractor to deliver the vessel in accordance with the delivery schedule specified elsewhere.

(2) The Government may forego furnishing any item of Government property to the Contractor. In that event, the Contractor shall prepare the vessel in terms of piping, wiring, structure, foundation, ventilation, and any other preinstallation requirements of the item, so that the work on the vessel may continue without delay and disruption resulting from the absence of the item. If the Government does not furnish an item designated as Government furnished property, the parties may be entitled to an equitable adjustment in the contract price, in accordance with the Changes clause for eliminating the requirement to install the Government property item. But, notwithstanding any other clause of this contract, an adjustment shall not be made in the delivery schedule of any vessel if the Government chooses not to furnish the item on or before the delivery date of the item. If the Government subsequently desires the Contractor to install the item prior to delivery of the vessel, a contract modification shall be executed which takes into account any increase in cost or performance time resulting from the installation.

(b) If the delivery date for the vessel is extended for any reason, the latest date for

which the Government must deliver items of Government property shall be deemed to be extended by an equal number of days unless (i) the Contracting Officer agrees in writing that earlier delivery of the items is required, in which case some or all of the Government property shall be extended as agreed rather than on a day-for-day basis, or (ii) a Government property item was the exclusive cause for the extension of the delivery date of the vessel in which case the latest date by which the Government must deliver the item shall not be deemed to be extended unless the parties agree otherwise.

(c) The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government furnished property suitable for use (except for such property furnished ''as is'') will be delivered to the Contractor at the time stated in the specification or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. If the Government furnished property is not delivered to the Contractor by such time and the Contractor makes a timely written request, the Contracting Officer shall determine if an equitable adjustment is appropriate. If determined appropriate, the Contracting Officer shall equitably adjust the delivery or performance date, the specifications, the price, or any other contractual provision affected by any such delay, in accordance with the Changes clause.

(d) The Government Property and Minimization of Delay Due to Government Furnished Property clauses contain exclusive remedies. The Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government furnished property or delivery of such property in a condition not suitable for its intended use.

(End of clause)

1352.217–95 Additional provisions relating to Government property.

As prescribed in 1317.7001(a), insert the following clause:

ADDITIONAL PROVISIONS RELATING TO GOVERNMENT PROPERTY (CAR 1352.217–95) (JAN 1987)

(a) Notwithstanding any requirements to the contrary for the furnishing of material by the Government which may appear in plans, drawings, or other data, the Government shall furnish only the material specifically listed in the specifications as Government furnished property. Any material required for the performance of the contract which does not appear in the specifications as Government furnished shall be furnished by the Contractor.

(b) The Contracting Officer may increase the amount of material to be furnished by the Government and the contract shall be equitably adjusted in accordance with the Government Property clause.

(c) Unless otherwise specifically directed by the Contracting Officer, nonreusable crates and other nonreusable packaging in which Government material is delivered to the Contractor shall become the property of the Contractor upon removal of the packaged or crated material.

(d) Any packaging in preparation for delivery or for other disposal of Government property by the Contractor at the direction or authorization of the Contracting Officer pursuant to paragraph (i) of the Government Property clause shall be provided for by change order and an appropriate adjustment shall be made in the contract price in accordance with the Changes clause.

(e) The vessel, its equipment, movable stores, cargo and other ship's material are not designated Government furnished property under the Government Property clause.

(End of clause)

1352.217–96 Liability and insurance.

As prescribed in 1317.7001(a), insert the following clause:

LIABILITY AND INSURANCE (CAR 1352.217–96) (JAN 1987)

(a) The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees, persons and property, in and about the work, and to the vessel or part thereof upon which work is done.

(b) The Contractor shall be responsible for and make good at its own cost and expense any and all loss of or damage of whatsoever nature to the vessel (or part thereof), its equipment, movable stores and cargo, and Government owned material and equipment for the repair, completion, alteration of or addition to the vessel in the possession of the Contractor, whether at the plant or elsewhere, arising or growing out of the performance of the work, except where the Contractor can affirmatively show that such loss or damage was due to causes beyond the Contractor's control, was proximately caused by the fault or negligence of agents or employees of the Government, or which loss or damage the Contractor by exercise of reasonable care was unable to prevent. However, the Contractor shall not be responsible for any such loss or damage discovered after redelivery of the vessel unless (i) the loss or damage is discovered within 90 days after redelivery of the vessel and (ii) loss or damage is affirmatively shown to be the result of the fault or negligence of the Contractor. To induce the Contractor to perform the work for

the compensation provided, it is specifically agreed that the Contractor's aggregate liability on account of loss of or damage to the vessel (or part thereof), its equipment, movable stores and cargo and Government owned materials and equipment shall in no event exceed the sum of $300,000. As to the Contractor, the Government assumes the risk of loss or damage to the Government-owned vessel (or part thereof), its equipment, movable stores and cargo and said Government-owned materials and equipment in excess of $300,000. This assumption of risk includes but is not limited to loss or damage from negligence of whatsoever degree of the Contractor's servants, employees, agents or subcontractors but specifically excludes loss or damage from willful misconduct or lack of good faith on the part of the Contractor's directors, officers and any of its managers, superintendents or other equivalent representatives who have supervision or direction of (i) all or substantially all of the Contractor's business, or (ii) all or substantially all of the Contractor's operation at any one plant. However, as to such risk assumed and borne by the Government, the Government shall be subrogated to any claim, demand or cause of action against third persons which exists in favor of the Contractor, and the contractor shall, if required, execute a formal assignment or transfer of claims, demands or causes of action. Nothing contained in this paragraph shall create or give rise to any right, privilege or power in any person except the Contractor, nor shall any person (except the Contractor) be or become entitled thereby to proceed directly against the Government, or join the Government as a co-defendent in any action against the Contractor brought to determine the Contractor's liability, or for any other purpose.

(c) The Contractor indemnifies and holds harmless the Government, its agencies and instrumentalities, and the vessel against all suits, actions, claims, costs or demands (including without limitation, suits, actions, claims, costs or demands resulting from death, personal injury and property damage) to which the Government, its agencies and instrumentalities, or the vessel may be subject or put by reason of damage or injury (including death) to the property or person of any one other than the Government, its agencies, instrumentalities and personnel, or the vessel arising or resulting in whole or in part from the fault, negligence, wrongful act or wrongful omission of the Contractor, or any subcontractor, its or their servants, agents or employees; provided that the Contractor's obligation to indemnify under this paragraph (c) shall not exceed the sum of $300,000 on account of any one accident or occurrence in respect of any one vessel. Such indemnity shall include, without limitation, suits, actions, claims, costs or demands of any kind whatsoever, resulting from death, personal injury or property damage occurring during the period of performance of work on the vessel or within 90 days after redelivery of the vessel. With respect to any such suits, actions, claims, costs or demands resulting from death, personal injury or property damage occurring after the expiration of such period, the rights and liabilities of the Government and the Contractor shall be as determined by other provisions of this contract and by law; provided that such indemnity shall apply to death occurring after such period which results from any personal injury received during the period covered by the Contractor's indemnity as provided herein.

(d) The Contractor shall, at its own expense, procure, and thereafter maintain such casualty, accident and liability insurance, in such forms and amounts as may be approved by the Contracting Officer, insuring the performance of its obligations under paragraph (c) of this clause. In addition, the Contractor shall at its own expense procure and thereafter maintain such ship repairer's legal liability insurance as may be necessary to insure the Contractor against its liability as ship repairer in the amount of $300,000, or the value of the vessel as determined by the Contracting Officer, whichever is the lesser, with respect to each vessel on which work is performed. The Contractor shall cause the Government to be named as an additional insured under any and all liability insurance policies. However, at the discretion of the Contracting Officer, such insurance need not be procured whenever the job order requires work on parts of a vessel only and the work is to be performed at a plant other than the site of the vessel. Further, the Contractor shall procure and maintain in force Workmen's Compensation Insurance (or its equivalent) covering its employees engaged in the work and shall insure the procurement and maintenance of such insurance by all subcontractors engaged in the work. The Contractor shall provide evidence of insurance as required by the Government.

(e) The Contractor shall receive no allowance in the contract price for inclusion of any premium expense or charge for any reserve made on account of self-insurance for coverage against any risk assumed by the Government under this clause.

(f) As soon as practicable after the occurrence of any loss or damage the risk of which the Government has assumed, written notice of the damage shall be given by the Contractor to the Contracting Officer. The notice shall contain full particulars of the loss or damage. If claim is made or suit is brought thereafter against the Contractor as the result or because of such event, the Contractor shall immediately deliver to the Government every demand, notice, summons or other process received by it or its representatives. The Contractor shall cooperate

with the Government and, upon the Government's request, shall assist in effecting settlements, securing and giving evidence; obtaining the attendance of witnesses and in the conduct of suits. The Government shall pay to the Contractor the expense, other than the cost of maintaining the Contractor's usual organization, incurred in this assistance. Except at its own cost, the Contractor shall not voluntarily make any payment, assume any obligation or incur any expense not imperative for the protection of the vessel or vessels at the time of the event.

(End of clause)

1352.217–97 Title.

As prescribed in 1317.7001(a), insert the following clause:

TITLE (CAR 1352.217–97) (JAN 1987)

Unless title to materials and equipment acquired or produced for, or allocated to, the performance of this contract shall have vested previously in the Government by virtue of other provisions of this contract, title to all materials and equipment to be incorporated in any vessel or part thereof, or to be placed upon any vessel or part hereof in accordance with the requirements of the contract, shall vest in the Government upon delivery thereof at the plant or such other location as may be specified in the contract for the performance of the work. However, the Contractor is fully responsible for all such Contractor furnished materials and equipment or the restoration of any damaged work. It is expressly understood and agreed that the Contractor shall assume without limitation the risk of loss for any such materials and equipment until such time as all work is completed and accepted by the Government and the vessel is redelivered to the Government. Upon completion of the contract, or with the approval of the Contracting Officer at any time during the performance of the contract, all such Contractor furnished materials and equipment not incorporated in any vessel or part thereof, or not placed upon any vessel or part thereof, in accordance with the requirements of the contract, shall become the property of the Contractor, except those materials and equipment the cost of which has been reimbursed by the Government to the Contractor.

(End of clause)

1352.217–98 Discharge of liens.

As prescribed in 1317.7001(a), insert the following clause:

DISCHARGE OF LIENS (CAR 1352.217–98) (JAN 1987)

The Contractor shall immediately discharge or cause to be discharged any lien or right in rem of any kind, other than in favor of the Government, which at any time exists or arises in connection with work done or materials furnished under any contract hereunder with respect to the machinery, fittings, equipment or materials for any of the vessels. If any such lien or right in rem is not immediately discharged, the Government may discharge or cause to be discharged such lien or right at the expense of the Contractor.

(End of clause)

1352.217–99 Department of Labor occupational safety and health standards for ship repairing.

As prescribed in 1317.7001(a), insert the following clause:

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIP REPAIRING (CAR 1352.217–99) (JAN 1987)

Attention of the Contractor is directed to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651–678), and to the Occupational Safety and Health Standards for Shipyard Employment (29 CFR 1915), promulgated under Pub. L. 85–742, amending Section 41 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 941), and adopted by the Department of Labor as occupational safety or health standards under Section 6(a) of the Occupation Safety and Health Act of 1970 (29 CFR 1910.13). These regulations apply to all ship repair and related work, as defined in the regulations, performed under this contract on the navigable waters of the United States, including any dry dock or marine railway. Nothing contained in this contract shall be construed as relieving the Contractor from any obligations which it may have for compliance with the aforesaid regulations.

(End of clause)

1352.217–100 Regulations governing asbestos work.

As prescribed in 1317.7001(a), insert the following clause:

REGULATIONS GOVERNING ASBESTOS WORK (CAR 1352.217–100) (JAN 1987)

If asbestos is encountered, the Contractor shall follow the regulations contained in 29 CFR 1910.1001 (OSHA, Chapter XVII).

(End of clause)

1352.217–101 Complete and final equitable adjustments.

As prescribed in 1317.7001(a), insert the following clause:

COMPLETE AND FINAL EQUITABLE ADJUSTMENTS (CAR 1352.217–101) (JAN 1987)

Whenever the Contractor submits any claim for an equitable adjustment attributable to any fact or circumstance regarded as a change order whether formal or ''constructive,'' under the Changes clause or any other clause of this contract, such claim shall include all adjustments (including but not limited to adjustments arising out of delays or disruptions or both caused by such change order) to which the Contractor is entitled under this contract. The foregoing requirement shall not preclude the Contractor from revising or resubmitting the claim prior to agreement upon the equitable adjustment for the change order. However, unless otherwise expressly agreed in the aforesaid supplemental agreement, the Contractor shall waive any right under the Changes clause or any other clause of this contract to further equitable adjustments attributable to such facts or circumstances giving rise to the claim upon the execution of the supplemental agreement setting forth the equitable adjustment. In any event, such right shall be deemed to be waived.

(End of clause)

1352.217–102 Government review, comment, acceptance, and approval.

As prescribed in 1317.7001(a), insert the following clause:

GOVERNMENT REVIEW, COMMENT, ACCEPTANCE AND APPROVAL (CAR 1352.217–102) (JAN 1987)

(a) Documentation, including drawings and other engineering products and reports, required by the contract to be submitted for review, comment, acceptance or approval will be acted upon by the Government within 30 calendar days after receipt by the Government, unless another period of time is specified.

(b) Review, comment, acceptance or approval by the Government as required under this contract and applicable specifications shall not relieve the Contractor of its obligation to comply with the specifications and with all other requirements of the contract, nor shall it impose upon the Government any liability it would not have had in the absence of such review, comment and acceptance or approval.

(End of clause)

1352.217–103 Access to the vessel(s).

As prescribed in 1317.7001(a), insert the following clause:

ACCESS TO THE VESSEL(S) (CAR 1352.217–103) (JAN 1987)

(a) As authorized by the Contracting Officer, a reasonable number of officers, employees and associates of the Government, or other prime Contractors with the Government and their subcontractors shall have admission to the plant and access to the vessel(s) at all reasonable times to perform and fulfill their respective obligations to the Government on a noninterference basis. The Contractor shall make reasonable arrangements to provide access for these personnel to office space, work areas, storage or shop areas, and other facilities and services, reasonable and necessary to performance of their respective duties. All such personnel shall comply with Contractor rules and regulations governing personnel at its shipyard, including those regarding safety and security.

(b) The Contractor further agrees to allow a reasonable number of officers, employees, and associates of offerors on other contemplated work, the same privileges of admission to the Contractor's plant and access to the vessel(s) on a noninterference basis subject to Contractor rules and regulations governing personnel in its shipyard, including those regarding safety and security.

(End of clause)

1352.217–104 Documentation of requests for equitable adjustment.

As prescribed in 1317.7001(a), insert the following clause:

DOCUMENTATION OF REQUESTS FOR EQUITABLE ADJUSTMENT (CAR 1352.217–104) (JAN 1987)

(a) For the purpose of this clause, the term ''change'' includes not only a change made pursuant to a written order designated as a ''change order'' but also any act or omission to act on the part of the Government where a request is made for equitable adjustment.

(b) Whenever the Contractor requests or proposes an equitable adjustment to the contract price of not more than $100,000, for a change or an act or omission on the part of the Government, the request shall include a breakdown of the price adjustment in such form and supported by such reasonable detail as the Contracting Officer may request. As a minimum, the Contractor shall provide a breakdown of direct labor hours, labor dollars, overhead, material, subcontracts, contingencies and profit for each change and a

justification for any extension of delivery date.

(c) Whenever the Contractor requests or proposes an equitable adjustment of $100,000 gross (aggregate increases and/or decreases) or more to the price of the contract for a change made pursuant to a written order designated as a ''change order'' or whenever the Contractor requests an equitable adjustment in any amount for any other act or omission to act on the part of the Government, the proposal supporting such request shall contain the following information for each individual item or element of the request:

(1) A description of (i) the unperformed work required by the contract before the change which has been deleted by the change and (ii) the work deleted by the change that already has been completed in whole or in part. The description shall include a list of components, equipment, and other identifiable property involved. Also, the status of manufacture, procurement, or installation of such property shall be indicated. A separate description shall be furnished for design and production work. Items of raw material, purchased parts, components, and other identifiable hardware which are made excess by the change, and which are not to be retained by the Contractor, are to be listed for later disposition;

(2) A description of the work necessary to undo work already completed which has been deleted by the change;

(3) A description of the work substituted or added by the change that was not required by the terms of the contract before the change. A list of components and equipment (not bulk material or items) involved, should be included. A separate description shall be furnished for design work and production work;

(4) A description of any interference or inefficiency encountered in performing the change;

(5) A description of disruption attributable solely to the change, which shall include the following information:

(i) A specific description of each element of disruption which states how the work has been, or will be, disrupted;

(ii) The calendar time period when disruption occurred, or will occur;

(iii) The area(s) aboard ship where disruption occurred, or will occur;

(iv) The trade(s) disrupted, with a breakdown of man-hours for each trade;

(v) The scheduling of trades before, during, and after the period of disruption;

(vi) A description of measures taken to lessen the disruptive effect of the change.

(6) The delay in delivery attributable solely to the change;

(7) A description of other work attributed to the change;

(8) A narrative statement of the direct causal relationship between any alleged Government act or omission and the claimed result, cross-referenced to the detailed information required above.

(9) A statement setting forth a comparative enumeration of the amounts ''budgeted'' for the cost elements, including the materials cost, labor hours, and indirect costs pertinent to the change estimated by the Contractor in preparing his initial and ultimate proposal(s) for this contract, and the amounts claimed to have been incurred, or projected to be incurred, corresponding to each such ''budgeted cost'' element.

(d) In addition to the information required by paragraph (b), each proposal submitted in support of a claim for equitable adjustment in the amount of $100,000 or more under any provision of this contract shall contain a duly executed Standard Form 1411 (Contract Pricing Proposal) for each individual claim item. The submitted Standard Form 1411 shall fully comply with Section 15.804–6 of the Federal Acquisition Regulation and any instructions on the reverse side of the form.

(e) In addition to the information required by paragraph (c), each proposal submitted in support of a claim for equitable adjustment under any provision of this contract shall contain a duly executed SF–1411 (Contracting Pricing Proposal) for each individual claim item. The submitted SF–1411 shall fully comply with Section 15.804–6 of the Federal Acquisition Regulation and any instructions on the reverse side of the form.

(f) Individual claims for equitable adjustment may not encompass all of the factors listed in (c) above. Accordingly, the Contractor is required to set forth in his proposal information only with respect to those factors which are encompassed in the individual claim for equitable adjustment. In any event, the information furnished hereunder shall be in sufficient detail to permit the Contracting Officer to correlate the claimed increased costs or delay in delivery set forth in the SF–1411 (Contracting Pricing Proposal) with the information submitted pursuant to paragraph (c).

