

governments in the aggregate or to the private sector.

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866 review.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Note: Incorporation by reference of the State Implementation Plan for the State of California was approved by the Director of the Federal Register on July 1, 1982.

Dated: September 5, 1995.
Felicia Marcus,
Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c)(183)(i)(A)(13) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(183) * * *

(i) * * *

(A) * * *

(13) Rule 67.15, adopted on December 18, 1990.

* * * * *

[FR Doc. 95-23822 Filed 9-25-95; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 89-580; RM-6977, RM-7177, RM-7446]

Radio Broadcasting Services; Elkins, WV; Mountain Lake Park and Westernport, MD

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission denied an application for review filed by Southern Highlands, Inc., which argued that a condition be placed on Marja's construction permit for Channel 255B1 at Elkins, West Virginia, requiring it to operate with maximum power and antenna height for Class B1 stations. In doing so, the Commission affirmed the *Memorandum Opinion and Order* on reconsideration in this proceeding, 57 FR 40342, September 3, 1992, which had granted in part Southern's petition for reconsideration and affirmed in part the *Report and Order*, 56 FR 52478, October 21, 1991. The *Memorandum Opinion and Order* rearranged the allotment plan adopted by the *Report and Order* in order to permit 6 kilowatt operation at Mountain Lake Park on Channel 283A in lieu of Channel 239A, and at Westernport on Channel 266A in lieu of Channel 283A. With this action, the proceeding is terminated.

EFFECTIVE DATE: September 26, 1995.

FOR FURTHER INFORMATION CONTACT: J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order*, MM Docket No. 89-580, adopted August 21, 1995 and released September 21, 1995. The full text of this Commission decision is available for inspection and copying during normal business hours in Commission's Reference Center (Room 239), 1919 M Street, NW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95-23772 Filed 9-25-95; 8:45 am]

BILLING CODE 6712-01-F

DEPARTMENT OF ENERGY

48 CFR Parts 933 and 970

RIN 1991-AB20

Acquisition Regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) amends the Department of Energy Acquisition Regulation (DEAR) to modify certain requirements for management and operating contractor subcontracting. This rule incorporates a revised clause and a new clause which minimizes obligations placed upon contractor purchasing systems and streamlines flowdown requirements for subcontracts awarded by management and operating contractors.

EFFECTIVE DATE: October 26, 1995.

FOR FURTHER INFORMATION CONTACT: James J. Cavanagh, Office of Contractor Management and Administration (HR-55), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585; telephone 202-586-8257.

SUPPLEMENTARY INFORMATION:

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I. Background

On March 2, 1995, DOE published in the Federal Register (60 FR 11646) a notice of proposed rulemaking (NPR). That notice proposed to amend the DEAR to identify certain purchasing system objectives and standards, eliminate the application of the "Federal norm," place greater reliance on commercial practices, and remove the provisions concerning General Accounting Office protest jurisdiction over management and operating contractor subcontract awards. The March 2, 1995 notice also reserved for further analysis the removal of DEAR Section 970.7104 and advised that an amendment to the rulemaking would be issued in the event portions of DEAR Section 970.7104 were to be retained and redesignated. Except for the

resolution of the analysis of DEAR Section 970.7104, the March 2, 1995 NOPR was finalized on June 2, 1995 (60 FR 28737).

On April 27, 1995, DOE published in the Federal Register (60 FR 20663) a notice amending the March 2, 1995 NOPR. Based on the Department's analysis, it was proposed to delete some items contained in DEAR Section 970.7104 and reorganize the remaining items, which were proposed to be retained in two subsections: a revised clause at 970.5204-22 and a new clause 970.5204-44. This final rule completes the process for revising DEAR Part 970.71 which had been initiated with the March 2, 1995 NOPR.

It is the intention of the Department to incorporate the revised and new clauses provided in today's final rule into existing management and operating contracts as soon as practicable after the effective date for today's rule.

