

government against a contractor" or "a decision by the contracting officer." However, a contractor's disagreement, and refusal to comply, with a final decision under this part could result in the contracting officer's decision to disallow certain costs or terminate the contract for default. In such case, the contractor could file a claim under the disputes procedures of the contract.

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DEPARTMENT OF ENERGY

48 CFR Parts 922, 952, and 970

RIN 1991-AB36

Acquisition regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) proposes to amend the Department of Energy Acquisition Regulation (DEAR) to implement a recommendation of its Department-wide contract reform initiative concerning costs in whistleblower actions. The effect of the rule, when finalized, will be to clarify those costs that are allowable and those that are unallowable in processing whistleblower cases.

DATES: Written comments should be forwarded no later than March 6, 1998.

ADDRESSES: Comments are to be submitted to P. Devers Weaver, Office of Policy (HR-51), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0705, facsimile 202-586-0545.

FOR FURTHER INFORMATION CONTACT: P. Devers Weaver, Office of Policy (HR-51), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0705, telephone 202-586-8250.

SUPPLEMENTARY INFORMATION:

I. Background

II. Section-by-Section Analysis

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B. Review Under Executive Order 12866

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F. Review Under the Regulatory Flexibility Act

G. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996

H. Review Under the Unfunded Mandates Reform Act of 1995

IV. Opportunities for Public Comment

V. Opportunity for Public Hearing

I. Background

An action item under the Department's Contract Reform Team Report was the development of an explicit policy concerning the allowability of defense costs in "whistleblower" cases. On October 17, 1994, the Secretary of Energy publicly released and solicited comments on a set of proposals concerning whistleblower reforms. These proposals were designed to strengthen the ability of the Department's federal and contractor employees to raise concerns relating to waste, fraud and abuse; environment, safety and health; and other matters. One of these proposals called for the development of provisions to limit the Department's reimbursement of contractor litigation costs in whistleblower cases. This rulemaking contains a new clause, Costs Associated with Whistleblower Actions, which is a proposal for implementation of the contractor employee whistleblower reform initiative in the Department's contracting activities.

II. Section-by-Section Analysis

Section 922.7101 and subsection 952.222-70 are amended to add a new clause prescription.

Section 970.3103, Contract clauses, is amended to add a new paragraph (e) to prescribe the use of the new clause.

Section 970.5204-13, Allowable costs and fixed-fee (management and operating contracts), is amended to add a new paragraph (e)(3).

Section 970.5204-14, Allowable costs and fixed-fee (support contracts), is amended to add a new paragraph (e)(3).

Section 970.5204-XX, Costs Associated with Whistleblower Actions, is added.

III. Procedural Requirements

A. Review Under Executive Order 12612

Executive Order 12612, entitled "Federalism," 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a

policy action. The Department has determined that this proposed rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

B. Review Under Executive Order 12866

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

C. Review Under Executive Order 12988

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

D. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500-1508), the Department has established guidelines for its

compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.*). Pursuant to Appendix A of subpart D of 10 CFR part 1021, National Environmental Policy Act Implementing Procedures (Categorical Exclusion A6), the Department has determined that this proposed rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

E. Review Under the Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed by this proposed rule. Accordingly, no Office of Management and Budget clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

F. Review Under the Regulatory Flexibility Act

This proposed rule was reviewed under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, *et seq.*, which requires preparation of a regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. This proposed rule is intended to provide policies for the Department of Energy's management and operating contractors, who generally have been large businesses. While this requirement will flowdown to subcontractors, it is anticipated that they generally will be cost-reimbursement type subcontracts. Based on this review the Department certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

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

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

H. Review Under the Unfunded Mandates Reform Act of 1995

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

entities, and the impact is less than \$100 million.