(End of clause)

1352.217–105 Change proposals.

As prescribed in 1317.7001(a), insert the following clause:

CHANGE PROPOSALS (CAR 1352.217–105) (JAN 1987)

(a)(1) In addition to issuing changes under the Changes clause, the Contracting Officer may propose changes within the general scope of this contract, as set forth below. Within 10 days from the date of receipt of any such proposed change, or within such further time as the Contracting Officer may

allow, the Contractor shall submit a scope of work, plans and sketches for the proposed change, and his estimate of: (i) the cost, (ii) the effect on the delivery date of the vessel, and (iii) the status of work on the ship affected by the proposed change. The proposed scope of work and estimate of the cost shall be in such form and supported by such reasonably detailed information as the Contracting Officer may require.

(2) The Contractor's estimate shall be a firm offer for 30 days from receipt thereof by the cognizant Contracting Officer, unless extended by mutual consent. Within the time limit, the Contractor agrees to either (i) enter into a supplemental agreement covering the estimate as submitted or (ii) begin good faith negotiations at the request of the Contracting Officer, leading to the execution of a bilateral supplemental agreement, if the estimate as submitted is not satisfactory to the Contracting Officer. In either case, the supplemental agreement shall include an equitable adjustment for the preparatory work set forth above.

(b) Pending execution of a bilateral agreement or the direction of the Contracting Officer pursuant to the Changes clause, the Contractor shall proceed diligently with contract performance without regard to the effect of any such proposed change.

(c) Concurrently with the submission of any Change Proposal under this contract in which the proposed aggregate cost is $100,000 or greater, the Contractor shall submit to the Contracting Officer a completed Standard Form 1411. At the time of agreement upon the price of the Change Proposal, the Contractor shall submit a signed Certificate of Current Cost or Pricing Data.

(End of clause)

1352.217–106 Lay days.

As prescribed in 1317.7001(a), insert the following clause:

LAY DAYS (CAR 1352.217–106) (JAN 1987)

(a) Lay day time will be paid for by the Government at the Contractor's stipulated bid price for this item of the contract when the vessel remains on the dry dock or marine railways as a result of any Government change that involves work in addition to that required under the basic contract.

(b) No amount for lay day time shall be paid until all accepted items of the basic contract for which a price was established by the Contractor and for which docking of the vessel was required have been satisfactorily completed.

(c) Days of hauling out and floating, whatever the hour, shall not be paid as lay day time, and days when no work is performed by the Contractor shall not be paid as lay day time.

(d) Payment of lay day time shall constitute complete compensation for all costs except for the direct cost of performing the changed work.

(End of clause)

1352.217–107 Changes—ship repair.

As prescribed in 1317.7001(a), insert the following clause:

CHANGES—SHIP REPAIR (CAR 1352.217–107) (JAN 1987)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract, in any one or more of the following:

(1) Drawings, designs, or specifications, when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications;

(2) Method of shipment or packing;

(3) Place of performance of the work;

(4) Time of commencement or completion of the work; and

(5) Other requirements within the general scope of the contract.

(b) If any such change causes an increase or decrease in the cost of, or the time requried for, performance of any part of the work under this contract, whether changed or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must submit any proposal for adjustment (hereafter referred to as proposal) under this clause within 10 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(End of clause)

1352.217–108 Default—ship repair.

As prescribed in 1317.7001(a), insert the following clause:

DEFAULT—SHIP REPAIR (CAR 1352.217–108) (JAN 1987)

(a) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—

(1) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(2) Make progress, so as to endanger performance of this contract; or

(3) Perform any of the other provisions of this contract.

(b) If the Government terminates this contract in whole or in part, it may arrange for completion of the work in the manner the Contracting Officer considers appropriate. The Contracting Officer may designate any plant or plants for completion of the work, including the Contractor's plant or plants. If the work is to be completed at the Contractor's plant, the Government may use all tools, machinery, facilities and equipment of the Contractor which the Contracting Officer determines to be necessary. The Contractor will be liable to the Government for any excess costs, other than those costs attributable to changes in the plans or specifications made after the termination date. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as ''manufacturing materials'' in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

1352.217–109 Insurance requirements.

As prescribed in 1317.7001(b), insert the following clause:

INSURANCE REQUIREMENTS (CAR 1352.217–109) (JAN 1987)

(a) The Contractor shall procure and thereafter maintain the following insurance:

(1) Ship repairer's legal liability insurance to insure the risks described in paragraph (b) of the Liability and Insurance clause. This insurance shall be for $300,000.

(2) Comprehensive general liability insurance and automobile insurance to insure the risks described in paragraph (c) of the Liability and Insurance clause. This insurance shall be for $300,000 on account of any one accident or occurrence with respect to each vessel, boat, and/or barge upon which work is performed. The Contractor shall cause the Government to be named as an additional insured under any and all liability insurance policies.

(3) Full coverage in accordance with the State Workmen's Compensation law; and

(4) Full coverage in accordance with the United States Longshoremen's and Harbor Worker's Act.

(b) As evidence that it has obtained the insurance specified in (a) above, the Contractor shall furnish the Contracting Officer with a certificate or certificates executed by

an agent of the insurer authorized to execute such certificates. Such certificates shall be furnished prior to commencement of the work. Each certificate shall state that (name of insurer) has insured (name of Contractor) awarded contract number _____ for repair/alteration of (name of vessel) in accordance with the Liability and Insurance clause and the Insurance Requirements clause contained herein. Each certificate shall set forth that each policy of insurance represented thereby will expire on (date) and that each such policy contains the following clause:

''It is agreed that in the event of cancellation, or any material change in the policy adversely affecting the interest of the Government in this insurance 30 days prior written notice will be given to the Contracting Officer.''

(End of clause)

1352.217–110 Guarantees.

As prescribed in 1317.7001(c), insert the following clause:

GUARANTEES (CAR 1352.217–110) (JAN 1987)

In case any work done or materials furnished by the Contractor under this contract on or for any vessel or the equipment thereof shall, within 90 days from the date of redelivery of the vessel by the Contractor, prove defective or deficient, such defects or deficiencies shall, as required by the Government in writing, be corrected and repaired by the Contractor or at Contractor expense to the satisfaction of the Contracting Officer. However, the Government shall be entitled to rely upon any guarantee secured by the Contractor or any subcontractor covering work done on materials furnished which exceeds the 90-day period until the expiration. Also, with respect to any individual work item identified and listed as incomplete at the redelivery of the vessel, the guarantee period shall run from the date of completion of such item. If and when practicable, the Government shall afford the Contractor an opportunity to effect such corrections and repairs itself. But, when it is impracticable or undesirable to return it to the Contractor, or the Contractor fails to proceed promptly with any such repairs as directed by the Contracting Officer, the corrections and repairs shall be made at Contractor expense at other Government designated locations. Where corrections and repairs are to be made by other than the Contractor, due to non-return of the vessel to the Contractor, the Contractor's liability may be discharged by an equitable deduction in the price of the contract. The Contractor's liability shall only extend for an additional 90-day guarantee period on those defects or deficiencies which it corrected and in no event to those for which payment was made. However, this clause does not limit the responsibility or relieve the liability of the Contractor under the Liability and Insurance clause. At the Contracting Officer's option, defects and deficiencies may be left in their uncorrected condition. In that event, the Contractor and the Contracting Officer shall agree on an equitable deduction from the contract price. If the Contractor and the Contracting Officer fail to agree upon an equitable deduction from the contract price, the dispute shall be determined in accordance with the Disputes clause.

(End of clause)

1352.217–111 Temporary services.

As prescribed in 1317.7001(d), insert the following clause:

TEMPORARY SERVICES (CAR 1352.217–111) (JAN 1987)

(a) Temporary services are services incidental to the performance of work which are required in the schedule or specifications to be provided by the contractor. Temporary services may include the furnishing of water, electricity, telephone service, toilet facilities, garbage removal, office space, parking places, or similar facilities as specified in the schedule or specifications.

(b) If performance time is extended due to Government caused delay or causes beyond the control of both the contractor and subcontractor, and without the fault or negligence of either, the contractor shall have the right to request an equitable adjustment for providing temporary services in excess of the number of estimated days contained in the schedule. Any such equitable adjustment shall not exceed the amount obtained by multiplying the number of excess days by the contractor's unit price contained in the schedule for this item.

(End of clause)

1352.217–112 Self-insurance information.

As prescribed in 1317.7001(e), insert the following provision:

SELF-INSURANCE INFORMATION (CAR 1352.217–112) (JAN 1987)

An offeror who proposes to self-insure for any or all of the risks set forth in the Liability and Insurance clause and the Insurance Requirements clause shall submit satisfactory evidence to permit the Contracting Officer to determine that the offeror's assets are sufficient for the risks set forth in such clauses. The offeror shall submit with its offer 2 certified copies of documents listing

its assets and liabilities and other information deemed necessary by the offeror or required by the Contracting Officer. For approval of self-insurance under the State Workmen's Compensation Law and the United States Longshoremen's and Harbor Workers' Act, evidence of qualifications as a self-insurer under the applicable compensation statute must be furnished to the Contracting Officer.

(End of provision)

1352.233–2 Service of protest.

As prescribed in 1333.106, insert the following provision:

SERVICE OF PROTEST (JAN 1985) (DEVIATION FAR 52.233–2)

Protests, as defined in 33.101 of the Federal Acquisition Regulation, shall be served on the Contracting Officer and the Contract Law Division of the Office of the Assistant General Counsel for Finance and Litigation by obtaining written and dated acknowledgement of receipt from the Contracting Officer or the head of the contracting office or designee and from the Contract Law Division of the Office of the Assistant General Counsel for Finance and Litigation located at the U.S. Department of Commerce, Herbert C. Hoover Building, Room H5882, 14th St. between Pennsylvania and Constitution Avenues, NW., Washington, DC 20230.

[Insert the address of the contracting officer or refer to the number of the block on the Standard Form 33 or 1442, etc., where the address of the contracting offfice is located.]

(End of provision)

[51 FR 15333, Apr. 23, 1986]

PART 1353—FORMS

Sec.
1353.000 Scope of part.

Subpart 1353.1—General

1353.103 Exceptions.

Subpart 1353.2—Prescription of Forms

1353.200 Scope of subpart.
1353.204 Administrative matters.
1353.204–2 Contract reporting (CD 409).
1353.213 Small purchase and other simplified purchase procedures (CD 404).
1353.232 Contract financing.
1353.232–2 (CD 45).

AUTHORITY: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10–5 and Department Administrative Order 208–2.

SOURCE: 49 FR 12965, Mar. 30, 1984, unless otherwise noted.

1353.000 Scope of part.

This part supplements FAR Part 53 by prescribing specific exceptions to FAR prescribed forms for Department-wide use.

Subpart 1353.1—General

1353.103 Exceptions.

The Department's policy is to use the FAR and CAR prescribed forms unless prior specific authority for exceptions or alterations has been obtained. Requests for exceptions to FAR or CAR forms shall be submitted to the Office of Procurement and Federal Assistance in the form prescribed by FAR 53.103 (See 1301.4 for authority to deviate).

Subpart 1353.2—Prescription of Forms

1353.200 Scope of subpart.

This subpart prescribes forms for Department-wide use which are exceptions to FAR prescribed forms. This subpart is arranged by subject matter, in the same order and keyed to the parts of the FAR or CAR in which the form use requirements are addressed.

1353.204 Administrative matters.

1353.204–2 Contract reporting (CD 409).

(a) *CD 409 (11/84) Report of Individual Procurement (over $10,000).* CD 409 is prescribed for Department-wide use in reporting individual contract actions above $10,000, in lieu of SF 279.

[50 FR 19364, May 8, 1985, and 51 FR 1377, Jan. 13, 1986]

1353.213 Small purchase and other simplified purchase procedures (CD 404).

(e) *CD 404 (1/84) Supply, Equipment of Service Order.* In lieu of OFs 347 and 348, CD 404 is prescribed for Department-wide use as follows:

(1) To accomplish small purchases

(2) To issue orders under basic ordering agreements

(3) To issue orders for paid advertisements

(4) To issue orders for construction or dismantling, demolition, or removal of improvements.

[50 FR 19365, May 8, 1985, and 51 FR 1377, Jan. 13, 1986]

1353.232 Contract financing.

A Department approved procurement request form certifies the availability of adequate funds for contract actions (See FAR 32.702). The Department's procurement request form also transmits technical and other specifications of the request, administrative approvals and clearances, and information for processing payments.

[50 FR 19365, May 8, 1985, and 51 FR 1377, Jan. 13, 1986]

1353.232–2 (CD 45).

CD 45 (3/76) Requisitioning Form. CD 45 is prescribed for Department-wide use in requesting action from the servicing contract office. This form is the vehicle for administrative approvals, clearances, and certification of the availability of adequate funds as specified in FAR 32.702.

CHAPTER 14—DEPARTMENT OF THE INTERIOR

SUBCHAPTER A—GENERAL

Part *Page*

1401 Department of the Interior Acquisition Regulation System 663

1403 Improper business practices and personal conflicts of interest 663

SUBCHAPTER B—ACQUISITION PLANNING [RESERVED]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

1415 Contracting by negotiation 665

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

1426 Other socio-economic programs 666

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

1428 Bonds and insurance 668

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

1437 Service contracting 669

SUBCHAPTER G—CONTRACT MANAGEMENT [RESERVED]

SUBCHAPTER H—CLAUSES AND FORMS

1452 Solicitation provisions and contract clauses 671

1453–1499 [Reserved]

SUBCHAPTER A—GENERAL

PART 1401—DEPARTMENT OF THE INTERIOR ACQUISITION REGULATION SYSTEM

Subpart 1401.1—Purpose, Authority, Issuance

Sec.
1401.106 OMB approval under the Paperwork Reduction Act.

Subpart 1401.3—Agency Acquisition Regulations

1401.303 Publication and codification.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c), and 5 U.S.C. 301.

SOURCE: 49 FR 14252, Apr. 10, 1984, unless otherwise noted.

Subpart 1401.1—Purpose, Authority, Issuance

1401.106 OMB approval under the Paperwork Reduction Act.

The information collection and recordkeeping requirements have been approved by the Office of Management and Budget (OMB) as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The following OMB control numbers apply:

DIAR segment	OMB control No.
1452.226–70	1084–0019

[62 FR 18054, Apr. 14, 1997, as amended at 62 FR 52266, Oct. 7, 1997]

Subpart 1401.3—Agency Acquisition Regulations

1401.303 Publication and codification.

(a)(1) Implementing and supplementing regulations issued under the DAIR System are codified under chapter 14 in title 48, Code of Federal Regulations and shall parallel the FAR in format, arrangement, and numbering system.

(2)(i) Departmentwide regulations are assigned parts 1401 through 1499 under 48 CFR, chapter 14.

(ii) Where material in the FAR requires no implementation, there will be no corresponding number in the DIAR. Thus, there are gaps in the DIAR sequence of numbers where the FAR, as written, is deemed adequate. Supplementary material shall be numbered as specified in FAR 1.303.

(3)(i) Bureauwide regulations are authorized for codification in appendices to chapter 14 as assigned by the Director, PAM.

(ii) Regulations implementing the FAR or DIAR are numbered using parts 1401 through 1479. Supplementary material is numbered using parts 1480 through 1499. Numbers for implementing or supplementing regulations by bureaus/offices are preceded by a prefix to the number 14 (indicating chapter 14—DIAR) for the organization indicated by lettered appendices as follows:

(A) Bureau of Indian Affaris—BIA
(B) Bureau of Reclamation—WBR
(C) Interior Service Center—ISC
(D) Bureau of Land Management—LLM
(E) U.S. Geological Survey—WGS
(F) Office of Surface Mining Reclamation and Enforcement—LSM
(G) U.S. Minerals Management Service—LMS
(H) National Park Service—FNP
(I) U.S. Fish and Wildlife Service—FWS

(e.g., FAR 1.3 then DIAR 1401.3 [Department level] then in appendix A, BIA 1401.3 [Bureau level])

(b) [Reserved]

[62 FR 18054, Apr. 14, 1997]

PART 1403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 1403.5—Other Improper Business Practices

Sec.
1403.570 Restrictions on contractor advertising.
1403.570–1 Policy.
1403.570–3 Contract clause.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c), and 5 U.S.C. 301.

SOURCE: 61 FR 5519, Feb. 13, 1996, unless otherwise noted.

Subpart 1403.5—Other Improper Business Practices

1403.570 Restrictions on contractor advertising.

1403.570–1 Policy.

Award of a contract does not signify endorsement of the supplies or services purchased, nor does it signify agreement with any views espoused by officials of the awards. It is vital to the integrity of the procurement system to avoid even the appearance of an improper preference toward a particular vendor. Therefore, contractors shall not be permitted to publicize, or otherwise circulate, promotional materials which state or imply Governmental endorsement of a product, service or position which the contractor represents.

1403.570–3 Contract clause.

CO's shall include the clause at 48 CFR 1452.203–70, Restriction on Endorsements, in all solicitations, contracts and agreements which are not executed in accordance with SAT procedures.

SUBCHAPTER B—ACQUISITION PLANNING [RESERVED]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 1415—CONTRACTING BY NEGOTIATION

Subpart 1415.1—General Requirements for Negotiation

Sec.

1415.106 Contract clauses.
1415.106–70 Examination of records by the Department of the Interior clause.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c), and 5 U.S.C. 301.

SOURCE: 49 FR 14259, Apr. 10, 1984, unless otherwise noted.

Subpart 1415.1—General Requirements for Negotiation

1415.106 Contract clauses.

1415.106–70 Examination of records by the Department of the Interior clause.

The contracting officer shall insert the clause at 1452.215–70, Examination of Records by the Department of the Interior, in all contracts requiring the clause a FAR 52.215–1, Examination of Records by the Comptroller General, as prescribed in FAR 15.106–1(b).

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1426—OTHER SOCIOECONOMIC PROGRAMS

Subpart 1426.70—Indian Preference

Sec.

1426.7000 Scope of subpart.
1426.7001 Definitions.
1426.7002 Statutory requirements.
1426.7003 Applicability and contract clause.
1426.7004 Compliance enforcement.
1426.7005 Tribal preference requirements.

AUTHORITY: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c) and 5 U.S.C. 301); Pub. L. 93–638, 88 Stat. 2205 (25 U.S.C. 450e(b)).

SOURCE: 60 FR 53279, Oct. 13, 1995, unless otherwise noted.

Subpart 1426.70—Indian Preference

1426.7000 Scope of subpart.

This subpart prescribes policies and procedures for implementation of section 7(b) of the Indian Self-Determination and Education Assistance Act (Public Law 93–638, 88 Stat. 2205, 25 U.S.C. 450e(b)).