II. Disposition of Comments

Comments on the April 27, 1995, amendment to the notice of proposed rulemaking were received from a total of seven entities: one is a DOE contracting activity, four are organizations awarded management and operating contracts, and two are entities which did not identify any affiliation with the Department. Some comments received are not discussed in the disposition of comments because they were nonsubstantive or editorial, offered no recommendations for consideration, or made recommendations outside the scope of this rulemaking. In addition, certain comments offered on the March 2, 1995 proposed rulemaking are discussed here because they address the disposition of comments which were related to Section 970.7104. It should be noted that the citations referenced in the disposition of comments are those reflected in the Federal Register publication dated April 27, 1995 (60 FR 20663). As a result of revisions incorporated in the final rule, some of the citations have changed.

Five commenters expressed opinions about the deletion of Section 970.7104 and the relocation of requirements on many of its subjects to the two clauses, the existing clause at 970.5204-22 and a new clause 970.5204-44. Two of the commenters stated that they support the goal of this rulemaking in making it easier for DOE's management and operating contractors to subcontract. However, because most of the requirements in Section 970.7104 have been redesignated and not eliminated, these two commenters believe that Section 970.7104 should be left intact. Two commenters believe that the added

portions of the clause at 970.5204-22 should be retained but the new clause at 970.5204-44 should be deleted. A fourth commenter believes that DOE should require that subcontracts include the FAR subcontracts clause at 52.244-2 only, and the final commenter believes that, "Those mandatory clauses laden the 'new commercial contracts' with far too many bureaucratic hurdles and far too many miles of red tape" and should therefore be deleted.

Regarding the comments cited above, the purposes of the rulemakings should be revisited. The first objective was to eliminate the overarching "Federal norm" process requirements from the preaward stages of the management and operating contractor's purchasing system, which were located in DEAR subparagraph 970.7103(c)(3). The portion of Subpart 970.71 containing the "Federal norm" requirement was deleted by the final rule published on June 2, 1995 (60 FR 28737) and replaced with purchasing system objectives which, inter alia, place greater reliance on commercial practices. The second purpose of the rulemaking dealt with reassessing the need for and organization of certain specific requirements placed upon the purchasing systems of the Department's management and operating contractors.

The Department has performed a detailed review of each of the requirements of Section 970.7104 as it stood before this rulemaking. Unnecessary provisions were deleted, both in the context of entire subparagraphs and portions of subparagraphs. However, those provisions that have been retained in the clauses represent either statutory or regulatory flowdown requirements or a policy decision that the provision should be applied to the Department's M&O contracts or subcontracts. For example, the Department has retained the controls on the contractors' purchase and lease of real property as a matter of policy, respecting 41 USC 14 which requires agencies to have specific statutory authority for the purchase of real property. The Department believes that most of the provisions previously cited at Section 970.7104 are contractual obligations which are, therefore, more appropriately suited for a contract clause. To implement the changes made in this rulemaking, the process-oriented requirements applicable to contractors' purchasing systems are retained in a revised clause at 970.5204-22, and the flowdown requirements for subcontracts awarded by management and operating contractors are listed in the new clause at 970.5204-44.

Another commenter suggested the substitution of "may" for "will" and "if any" after "clauses" in the third sentence of paragraph (a) of the clause at 970.5204-22. The commenter believed that the proposed changes would allow inclusion of the clause in management and operating contracts with nonprofit organizations as well as profit-making firms, with the assumption that only profit-making contracts will have performance criteria and measures. That assumption is not correct. We expect all management and operating contracts to have performance criteria and measures and have not made the change.

One commenter asserts that paragraph (c), Acquisition of Real Property, of the clause at 970.5204-22 is unnecessary except as it may modify the clause at 952.217-70, Acquisition of Real Property. The clause at 952.217-70 does not provide sufficient guidance for DOE's management and operating contractors to properly treat the process of determining whether to purchase or lease real property. We have not made any changes.

Two commenters questioned the necessity of retaining any provision for notice of subcontract awards as is reflected in paragraph (d) of the revised clause at 970.5204-22. The requirement for notice arises in Section 304(b) of the Federal Property and Administrative Services Act of 1949 ("Act"), 41 U.S.C. 254(b). DOE has used certain statutory authorities available to it (Section 602(d)(13) of the Act (40 U.S.C. 474(d)(13)) to limit the application of the advance notice requirement to the specific instances listed at DEAR Section 970.7109. Those instances are important and are being retained. We have made no change.