IV. Opportunities for Public Comment

Interested persons are invited to participate by submitting data, views, or arguments with respect to the DEAR amendments set forth in this proposed rule. Three copies of written comments should be submitted to the address indicated in the ADDRESSES section. In addition, it is requested that you provide a copy of your comments on a WordPerfect 6.1 or ASCII diskette. All comments received will be available for public inspection upon request. All written comments received on or before the date specified in the beginning of this proposed rule and all other relevant information will be considered by the Department before taking final action. Comments received after that date will be considered to the extent that time allows. Any person submitting information which that person believes to be confidential and which may be exempt from public disclosure should submit one complete copy, as well as an additional copy from which the information claimed to be confidential has been deleted. The Department reserves the right to determine the confidential status of the information or data and to treat it according to its determination. The Department's generally applicable procedures for handling information which has been submitted in a document and may be exempt from public disclosure are set forth in 10 CFR 1004.11.

V. Opportunity for Public Hearing

The Department has concluded that this rule does not involve any significant issues of law or fact. Therefore, consistent with 42 U.S.C. 7191 and 5 U.S.C. 553, the Department has not scheduled a public hearing. However, upon the receipt of a written request received at the address in the ADDRESSES section near the beginning of this rule on or before January 20, 1998 a public hearing on the proposed rule will be scheduled in the Forrestal Building, Washington, DC. The date, time, and exact place of the hearing and procedures governing the conduct of the hearing will be published in advance in the **Federal Register**.

List of Subjects in 48 CFR Parts 922, 952, and 970

Government procurement.

Issued in Washington, D.C., on December 22, 1997.

Federico Peña,
Secretary of Energy.

For the reasons set forth in the preamble, Chapter 9 of Title 48 of the

Code of Federal Regulations is proposed to be amended as set forth below.

1. The authority citation for Parts 922 and 952 continues to read as follows:

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

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

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

PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

§ 922.7101 [Amended]

3. The heading of Section 922.7101 is revised to read "Clauses," the existing text is designated "(a)" and a paragraph (b) is added as follows:

922.7101 Clauses.

(b) The contracting officer shall insert the clause at 970.5204-XX, Costs Associated with Whistleblower Actions, in cost reimbursement type contracts that involve work to be performed on-site at a DOE-owned or -leased facility. The contracting officer may amend the clause by deleting references to clauses applicable only to management and operating contracts.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

952.222-70 [Amended]

4. Subsection 952.222-70 is amended by designating the existing text as "(a)" and adding a paragraph (b) as follows:

952.222-70 Whistleblower protection for contractor employees.

(b) As prescribed in 922.7101, insert the clause at 970.5204-XX, Costs Associated with Whistleblower Actions, in cost reimbursement type contracts for work to be performed on-site at a DOE-owned or -leased facility. The contracting officer may amend the clause by deleting references to clauses applicable only to management and operating contracts.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

970.3103 [Amended]

5. Section 970.3103, Contract clauses, is amended to add the following paragraph (e):

970.3103 Contract clauses.

* * * * *

(e) The contracting officer shall insert the clause at 970.5204-XX, Costs Associated with Whistleblower Actions,

in cost reimbursement type contracts for the management and operation of a DOE facility or for work to be performed on-site at a DOE-owned or -leased facility.

970.5204-13 [Amended]

6. In subsection 970.5204-13, Allowable costs and fixed-fee (management and operating contracts), the parenthetical date following the clause title is revised and a paragraph (e)(3—) is added as follows:

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

* * * * *

ALLOWABLE COSTS AND FIXED-FEE (MANAGEMENT AND OPERATING CONTRACTS) (XXX and XXXX)

* * * * *

(e) * * *

(3_) Costs incurred in connection with any employee action, as provided in the clause entitled "Costs Associated with Whistleblower Actions."

970.5204-14 [Amended]

7. In subsection 970.5204-14, Allowable costs and fixed-fee (support contracts), the parenthetical date following the clause title is revised and a paragraph (e)(3_) is added as follows:

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

* * * * *

ALLOWABLE COSTS AND FIXED-FEE (SUPPORT CONTRACTS) (XXX and XXXX)

* * * * *

(e) * * *

(3_) Costs incurred in connection with any employee action, as provided in the clause entitled "Costs Associated with Whistleblower Actions."