1426.7001 Definitions.

For purposes of this subpart the following definitions shall apply:

Indian means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the contractor shall grant the preference but shall require the individual within thirty (30) days to provide evidence from the Tribe concerned that the person is a member of the Tribe.

Indian organization means that governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (Pub. L. 93–262, 88 Stat. 77; 25 U.S.C. 1451).

Indian-owned economic enterprise means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit provided that such Indian ownership shall constitute not less than 51 percent of the enterprise.

Indian reservation includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act, (Pub. L. 92–203, 85 Stat. 688; 43 U.S.C. 1601 *et seq.)*.

Indian Tribe means an Indian Tribe, band, nation, or other recognized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (Pub. L. 92–203, 85 Stat. 688; 43 U.S.C. 1601), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

On or near an Indian reservation means on a reservation or the distance within that area surrounding an Indian reservation(s) that a persons seeking employment could reasonably be expected to commute to and from in the course of a work day.

1426.7002 Statutory requirements.

Section 7(b) of the Indian Self-Determination and Education Assistance Act requires that any contract or subcontract entered into pursuant to that Act, the Act of April 16, 1934 (48 Stat. 596; 25 U.S.C. 452), as amended, (the Johnson-O'Malley Act), or any other Act authorizing contracts with Indian organizations or for the benefit of Indians shall require that, to the greatest extent feasible:

(a) Preferences and opportunities for training and employment in connection with the administration of such contracts shall be given to Indians, and

(b) Preference in the award of subcontracts in connection with the administration of such contracts shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (Sec. 3, Pub. L. 93–262; 88 Stat. 77; 25 U.S.C. 1452).

1426.7003 Applicability and contract clause.

(a) The Contracting Officer (CO) shall insert the clause at 1452.226–70, Indian Preference—Department of the Interior, in solicitations issued and contracts awarded by

(1) The Bureau of Indian Affairs,

(2) A contracting activity other than the Bureau of Indian Affairs when the contract is entered into pursuant to an act specifically authorizing contracts with Indian organizations and

(3) A contracting activity other than the Bureau of Indian Affairs where the work to be performed is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public.

(b) The CO shall insert the clause at 1452.226–71, Indian Preference Program—Department of the Interior, in all solicitations issued and contracts awarded by a contracting activity which may exceed $50,000, which contain the clause required by paragraph (a) of this section and where it is determined by the CO, prior to solicitation, that the work under the contract will be performed in whole or in part on or near an Indian reservation(s). The Indian Preference Program clause may also be included in solicitations issued and contracts awarded by a contracting activity which may not exceed $50,000, but which contain the clause required by paragraph (a) of this section and which, in the opinion of the CO, offer substantial opportunities for Indian employment, training or subcontracting.

1426.7004 Compliance enforcement.

(a) The CO is responsible for conducting periodic reviews of the contractor to ensure compliance with the requirements of the clauses prescribed in 1426.7003. These reviews may be conducted with the assistance of the Indian Tribe(s) concerned.

(b) Complaints of noncompliance with the requirements of the clauses prescribed under 1426.7003 which are received in writing by the contracting activity shall be promptly investigated by the CO and a written disposition of the complaint shall be prepared.

1426.7005 Tribal preference requirements.

(a) Where the work under a contract is to be performed on an Indian reservation, the CO may supplement the clause at 1452.226–71, Indian Preference Program—Department of the Interior, by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed. The supplemental requirements shall be jointly developed for the contract by the CO and the Tribe. Supplemental preference requirements must represent a further implementation of the requirements of section 7(b) of Public Law 93–638 and must be approved by the SOL for legal sufficiency before being added to a solicitation and resultant contract. Any supplemental preference requirements to be added to the clause at 1452.226–71 shall be included in the solicitation and clearly identified in order to ensure uniform understanding of the additional requirements by all prospective bidders or offerors.

(b) Nothing in this subpart shall be interpreted to preclude Tribes from independently developing and enforcing their own tribal preference requirements. Such independently developed tribal preference requirements shall not, except as provided in paragraph (a) of this section, become a requirement in contracts covered under this subpart 1426.70 and must not hinder the Government's right to award contracts and to administer their provisions.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 1428—BONDS AND INSURANCE

Subpart 1428.3—Insurance

Sec.
1428.301 Policy.
1428.306 Insurance under fixed-price contracts.
1428.306–70 Insurance for aircraft services contracts.
1428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
1428.311–2 Contract clause.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c) and 5 U.S.C. 301.

SOURCE: 60 FR 53280, Oct. 13, 1995, unless otherwise noted.

Subpart 1428.3—Insurance

1428.301 Policy.

It is the policy of DOI to insure its own risks only when such action is in the best interest of the Government. Circumstances where contractors are required to carry insurance are listed under FAR 28.301 and 28.306. In these circumstances, the CO shall insert the clause at 1452.228–70, Liability Insurance—Department of the Interior, in solicitations and contracts.

1428.306 Insurance under fixed-price contracts.

1428.306–70 Insurance for aircraft services contracts.

(a) *Policy*. The CO shall insert minimum insurance requirements in aircraft services contracts in order to protect the Government and its contractors.

(b) *Applicability*. The clauses prescribed by paragraph (c) of this section are applicable to all fixed-price contracts involving use of aircraft with either a contractor-furnished or a Government-furnished pilot except for one-time charters when Government exposure is minimal and time limitations are present.

(c) *Clauses.* The following clauses shall be used as prescribed:

(1) The CO shall insert the clause at 1452.228–71, Aircraft and General Public Liability Insurance—Department of the Interior, in solicitations and contracts when a fixed-price contract for operation of aircraft where the Government is using a contractor-furnished pilot is contemplated.

(2) The CO shall insert the clause at 1452.228–72, Liability for Loss or Damage—Department of the Interior, in solicitations and contracts when a fixed-price contract for use of aircraft where the Government does not have a property interest and is using a Government-furnished pilot is contemplated.

(3) The CO shall insert the clause at 1452.228–73, Liability for Loss or Damage—Department of the Interior (Property Interest), in solicitations and contracts when a fixed-price contract for use of aircraft where the Government has a property interest in the aircraft and is using a Government-furnished pilot (e.g., a lease with purchase option) is contemplated.

1428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

1428.311–2 Contract clause.

The CO shall modify the clause at FAR 52.228–7, Insurance—Liability to Third Persons, in accordance with 1452.228–7, and insert in solicitations and contracts as prescribed in FAR 28.311–2.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 1437—SERVICE CONTRACTING

Subpart 1437.72—Utilization of Woody Biomass

Sec.
1437.7200 General.
1437.7201 When can woody biomass be removed?
1437.7202 When is the biomass utilization clause required?
1437.7203 Definitions.

AUTHORITY: 30 U.S.C. 601–604, 611, as amended; 16 U.S.C. 668dd; 16 U.S.C. 1; 25 U.S.C. 3101 *et seq;* 43 U.S.C. 1701 *et seq.*

SOURCE: 70 FR 29210, May 20, 2005, unless otherwise noted.

Subpart 1437.72—Utilization of Woody Biomass

§ 1437.7200 General.

This subpart establishes consistent and efficient procedures to allow contractors the option to remove woody biomass by-products from Department of the Interior land management activities where ecologically appropriate. If the woody biomass has fair market value and payment is required, or as required by regulation, Bureau policy or the Mineral Materials Disposal Act of 1947 (30 U.S.C. 601 *et seq*) a separate timber/vegetative sales contract must be executed.

§ 1437.7201 When can woody biomass be removed?

(a) The Department of the Interior allows and encourages contractors to remove and use woody biomass from project areas when:

(1) The biomass is generated during land management service contract activity; and

(2) Removal is ecologically appropriate.

(b) A contractor removing biomass under this part shall:

(1) Do so only within legal limits applicable to the contractor, including National Environmental Policy Act (NEPA) compliance; and

(2) If required, comply with the terms, conditions and special provisions of the applicable timber/vegetative sales notice.

§ 1437.7202 When is the biomass utilization clause required?

(a) The contracting officer must insert a clause reading substantially the same as § 1452.237–71 in each solicitation and contract that is expected to generate woody biomass that meets the criteria in § 1437.7201(a), unless biomass removal is required elsewhere in the contract.

(b) In addition, the contract will specify any limitations on types of woody biomass that may not be removed and any areas from which woody biomass must not be removed.

§ 1437.7203 Definitions.

Ecologically appropriate means those situations where the Responsible Official determines it is not necessary to retain specific woody material or reserve specific areas from woody biomass removal to meet ecological objectives. For example, it may be necessary to retain snags or small woody debris to meet wildlife habitat objectives, or to create specific prescribed burning conditions to stimulate native plant development; therefore it would not be appropriate to allow removal of the specified woody biomass.

Responsible Official means the Secretary of the Interior or designee having the delegated authority to responsibility to:

(1) Oversee the planning process and make decisions to carry out a specific planning action;

(2) Render a National Environmental Policy Act decision; or

(3) Sign the authorizing environmental document.

Timber/vegetative sales contract and/or notice means the agency-specific authorized contract instrument for the sale, barter, exchange, billing or other compensation for the payment, removal, and/or transportation of woody biomass material.

Woody biomass means the trees and woody plants, including limbs, tops, needless, leaves, and other woody parts, grown in a forest, woodland, or

rangeland environment, that are the by-products of management, restoration and/or hazardous fuel reduction treatment.

Woody biomass utilization or use means the harvest, sale, offer, trade, and/or utilization of woody biomass to produce the full range of wood products, including timber, engineered lumber, paper and pulp, furniture and value-added commodities, and bio-energy and/or bio-based products such as plastics, ethanol and diesel.

SUBCHAPTER G—CONTRACT MANAGEMENT [RESERVED]

SUBCHAPTER H—CLAUSES AND FORMS

PART 1452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Sec.
1452.000 Scope of part.

Subpart 1452.2—Texts of Provisions and Clauses

1452.200 Scope of subpart.
1452.203–70 Restriction on endorsements.
1452.215–70 Examination of records by the Department of the Interior.
1452.215–71 Use and disclosure of proposal information.
1452.226–70 Indian preference.
1452.226–71 Indian preference program.
1452.228–7 Insurance—liability to third persons.
1452.228–70 Liability insurance.
1452.228–71 Aircraft and general public liability.
1452.228–72 Liability for loss or damage.
1452.228–73 Liability for loss or damage (property interest).
1452.237–71 Utilization of Woody Biomass.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); 5 U.S.C. 301; 30 U.S.C. 601–604, 611, as amended; 16 U.S.C. 668dd; 16 U.S.C. 1; 25 U.S.C. 3101, *et seq.*; 43 U.S.C. 1701, *et seq.*

SOURCE: 49 FR 14267, Apr. 10, 1984, unless otherwise noted.

1452.000 Scope of part.

This part prescribes Department of the Interior provisions and clauses for use in acquisition.

Subpart 1452.2—Texts of Provisions and Clauses

1452.200 Scope of subpart.

This subpart sets forth the texts of all DIAR provisions and clauses. Consistent with the numbering scheme prescribed in FAR 52.101 and the approach used in Far Subpart 52.2, this subpart is arranged by subject matter, in the same order as, and keyed to, the parts of the DIAR in which provisions and clause requirements are addressed.

1452.203–70 Restriction on endorsements.

As prescribed in 48 CFR 1403.570–3, insert the following clause in all solicitations, contracts and agreements which are expected to exceed the simplified acquisition threshold.

RESTRICTION ON ENDORSEMENTS—DEPARTMENT OF THE INTERIOR (NOV 1995)

The contractor shall not refer to contracts awarded by the Department of the Interior in commercial advertising, as defined in FAR 31.205–1, in a manner which states or implies that the product or service provided is approved or endorsed by the Government, or is considered by the Government to be superior to other products or services. This restriction is intended to avoid the appearance of preference by the Government toward any product or service. The contractor may request a determination as to the propriety of promotional material from the CO.

(End of clause)

[61 FR 5520, Feb. 13, 1995]

1452.215–70 Examination of records by the Department of the Interior.

As prescribed in 1415.106–1, insert the following clause in all contracts containing the clause at FAR 52.215–1, Examination of Records by the Comptroller General (see FAR 15.106–1(b)):

EXAMINATION OF RECORDS BY THE DEPARTMENT OF THE INTERIOR (APR 1984)

For purposes of the Examination of Records by the Comptroller General (APR 1984) clause of this contract (FAR 52.214–1), the Secretary of the Interior, the Inspector General, and their duty authorized representative(s) from the Department of the Interior shall have the same access and examination rights as the Comptroller General of the United States.

(End of clause)

1452.215–71 Use and disclosure of proposal information.

As prescribed in 1415.413–70, insert the following provision in requests for proposals and requests for quotations instead of the provision at FAR 52.215–12:

USE AND DISCLOSURE OF PROPOSAL INFORMATION—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) Definitions. For the purposes of this provision and the Freedom of Information Act (5 U.S.C. 552), the following terms shall have the meaning set forth below:

(1) *Trade Secret* means an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for making, preparing, compounding, treating or processing articles or materials, which are trade commodities.

(2) *Confidential commercial or financial information* means any business information (other than trade secrets) which is exempt from the mandatory disclosure requirement of the Freedom of Information Act, 5 U.S.C. 552. Exemptions from mandatory disclosure which may be applicable to business information contained in proposals include exemption (4), which covers ''commercial and financial information obtained from a person and privileged or confidential,'' and exemption (9), which covers ''geological and geophysical information, including maps, concerning wells.''

(b) If the offeror, or its subcontactor(s), believes that the proposal contains trade secrets or confidential commercial or financial information exempt from disclosure under the Freedom of Information Act, (5 U.S.C. 552), the cover page of each copy of the proposal shall be marked with the following legend:

''The information specifically identified on pages ____ of this proposal constitutes trade secrets or confidential commercial and financial information which the offeror believes to be exempt from disclosure under the Freedom of Information Act. The offeror requests that this information not be disclosed to the public, except as may be required by law. The offeror also requests that this information not be used in whole or part by the Government for any purpose other than to evaluate the proposal, except that if a contract is awarded to the offeror as a result of or in connection with the submission of the proposal, the Government shall have the right to use the information to the extent provided in the contract.''

(c) The offeror shall also specifically identify trade secret information and confidential commerical and financial information on the pages of the proposal on which it appears and shall mark each such page with the following legend:

''This page contains trade secrets or confidential commercial and financial information which the offeror believes to be exempt from disclosure under the Freedom of Information Act and which is subject to the legend contained on the cover page of this proposal.''

(d) Information in a proposal identified by an offeror as trade secret information or confidential commercial and financial information shall be used by the Government only for the purpose of evaluating the proposal, except that: (i) If a contract is awarded to the offeror as a result of or in connection with submission of the proposal, the Government shall have the right to use the information as provided in the contract, and (ii) if the same information is obtained from another source without restriction it may be used without restriction.

(e) If a request under the Freedom of Information Act seeks access to information in a proposal identified as trade secret information or confidential commercial and financial information, full consideration will be given to the offeror's view that the information constitutes trade secrets or confidential commercial or financial information. The offeror will also be promptly notified of the request and given an opportunity to provide additional evidence and argument in support of its position, unless administratively unfeasible to do so. If it is determined that information claimed by the offeror to be trade secret information or confidential commercial or financial information is not exempt from disclosure under the Freedom of Information Act, the offeror will be notified of this determination prior to disclosure of the information.

(f) The Government assumes no liability for the disclosure or use of information contained in a proposal if not marked in accordance with paragraphs (b) and (c) of this provision. If a request under the Freedom of Information Act is made for information in a proposal not marked in accordance with paragraphs (b) and (c) of this provision, the offeror concerned shall be promptly notified of the request and given an opportunity to provide its position to the Government. However, failure of an offeror to mark information contained in a proposal as trade secret information or confidential commercial or financial information will be treated by the Government as evidence that the information is not exempt from disclosure under the Freedom of Information Act, absent a showing that the failure to mark was due to unusual or extenuating circumstances, such as a showing that the offeror had intended to mark, but that markings were omitted from the offeror's proposal due to clerical error.

(End of provision)

1452.226–70 Indian preference.

As prescribed in 1404.7003(a), insert the following clause in solicitations issued and contracts awarded (a) by the Bureau of Indian Affairs except those pursuant to Title I and to Indian Tribes and Indian Organizations under Title II of Pub. L. 93–638 (25 U.S.C. 450 *et seq.* and 25 U.S.C. 455 *et seq.*, respectively); (b) a contracting activity other than the Bureau of Indian Affairs when the contract is entered into pursuant to an act specifically authorizing contracts with Indian organizations, and (c) a contracting activity other than

the Bureau of Indian Affairs when the work to be performed is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public.

INDIAN PREFERENCE—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) The Contractor agrees to give preferences to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation for training and employment opportunities under this contract and, to the extent feasible consistent with the efficient performance of this contract, training and employment preferences and opportunities shall be provided to Indians regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation who are not fully qualified to perform under this contract. The Contractor also agrees to give preference to Indian organizations and Indian-owned economic enterprises in the awarding of any subcontracts consistent with the efficient performance of this contract. The Contractor shall maintain such records as are necessary to indicate compliance with this paragraph.

(b) In connection with the Indian employment preference requirements of this clause, the Contractor shall also provide opportunities for training incident to such employment. Such training shall include on-the-job, classroom, or apprenticeship training which is designed to increase the vocational effectiveness of an Indian employee.

(c) If the Contractor is unable to fill its training and employment needs after giving full consideration to Indians as required by this clause, those needs may be satisfied by selection of persons other than Indians in accordance with the clause of this contract entitled ''Equal Opportunity''.

(d) If no Indian organizations or Indian-owned economic enterprises are available for awarding of subcontracts in connection with the work performed under this contract, the Contractor agrees to comply with the provisions of this contract involving utilization of small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, or labor surplus are concerns.

(e) As used in this clause:

(1) *Indian* means a person who is a member of an Indian Tribe. If the Contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual within thirty (30) days to provide evidence from the Tribe concerned that the person is a member of that Tribe.

(2) *Indian Tribe* means an Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 668; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) *Indian organization* means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451); and

(4) *Indian-owned economic enterprise* means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit provided that such Indian ownership shall constitute not less than 51 percent of the enterprise.

(f) The Contractor agrees to include the provisions of the clause including this paragraph (f) in each subcontract awarded under this contract.

(g) In the event of noncompliance with this clause, the Contractor's right to proceed may be terminated in whole or in part by the Contracting Officer and the work completed in a manner determined by the Contracting Officer to be in the best interests of the Government.

(End of clause)

[49 FR 14267, Apr. 10, 1984. Redesignated at 60 FR 53280, Oct. 13, 1995]

1452.226–71 Indian preference program.