A commenter recommends that paragraph (e), Audits of Subcontractors, of the proposed clause at 970.5204-22 be deleted as unnecessary if the contractor includes FAR 15.215-2 in "appropriate subcontracts." We believe the commenter intended to refer to FAR 52.215-2, the Audit Negotiation clause. We find little similarity between the two provisions. Paragraph (e) provides for pre-award audits; authorization of management and operating contractors to use DCAA for audits; and directs the applicable cost principles. The FAR provides the contracting officer the right to examine and audit the contractors books and records. We have made no change.

Another commenter recommends the deletion of the second sentence of paragraph (e)(4) of the clause 970.5204-22 relating to allowable costs regarding the purchase or transfer from contractor-

affiliated sources. These regulatory controls prevent the conflict of interest inherent in a management and operating contractor's purchasing goods and services in support of the DOE facility from affiliated organizations. The Department has reviewed this matter and has chosen to make no change.

A commenter suggests deleting paragraph (f), Bonds and Insurance, of clause 970.5204-22 and adding it instead to the clause 970.5204-32, Required bond and insurance—exclusive of Government property. The commenter explains the logic of the suggestion is "to help bring the M&O Contractor's acquisition function into the mainstream of activity, rather than being considered a stepchild." It is unclear how this proposed change will accomplish the intended purpose. The clause at 970.5204-32 is designed to be included into the prime contract, and it controls the acquisition of bonds and insurance by the prime contractor. The provision listed in paragraph (f) establishes responsibilities and authorities in requiring bonds and insurance from subcontractors. We have made no change.

The same commenter recommends the deletion of paragraph (g), Buy American, of clause 970.5204-22 in the belief that the clause in the prime contract is sufficient. We disagree. The additional guidance on the treatment of the responsibilities of the Buy American Act is necessary. The FAR clause is drafted to deal with situations in which a Government contractor supplies goods to a Federal agency. DOE M&O contractors do not perform that function; instead, they purchase goods in the management and operation of the specific DOE facility. The Department, however, has made two changes to paragraph (g) of the clause 970.5204-22: (1) To include a statement on determinations of nonavailability which had previously been cited at Subsection 970.7104-22 and (2) to include reference to the DEAR clause at 970.5204-3 for construction materials.

The same commenter makes a series of comments that share the same theme. The commenter suggests that paragraphs (b), Acquisition of Utility Services; (h), Construction and Architect Engineer Contracts; (m), Leasing of Motor Vehicles; (n), Management, Acquisition, and Use of Information Resources; (p), Purchase of Special Items; (q), Purchase vs. Lease Determinations; (s), Set-Off and Assigned Subcontractor Proceeds; and (w), Unclassified Controlled Nuclear Information, be deleted from the clause 970.5204-22 and remain in Section 970.7104. We have made no

change since the Department has chosen to eliminate Section 970.7104.

The same commenter objects to the treatment of Contractor-Affiliated Sources in paragraph (i) of the clause 970.5204-22 as continuing "the apparent bias against large multi-segmented contractors." There is no bias in these provisions, apparent or otherwise. This area is of significance in maintaining credible oversight of \$8 billion of subcontractor purchases by DOE's M&O contractors. This provision is a reference to the authority for, and limits of, such purchases stated at Section 970.7105. We have made no change.

The same commenter recommends the deletion of paragraph (j), Contractor-Subcontractor Relationship, of the clause 970.5204-22, as unnecessary. The Department believes that this paragraph provides clarity regarding the obligations of, and commitments made by, the prime contractor. We have made no change.

The same commenter suggests the deletion of paragraphs (k), Government Property; (o), Priorities, Allocations, and Allotments; (r), Quality Assurance; (u), Suspended, Debarred, or Ineligible Contractors; and (v), Termination, of the clause 970.5204-22. This commenter believes that each of these is unnecessary or redundant or both. We disagree, believing the guidance on most subjects to be necessary in the context of the award of individual subcontracts by a DOE M&O contractor. We have not made the changes recommended, except that paragraph (u) relating to Suspended, Debarred, or Ineligible Contractors has been deleted. To accomplish the intended purpose, a reference to the FAR counterpart (FAR 52.209-6) has been inserted at Section 970.5204-7.