970.52 [Amended]

8. 970.5204-XX, Costs Associated with Whistleblower Actions, is added to read as follows:

970.5204-XX Costs Associated with Whistleblower Actions

As prescribed in 970.3103(e), insert the following clause.

COSTS ASSOCIATED WITH WHISTLEBLOWER ACTIONS (XXX and XXXX)

(a) Definitions.

(1) "Adverse determination" means

(i) A recommended decision under 29 CFR part 24 by an administrative law judge that the Contractor has violated the employee protection provisions of the statutes for which the Secretary of Labor has been assigned responsibility;

(ii) An initial agency decision under 10 CFR 708.10 that the Contractor has engaged in conduct prohibited by 10 C.F.R. 708.5; or

(iii) A decision against the Contractor by the Secretary under 41 U.S.C. 265(c)(1).

Note: In contracts with a non-standard paragraph (h) in the Insurance-Litigation and Claims clause, add the following subparagraph (iv):

(iv) A judgment or other determination of liability against the Contractor and in favor of the employee in an action in a judicial forum.

(2) "Costs" include any costs or expenses relating to an employee action, as defined below, including but not limited to back pay, damages or other award in the form of relief to the employee; administrative and clerical expenses; the cost of legal services, including litigation costs, whether provided by the Contractor or procured from outside sources; the costs of services of accountants, consultants or other experts retained by the Contractor; all elements of related compensation, costs and expenses of employees, officers and directors; and any similar costs incurred after the commencement of the employee action.

(3) "Employee action" means an action brought by an employee of the Contractor under 29 CFR part 24, 10 CFR part 708, or 41 U.S.C. 265, or an action filed in federal or state court for redress of discrimination or discriminatory action by a Contractor based on activities that would be actionable under 29 CFR part 24, 10 CFR part 708, or 41 U.S.C. 265.

(4) "Litigation costs" include attorney, consultant and expert witness fees associated with the defense of an employee action, but exclude the costs of implementing a settlement, judgment, or Secretarial Order.

(b) Segregation of costs. All litigation costs incurred in the investigation and defense of an employee action under this clause 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.

(c) Allowability of litigation and other costs. (1) Litigation costs, including the use of alternative dispute resolution, and settlement costs incurred in connection with an employee action under this clause are allowable if the employee action is resolved prior to an adverse determination, provided such costs are otherwise allowable under the clauses entitled "Insurance-Litigation and Claims," "Cost Prohibitions Related to Legal and Other Proceedings," and other relevant provisions of this contract.

(2) In actions in which an adverse determination is issued, litigation, settlement, and judgment costs, as well as the cost of complying with any Secretarial Order, are not allowable, unless:

(i) The Contractor prevails in a proceeding subsequent to the adverse determination at which a final decision is rendered in the action; or

(ii) The Contracting Officer has, on the basis that it is in the best interest of the Government, approved the Contractor's request to proceed with defense of an action rather than entering into a settlement with the employee or accepting an adverse determination or other interim decision prior to a final decision.

(3) Subsequent to an adverse determination, litigation costs, as well as costs associated with any interim relief granted, may not be paid from contract funds; provided, however, that the Contracting Officer may, in appropriate circumstances, provide for conditional payment from contract funds upon provision of adequate security, or other adequate assurance, and agreements by the Contractor to repay all litigation costs, plus interest, if they are subsequently determined to be unallowable.

(4) Litigation costs incurred to defend an appeal by the employee from an interim or final decision in the Contractor's favor are allowable provided they are otherwise allowable under the clauses entitled "Insurance Litigation and Claims" and "Cost Prohibitions Related to Legal and Other Proceedings," and other relevant provisions of the contract.

(d) The provisions of this clause shall not apply to the defense of suits by employees or ex-employees of the Contractor under section 2 of the Major Fraud Act of 1988 as amended. (See the clause entitled "Cost Prohibitions Related to Legal and Other Proceedings.")

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