As prescribed in 1404.7003(b), insert the following clause in all solicitations and contracts, awarded by the contacting activity which may exceed $50,000, and which contain the clause at 1452.204–71, and where it is determined by the Contracting Officer, prior to solicitation, that the work under the contract will be performed in whole or in part on or near an Indian reservation(s). The clause may also be included in solicitations issued and contracts awarded by a contracting activity which may not exceed $50,000 but which contain the clause at 1452.204–71 and which, in the opinion of the contracting officer, offer substantial opportunities for Indian employment, training, and subcontracting.

INDIAN PREFERENCE PROGRAM—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) In addition to the requirements of the clause of this contract entitled ''Indian Preference—Department of the Interior'', the Contractor agrees to establish and conduct

an Indian preference program which will expand the opportunities for Indian organizations and Indian-owned economic enterprises to receive a preference in the awarding of subcontracts and which will expand opportunities for Indians to receive preference for training and employment in connection with the work to be performed under this contract. In this connection, the contractor shall:

(1) Designate a liaison officer who will: (i) Maintain liaison with the Government and Tribe(s) on Indian preference matters; (ii) supervise compliance with the provisions of this clause; and (iii) administer the Contractor's Indian preference program.

(2) Advise its recruitment sources in writing and include a statement in all advertisements for employment that Indian applicants will be given preference in employment and training incident to such employment.

(3) Not less than twenty (20) calendar days prior to commencement of work under this contract, post a written notice in the Tribal office of any reservations on which or near where the work under this contract is to be performed, which sets forth the Contractor's employment needs and related training opportunities. The notice shall include the approximate number and types of employees needed, the approximate dates of employment; the experience or special skills required for employment, if any; training opportunities available; and all other pertinent information necessary to advise prospective employees of any other employment requirements. The Contractor shall also request the Tribe(s) on or near whose reservation(s) the work is to be performed to provide assistance to the Contractor in filling its employment needs and training opportunties. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to contract in regard to the posting of notices and requests for Tribal assistance.

(4) Establish and conduct a subcontracting program which gives preference to Indian organizations and Indian-owned economic enterprises as subcontractors and suppliers under this contract. Consistent with the efficient performance of this contract, the Contractor shall give public notice of existing subcontracting opportunities by soliciting bids or proposals only from Indian organizations or Indian-owned economic enterprises. The Contractor shall request assistance and information on Indian firms qualified as suppliers or subcontractors from the Tribe(s) on or near whose reservation(s) the work under the contract is to be performed. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to be contacted in regard to the request for assistance and information. Public notices and solicitations for existing subcontracting opportunities shall provide an equitable opportunity for Indian firms to submit bids or proposals by including: (i) A clear description of the supplies or services required including quantities, specifications, and delivery schedules which facilitate the participation of Indian firms; (ii) a statement indicating the perference will be given to Indian organizations and Indian-owned economic enterprises in accordance with section 7(b) of Pub. L. 93–638; (88 Stat. 2205; 25 U.S.C. 450e(b)); (iii) definitions for the terms *Indian organization* and *Indian-owned economic enterprise* as prescribed under the ''Indian Preference—Department of the Interior'' clause of this contract; (iv) a representation to be completed by the bidder or offeror that it is an Indian organization or Indian-owned economic enterprise; and (v) a closing date for receipt of bids or proposals which provides sufficient time for preparation and submission of a bid or proposal. If after soliciting bids from Indian organizations and Indian owned economic enterprises, no responsive bid is received, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference—Department of the Interior'' clause of this contract. If one or more responsive bids are received, award shall be made to the low responsible bidder if the bid price is determined to be reasonable. If the low responsive bid is determined to be unreasonable as to price, the Contractor shall attempt to negotiate a reasonable price and award a subcontract. If a reasonable price cannot be agreed upon, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference—Department of the Interior'' clause of the contract.

(5) Maintain written records under this contract which indicate: (i) The names and addresses of all Indians seeking employment for each employment position available under this contract; (ii) the number of types of positions filled by (A) Indians and (B) non-Indians, and the name, address and position of each Indian employed under this contract; (iii) for those positions where there are both Indian and non-Indian applicants, and a non-Indian is selected for employment, the reason(s) why the Indian applicant was not selected; (iv) actions taken to give preference to Indian organizations and Indian-owned economic enterprises for subcontracting opportunities which exist under this contract; (v) reasons why preference was not given to Indian firms as subcontractors or suppliers for each requirement where it was determined by the Contractor that such preference would not be consistent with the efficient performance of the contract, and (vi) the names and addresses of all Indian organizations and Indian-owned economic enterprises (A) contacted, and (B) receiving subcontract awards under this contract.

(6) The Contractor shall submit to the Contracting Officer for approval a semiannual report which summarizes the Contractor's Indian preference program and indicates (i) the number and types of available positions filled and dollar amounts of all subcontracts awarded to (a) Indian organizations and Indian-owned economic enterprises and (b) all other firms.

(7) Records maintained pursuant to this clause will be kept available for review by the Government until expiration of one (1) year after final payment under this contract, or for such longer period as may be required by any other clause of this contract or by applicable law or regulation.

(b) For purposes of this clause, the following definitions of terms shall apply:

(1) The terms *Indian, Indian Tribe, Indian Organization,* and *Indian-owned economic enterprise* are defined in the clause of this contract entitled ''Indian Preference.''

(2) *Indian reservation* includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.).

(3) *On or near an Indian Reservation* means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a workday.

(c) Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not hinder the Government's right to award contracts and to administer their provisions.

(d) The Contractor agrees to include the provisions of this clause including this paragraph (d) in each subcontract awarded under this contract and to notify the Contracting Officer of such subcontracts.

(e) In the event of noncompliance with this clause, the Contractor's right to proceed may be terminated in whole or in part by the Contracting Officer and the work completed in a manner determined by the Contracting Officer to be in the best interest of the Government.

(End of clause)

[49 FR 14267, Apr. 10, 1984. Redesignated at 60 FR 53280, Oct. 13, 1995]

1452.228–7 Insurance—liability to third persons.

(a) As prescribed in 1428.311–2, the clause at FAR 52.228–7, Insurance—Liability to Third Persons, shall be modified before insertion into solicitations and contracts by—

(1) Changing the title of the clause to read ''Insurance—Liability to Third Persons (APR 1984) (Deviations)''; and

(2) Changing the first sentence in subparagraph (c)(2) of the clause to read ''For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise but subject to the 'Limitation of Cost' or 'Limitation of Funds' clause of this contract.''

(b) As prescribed in FAR 52.103(a) and 52.107(f), the clause at FAR 52.252–6, Authorized Deviations in Clauses, shall be inserted into solicitations and contracts containing the clause in paragraph (a) of this section.

1452.228–70 Liability insurance.

As prescribed in 1428.301, insert the following clause in all contracts where circumstances warrant the carrying of insurance by the contractor (see FAR 28.301 and 28.306):

LIABILITY INSURANCE—DEPARTMENT OF THE INTERIOR (JUL 1995)

(a) The contractor shall procure and maintain during the term of this contract and any extension thereof liability insurance in form satisfactory to the Contracting Officer by an insurance company which is acceptable to the Contracting Officer. The named insured parties under the policy shall be the Contractor and the United States of America. The amounts of the insurance shall be not less than as follows:

$_____ each person.*
$_____ each occurrence.*
$_____ property damage.*

(b) Each policy shall have a certificate evidencing the insurance coverage. The insurance company shall provide an endorsement to notify the Contracting Officer 30 days prior to the effective date of cancellation or termination of the policy or certificate; or modification of the policy or certificate which may adversely affect the interest of the Government in such insurance. The certificate shall identify the contract number, the name and address of the Contracting Officer, as well as the insured, the policy number and a brief description of contract services to be performed. The contractor shall furnish the Contracting Officer with a copy of an acceptable insurance certificate prior to beginning the work.

*These amounts to be set by the Contracting Officer.

(End of clause)

[60 FR 53280, Oct. 13, 1995]

1452.228–71 Aircraft and general public liability.

As prescribed in 1428.306–70(c)(1), insert the following clause in all fixed-price contracts for operation of aircraft with contractor-furnished pilot:

AIRCRAFT AND GENERAL PUBLIC LIABILITY INSURANCE—DEPARTMENT OF THE INTERIOR ( )

(a) The contractor, at the contractor's expense, agrees to maintain, during the continuance of this contract, aircraft liability and general public liability insurance with limits of liability for (1) bodily injury to or death of aircraft passengers of not less than $75,000 for any one passenger and a limit for each occurance in any one aircraft of at least an amount equal to the sum produced by multiplying $75,000 by 75 percent of the total number of passenger seats installed in the aircraft, (2) bodily injury or death of persons (excluding passengers) of not less than $75,000 for any one person in any one occurrence and $300,000 for each occurrence, and (3) property damage of not less than $100,000 for each occurrence, or (4) a single limit of liability for each occurrence equal to or greater than the combined required minimums set forth in (1) through (3) above.

(b) The contractor agrees to maintain workers' compensation and other legally required insurance with respect to the contractor's own employees and agents.

(End of clause)

[54 FR 10989, Mar. 16, 1989]

1452.228–72 Liability for loss or damage.

As prescribed in 1428.306–70(c)(2), insert the following clause in all fixed-price contracts involving the use of aircraft with Government-furnished pilot where the Government does not have a property interest in the aircraft:

LIABILITY FOR LOSS OR DAMAGE—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) The Contractor shall indemnify and hold the Government harmless from any and all loss or damage to the aircraft furnished under this contract except as provided in paragraph (d) of this clause. For the purpose of fulfilling its obligation under this clause, the Contractor shall procure and maintain during the term of this contract, and any extension thereof, hull insurance acceptable to the Contracting Officer. The Contractor's insurance coverage shall apply to pilots furnished by the Government who operate the aircraft. The contractor may request a list of Government pilots by name and qualification who are potential pilots.

(b) Prior to the commencement of work hereunder, the Contractor shall furnish to the Contracting Officer a copy of the insurance policy or policies or a certificate of insurance issued by the underwriter(s) showing that the coverage required by this clause has been obtained.

(c) Each policy or certificate evidencing the insurance shall contain an endorsement which provides that the insurance company will notify the Contracting Officer 30 days prior to the effective date of any cancellation or termination of any policy or certificate or any modification of a policy or certificate which adversely affects the interests of the Government in such insurance. The notice shall be sent by registered mail and shall identify this contract, the name and address of the contracting office, the policy, and the insured.

(d) If the aircraft is damaged or destroyed while in the custody and control of the Government, the Government will reimburse the Contractor for the deductible stipulated in the insurance coverage (if any) as follows:

(1) In-Motion Accidents—Up to 5% of the current insured value of the aircraft stated in the policy, or $10,000.00, whichever is less.

(2) Not In-Motion Accidents—Up to $250.00 per accident. Such reimbursement shall not be made, however, for loss or damage to the aircraft resulting from: (1) Normal wear and tear, (2) negligence or fault in maintenance of the aircraft by the Contractor, or (3) a defect in construction of the aircraft or a component thereof.

(e) If damage to the aircraft is established to be the fault of the Government, rental payments to the Contractor during the repair period will be made as set forth elsewhere in this contract. The Government may, at its option, make necessary repairs or return the aircraft to the Contractor for repair. In the event the aircraft is lost, destroyed, or damaged so extensively as to be beyond repair, no rental payment will be made to the Contractor thereafter.

(f) Any failure to agree as to the responsibility of the Government or the Contractor under this clause shall, after a final finding and determination by the Contracting Officer, be considered a dispute within the meaning of the ''Disputes'' clause of this contract.

(End of clause)

1452.228–73 Liability for loss or damage (property interest).

As prescribed in 1428.306–70(c)(3), insert the following clause in all fixed-

price contracts involving the use of aircraft with Government-furnished pilot where the Government has a property interest in the aircraft (e.g., lease with purchase option):

LIABILITY FOR LOSS OR DAMAGE—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) The Government assumes all risk and liability for damage to or loss of the aircraft for the term of this contract, while the aircraft is in the Government's possession, except for: (1) Normal wear and tear to the aircraft, or (2) loss which occurs as a result of negligence or fault in maintenance of the aircraft by the contractor, or (3) loss resulting from a latent defect in the construction of the aircraft or a component thereof.

(b) In the event of damage to the aircraft, the Government may, at its option, make the necessary repairs with its own facilities, or by contract, or pay the Contractor the reasonable cost of repair of the aircraft. If damage to the aircraft is established to be the fault of the Government, rental payments to the Contractor during the repair period will be made as set forth elsewhere in this contract.

(c) In the event the aircraft is lost, destroyed, or damaged so extensively as to be beyond repair, no rental payment will be made to the Contractor thereafter, but the Government will pay to the Contractor a sum equal to the fair market value of the aircraft just prior to such loss, destruction, or extensive damage less the salvage value of the aircraft.

(d) The Contractor certifies that the contract price does not include any cost attributable to insurance or to any reserve fund it has established to protect its interests in or use of the aircraft, regardless of whether or not the insurance coverage applies for the period during which the Government has possession of the aircraft. If, in the event of loss or damage to the aircraft, the Contractor receives compensation for such loss or damage, in any form, from any source, the amount of such compensation shall be credited to the Government in determining the amount of the Government's liability under this clause; except that this shall not apply to proceeds of insurance received solely as an advance of insurance pending determination of Government liability, or for an increment of value of the aircraft beyond the value for which the Government is responsible.

(e) In the event of loss or damage, the Government shall be subrogated to all rights of recovery by the Contractor against third parties for such loss or damage and such rights shall be immediately assigned to the Government. Except as the Contracting Officer may permit in writing, the Contractor shall neither release nor discharge any third party from liability for such loss or damage nor otherwise compromise or adversely affect the Government's subrogation or other rights hereunder. The Contractor shall cooperate with the Government in any suit or action undertaken by the Government against any such third party.

(f) Any failure to agree as to the responsibility of the Government or the Contractor under this clause shall, after a final finding and determination by the Contracting Officer, be considered a dispute within the meaning of the ''Disputes'' clause of this contract.

(End of clause)

[49 FR 14267, Apr. 10, 1984, as amended at 60 FR 53280, Oct. 13, 1995]

§ 1452.237–71 Utilization of Woody Biomass.

As prescribed in §1437.7202, insert the following clause:

UTILIZATION OF WOODY BIOMASS

1. The contractor may remove and utilize woody biomass, if:

(a) Project work is progressing as scheduled; and

(b) Removal is completed before contract expiration.

2. To execute this option, the contractor must submit a written request to the Government.

3. Following receipt of the written request, and if appropriate, the Government and the contractor will negotiate and execute a separate timber/vegetative sales contract. Payment under the timber/vegetative sales contract must be at a price equal to or greater than the appraised value of the woody biomass. The contractor must make any appropriate payment specified in the related timber/vegetative sales contract before removal may be authorized.

4. If required by law, regulation or Bureau policy, the Government will prepare a timber/vegetative sales notice and/or prospectus, including volume estimates, appraised value and any appropriate special provisions.

5. The contractor must treat any woody biomass not removed in accordance with the specifications in the service contract.

6. The sales contract and service contract are severable; default or termination under either contract does not remove the contractor from payment or performance obligations under the other contract.

7. Definitions:

Timber/vegetative sales contract and/or notice means the agency-specific authorized contract instrument for the sale, barter, exchange, billing or other compensation for the payment, removal, and/or transportation of woody biomass material.

Woody biomass means the trees and woody plants, including limbs, tops, needles, leaves,

and other woody parts, grown in a forest, woodland, or rangeland environment, that are the by-products of management, restoration and/or hazardous fuel reduction treatment.

[70 FR 29211, May 20, 2005]

PARTS 1453–1499 [RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

Table of CFR Titles and Chapters
Alphabetical List of Agencies Appearing in the CFR
List of CFR Sections Affected

Table of CFR Titles and Chapters

(Revised as of October 1, 2008)

Title 1—General Provisions

I Administrative Committee of the Federal Register (Parts 1—49)
II Office of the Federal Register (Parts 50—299)
IV Miscellaneous Agencies (Parts 400—500)

Title 2—Grants and Agreements

SUBTITLE A—OFFICE OF MANAGEMENT AND BUDGET GUIDANCE FOR GRANTS AND AGREEMENTS
I Office of Management and Budget Governmentwide Guidance for Grants and Agreements (Parts 100—199)
II Office of Management and Budget Circulars and Guidance (200—299)
SUBTITLE B—FEDERAL AGENCY REGULATIONS FOR GRANTS AND AGREEMENTS
III Department of Health and Human Services (Parts 300— 399)
VI Department of State (Parts 600—699)
VIII Department of Veterans Affairs (Parts 800—899)
IX Department of Energy (Parts 900—999)
XI Department of Defense (Parts 1100—1199)
XII Department of Transportation (Parts 1200—1299)
XIV Department of the Interior (Parts 1400—1499)
XV Environmental Protection Agency (Parts 1500—1599)
XVIII National Aeronautics and Space Administration (Parts 1880—1899)
XXII Corporation for National and Community Service (Parts 2200—2299)
XXIII Social Security Administration (Parts 2300—2399)
XXIV Housing and Urban Development (Parts 2400—2499)
XXV National Science Foundation (Parts 2500—2599)
XXVI National Archives and Records Administration (Parts 2600—2699)
XXVII Small Business Administration (Parts 2700—2799)
XXVIII Department of Justice (Parts 2800—2899)
XXXI Institute of Museum and Library Services (Parts 3100—3199)
XXXII National Endowment for the Arts (Parts 3200—3299)
XXXIII National Endowment for the Humanities (Parts 3300—3399)
XXXV Export-Import Bank of the United States (Parts 3500—3599)
XXXVII Peace Corps (Parts 3700—3799)

Title 3—The President

Chap.