The same commenter recommends the deletion of paragraph (t), Strategic and Critical Materials, of the clause 970.5204-22 because its application "is not limited to subcontracting procedures." The Department disagrees. This provision sets forth authority for access to strategic and critical materials in the fulfillment of needs in the performance of the prime contract. We have made no change.

The same commenter questions the language of paragraph (l), Indemnification, of the clause 970.5204-22. We agree that, as proposed, the meaning of the provision was not clear. We have made editorial changes to assure it conveys its intended meaning that, other than the statutory Price-Anderson indemnity, M&O contractors may not offer

subcontractors any indemnification without the required authorization.

Two commenters recommend that Section 970.7110, Nuclear Material Transfers, be incorporated into the clause at 970.5204-22. We agree that this choice is reasonable, but believe the subject to be sufficiently critical and special to warrant the coverage as it exists. We have made no change.

Three commenters oppose the creation of the new clause 970.5204-44, believing the identification of the flowdown provisions should be left to the contractors. The Department disagrees. A list of the flowdown provisions and reference to the regulations controlling their application simplifies the subcontracting process, clarifies the contractors' obligations in the award of subcontracts, and provides a meeting of the minds between DOE and the M&O contractor about the treatment of the subjects covered in the clause 970.5204-44 in the award of subcontracts.

Another commenter recommends the deletion of the following seven paragraphs in the new clause 970.5204-44 in order to better establish commercial acquisition systems: (4), Contract Work Hours and Safety Standards Act; (5), Cost or Pricing Data; (8), Davis Bacon Labor Standards for Construction; (11) Equal Employment Opportunity; (16), Organizational Conflicts of Interest; (22) Service Contract Act; and (23), Small Business and Small Disadvantaged Business Concerns. Each of these provisions either require treatment of the subject in recognition that the clauses themselves may not apply to the DOE M&O contractor, but do apply to subcontracts awarded by the M&O contractor, e.g., Davis Bacon provisions; or are statutory flowdown requirements applicable to subcontractors. We have made no change.

One commenter asks where the material originally at paragraph 970.7104-28(f) is to be relocated. That material is incorporated at paragraph (h) of the clause at 970.5204-22. The same commenter has recommended that the subject of differing site conditions be covered. The Department disagrees, believing it is more appropriate to leave such a matter to the discretion of the M&O contractor.

In reviewing the April 27, 1995 amendment to the NOPR, it was noted that certain references had not been revised, information had inadvertently been omitted, or technical changes were required. Therefore, the following additional revisions are being made in this final rule:

(1) Part 933 is amended to conform section 933.104 with changes finalized in the June 2, 1995, final rule.

(2) The material proposed to be relocated to 970.1901 has been deleted. The two paragraphs were intended as communication to DOE contracting officers and we have decided to communicate this information internally by other means.

(3) The prescription for Subsection 970.5203-1, Covenant against contingent fees, is amended to delete a flowdown requirement.

(4) The introductory text for the clauses at 970.5204-21, 970.5204-24, 970.5204-45 and 970.5204-50 which referenced Section 970.7104 is removed.

(5) The clause 970.5204-22 is amended at paragraphs (a) and (d); requirements previously cited at paragraph (d), Advance notice of proposed subcontract awards, relating to file documentation is relocated to paragraph (a).

(6) The clause 970.5204-22 is amended at paragraphs (e)(3) and (e)(4). The last sentence of paragraph (e)(4), beginning with "In no case, however, * * *" is moved to the end of paragraph (e)(3). The change corrected an error in the Amendment to the NOPR published on April 27, 1995.

(7) Clause 970.5204-22 is amended at paragraph (f), Bonds and Insurance, to include a discussion on performance bonds which had inadvertently been deleted. The paragraph on corporate sureties has been rewritten to simplify the language.