I Executive Office of the President (Parts 100—199)

Title 4—Accounts

I Government Accountability Office (Parts 1—99)

Title 5—Administrative Personnel

I Office of Personnel Management (Parts 1—1199)
II Merit Systems Protection Board (Parts 1200—1299)
III Office of Management and Budget (Parts 1300—1399)
V The International Organizations Employees Loyalty Board (Parts 1500—1599)
VI Federal Retirement Thrift Investment Board (Parts 1600—1699)
VIII Office of Special Counsel (Parts 1800—1899)
IX Appalachian Regional Commission (Parts 1900—1999)
XI Armed Forces Retirement Home (Parts 2100—2199)
XIV Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Service Impasses Panel (Parts 2400—2499)
XV Office of Administration, Executive Office of the President (Parts 2500—2599)
XVI Office of Government Ethics (Parts 2600—2699)
XXI Department of the Treasury (Parts 3100—3199)
XXII Federal Deposit Insurance Corporation (Parts 3200—3299)
XXIII Department of Energy (Parts 3300—3399)
XXIV Federal Energy Regulatory Commission (Parts 3400—3499)
XXV Department of the Interior (Parts 3500—3599)
XXVI Department of Defense (Parts 3600— 3699)
XXVIII Department of Justice (Parts 3800—3899)
XXIX Federal Communications Commission (Parts 3900—3999)
XXX Farm Credit System Insurance Corporation (Parts 4000—4099)
XXXI Farm Credit Administration (Parts 4100—4199)
XXXIII Overseas Private Investment Corporation (Parts 4300—4399)
XXXV Office of Personnel Management (Parts 4500—4599)
XL Interstate Commerce Commission (Parts 5000—5099)
XLI Commodity Futures Trading Commission (Parts 5100—5199)
XLII Department of Labor (Parts 5200—5299)
XLIII National Science Foundation (Parts 5300—5399)
XLV Department of Health and Human Services (Parts 5500—5599)
XLVI Postal Rate Commission (Parts 5600—5699)
XLVII Federal Trade Commission (Parts 5700—5799)
XLVIII Nuclear Regulatory Commission (Parts 5800—5899)
L Department of Transportation (Parts 6000—6099)
LII Export-Import Bank of the United States (Parts 6200—6299)
LIII Department of Education (Parts 6300—6399)

Title 5—Administrative Personnel—Continued

Chap.

LIV Environmental Protection Agency (Parts 6400—6499)
LV National Endowment for the Arts (Parts 6500—6599)
LVI National Endowment for the Humanities (Parts 6600—6699)
LVII General Services Administration (Parts 6700—6799)
LVIII Board of Governors of the Federal Reserve System (Parts 6800—6899)
LIX National Aeronautics and Space Administration (Parts 6900—6999)
LX United States Postal Service (Parts 7000—7099)
LXI National Labor Relations Board (Parts 7100—7199)
LXII Equal Employment Opportunity Commission (Parts 7200—7299)
LXIII Inter-American Foundation (Parts 7300—7399)
LXIV Merit Systems Protection Board (Parts 7400—7499)
LXV Department of Housing and Urban Development (Parts 7500—7599)
LXVI National Archives and Records Administration (Parts 7600—7699)
LXVII Institute of Museum and Library Services (Parts 7700—7799)
LXVIII Commission on Civil Rights (Parts 7800—7899)
LXIX Tennessee Valley Authority (Parts 7900—7999)
LXXI Consumer Product Safety Commission (Parts 8100—8199)
LXXIII Department of Agriculture (Parts 8300—8399)
LXXIV Federal Mine Safety and Health Review Commission (Parts 8400—8499)
LXXVI Federal Retirement Thrift Investment Board (Parts 8600—8699)
LXXVII Office of Management and Budget (Parts 8700—8799)
XCVII Department of Homeland Security Human Resources Management System (Department of Homeland Security—Office of Personnel Management) (Parts 9700—9799)
XCIX Department of Defense Human Resources Management and Labor Relations Systems (Department of Defense—Office of Personnel Management) (Parts 9900—9999)

Title 6—Domestic Security

I Department of Homeland Security, Office of the Secretary (Parts 0—99)
X Privacy and Civil Liberties Oversight Board (Parts 1000—1099)

Title 7—Agriculture

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE (PARTS 0—26)

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

I Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture (Parts 27—209)
II Food and Nutrition Service, Department of Agriculture (Parts 210—299)

Title 7—Agriculture—Continued

Chap.

III Animal and Plant Health Inspection Service, Department of Agriculture (Parts 300—399)

IV Federal Crop Insurance Corporation, Department of Agriculture (Parts 400—499)

V Agricultural Research Service, Department of Agriculture (Parts 500—599)

VI Natural Resources Conservation Service, Department of Agriculture (Parts 600—699)

VII Farm Service Agency, Department of Agriculture (Parts 700—799)

VIII Grain Inspection, Packers and Stockyards Administration (Federal Grain Inspection Service), Department of Agriculture (Parts 800—899)

IX Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts), Department of Agriculture (Parts 900—999)

X Agricultural Marketing Service (Marketing Agreements and Orders; Milk), Department of Agriculture (Parts 1000—1199)

XI Agricultural Marketing Service (Marketing Agreements and Orders; Miscellaneous Commodities), Department of Agriculture (Parts 1200—1299)

XIV Commodity Credit Corporation, Department of Agriculture (Parts 1400—1499)

XV Foreign Agricultural Service, Department of Agriculture (Parts 1500—1599)

XVI Rural Telephone Bank, Department of Agriculture (Parts 1600—1699)

XVII Rural Utilities Service, Department of Agriculture (Parts 1700—1799)

XVIII Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, Department of Agriculture (Parts 1800—2099)

XX Local Television Loan Guarantee Board (Parts 2200—2299)

XXVI Office of Inspector General, Department of Agriculture (Parts 2600—2699)

XXVII Office of Information Resources Management, Department of Agriculture (Parts 2700—2799)

XXVIII Office of Operations, Department of Agriculture (Parts 2800—2899)

XXIX Office of Energy Policy and New Uses, Department of Agriculture (Parts 2900—2999)

XXX Office of the Chief Financial Officer, Department of Agriculture (Parts 3000—3099)

XXXI Office of Environmental Quality, Department of Agriculture (Parts 3100—3199)

XXXII Office of Procurement and Property Management, Department of Agriculture (Parts 3200—3299)

XXXIII Office of Transportation, Department of Agriculture (Parts 3300—3399)

XXXIV Cooperative State Research, Education, and Extension Service, Department of Agriculture (Parts 3400—3499)

Title 7—Agriculture—Continued

Chap.

XXXV Rural Housing Service, Department of Agriculture (Parts 3500—3599)

XXXVI National Agricultural Statistics Service, Department of Agriculture (Parts 3600—3699)

XXXVII Economic Research Service, Department of Agriculture (Parts 3700—3799)

XXXVIII World Agricultural Outlook Board, Department of Agriculture (Parts 3800—3899)

XLI [Reserved]

XLII Rural Business-Cooperative Service and Rural Utilities Service, Department of Agriculture (Parts 4200—4299)

Title 8—Aliens and Nationality

I Department of Homeland Security (Immigration and Naturalization) (Parts 1—499)

V Executive Office for Immigration Review, Department of Justice (Parts 1000—1399)

Title 9—Animals and Animal Products

I Animal and Plant Health Inspection Service, Department of Agriculture (Parts 1—199)

II Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs), Department of Agriculture (Parts 200—299)

III Food Safety and Inspection Service, Department of Agriculture (Parts 300—599)

Title 10—Energy

I Nuclear Regulatory Commission (Parts 0—199)

II Department of Energy (Parts 200—699)

III Department of Energy (Parts 700—999)

X Department of Energy (General Provisions) (Parts 1000—1099)

XIII Nuclear Waste Technical Review Board (Parts 1303—1399)

XVII Defense Nuclear Facilities Safety Board (Parts 1700—1799)

XVIII Northeast Interstate Low-Level Radioactive Waste Commission (Parts 1800—1899)

Title 11—Federal Elections

I Federal Election Commission (Parts 1—9099)

Title 12—Banks and Banking

I Comptroller of the Currency, Department of the Treasury (Parts 1—199)

II Federal Reserve System (Parts 200—299)

Title 12—Banks and Banking—Continued

Chap.

III Federal Deposit Insurance Corporation (Parts 300—399)

IV Export-Import Bank of the United States (Parts 400—499)

V Office of Thrift Supervision, Department of the Treasury (Parts 500—599)

VI Farm Credit Administration (Parts 600—699)

VII National Credit Union Administration (Parts 700—799)

VIII Federal Financing Bank (Parts 800—899)

IX Federal Housing Finance Board (Parts 900—999)

XI Federal Financial Institutions Examination Council (Parts 1100—1199)

XII Federal Housing Finance Agency (Parts 1200—1299)

XIV Farm Credit System Insurance Corporation (Parts 1400—1499)

XV Department of the Treasury (Parts 1500—1599)

XVII Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development (Parts 1700—1799)

XVIII Community Development Financial Institutions Fund, Department of the Treasury (Parts 1800—1899)

Title 13—Business Credit and Assistance

I Small Business Administration (Parts 1—199)

III Economic Development Administration, Department of Commerce (Parts 300—399)

IV Emergency Steel Guarantee Loan Board, Department of Commerce (Parts 400—499)

V Emergency Oil and Gas Guaranteed Loan Board, Department of Commerce (Parts 500—599)

Title 14—Aeronautics and Space

I Federal Aviation Administration, Department of Transportation (Parts 1—199)

II Office of the Secretary, Department of Transportation (Aviation Proceedings) (Parts 200—399)

III Commercial Space Transportation, Federal Aviation Administration, Department of Transportation (Parts 400—499)

V National Aeronautics and Space Administration (Parts 1200—1299)

VI Air Transportation System Stabilization (Parts 1300—1399)

Title 15—Commerce and Foreign Trade

SUBTITLE A—OFFICE OF THE SECRETARY OF COMMERCE (PARTS 0—29)

SUBTITLE B—REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE

I Bureau of the Census, Department of Commerce (Parts 30—199)

Title 15—Commerce and Foreign Trade—Continued

Chap.

II National Institute of Standards and Technology, Department of Commerce (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV Foreign-Trade Zones Board, Department of Commerce (Parts 400—499)

VII Bureau of Industry and Security, Department of Commerce (Parts 700—799)

VIII Bureau of Economic Analysis, Department of Commerce (Parts 800—899)

IX National Oceanic and Atmospheric Administration, Department of Commerce (Parts 900—999)

XI Technology Administration, Department of Commerce (Parts 1100—1199)

XIII East-West Foreign Trade Board (Parts 1300—1399)

XIV Minority Business Development Agency (Parts 1400—1499)

SUBTITLE C—REGULATIONS RELATING TO FOREIGN TRADE AGREEMENTS

XX Office of the United States Trade Representative (Parts 2000—2099)

SUBTITLE D—REGULATIONS RELATING TO TELECOMMUNICATIONS AND INFORMATION

XXIII National Telecommunications and Information Administration, Department of Commerce (Parts 2300—2399)

Title 16—Commercial Practices

I Federal Trade Commission (Parts 0—999)

II Consumer Product Safety Commission (Parts 1000—1799)

Title 17—Commodity and Securities Exchanges

I Commodity Futures Trading Commission (Parts 1—199)

II Securities and Exchange Commission (Parts 200—399)

IV Department of the Treasury (Parts 400—499)

Title 18—Conservation of Power and Water Resources

I Federal Energy Regulatory Commission, Department of Energy (Parts 1—399)

III Delaware River Basin Commission (Parts 400—499)

VI Water Resources Council (Parts 700—799)

VIII Susquehanna River Basin Commission (Parts 800—899)

XIII Tennessee Valley Authority (Parts 1300—1399)

Title 19—Customs Duties

I Bureau of Customs and Border Protection, Department of Homeland Security; Department of the Treasury (Parts 0—199)

Title 19—Customs Duties—Continued

Chap.

II United States International Trade Commission (Parts 200—299)

III International Trade Administration, Department of Commerce (Parts 300—399)

IV Bureau of Immigration and Customs Enforcement, Department of Homeland Security (Parts 400—599)

Title 20—Employees' Benefits

I Office of Workers' Compensation Programs, Department of Labor (Parts 1—199)

II Railroad Retirement Board (Parts 200—399)

III Social Security Administration (Parts 400—499)

IV Employees Compensation Appeals Board, Department of Labor (Parts 500—599)

V Employment and Training Administration, Department of Labor (Parts 600—699)

VI Employment Standards Administration, Department of Labor (Parts 700—799)

VII Benefits Review Board, Department of Labor (Parts 800—899)

VIII Joint Board for the Enrollment of Actuaries (Parts 900—999)

IX Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 1000—1099)

Title 21—Food and Drugs

I Food and Drug Administration, Department of Health and Human Services (Parts 1—1299)

II Drug Enforcement Administration, Department of Justice (Parts 1300—1399)

III Office of National Drug Control Policy (Parts 1400—1499)

Title 22—Foreign Relations

I Department of State (Parts 1—199)

II Agency for International Development (Parts 200—299)

III Peace Corps (Parts 300—399)

IV International Joint Commission, United States and Canada (Parts 400—499)

V Broadcasting Board of Governors (Parts 500—599)

VII Overseas Private Investment Corporation (Parts 700—799)

IX Foreign Service Grievance Board (Parts 900—999)

X Inter-American Foundation (Parts 1000—1099)

XI International Boundary and Water Commission, United States and Mexico, United States Section (Parts 1100—1199)

XII United States International Development Cooperation Agency (Parts 1200—1299)

XIII Millenium Challenge Corporation (Parts 1300—1399)

Title 22—Foreign Relations—Continued

Chap.

XIV Foreign Service Labor Relations Board; Federal Labor Relations Authority; General Counsel of the Federal Labor Relations Authority; and the Foreign Service Impasse Disputes Panel (Parts 1400—1499)

XV African Development Foundation (Parts 1500—1599)

XVI Japan-United States Friendship Commission (Parts 1600—1699)

XVII United States Institute of Peace (Parts 1700—1799)

Title 23—Highways

I Federal Highway Administration, Department of Transportation (Parts 1—999)

II National Highway Traffic Safety Administration and Federal Highway Administration, Department of Transportation (Parts 1200—1299)

III National Highway Traffic Safety Administration, Department of Transportation (Parts 1300—1399)

Title 24—Housing and Urban Development

SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT

I Office of Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development (Parts 100—199)

II Office of Assistant Secretary for Housing-Federal HousingCommissioner, Department of Housing and Urban Development (Parts 200—299)

III Government National Mortgage Association, Department of Housing and Urban Development (Parts 300—399)

IV Office of Housing and Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development (Parts 400—499)

V Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 500—599)

VI Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 600—699) [Reserved]

VII Office of the Secretary, Department of Housing and Urban Development (Housing Assistance Programs and Public and Indian Housing Programs) (Parts 700—799)

VIII Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Section 8 Housing Assistance Programs, Section 202 Direct Loan Program, Section 202 Supportive Housing for the Elderly Program and Section 811 Supportive Housing for Persons With Disabilities Program) (Parts 800—899)

IX Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (Parts 900—1699)

Title 24—Housing and Urban Development—Continued

Chap.

X Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Interstate Land Sales Registration Program) (Parts 1700—1799)

XII Office of Inspector General, Department of Housing and Urban Development (Parts 2000—2099)

XX Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Parts 3200—3899)

XXV Neighborhood Reinvestment Corporation (Parts 4100—4199)

Title 25—Indians

I Bureau of Indian Affairs, Department of the Interior (Parts 1—299)

II Indian Arts and Crafts Board, Department of the Interior (Parts 300—399)

III National Indian Gaming Commission, Department of the Interior (Parts 500—599)

IV Office of Navajo and Hopi Indian Relocation (Parts 700—799)

V Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Part 900)

VI Office of the Assistant Secretary-Indian Affairs, Department of the Interior (Parts 1000—1199)

VII Office of the Special Trustee for American Indians, Department of the Interior (Parts 1200—1299)

Title 26—Internal Revenue

I Internal Revenue Service, Department of the Treasury (Parts 1—899)

Title 27—Alcohol, Tobacco Products and Firearms

I Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury (Parts 1—399)

II Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice (Parts 400—699)

Title 28—Judicial Administration

I Department of Justice (Parts 0—299)

III Federal Prison Industries, Inc., Department of Justice (Parts 300—399)

V Bureau of Prisons, Department of Justice (Parts 500—599)

VI Offices of Independent Counsel, Department of Justice (Parts 600—699)

VII Office of Independent Counsel (Parts 700—799)

Title 28—Judicial Administration—Continued

Chap.

VIII Court Services and Offender Supervision Agency for the District of Columbia (Parts 800—899)

IX National Crime Prevention and Privacy Compact Council (Parts 900—999)

XI Department of Justice and Department of State (Parts 1100—1199)

Title 29—Labor

SUBTITLE A—OFFICE OF THE SECRETARY OF LABOR (PARTS 0—99)

SUBTITLE B—REGULATIONS RELATING TO LABOR

I National Labor Relations Board (Parts 100—199)

II Office of Labor-Management Standards, Department of Labor (Parts 200—299)

III National Railroad Adjustment Board (Parts 300—399)

IV Office of Labor-Management Standards, Department of Labor (Parts 400—499)

V Wage and Hour Division, Department of Labor (Parts 500—899)

IX Construction Industry Collective Bargaining Commission (Parts 900—999)

X National Mediation Board (Parts 1200—1299)

XII Federal Mediation and Conciliation Service (Parts 1400—1499)

XIV Equal Employment Opportunity Commission (Parts 1600—1699)

XVII Occupational Safety and Health Administration, Department of Labor (Parts 1900—1999)

XX Occupational Safety and Health Review Commission (Parts 2200—2499)

XXV Employee Benefits Security Administration, Department of Labor (Parts 2500—2599)

XXVII Federal Mine Safety and Health Review Commission (Parts 2700—2799)

XL Pension Benefit Guaranty Corporation (Parts 4000—4999)

Title 30—Mineral Resources

I Mine Safety and Health Administration, Department of Labor (Parts 1—199)

II Minerals Management Service, Department of the Interior (Parts 200—299)

III Board of Surface Mining and Reclamation Appeals, Department of the Interior (Parts 300—399)

IV Geological Survey, Department of the Interior (Parts 400—499)

VII Office of Surface Mining Reclamation and Enforcement, Department of the Interior (Parts 700—999)

Title 31—Money and Finance: Treasury

SUBTITLE A—OFFICE OF THE SECRETARY OF THE TREASURY (PARTS 0—50)

Title 31—Money and Finance: Treasury—Continued

Chap.