(8) Paragraph (g) of the clause at 970.5204-22 has been changed to allow the Head of Contracting Activity rather than the Procurement Executive to approve management and operating contractor determinations of nonavailability. The threshold for referral to the HCA has been increased from \$25,000 to \$100,000.

(9) Clause 970.5204-22 is amended at paragraph (n) to retain the discussion of make-or-buy plans that had been set forth at now deleted paragraph 970.7104-8(b).

(10) Paragraph (v), Suspended, Debarred or Ineligible Contractors, is deleted from clause 970.5204-22 and a new clause is inserted at 970.5204-7 to provide instructions for the inclusion of FAR clause 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, in the management and operating contractor prime contract. This change is made to provide for consistency with FAR requirements.

(11) Subparagraph (b)(15), Officials Not to Benefit, of clause 970.5204-44 is

removed as proposed in the Amendment to the NOPR published on April 27, 1995.

(12) Subparagraph (b)(24), Taxes, is amended to provide requirements for both cost-reimbursement and fixed-price subcontracts.

In addition, the Department streamlined the wording of the requirements listed in paragraphs (b) through (w) of the clause 970.5204-22. These revisions have not resulted in substantive changes to the requirements as stated in the April 27, 1995 Amendment to the NOPR.

III. Procedural Requirements

A. Review Under Executive Order 12866

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

B. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR Parts 1500-1508), the Department has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR Part 1021, National Environmental Policy Act Implementing Procedures (Categorical Exclusion A6), the Department of Energy has determined that this final rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

C. Review Under the Paperwork Reduction Act

To the extent that new information collection or record keeping requirements are imposed by this rulemaking, they are provided for under Office of Management and Budget paperwork clearance package No. 1910-0300. No new information collection is proposed by this rule.

D. Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96-354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. DOE concluded that the rule will have no impact on interest rates, tax policies

or liabilities, the cost of goods or services, or other direct economic factors. It will also not have any indirect economic consequences, such as changed construction rates. Accordingly, DOE certified that this rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared. DOE did not receive any comments on this certification.

E. Review Under Executive Order 12612

Executive Order 12612 entitled "Federalism," 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. The Department of Energy has determined that this final rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that this rule meets the requirements of sections 2(a) and 2(b) of Executive Order 12778.

List of Subjects in 48 CFR Parts 933 and 970

Government procurement.

Issued in Washington, D.C. on September 20, 1995.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

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

PART 933—PROTESTS, DISPUTES, AND APPEALS

1. The authority citation for Part 933 continues to read as follows:

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

§ 933.104 [Amended]

2. Section 933.104, Protests to GAO, is amended in paragraph (b)(1), by removing from the first sentence the phrase "Except in the case of a subcontract level protest," and by removing the last sentence of the paragraph, and paragraph (c), Protests after award, remove paragraph (c)(1) and remove the paragraph designation (c)(2).

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

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

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

§ 970.5203-1 [Amended]

4. In Section 970.5203-1, Covenant against contingent fees, the phrase "with the addition of the following paragraph," is removed and clause paragraph (c) is removed.

5. Section 970.5204-7, is added to read as follows:

§ 970.5204-7 Protecting the Government's interest when subcontracting with contractors debarred, suspended, or proposed for debarment.

Include the clause at FAR 52.209-6 as prescribed in FAR 9.409(b).

§ 970.5204-21 [Amended]

6. Section 970.5204-21, Property, the phrase "As prescribed in 970.7104-43," is removed from the introductory text.

7. Section 970.5204-22, is revised to read as follows:

§ 970.5204-22 Contractor purchasing system.

Insert the following clause.

Contractor Purchasing System (Oct 1995)

(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, 48 CFR (DEAR) 970.5204-44, and 48

CFR (DEAR) 970.71. The contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to DOE in accordance with 48 CFR (DEAR) 970.7102. 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. The contractor's approved purchasing system and methods shall include the requirements set forth in paragraphs (b) through (w) of this clause.

(b) *Acquisition of Utility Services.* Utility services shall be acquired in accordance with the requirements of 48 CFR (DEAR) 970.0803.

(c) *Acquisition of Real Property.* Real property shall be acquired in accordance with 48 CFR (DEAR) Subpart 917.74.

(d) *Advance Notice of Proposed Subcontract Awards.* Advance notice shall be provided in accordance with 48 CFR (DEAR) 970.7109.

(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 FAR Part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by 48 CFR (DEAR) Part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 48 CFR (DEAR) 970.7105 and 48 CFR (DEAR) 970.3102-15(b).

(f) *Bonds and Insurance.*

(1) The contractor shall require performance bonds in penal amounts as set forth in FAR 28.102-2(a) for all fixed priced and unit-priced construction subcontracts in excess of \$25,000. The contractor shall consider the use of performance bonds in fixed price nonconstruction subcontracts, where appropriate.

(2) 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, for all fixed price, unit-price and cost-reimbursement construction subcontracts in excess of \$25,000. The penal amounts shall be determined as set forth in FAR 28.102-2(b).

(3) 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 (DEAR) 970.5203-3 and 48 CFR (DEAR) 970.5204-3. 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 (DEAR) 970.7105.

(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 FAR Part 45, 48 CFR (DEAR) 945, the Federal Property Management Regulations 41 CFR 101, the DOE Property Management Regulations 41 CFR 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 Procurement Executive.

(m) *Leasing of Motor Vehicles.* Contractors shall comply with FAR 8.11 and 48 CFR (DEAR) 908.11.

(n) *Make-or-Buy Plans.* Acquisition of property and services shall be obtained on a least-cost basis, consistent with the requirements of the Make-or-Buy Plan clause of this contract and the contractor's approved make-or-buy plan.

(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 (DEAR) 908.71 and the Federal Property Management Regulations, 41 CFR 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 (DEAR) 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 FAR 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 FAR 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.

§ 970.5204-24 [Amended]

9. Section 970.5204-24, Subcontractor cost or pricing data, the phrase "As prescribed in 970.7104-11," is removed from the introductory text.

10. Add new Section 970.5204-44, Flowdown of contract requirements to subcontracts, to read as set forth below:

§ 970.5204-44 Flowdown of contract requirements to subcontracts.

Insert the following clause.

Flowdown of Contract Requirements to Subcontracts (Oct 1995)

(a) The contractor shall include the clauses in paragraph (b) of this clause in appropriate subcontracts.

(1) To the extent that the clause is included in this prime contract, the contractor shall comply with that portion of the clause that directs application to subcontracts.

(2) To the extent that the clause is not included in this prime contract, or where it

is included but there is no instruction for treatment in subcontracts, the contractor shall include the clause in accordance with applicable regulatory guidance which would apply if the subcontract were a prime contract with the Federal government.

(3) In all cases, where a regulation is cited, the contractor shall comply with the regulation in administration of the related clause.

(b) Clauses and related regulations.

(1) *Air Transportation by U.S.-Flag Carriers.* Clause at FAR 52.247-63.

(2) *Anti-Kickback Act of 1986.* Clause at FAR 52.203-7.

(3) *Clean Air and Water.* Clause at FAR 52.223-2, and follow the requirements of FAR 23.1.

(4) *Contract Work Hours and Safety Standards Act.* Clause at FAR 52.222-4, and follow the requirements of FAR 22.3.

(5) *Cost or Pricing Data.* Clause at 48 CFR (DEAR) 970.5204-24.

(6) *Cost and Schedule Control Systems.* Clause at 48 CFR (DEAR) 970.5204-50.

(7) *Cost Accounting Standards.* Clause at FAR 52.230-2, as prescribed in 48 CFR (DEAR) 970.30.

(8) *Davis-Bacon Act.* Clauses as directed at FAR 22.407, and follow the requirements of FAR 22.4 to the same extent that they would apply if the subcontract had been directly awarded by DOE. 48 CFR (DEAR) Subpart 922.4 and 48 CFR (DEAR) 970.2273 provide guidance to assist in determining the applicability of these regulations.

(9) *Employment of the Handicapped.* Clause at FAR 52.222-36, and follow the requirements of FAR 22.14.