SUBTITLE B—REGULATIONS RELATING TO MONEY AND FINANCE

I Monetary Offices, Department of the Treasury (Parts 51—199)
II Fiscal Service, Department of the Treasury (Parts 200—399)
IV Secret Service, Department of the Treasury (Parts 400—499)
V Office of Foreign Assets Control, Department of the Treasury (Parts 500—599)
VI Bureau of Engraving and Printing, Department of the Treasury (Parts 600—699)
VII Federal Law Enforcement Training Center, Department of the Treasury (Parts 700—799)
VIII Office of International Investment, Department of the Treasury (Parts 800—899)
IX Federal Claims Collection Standards (Department of the Treasury—Department of Justice) (Parts 900—999)

Title 32—National Defense

SUBTITLE A—DEPARTMENT OF DEFENSE

I Office of the Secretary of Defense (Parts 1—399)
V Department of the Army (Parts 400—699)
VI Department of the Navy (Parts 700—799)
VII Department of the Air Force (Parts 800—1099)

SUBTITLE B—OTHER REGULATIONS RELATING TO NATIONAL DEFENSE

XII Defense Logistics Agency (Parts 1200—1299)
XVI Selective Service System (Parts 1600—1699)
XVII Office of the Director of National Intelligence (Parts 1700—1799)
XVIII National Counterintelligence Center (Parts 1800—1899)
XIX Central Intelligence Agency (Parts 1900—1999)
XX Information Security Oversight Office, National Archives and Records Administration (Parts 2000—2099)
XXI National Security Council (Parts 2100—2199)
XXIV Office of Science and Technology Policy (Parts 2400—2499)
XXVII Office for Micronesian Status Negotiations (Parts 2700—2799)
XXVIII Office of the Vice President of the United States (Parts 2800—2899)

Title 33—Navigation and Navigable Waters

I Coast Guard, Department of Homeland Security (Parts 1—199)
II Corps of Engineers, Department of the Army (Parts 200—399)
IV Saint Lawrence Seaway Development Corporation, Department of Transportation (Parts 400—499)

Title 34—Education

SUBTITLE A—OFFICE OF THE SECRETARY, DEPARTMENT OF EDUCATION (PARTS 1—99)

Title 34—Education—Continued

Chap.

SUBTITLE B—REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

I Office for Civil Rights, Department of Education (Parts 100—199)

II Office of Elementary and Secondary Education, Department of Education (Parts 200—299)

III Office of Special Education and Rehabilitative Services, Department of Education (Parts 300—399)

IV Office of Vocational and Adult Education, Department of Education (Parts 400—499)

V Office of Bilingual Education and Minority Languages Affairs, Department of Education (Parts 500—599)

VI Office of Postsecondary Education, Department of Education (Parts 600—699)

VII Office of Educational Research and Improvmeent, Department of Education [Reserved]

XI National Institute for Literacy (Parts 1100—1199)

SUBTITLE C—REGULATIONS RELATING TO EDUCATION

XII National Council on Disability (Parts 1200—1299)

Title 35 [Reserved]

Title 36—Parks, Forests, and Public Property

I National Park Service, Department of the Interior (Parts 1—199)

II Forest Service, Department of Agriculture (Parts 200—299)

III Corps of Engineers, Department of the Army (Parts 300—399)

IV American Battle Monuments Commission (Parts 400—499)

V Smithsonian Institution (Parts 500—599)

VI [Reserved]

VII Library of Congress (Parts 700—799)

VIII Advisory Council on Historic Preservation (Parts 800—899)

IX Pennsylvania Avenue Development Corporation (Parts 900—999)

X Presidio Trust (Parts 1000—1099)

XI Architectural and Transportation Barriers Compliance Board (Parts 1100—1199)

XII National Archives and Records Administration (Parts 1200—1299)

XV Oklahoma City National Memorial Trust (Parts 1500—1599)

XVI Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation (Parts 1600—1699)

Title 37—Patents, Trademarks, and Copyrights

I United States Patent and Trademark Office, Department of Commerce (Parts 1—199)

II Copyright Office, Library of Congress (Parts 200—299)

III Copyright Royalty Board, Library of Congress (Parts 301—399)

Title 37—Patents, Trademarks, and Copyrights—Continued

Chap.

IV Assistant Secretary for Technology Policy, Department of Commerce (Parts 400—499)

V Under Secretary for Technology, Department of Commerce (Parts 500—599)

Title 38—Pensions, Bonuses, and Veterans' Relief

I Department of Veterans Affairs (Parts 0—99)

Title 39—Postal Service

I United States Postal Service (Parts 1—999)

III Postal Regulatory Commission (Parts 3000—3099)

Title 40—Protection of Environment

I Environmental Protection Agency (Parts 1—1099)

IV Environmental Protection Agency and Department of Justice (Parts 1400—1499)

V Council on Environmental Quality (Parts 1500—1599)

VI Chemical Safety and Hazard Investigation Board (Parts 1600—1699)

VII Environmental Protection Agency and Department of Defense; Uniform National Discharge Standards for Vessels of the Armed Forces (Parts 1700—1799)

Title 41—Public Contracts and Property Management

SUBTITLE B—OTHER PROVISIONS RELATING TO PUBLIC CONTRACTS

50 Public Contracts, Department of Labor (Parts 50–1—50–999)

51 Committee for Purchase From People Who Are Blind or Severely Disabled (Parts 51–1—51–99)

60 Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Parts 60–1—60–999)

61 Office of the Assistant Secretary for Veterans' Employment and Training Service, Department of Labor (Parts 61–1—61–999)

Chapters 62—100 [Reserved]

SUBTITLE C—FEDERAL PROPERTY MANAGEMENT REGULATIONS SYSTEM

101 Federal Property Management Regulations (Parts 101–1—101–99)

102 Federal Management Regulation (Parts 102–1—102–299)

Chapters 103—104 [Reserved]

105 General Services Administration (Parts 105–1—105–999)

109 Department of Energy Property Management Regulations (Parts 109–1—109–99)

114 Department of the Interior (Parts 114–1—114–99)

115 Environmental Protection Agency (Parts 115–1—115–99)

128 Department of Justice (Parts 128–1—128–99)

Title 41—Public Contracts and Property Management—Continued

Chap.

Chapters 129—200 [Reserved]

SUBTITLE D—OTHER PROVISIONS RELATING TO PROPERTY MANAGEMENT [RESERVED]

SUBTITLE E—FEDERAL INFORMATION RESOURCES MANAGEMENT REGULATIONS SYSTEM [RESERVED]

SUBTITLE F—FEDERAL TRAVEL REGULATION SYSTEM

300 General (Parts 300–1—300–99)

301 Temporary Duty (TDY) Travel Allowances (Parts 301–1—301–99)

302 Relocation Allowances (Parts 302–1—302–99)

303 Payment of Expenses Connected with the Death of Certain Employees (Part 303–1—303–99)

304 Payment of Travel Expenses from a Non-Federal Source (Parts 304–1—304–99)

Title 42—Public Health

I Public Health Service, Department of Health and Human Services (Parts 1—199)

IV Centers for Medicare & Medicaid Services, Department of Health and Human Services (Parts 400—499)

V Office of Inspector General-Health Care, Department of Health and Human Services (Parts 1000—1999)

Title 43—Public Lands: Interior

SUBTITLE A—OFFICE OF THE SECRETARY OF THE INTERIOR (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC LANDS

I Bureau of Reclamation, Department of the Interior (Parts 200—499)

II Bureau of Land Management, Department of the Interior (Parts 1000—9999)

III Utah Reclamation Mitigation and Conservation Commission (Parts 10000—10010)

Title 44—Emergency Management and Assistance

I Federal Emergency Management Agency, Department of Homeland Security (Parts 0—399)

IV Department of Commerce and Department of Transportation (Parts 400—499)

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES (PARTS 1—199)

SUBTITLE B—REGULATIONS RELATING TO PUBLIC WELFARE

Title 45—Public Welfare—Continued

Chap.

II Office of Family Assistance (Assistance Programs), Administration for Children and Families, Department of Health and Human Services (Parts 200—299)

III Office of Child Support Enforcement (Child Support Enforcement Program), Administration for Children and Families, Department of Health and Human Services (Parts 300—399)

IV Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services (Parts 400—499)

V Foreign Claims Settlement Commission of the United States, Department of Justice (Parts 500—599)

VI National Science Foundation (Parts 600—699)

VII Commission on Civil Rights (Parts 700—799)

VIII Office of Personnel Management (Parts 800—899) [Reserved]

X Office of Community Services, Administration for Children and Families, Department of Health and Human Services (Parts 1000—1099)

XI National Foundation on the Arts and the Humanities (Parts 1100—1199)

XII Corporation for National and Community Service (Parts 1200—1299)

XIII Office of Human Development Services, Department of Health and Human Services (Parts 1300—1399)

XVI Legal Services Corporation (Parts 1600—1699)

XVII National Commission on Libraries and Information Science (Parts 1700—1799)

XVIII Harry S. Truman Scholarship Foundation (Parts 1800—1899)

XXI Commission on Fine Arts (Parts 2100—2199)

XXIII Arctic Research Commission (Part 2301)

XXIV James Madison Memorial Fellowship Foundation (Parts 2400—2499)

XXV Corporation for National and Community Service (Parts 2500—2599)

Title 46—Shipping

I Coast Guard, Department of Homeland Security (Parts 1—199)

II Maritime Administration, Department of Transportation (Parts 200—399)

III Coast Guard (Great Lakes Pilotage), Department of Homeland Security (Parts 400—499)

IV Federal Maritime Commission (Parts 500—599)

Title 47—Telecommunication

I Federal Communications Commission (Parts 0—199)

II Office of Science and Technology Policy and National Security Council (Parts 200—299)

Title 47—Telecommunication—Continued

Chap.

III National Telecommunications and Information Administration, Department of Commerce (Parts 300—399)

Title 48—Federal Acquisition Regulations System

1 Federal Acquisition Regulation (Parts 1—99)

2 Defense Acquisition Regulations System, Department of Defense (Parts 200—299)

3 Department of Health and Human Services (Parts 300—399)

4 Department of Agriculture (Parts 400—499)

5 General Services Administration (Parts 500—599)

6 Department of State (Parts 600—699)

7 Agency for International Development (Parts 700—799)

8 Department of Veterans Affairs (Parts 800—899)

9 Department of Energy (Parts 900—999)

10 Department of the Treasury (Parts 1000—1099)

12 Department of Transportation (Parts 1200—1299)

13 Department of Commerce (Parts 1300—1399)

14 Department of the Interior (Parts 1400—1499)

15 Environmental Protection Agency (Parts 1500—1599)

16 Office of Personnel Management, Federal Employees Health Benefits Acquisition Regulation (Parts 1600—1699)

17 Office of Personnel Management (Parts 1700—1799)

18 National Aeronautics and Space Administration (Parts 1800—1899)

19 Broadcasting Board of Governors (Parts 1900—1999)

20 Nuclear Regulatory Commission (Parts 2000—2099)

21 Office of Personnel Management, Federal Employees Group Life Insurance Federal Acquisition Regulation (Parts 2100—2199)

23 Social Security Administration (Parts 2300—2399)

24 Department of Housing and Urban Development (Parts 2400—2499)

25 National Science Foundation (Parts 2500—2599)

28 Department of Justice (Parts 2800—2899)

29 Department of Labor (Parts 2900—2999)

30 Department of Homeland Security, Homeland Security Acquisition Regulation (HSAR) (Parts 3000—3099)

34 Department of Education Acquisition Regulation (Parts 3400—3499)

51 Department of the Army Acquisition Regulations (Parts 5100—5199)

52 Department of the Navy Acquisition Regulations (Parts 5200—5299)

53 Department of the Air Force Federal Acquisition Regulation Supplement [Reserved]

54 Defense Logistics Agency, Department of Defense (Parts 5400—5499)

Title 48—Federal Acquisition Regulations System—Continued

Chap.

57 African Development Foundation (Parts 5700—5799)

61 General Services Administration Board of Contract Appeals (Parts 6100—6199)

63 Department of Transportation Board of Contract Appeals (Parts 6300—6399)

99 Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget (Parts 9900—9999)

Title 49—Transportation

SUBTITLE A—OFFICE OF THE SECRETARY OF TRANSPORTATION (PARTS 1—99)

SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION

I Pipeline and Hazardous Materials Safety Administration, Department of Transportation (Parts 100—199)

II Federal Railroad Administration, Department of Transportation (Parts 200—299)

III Federal Motor Carrier Safety Administration, Department of Transportation (Parts 300—399)

IV Coast Guard, Department of Homeland Security (Parts 400—499)

V National Highway Traffic Safety Administration, Department of Transportation (Parts 500—599)

VI Federal Transit Administration, Department of Transportation (Parts 600—699)

VII National Railroad Passenger Corporation (AMTRAK) (Parts 700—799)

VIII National Transportation Safety Board (Parts 800—999)

X Surface Transportation Board, Department of Transportation (Parts 1000—1399)

XI Research and Innovative Technology Administration, Department of Transportation [Reserved]

XII Transportation Security Administration, Department of Homeland Security (Parts 1500—1699)

Title 50—Wildlife and Fisheries

I United States Fish and Wildlife Service, Department of the Interior (Parts 1—199)

II National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 200—299)

III International Fishing and Related Activities (Parts 300—399)

IV Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations (Parts 400—499)

V Marine Mammal Commission (Parts 500—599)

Title 50—Wildlife and Fisheries—Continued

Chap.

VI Fishery Conservation and Management, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 600—699)

CFR Index and Finding Aids

Subject/Agency Index
List of Agency Prepared Indexes
Parallel Tables of Statutory Authorities and Rules
List of CFR Titles, Chapters, Subchapters, and Parts
Alphabetical List of Agencies Appearing in the CFR

Alphabetical List of Agencies Appearing in the CFR

(Revised as of October 1, 2008)

Agency	CFR Title, Subtitle or Chapter
Administrative Committee of the Federal Register	1, I
Advanced Research Projects Agency	32, I
Advisory Council on Historic Preservation	36, VIII
African Development Foundation	22, XV
Federal Acquisition Regulation	48, 57
Agency for International Development	22, II
Federal Acquisition Regulation	48, 7
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Agriculture Department	5, LXXIII
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Animal and Plant Health Inspection Service	7, III; 9, I
Chief Financial Officer, Office of	7, XXX
Commodity Credit Corporation	7, XIV
Cooperative State Research, Education, and Extension Service	7, XXXIV
Economic Research Service	7, XXXVII
Energy, Office of	2, IX; 7, XXIX
Environmental Quality, Office of	7, XXXI
Farm Service Agency	7, VII, XVIII
Federal Acquisition Regulation	48, 4
Federal Crop Insurance Corporation	7, IV
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Forest Service	36, II
Grain Inspection, Packers and Stockyards Administration	7, VIII; 9, II
Information Resources Management, Office of	7, XXVII
Inspector General, Office of	7, XXVI
National Agricultural Library	7, XLI
National Agricultural Statistics Service	7, XXXVI
Natural Resources Conservation Service	7, VI
Operations, Office of	7, XXVIII
Procurement and Property Management, Office of	7, XXXII
Rural Business-Cooperative Service	7, XVIII, XLII
Rural Development Administration	7, XLII
Rural Housing Service	7, XVIII, XXXV
Rural Telephone Bank	7, XVI
Rural Utilities Service	7, XVII, XVIII, XLII
Secretary of Agriculture, Office of	7, Subtitle A
Transportation, Office of	7, XXXIII
World Agricultural Outlook Board	7, XXXVIII
Air Force Department	32, VII
Federal Acquisition Regulation Supplement	48, 53
Air Transportation Stabilization Board	14, VI
Alcohol and Tobacco Tax and Trade Bureau	27, I
Alcohol, Tobacco, Firearms, and Explosives, Bureau of	27, II
AMTRAK	49, VII
American Battle Monuments Commission	36, IV
American Indians, Office of the Special Trustee	25, VII
Animal and Plant Health Inspection Service	7, III; 9, I
Appalachian Regional Commission	5, IX

Agency	CFR Title, Subtitle or Chapter
Architectural and Transportation Barriers Compliance Board	36, XI
Arctic Research Commission	45, XXIII
Armed Forces Retirement Home	5, XI
Army Department	32, V
Engineers, Corps of	33, II; 36, III
Federal Acquisition Regulation	48, 51
Benefits Review Board	20, VII
Bilingual Education and Minority Languages Affairs, Office of	34, V
Blind or Severely Disabled, Committee for Purchase From People Who Are	41, 51
Broadcasting Board of Governors	22, V
Federal Acquisition Regulation	48, 19
Census Bureau	15, I
Centers for Medicare & Medicaid Services	42, IV
Central Intelligence Agency	32, XIX
Chief Financial Officer, Office of	7, XXX
Child Support Enforcement, Office of	45, III
Children and Families, Administration for	45, II, III, IV, X
Civil Rights, Commission on	5, LXVIII; 45, VII
Civil Rights, Office for	34, I
Coast Guard	33, I; 46, I; 49, IV
Coast Guard (Great Lakes Pilotage)	46, III
Commerce Department	44, IV
Census Bureau	15, I
Economic Affairs, Under Secretary	37, V
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Emergency Management and Assistance	44, IV
Federal Acquisition Regulation	48, 13
Fishery Conservation and Management	50, VI
Foreign-Trade Zones Board	15, IV
Industry and Security, Bureau of	15, VII
International Trade Administration	15, III; 19, III
National Institute of Standards and Technology	15, II
National Marine Fisheries Service	50, II, IV, VI
National Oceanic and Atmospheric Administration	15, IX; 50, II, III, IV, VI
National Telecommunications and Information Administration	15, XXIII; 47, III
National Weather Service	15, IX
Patent and Trademark Office, United States	37, I
Productivity, Technology and Innovation, Assistant Secretary for	37, IV
Secretary of Commerce, Office of	15, Subtitle A
Technology, Under Secretary for	37, V
Technology Administration	15, XI
Technology Policy, Assistant Secretary for	37, IV
Commercial Space Transportation	14, III
Commodity Credit Corporation	7, XIV
Commodity Futures Trading Commission	5, XLI; 17, I
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Community Services, Office of	45, X
Comptroller of the Currency	12, I
Construction Industry Collective Bargaining Commission	29, IX
Consumer Product Safety Commission	5, LXXI; 16, II
Cooperative State Research, Education, and Extension Service	7, XXXIV
Copyright Office	37, II
Copyright Royalty Board	37, III
Corporation for National and Community Service	2, XXII; 45, XII, XXV
Cost Accounting Standards Board	48, 99
Council on Environmental Quality	40, V
Court Services and Offender Supervision Agency for the District of Columbia	28, VIII
Customs and Border Protection Bureau	19, I
Defense Contract Audit Agency	32, I
Defense Department	5, XXVI; 32, Subtitle A; 40, VII

Agency	CFR Title, Subtitle or Chapter
Advanced Research Projects Agency	32, I
Air Force Department	32, VII
Army Department	32, V; 33, II; 36, III, 48, 51
Defense Acquisition Regulations System	48, 2
Defense Intelligence Agency	32, I
Defense Logistics Agency	32, I, XII; 48, 54
Engineers, Corps of	33, II; 36, III
National Imagery and Mapping Agency	32, I
Navy Department	32, VI; 48, 52
Secretary of Defense, Office of	2, XI; 32, I
Defense Contract Audit Agency	32, I
Defense Intelligence Agency	32, I
Defense Logistics Agency	32, XII; 48, 54
Defense Nuclear Facilities Safety Board	10, XVII
Delaware River Basin Commission	18, III
District of Columbia, Court Services and Offender Supervision Agency for the	28, VIII
Drug Enforcement Administration	21, II
East-West Foreign Trade Board	15, XIII
Economic Affairs, Under Secretary	37, V
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Economic Research Service	7, XXXVII
Education, Department of	5, LIII
Bilingual Education and Minority Languages Affairs, Office of	34, V
Civil Rights, Office for	34, I
Educational Research and Improvement, Office of	34, VII
Elementary and Secondary Education, Office of	34, II
Federal Acquisition Regulation	48, 34
Postsecondary Education, Office of	34, VI
Secretary of Education, Office of	34, Subtitle A
Special Education and Rehabilitative Services, Office of	34, III
Vocational and Adult Education, Office of	34, IV
Educational Research and Improvement, Office of	34, VII
Elementary and Secondary Education, Office of	34, II
Emergency Oil and Gas Guaranteed Loan Board	13, V
Emergency Steel Guarantee Loan Board	13, IV
Employee Benefits Security Administration	29, XXV
Employees' Compensation Appeals Board	20, IV
Employees Loyalty Board	5, V
Employment and Training Administration	20, V
Employment Standards Administration	20, VI
Endangered Species Committee	50, IV
Energy, Department of	5, XXIII; 10, II, III, X
Federal Acquisition Regulation	48, 9
Federal Energy Regulatory Commission	5, XXIV; 18, I
Property Management Regulations	41, 109
Energy, Office of	7, XXIX
Engineers, Corps of	33, II; 36, III
Engraving and Printing, Bureau of	31, VI
Environmental Protection Agency	2, XV; 5, LIV; 40, I, IV, VII
Federal Acquisition Regulation	48, 15
Property Management Regulations	41, 115
Environmental Quality, Office of	7, XXXI
Equal Employment Opportunity Commission	5, LXII; 29, XIV
Equal Opportunity, Office of Assistant Secretary for	24, I
Executive Office of the President	3, I
Administration, Office of	5, XV
Environmental Quality, Council on	40, V
Management and Budget, Office of	5, III, LXXVII; 14, VI; 48, 99
National Drug Control Policy, Office of	21, III
National Security Council	32, XXI; 47, 2
Presidential Documents	3

Agency	CFR Title, Subtitle or Chapter
Science and Technology Policy, Office of	32, XXIV; 47, II
Trade Representative, Office of the United States	15, XX
Export-Import Bank of the United States	2, XXXV; 5, LII; 12, IV
Family Assistance, Office of	45, II
Farm Credit Administration	5, XXXI; 12, VI
Farm Credit System Insurance Corporation	5, XXX; 12, XIV
Farm Service Agency	7, VII, XVIII
Federal Acquisition Regulation	48, 1
Federal Aviation Administration	14, I
Commercial Space Transportation	14, III
Federal Claims Collection Standards	31, IX
Federal Communications Commission	5, XXIX; 47, I
Federal Contract Compliance Programs, Office of	41, 60
Federal Crop Insurance Corporation	7, IV
Federal Deposit Insurance Corporation	5, XXII; 12, III
Federal Election Commission	11, I
Federal Emergency Management Agency	44, I
Federal Employees Group Life Insurance Federal Acquisition Regulation	48, 21
Federal Employees Health Benefits Acquisition Regulation	48, 16
Federal Energy Regulatory Commission	5, XXIV; 18, I
Federal Financial Institutions Examination Council	12, XI
Federal Financing Bank	12, VIII
Federal Highway Administration	23, I, II
Federal Home Loan Mortgage Corporation	1, IV
Federal Housing Enterprise Oversight Office	12, XVII
Federal Housing Finance Agency	12, XII
Federal Housing Finance Board	12, IX
Federal Labor Relations Authority, and General Counsel of the Federal Labor Relations Authority	5, XIV; 22, XIV
Federal Law Enforcement Training Center	31, VII
Federal Management Regulation	41, 102
Federal Maritime Commission	46, IV
Federal Mediation and Conciliation Service	29, XII
Federal Mine Safety and Health Review Commission	5, LXXIV; 29, XXVII
Federal Motor Carrier Safety Administration	49, III
Federal Prison Industries, Inc.	28, III
Federal Procurement Policy Office	48, 99
Federal Property Management Regulations	41, 101
Federal Railroad Administration	49, II
Federal Register, Administrative Committee of	1, I
Federal Register, Office of	1, II
Federal Reserve System	12, II
Board of Governors	5, LVIII
Federal Retirement Thrift Investment Board	5, VI, LXXVI
Federal Service Impasses Panel	5, XIV
Federal Trade Commission	5, XLVII; 16, I
Federal Transit Administration	49, VI
Federal Travel Regulation System	41, Subtitle F
Fine Arts, Commission on	45, XXI
Fiscal Service	31, II
Fish and Wildlife Service, United States	50, I, IV
Fishery Conservation and Management	50, VI
Food and Drug Administration	21, I
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Foreign Assets Control, Office of	31, V
Foreign Claims Settlement Commission of the United States	45, V
Foreign Service Grievance Board	22, IX
Foreign Service Impasse Disputes Panel	22, XIV
Foreign Service Labor Relations Board	22, XIV
Foreign-Trade Zones Board	15, IV
Forest Service	36, II
General Services Administration	5, LVII; 41, 105
Contract Appeals, Board of	48, 61
Federal Acquisition Regulation	48, 5

Agency	CFR Title, Subtitle or Chapter
Federal Management Regulation	41, 102
Federal Property Management Regulations	41, 101
Federal Travel Regulation System	41, Subtitle F
General	41, 300
Payment From a Non-Federal Source for Travel Expenses	41, 304
Payment of Expenses Connected With the Death of Certain Employees	41, 303
Relocation Allowances	41, 302
Temporary Duty (TDY) Travel Allowances	41, 301
Geological Survey	30, IV
Government Accountability Office	4, I
Government Ethics, Office of	5, XVI
Government National Mortgage Association	24, III
Grain Inspection, Packers and Stockyards Administration	7, VIII; 9, II
Harry S. Truman Scholarship Foundation	45, XVIII
Health and Human Services, Department of	2, III; 5, XLV; 45, Subtitle A,
Centers for Medicare & Medicaid Services	42, IV
Child Support Enforcement, Office of	45, III
Children and Families, Administration for	45, II, III, IV, X
Community Services, Office of	45, X
Family Assistance, Office of	45, II
Federal Acquisition Regulation	48, 3
Food and Drug Administration	21, I
Human Development Services, Office of	45, XIII
Indian Health Service	25, V
Inspector General (Health Care), Office of	42, V
Public Health Service	42, I
Refugee Resettlement, Office of	45, IV
Homeland Security, Department of	6, I
Coast Guard	33, I; 46, I; 49, IV
Coast Guard (Great Lakes Pilotage)	46, III
Customs and Border Protection Bureau	19, I
Federal Emergency Management Agency	44, I
Immigration and Customs Enforcement Bureau	19, IV
Immigration and Naturalization	8, I
Transportation Security Administration	49, XII
Housing and Urban Development, Department of	2, XXIV; 5, LXV; 24, Subtitle B
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Equal Opportunity, Office of Assistant Secretary for	24, I
Federal Acquisition Regulation	48, 24
Federal Housing Enterprise Oversight, Office of	12, XVII
Government National Mortgage Association	24, III
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, VIII, X, XX
Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of	24, IV
Inspector General, Office of	24, XII
Public and Indian Housing, Office of Assistant Secretary for	24, IX
Secretary, Office of	24, Subtitle A, VII
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, VIII, X, XX
Housing, Office of, and Multifamily Housing Assistance Restructuring, Office of	24, IV
Human Development Services, Office of	45, XIII
Immigration and Customs Enforcement Bureau	19, IV
Immigration and Naturalization	8, I
Immigration Review, Executive Office for	8, V
Independent Counsel, Office of	28, VII
Indian Affairs, Bureau of	25, I, V
Indian Affairs, Office of the Assistant Secretary	25, VI
Indian Arts and Crafts Board	25, II
Indian Health Service	25, V
Industry and Security, Bureau of	15, VII
Information Resources Management, Office of	7, XXVII

Agency	CFR Title, Subtitle or Chapter
Information Security Oversight Office, National Archives and Records Administration	32, XX
Inspector General	
Agriculture Department	7, XXVI
Health and Human Services Department	42, V
Housing and Urban Development Department	24, XII
Institute of Peace, United States	22, XVII
Inter-American Foundation	5, LXIII; 22, X
Interior Department	
American Indians, Office of the Special Trustee	25, VII
Endangered Species Committee	50, IV
Federal Acquisition Regulation	48, 14
Federal Property Management Regulations System	41, 114
Fish and Wildlife Service, United States	50, I, IV
Geological Survey	30, IV
Indian Affairs, Bureau of	25, I, V
Indian Affairs, Office of the Assistant Secretary	25, VI
Indian Arts and Crafts Board	25, II
Land Management, Bureau of	43, II
Minerals Management Service	30, II
National Indian Gaming Commission	25, III
National Park Service	36, I
Reclamation, Bureau of	43, I
Secretary of the Interior, Office of	2, XIV; 43, Subtitle A
Surface Mining and Reclamation Appeals, Board of	30, III
Surface Mining Reclamation and Enforcement, Office of	30, VII
Internal Revenue Service	26, I
International Boundary and Water Commission, United States and Mexico, United States Section	22, XI
International Development, United States Agency for	22, II
Federal Acquisition Regulation	48, 7
International Development Cooperation Agency, United States	22, XII
International Fishing and Related Activities	50, III
International Investment, Office of	31, VIII
International Joint Commission, United States and Canada	22, IV
International Organizations Employees Loyalty Board	5, V
International Trade Administration	15, III; 19, III
International Trade Commission, United States	19, II
Interstate Commerce Commission	5, XL
James Madison Memorial Fellowship Foundation	45, XXIV
Japan–United States Friendship Commission	22, XVI
Joint Board for the Enrollment of Actuaries	20, VIII
Justice Department	2, XXVII; 5, XXVIII; 28, I, XI; 40, IV
Alcohol, Tobacco, Firearms, and Explosives, Bureau of	27, II
Drug Enforcement Administration	21, II
Federal Acquisition Regulation	48, 28
Federal Claims Collection Standards	31, IX
Federal Prison Industries, Inc.	28, III
Foreign Claims Settlement Commission of the United States	45, V
Immigration Review, Executive Office for	8, V
Offices of Independent Counsel	28, VI
Prisons, Bureau of	28, V
Property Management Regulations	41, 128
Labor Department	5, XLII
Benefits Review Board	20, VII
Employee Benefits Security Administration	29, XXV
Employees' Compensation Appeals Board	20, IV
Employment and Training Administration	20, V
Employment Standards Administration	20, VI
Federal Acquisition Regulation	48, 29
Federal Contract Compliance Programs, Office of	41, 60
Federal Procurement Regulations System	41, 50
Labor-Management Standards, Office of	29, II, IV
Mine Safety and Health Administration	30, I

Agency	CFR Title, Subtitle or Chapter
Occupational Safety and Health Administration	29, XVII
Public Contracts	41, 50
Secretary of Labor, Office of	29, Subtitle A
Veterans' Employment and Training Service, Office of the Assistant Secretary for	41, 61; 20, IX
Wage and Hour Division	29, V
Workers' Compensation Programs, Office of	20, I
Labor-Management Standards, Office of	29, II, IV
Land Management, Bureau of	43, II
Legal Services Corporation	45, XVI
Library of Congress	36, VII
Copyright Office	37, II
Copyright Royalty Board	37, III
Local Television Loan Guarantee Board	7, XX
Management and Budget, Office of	5, III, LXXVII; 14, VI; 48, 99
Marine Mammal Commission	50, V
Maritime Administration	46, II
Merit Systems Protection Board	5, II, LXIV
Micronesian Status Negotiations, Office for	32, XXVII
Millenium Challenge Corporation	22, XIII
Mine Safety and Health Administration	30, I
Minerals Management Service	30, II
Minority Business Development Agency	15, XIV
Miscellaneous Agencies	1, IV
Monetary Offices	31, I
Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation	36, XVI
National Aeronautics and Space Administration	2, XVIII; 5, LIX; 14, V
Federal Acquisition Regulation	48, 18
National Agricultural Library	7, XLI
National Agricultural Statistics Service	7, XXXVI
National and Community Service, Corporation for	45, XII, XXV
National Archives and Records Administration	2, XXVI; 5, LXVI; 36, XII
Information Security Oversight Office	32, XX
National Capital Planning Commission	1, IV
National Commission for Employment Policy	1, IV
National Commission on Libraries and Information Science	45, XVII
National Council on Disability	34, XII
National Counterintelligence Center	32, XVIII
National Credit Union Administration	12, VII
National Crime Prevention and Privacy Compact Council	28, IX
National Drug Control Policy, Office of	21, III
National Endowment for the Arts	2, XXXII
National Endowment for the Humanities	2, XXXIII
National Foundation on the Arts and the Humanities	45, XI
National Highway Traffic Safety Administration	23, II, III; 49, V
National Imagery and Mapping Agency	32, I
National Indian Gaming Commission	25, III
National Institute for Literacy	34, XI
National Institute of Standards and Technology	15, II
National Intelligence, Office of Director of	32, XVII
National Labor Relations Board	5, LXI; 29, I
National Marine Fisheries Service	50, II, IV, VI
National Mediation Board	29, X
National Oceanic and Atmospheric Administration	15, IX; 50, II, III, IV, VI
National Park Service	36, I
National Railroad Adjustment Board	29, III
National Railroad Passenger Corporation (AMTRAK)	49, VII
National Science Foundation	2, XXV; 5, XLIII; 45, VI
Federal Acquisition Regulation	48, 25
National Security Council	32, XXI
National Security Council and Office of Science and Technology Policy	47, II
National Telecommunications and Information Administration	15, XXIII; 47, III

Agency	CFR Title, Subtitle or Chapter
National Transportation Safety Board	49, VIII
Natural Resources Conservation Service	7, VI
Navajo and Hopi Indian Relocation, Office of	25, IV
Navy Department	32, VI
Federal Acquisition Regulation	48, 52
Neighborhood Reinvestment Corporation	24, XXV
Northeast Interstate Low-Level Radioactive Waste Commission	10, XVIII
Nuclear Regulatory Commission	5, XLVIII; 10, I
Federal Acquisition Regulation	48, 20
Occupational Safety and Health Administration	29, XVII
Occupational Safety and Health Review Commission	29, XX
Offices of Independent Counsel	28, VI
Oklahoma City National Memorial Trust	36, XV
Operations Office	7, XXVIII
Overseas Private Investment Corporation	5, XXXIII; 22, VII
Patent and Trademark Office, United States	37, I
Payment From a Non-Federal Source for Travel Expenses	41, 304
Payment of Expenses Connected With the Death of Certain Employees	41, 303
Peace Corps	22, III
Pennsylvania Avenue Development Corporation	36, IX
Pension Benefit Guaranty Corporation	29, XL
Personnel Management, Office of	5, I, XXXV; 45, VIII
Federal Acquisition Regulation	48, 17
Federal Employees Group Life Insurance Federal Acquisition Regulation	48, 21
Federal Employees Health Benefits Acquisition Regulation	48, 16
Pipeline and Hazardous Materials Safety Administration	49, I
Postal Regulatory Commission	5, XLVI; 39, III
Postal Service, United States	5, LX; 39, I
Postsecondary Education, Office of	34, VI
President's Commission on White House Fellowships	1, IV
Presidential Documents	3
Presidio Trust	36, X
Prisons, Bureau of	28, V
Privacy and Civil Liberties Oversight Board	6, X
Procurement and Property Management, Office of	7, XXXII
Productivity, Technology and Innovation, Assistant Secretary	37, IV
Public Contracts, Department of Labor	41, 50
Public and Indian Housing, Office of Assistant Secretary for	24, IX
Public Health Service	42, I
Railroad Retirement Board	20, II
Reclamation, Bureau of	43, I
Refugee Resettlement, Office of	45, IV
Relocation Allowances	41, 302
Research and Innovative Technology Administration	49, XI
Rural Business-Cooperative Service	7, XVIII, XLII
Rural Development Administration	7, XLII
Rural Housing Service	7, XVIII, XXXV
Rural Telephone Bank	7, XVI
Rural Utilities Service	7, XVII, XVIII, XLII
Saint Lawrence Seaway Development Corporation	33, IV
Science and Technology Policy, Office of	32, XXIV
Science and Technology Policy, Office of, and National Security Council	47, II
Secret Service	31, IV
Securities and Exchange Commission	17, II
Selective Service System	32, XVI
Small Business Administration	2, XXVII; 13, I
Smithsonian Institution	36, V
Social Security Administration	2, XXIII; 20, III; 48, 23
Soldiers' and Airmen's Home, United States	5, XI
Special Counsel, Office of	5, VIII
Special Education and Rehabilitative Services, Office of	34, III
State Department	2, VI; 22, I; 28, XI

Agency	CFR Title, Subtitle or Chapter
Federal Acquisition Regulation	48, 6
Surface Mining and Reclamation Appeals, Board of	30, III
Surface Mining Reclamation and Enforcement, Office of	30, VII
Surface Transportation Board	49, X
Susquehanna River Basin Commission	18, VIII
Technology Administration	15, XI
Technology Policy, Assistant Secretary for	37, IV
Technology, Under Secretary for	37, V
Tennessee Valley Authority	5, LXIX; 18, XIII
Thrift Supervision Office, Department of the Treasury	12, V
Trade Representative, United States, Office of	15, XX
Transportation, Department of	2, XII; 5, L
Commercial Space Transportation	14, III
Contract Appeals, Board of	48, 63
Emergency Management and Assistance	44, IV
Federal Acquisition Regulation	48, 12
Federal Aviation Administration	14, I
Federal Highway Administration	23, I, II
Federal Motor Carrier Safety Administration	49, III
Federal Railroad Administration	49, II
Federal Transit Administration	49, VI
Maritime Administration	46, II
National Highway Traffic Safety Administration	23, II, III; 49, V
Pipeline and Hazardous Materials Safety Administration	49, I
Saint Lawrence Seaway Development Corporation	33, IV
Secretary of Transportation, Office of	14, II; 49, Subtitle A
Surface Transportation Board	49, X
Transportation Statistics Bureau	49, XI
Transportation, Office of	7, XXXIII
Transportation Security Administration	49, XII
Transportation Statistics Bureau	49, XI
Travel Allowances, Temporary Duty (TDY)	41, 301
Treasury Department	5, XXI; 12, XV; 17, IV; 31, IX
Alcohol and Tobacco Tax and Trade Bureau	27, I
Community Development Financial Institutions Fund	12, XVIII
Comptroller of the Currency	12, I
Customs and Border Protection Bureau	19, I
Engraving and Printing, Bureau of	31, VI
Federal Acquisition Regulation	48, 10
Federal Claims Collection Standards	31, IX
Federal Law Enforcement Training Center	31, VII
Fiscal Service	31, II
Foreign Assets Control, Office of	31, V
Internal Revenue Service	26, I
International Investment, Office of	31, VIII
Monetary Offices	31, I
Secret Service	31, IV
Secretary of the Treasury, Office of	31, Subtitle A
Thrift Supervision, Office of	12, V
Truman, Harry S. Scholarship Foundation	45, XVIII
United States and Canada, International Joint Commission	22, IV
United States and Mexico, International Boundary and Water Commission, United States Section	22, XI
Utah Reclamation Mitigation and Conservation Commission	43, III
Veterans Affairs Department	2, VIII; 38, I
Federal Acquisition Regulation	48, 8
Veterans' Employment and Training Service, Office of the Assistant Secretary for	41, 61; 20, IX
Vice President of the United States, Office of	32, XXVIII
Vocational and Adult Education, Office of	34, IV
Wage and Hour Division	29, V
Water Resources Council	18, VI
Workers' Compensation Programs, Office of	20, I
World Agricultural Outlook Board	7, XXXVIII

List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations that were made by documents published in the FEDERAL REGISTER since January 1, 2001, are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to FEDERAL REGISTER pages. The user should consult the entries for chapters and parts as well as sections for revisions.