(10) *Environmental and Occupational Safety and Health.* Clauses as prescribed in 48 CFR (DEAR) 970.2303-2.

(11) *Equal Employment Opportunity.* Clauses as prescribed in FAR 22.810, as applicable, and follow the requirements of FAR 22.8, 48 CFR (DEAR) 922.8, E.O. 11246 and 40 CFR Part 60.

(12) *Examination of Records by Comptroller General.* Clause at FAR 52.215-1.

(13) *Foreign Travel.* Clause at 48 CFR (DEAR) 970.5204-52.

(14) *Nuclear Hazards Indemnity.* Clause at 48 CFR (DEAR) 970.2870.

(15) *Organizational Conflicts of Interest.* Clause at 48 CFR (DEAR) 952.209-72.

(16) *Patent, Data and Copyrights.* Appropriate clauses as required by 48 CFR (DEAR) Parts 927 and 970.

(17) *Printing.* Clause at 48 CFR (DEAR) 970.5204-19.

(18) *Privacy Act.* Clauses at FAR 52.224-1 and FAR 52.224-2, and follow the requirements of FAR 24.1.

(19) *Record Retention.* Clause at 48 CFR (DEAR) 970.5204-9.

(20) *Safeguarding Classified Information.* Appropriate clauses as prescribed at 48 CFR (DEAR) 970.0404.

(21) *Service Contract Act.* Clauses at FAR 52.222-40 and FAR 52.222-41.

(22) *Small Business and Small Disadvantaged Business Concerns.* Clause at FAR 52.219-9.

(23) *Special Disabled and Vietnam Era Veterans.* Clause at FAR 52.222-35, and

follow the requirements of FAR Subpart 22.13.

(24) *Taxes*. Clause similar to 48 CFR (DEAR) 970.5204-23 cost-reimbursement. An appropriate tax clause covering tax matters should also be included in fixed-price subcontracts.

(25) *Termination*. Appropriate clause or clauses as set forth at FAR 52.249-1 through 52.249-14.

(c) *Other*. Omission from the foregoing list of contract flowdown provisions shall not be construed as waiving a requirement for the contractor to comply with a flowdown requirement for subcontracts appearing elsewhere in this contract.

§ 970.5204-45 [Amended]

11. Section 970.5204-45, Termination, the phrase "As prescribed in 970.7104-30," is removed from the introductory text.

§ 970.5204-50 [Amended]

12. At 970.5204-50, Cost and schedule control systems, remove the phrase "As prescribed in 970.7104-40," from the introductory text.

§ 970.7104 [Removed and Reserved]

13. Section 970.7104, Conditions of purchasing by management and operating contractors, including

970.7104-1 through 970.7104-47, is removed and reserved.

[FR Doc. 95-23739 Filed 9-25-95; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 92-29; Notice 6]

RIN 2127-AAOO

Federal Motor Vehicle Safety Standards; Stability and Control of Medium and Heavy Vehicles During Braking; Correction

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule; correction of effective dates.

SUMMARY: On March 10, 1995, NHTSA published a final rule that amended Standard No. 105, *Hydraulic Brake Systems*, and Standard No. 121, *Air Brake Systems*, to require medium and heavy vehicles to be equipped with an antilock brake system (ABS) to improve

the directional stability and control of these vehicles during braking. (60 FR 13216) The agency has since learned that the dates section of that document was incomplete because it does not set effective dates for the changes to Part 571.3 and Standard No. 101. Today's document corrects the dates section to address the effective dates for these amendments.

EFFECTIVE DATES: Effective September 26, 1995, the document published at 60 FR 13216 (March 11, 1995) is effective on March 1, 1999 for amendments to 49 CFR 571.105 and March 1, 1997 for amendments to 49 CFR 571.121. The amendments to 49 CFR Part 571.3 and to 49 CFR 571.101 become effective September 26, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Marvin L. Shaw, Office of Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590 (202-366-2992).

Issued on: September 21, 1995.

Barry Felrice,

Associate Administrator for Safety Performance Standards.

[FR Doc. 95-23877 Filed 9-25-95; 8:45 am]

BILLING CODE 4910-59-P