For the period before January 1, 2001, see the ''List of CFR Sections Affected, 1973–1985, and 1986–2000,'' published in eight separate volumes.

2001

48 CFR

66 FR Page

Chapter 9
931 Policy statement 19717
931.205–19 Added 4627
Regulation at 66 FR 4627 eff. date delayed 8746
931.205–33 Added 4627
Regulation at 66 FR 4627 eff. date delayed 8746
970 Policy statement 19717
970.3102–05–33 Added 4627
Regulation at 66 FR 4627 eff. date delayed 8746
970.5228–1 Amended 4627
Regulation at 66 FR 4627 eff. date delayed 8746
970.5244–1 Amended 4627
Regulation at 66 FR 4627 eff. date delayed 8746

2002

48 CFR

66 FR Page

Chapter 8
801.103–70 Redesignated as 801.104–70 49257
801.104–70 Redesignated from 801.103–70 49257
801.301–70 (b) introductory text added; (b)(1) revised; (c)(1) table amended (OMB numbers) 49258
816.213–70 Redesignated from 836.371; (b) and (d) amended 49259
825.901 (Subpart 825.9) Redesignated as Subpart 825.10 49258

48 CFR—Continued

66 FR Page

Chapter 8—Continued
825.901 Redesignated as 825.1001 49258
825.1001 (Subpart) Redesignated from Subpart 825.9; heading revised 49258
825.1001 Redesignated from 825.901; heading revised 49258
825.1102 (Subpart 825.11) Added 49258
832.111 (Subpart 832.1) Added 49258
836.3 (Subpart) Removed 49259
836.202 (b) and (c) amended 49258
836.203 Added 49258
836.208 Removed 49258
836.209 Revised 49258
836.211 Removed 49258
836.213–4 Added 49259
836.371 Redesignated as 836.213–70 49259
836.500 Redesignated from 852.236–70; (a) amended; heading revised 49260
836.501 Added 49259
836.521 Added 49259
836.570 Added 49259
836.571 Added 49259
836.572 Added 49259
836.573 Added 49259
836.574 Added 49259
836.575 Added 49259
836.576 Added 49259
836.577 Added 49259
836.578 Added 49259
836.579 Added 49259
836.602–1 (c) amended 49259
836.602–2 (a) and (b) amended; (c) added 49259
836.602–4 Amended 49260
836.602–5 Revised 49260

48 CFR—Continued

66 FR Page

Chapter 8—Continued
836.603 Added 49260
836.606 Added 49260
836.606–73 (a)(3)(iii) amended 49260
846.302–70 Amended 49260
846.312 Added 49260
846.710—846.710–71 (Subpart 846.7) Added 49260
852.236–70 Redesignated as 836.500 49260
852.236–71 Introductory text revised; clause amended 49260
852.236–72 Introductory text revised; clause amended 49260
852.236–74 Introductory text revised; clause amended 49261
852.236–75 Redesignated as 852.246–2 49261
852.236–76 Introductory text added 49261
852.236–77 Introductory text added; clause amended 49261
852.236–78 Introductory text added; clause amended 49261
852.236–79 Introductory text added 49261
852.236–80 Introductory text added; clause amended 49261
852.236–81 Heading and introductory text removed; clause amended 49261
852.236–82 Introductory text revised; clause amended 49261
852.236–83 Introductory text revised; clause amended 49262
852.236–84 Introductory text revised 49262
852.236–85 Introductory text added 49262
852.236–86 Revised 49262
852.236–88 Heading and introductory text revised; clause amended 49262
852.236–89 Revised 49263
852.236–91 Introductory text added; clause amended 49263
852.246–1 Added 49263
852.246–2 Redesignated from 852.236–75 and revised 49261

Chapter 9
902 Authority citation revised 14870
904.70 Amended; interim 14876
902.200 Revised 14870
904 Authority citation revised 14870, 14875
904.401 Revised; interim 14875
904.402 Revised; interim 14876

48 CFR—Continued

66 FR Page

Chapter 9—Continued
904.404 Amended 14871
(d)(1) and (2) heading revised; (d)(3) amended; (d)(5) added; interim 14876
904.702 (b) amended 14871
904.7000 Revised; interim 14876
904.7002 Amended; interim 14876
904.7003 (a) and (b) revised; interim 14876
904.7005 Removed; interim 14876
904.7100 Amended; interim 14876
904.7102 (b) amended 14871
Revised; interim 14876
904.7103 (a) amended; (b) revised; interim 14877
909 Authority citation revised 14870
909.403 Revised 14871
913 Revised 14871
914 Authority citation revised 14870
914.406 Redesignated as 914.407 14871
914.406–3 Redesignated as 914.407–3 14871
914.406–4 Redesignated as 914.407–4 and amended 14871
914.407 Redesignated from 914.406 14871
914.407–3 Redesignated from 914.406–3; new (e) amended 14871
914.407–4 Redesignated from 914.406–4 and amended 14871
915 Authority citation revised 14870
915.606 Amended 14871
916 Authority citation revised 14870
916.606 (Subpart 916.6) Added 14871
917 Authority citation revised 14870
917.602 (c) amended 14871
925 Authority citation revised 14870
925.901 (c) amended 14871
927 Regulation at 65 FR 68934 confirmed 48569
927.303 Regulation at 65 FR 68935 confirmed 48569
931 Authority citation revised 14870
931.205–19 (b) revised 14871
933 Authority citation revised 14870
933.103 (i)(2), (j) and (k) amended 14871
950 Authority citation revised 14870
950.104 Removed 14871
952 Authority citation revised 14870, 14875
952.202–1 Revised 14871
952.204–2 Clause amended; (j) revised; interim 14877
952.204–73 Revised; interim 14877
952.204–74 Removed; interim 14878

48 CFR—Continued

66 FR Page

Chapter 9—Continued
952.208–7 Introductory text amended 14872
952.217–70 Introductory text amended 14872
952.227–13 Introductory text amended 14872
952.231–71 Added 14872
952.233–2 Introductory text amended 14872
952.236–70 Removed 14873
952.236–72 Introductory text amended 14872
952.249–70 Removed 14873
952.250–72 Note II amended 14872
970.0404–1 Amended; interim 14878
970.0404–2 Revised; interim 14878
970.0404–3 (a) removed; (b) and (c) redesignated as (a) and (b) 14878
970.2701 Regulation at 65 FR 68935 confirmed 48569
970.2702 Regulation at 65 FR 68935 confirmed 48569
970.2702–1 Regulation at 65 FR 68935 confirmed 48569
970.2702–2 Regulation at 65 FR 68935 confirmed 48569
970.2702–3 Regulation at 65 FR 68935 confirmed 48569
970.2702–4 Regulation at 65 FR 68935 confirmed 48569
970.2702–5 Regulation at 65 FR 68935 confirmed 48569
970.2702–6 Regulation at 65 FR 68935 confirmed 48569
970.2703 Regulation at 65 FR 68935 confirmed 48569
970.2704 Regulation at 65 FR 68935 confirmed 48569
970.3102–05–53 Redesignated as 970.3102–05–70 14873
970.3102–05–70 Redesignated from 970.3102–05–53 14873
970.5204–71 Regulation at 65 FR 68936 confirmed 48569
970.5204–72 Regulation at 65 FR 68936 confirmed 48569
970.5204–94 Regulation at 65 FR 68936 confirmed 48569
970.5204–95 Regulation at 65 FR 68936 confirmed 48569
970.5204–96 Regulation at 65 FR 68936 confirmed 48569
970.5204–97 Regulation at 65 FR 68936 confirmed 48569
970.5204–98 Regulation at 65 FR 68936 confirmed 48569

48 CFR—Continued

66 FR Page

Chapter 9—Continued
970.5204–100 Regulation at 65 FR 68936 confirmed 48569
970.5204–101 Regulation at 65 FR 68936 confirmed 48569
970.5204–102 Regulation at 65 FR 68936 confirmed 48569
970.5204–103 Regulation at 65 FR 68936 confirmed 48569
970.5227–3 Clause and Alternate I amended 48570
970.5227–4 Clause revised 48570
970.5227–5 Clause amended 48570
970.5227–8 Clause revised 48570
970.5227–10 Clause amended 48571
970.5227–12 Clause amended 48571
970.5228–1 (e)(2), (h) introductory text and (j)(4) revised 14873
Chapter 15
1509 Authority citation revised 66344
1509.170–3 (a) and (c) revised; (d) added 66344
1509.170–4 (f) amended 66344
1509.170–5 (b) revised 66344
1509.170–8 (b) revised 66344
1509.209–76 Undesignated text, (a)(2), (b)(2) and (4) revised 66344
1552 Authority citation revised 66344
1552.209–76 Introductory text, (a)(2), (b)(2) and (4) revised 66344

2003

48 CFR

68 FR Page

Chapter 8
801.301–70 (c) table amended (OMB numbers) 3467
801.602–70 (a)(4)(vi) and (vii) revised 3468
801.602–71 (b)(2) revised 3468
801.602–72 (b) revised 3468
806.302–5 (b) revised; (c) redesignated as (d); new (c) added 3468
812.301 (c) revised; (g) added 3468
837.403 Amended 3469
852.207–70 Introductory text revised 3469
852.273–70 Added 3469
852.273–71 Added 3469
852.273–72 Added 3469
852.273–73 Added 3469
852.273–74 Added 3469
873 Added 3469

48 CFR—Continued

68 FR Page

Chapter 9

904 Regulation at 67 FR 14875 confirmed 56
Authority citation revised 68776
904.401 Regulation at 67 FR 14875 confirmed 56
904.402 Regulation at 67 FR 14876 confirmed 56
(c) added; interim 68776
904.404 Regulation at 67 FR 14876 confirmed 56
(d)(6) added; interim 68777
904.70 Regulation at 67 FR 14876 confirmed 56
904.7000 Regulation at 67 FR 14876 confirmed 56
904.7002 Regulation at 67 FR 14876 confirmed 56
904.7003 Regulation at 67 FR 14876 confirmed 56
904.7005 Regulation at 67 FR 14876 confirmed 56
904.7100 Regulation at 67 FR 14876 confirmed 56
904.7102 Regulation at 67 FR 14876 confirmed 56
904.7103 Regulation at 67 FR 14877 confirmed 56
923 Authority citation revised 6358
923.703 (Subpart 923.7) Added; eff. 10–1–03 52131
923.405 Added 6358
923.471 Removed 6358
923.7002 Redesignated as 923.7003; new 923.7002 added; interim 68777
923.7003 Redesignated from 923.7002; (f) and (g) added; interim 68777
936 Authority citation revised 6358
936.602–70 (a)(8) added 6358
952 Regulation at 67 FR 14875 confirmed 56
Authority citation revised 68776
952.204–2 Regulation at 67 FR 14877 confirmed 56
952.204–73 Regulation at 67 FR 14877 confirmed 56
952.204–74 Regulation at 67 FR 14878 confirmed 56
952.204–76 Added; interim 68777
952.223–77 Added; interim 68780
970 Authority citation revised 68781
970.0404–1 Regulation at 67 FR 14878 confirmed 56
970.0404–2 Regulation at 67 FR 14878 confirmed 56
970.0404–2 (c) added; interim 68781

48 CFR—Continued

68 FR Page

Chapter 9—Continued

970.0404–3 Regulation at 67 FR 14878 confirmed 56
970.1504–1–2 (i) added; interim 68781
970.1504–1–3 (c)(1) amended; interim 68781
970.1504–5 Heading and (c) revised; interim 68781
970.2303—970.2306 (Subpart 970.23) Heading revised 6359
970.2303–1 (c) added; interim 68782
970.2304–1 Revised 6359
970.2304–2 Revised 6359
970.2307 Added; eff. 10–1–03 52131
970.2307–1 Added; eff. 10–1–03 52131
970.2307–2 Added; eff. 10–1–03 52131
970.5215–1 (c)(3) amended; interim 68782
970.5215–3 Revised; interim 68782
970.5223–2 Revised 6359
970.5223–5 Added; eff. 10–1–03 52132

Chapter 10

Chapter 10 Revised 39855
1005.202 Regulation at 68 FR 39865 correctly designated 42815

2004

48 CFR

69 FR Page

Chapter 9

909.403 Revised; interim 75003
970.1707 Added; interim 75003
970.1707–1 Added; interim 75003
970.1707–2 Added; interim 75003
970.1707–3 Added; interim 75003
970.1707–4 Added; interim 75003
970.5217–1 Added; interim 75004

Chapter 14

1437 Added; interim 52609

2005

48 CFR

70 FR Page

Chapter 9

909.403 Regulation at 69 FR 75003 confirmed 71039
935.070 Added; interim 37015
935.071 Added; interim 37015
952.235–71 Added; interim 37015
970.1707 Regulation at 69 FR 75003 confirmed 71039
970.1707–1 Regulation at 69 FR 75003 confirmed 71039
970.1707–2 Regulation at 69 FR 75003 confirmed 71039

48 CFR—Continued

70 FR Page

Chapter 9—Continued
970.1707–3 Regulation at 69 FR 75003 confirmed 71039
970.1707–4 Regulation at 69 FR 75003 confirmed 71039
970.5204–3 (b)(1) revised; interim 37016
970.5217–1 Regulation at 69 FR 75004 confirmed 71039

Chapter 12
1201—1253 (Ch. 12) Revised; interim 6507
Regulation at 70 FR 6507 confirmed 76417
1201.105-2 (a) amended 76417
1202.1 Amended 76417
1217.7001 (e) amended 76417
1228.306-70 (d) revised 76418
1252 Heading revised 76418
1252.217-75 Introductory text amended 76418
1252 Appendix revised 76418

Chapter 14
1437 Revised 29210
1452 Authority citation revised 29211
1452.237–71 Added 29211

2006

48 CFR

71 FR Page

Chapter 9
901 Authority citation revised 16243
901.105 Amended 16243
904.404 (d)(7) added 40885
950.7000 Existing section removed; reinstated; CFR correction 19829
950.7001 Existing section removed; reinstated; CFR correction 19829
952.204-77 Added 40885
970.1504–4–1 Removed 16243
970.1504–4–2 Removed 16243
970.1504–4–3 Removed 16243
970.1504–5 (b) removed; (c), (d) and (e) redesignated as (b), (c) and (d) 16243
970.5203–1 Clause amended 16243
970.5203–2 Clause amended 16243
970.5215–2 Removed 16243
970.5244–1 Clause amended 16243

2007

48 CFR

72 FR Page

Chapter 7
701.105 (c) amended 19670
701.301 (a) introductory text amended 19670
701.303 (c) amended 19670
701.470 (a)(2), (b)(1), (2), (3)(i), (e) and (f)(1) amended 19670
701.601 (a)(1), (2) introductory text and (c)(2) amended 19670
701.602–3 (b)(2) amended 19670
702.170–3 (a) amended 19670
702.170–9 Amended 19670
702.170–10 (a)(1)(i) amended 19670
705.502 (a) amended 19670
706.501 Amended 19670
709.403 Amended 19670
709.503 Amended 19670
714.406–3 Amended 19670
714.406–4 Amended 19670
716.303 (c) amended 19670
719 Authority citation revised 32543
719.273—719.273–11 (Subpart 719.273) Added 32543
726.7005 Amended 19670
727 Added; eff. 10–18–07 53163
728.105–1 (b)(4) amended 19670
731.109 Amended 19670
731.205–6 (b) revised 19669
731.371 (b)(1) revised 19669
731.770 (a) amended 19670
733.103–71 (a) and (c) amended 19670
733.103–72 (a) amended 19670
733.103–73 (h) and (i) amended 19670
734.002–70 Amended 19670
742.1170—742.1170–4 (Subpart 742.11) Added; eff. 10–18–07 53163
749.111–70 (a)(1) and (b) amended 19670
749.111–71 (b) amended 19670
750.7105 Amended 19670
750.7109–1 Amended 19670
750.7110–1 Amended 19670
750.7110–2 Amended 19670
750.7110–3 Introductory text amended 19670
750.7110–4 Amended 19670
752.219–70 Added 32546
752.219–71 Added 32546
752.227–14 Added; eff. 10–18–07 53164
752.228–70 Clause amended 19669
752.232–7 Removed; eff. 10–18–07 53164
752.242–70 Added; eff. 10–18–07 53164
752.247–70 (c)(1) amended 19670
752.7002 (p)(1)(i) amended 19670
752.7007 Clause amended 19669

48 CFR—Continued

72 FR Page

Chapter 7—Continued
752.7016 Removed 19670
Chapter 7 Appendixes D and J amended 19670
Chapter 9
913.402 (Subpart 913.4) Removed 29434
970.1170 Added 29434
970.1170–1 Added 29434
970.1170–2 Added 29434
970.3270 (a)(2)(i) designation and (ii) removed 29081
970.3770–2 Removed 29434
970.5203–1 (a)(4) amended 29081
Clause correctly amended 39761
970.5211–1 Added 29434
970.5232–3 Clause amended; Alternate II removed 29081
970.5237–2 Removed 29434

2008

(Regulations published from January 1, 2008, through October 1, 2008)

48 CFR

73 FR Page

Chapter 8
801—873 (Ch. 8) Revised 2717
Chapter 9
911 Authority citation revised 10985
911.600 Amended 10985
911.602 (d) removed 10985
911.604 (d) and (e) removed 10985
952 Authority citation revised 10985
952.211–70 Revised 10985
952.211–71 Revised 10985