

**DEPARTMENT OF ENERGY****48 CFR Parts 915, 934, 942, 944, 945 and 952****RIN 1991-AC01****Acquisition Regulation: Contractor Business Systems—Definition and Administration****AGENCY:** Department of Energy.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Energy (DOE) is proposing to amend the Department of Energy Acquisition Regulation (DEAR) to define contractor business system as accounting system, estimating system, purchasing system, earned value management system (EVMS), and property management system. DOE is proposing to implement compliance enforcement mechanisms in the form of a contractor business system clause and related clauses that includes a provision that would allow contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains significant deficiencies.

**DATES:** Written comments on the proposed rulemaking must be received on or before close of business June 2, 2014.

**ADDRESSES:** You may submit comments, identified by "DEAR—Contractor Business Systems—Definition and Administration and RIN 1991-AC01," by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email to:* *DEARrulemaking@hq.doe.gov* *mailto:*. Include DEAR: Contractor Business Systems—Definition and Administration and RIN 1991-AC01 in the subject line of the message.
- *Mail to:* U.S. Department of Energy, Office of Procurement and Assistance Management, MA-611, 1000 Independence Avenue SW., Washington, DC 20585. Comments by email are encouraged.

**FOR FURTHER INFORMATION CONTACT:** Barbara Binney, (202) 287-1340 or [barbara.binney@hq.doe.gov](mailto:barbara.binney@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:**

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II. Section-by-Section Analysis  
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- B. Review Under Executive Order 12988
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**I. Background**

The purpose of this rulemaking is to define a contractor's business system as their accounting system, estimating system, purchasing system, earned value management system (EVMS), and property management system. DOE proposes to implement compliance enforcement mechanisms in the form of a business system clause and related clauses that allow contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains significant deficiencies. DOE proposes, when the prime contract is awarded to a large business, to include a contractor teaming arrangement, and the total contract value exceeds \$50 million, including options; or when the prime contract totaling \$10 million or more including options (but less than \$50 million) is awarded to a large business, to include a contractor teaming arrangement, and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist or the contractor's sales are predominantly Government) to prescribe these clauses for contracts in support of Capital Asset Projects (other than management and operating contracts), as prescribed in DOE Order (DOE O) 413.3B, Program and Project Management for the Acquisition of Capital Assets, or non-capital asset projects. Under the proposed rule, DOE could withhold a percentage of interim payments invoiced under—cost reimbursement contracts; incentive type contracts; time-and-materials contracts and; labor-hour contracts; as well as progress payments; and performance-based payments. The proposed changes affect DOE, which includes the National Nuclear Security Administration (NNSA), as well as DOE contractors, which include both DOE and NNSA contractors. The proposed changes do not affect Management & Operating (M&O) contracts. M&O contracts include M&O specific clauses that need to be considered and possibly revised to incorporate the clauses for the business system. For example, DOE authorizes the M&O contractor to finance contract performance by use of Special Financial Institution Accounts and requires the

M&O contractor to maintain integrated accounting systems, under which the contractors budgeting and accounting follow DOE's Accounting Handbook. Because of these differences the business system clause and related clauses for the M&O contracts will be different from this rule; it is our intent to publish a separate proposed rule for M&O contracts at a later time.

The proposed changes include policy revisions under DOE contracts.

Contractor business systems and internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable costs on Government contracts. To improve the effectiveness of DOE's oversight of contractor business systems, DOE is considering a rule to clarify the definition and administration of contractor business systems. It applies to designated fixed-price contracts awarded to a large business on the basis of adequate price competition without submission of cost or pricing data or covered contracts subject to the Cost Accounting Standards under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201-1(a) and not exempted at 9903.201-1(b)(1) through (14). DOE proposes to:

1. Define contractor business system as estimating system, purchasing system, earned value management system (EVMS), accounting system and property management system.

2. Implement compliance enforcement mechanisms in the form of a business system clause that allows contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains significant deficiencies. Significant deficiency means a shortcoming in the system that materially affects the ability of officials of the Department of Energy to rely upon information produced by the system that is needed for management purposes. Under such circumstances, payments could be withheld on—

- Interim payments under—
  - Cost reimbursement contracts;
  - Incentive type contracts;
  - Time-and-materials contracts; or
  - Labor-hour contracts;
- Progress payments to include fixed-price contracts; and
- Performance-based payments to include fixed-price contracts.

If the contracting officer issues the final determination with a notice to withhold payments for significant deficiencies in a contractor business system required under the contract, the contracting officer will withhold no more than five percent of amounts for

one or more significant deficiencies in any single contractor business system and no more than ten percent of amounts for significant deficiencies in multiple contractor business system by directing the contractor, in writing, to withhold five percent or ten percent from its invoices until the contracting officer has determined that the contractor has corrected all significant deficiencies as directed by the contracting officer's final determination. When the contracting officer has determined that all significant deficiencies are corrected, the contracting officer will direct the contractor to discontinue the payment withholding from invoices and authorize the contractor to invoice for any monies previously withheld that are not also being withheld due to other significant deficiencies. This final determination is not a final decision within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 7101, et seq.).

At the end of contract performance, if significant deficiencies remain in the disapproved system or systems and payment withholdings are in effect, the payment withholdings will be released during contract closeout. However, the release of the payment withholdings from one contract will not mean the system is approved. If there are other contracts where payment withholdings are in effect, the payment withholdings will continue on those contracts. These payment withholding are contract financing payments, and therefore are not subject to the interest penalty provisions of the Prompt Payment Act.

When the Final Rule becomes effective, the clauses will be incorporated into solicitations that meet the established applicability requirements and will apply prospectively after being incorporated into affected contracts. Affected contracts are contracts awarded to large businesses, to include teaming arrangements, in support of Capital Asset Projects (other than management and operating contracts), as prescribed in DOE Order (DOE O) 413.3B, Program and Project Management for the Acquisition of Capital Assets, and non-capital asset projects when the total contract value exceeds \$50 million, including options; or when the prime contract totaling \$10 million or more, including options (but less than \$50 million) is awarded to a large business, to include a contractor teaming arrangement, and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist or the contractor's sales a

predominantly Government). After the effective date of the Final Rule, contracting officers will negotiate bilaterally with contractors who hold affected contracts to incorporate the changes of the Final Rule into their contracts within 60 days. Contracting officers must also incorporate the changes of the Final Rule into affected contracts before extending them or exercising options under them by negotiating bilaterally with the contractors.

DOE notes that the Department of Defense (DoD) clauses were considered in drafting the proposed clauses. The system criteria in the clauses are based on the DoD clauses. Because the applicable DOE contracts are performed mostly at the DOE sites, each contractor will provide documentation to support the system criteria that they are using for that DOE contract. In circumstances where the contractor is using the same business system for a DoD contract and a DOE contract, the contractor would explain this circumstance and provide the results of DoD's review of their business system so that DOE can coordinate with DoD concerning use of the business system under the DOE contract.

Today's proposed rule does not alter substantive rights or obligations under current law.

DOE requests comments on all aspects of this proposed rule.

## II. Section-by-Section Analysis

1. Part 915 is amended to add new Sections 915.407 Special cost or pricing areas, 915.407-5 Estimating system, and 915.407-5-70 Disclosure, maintenance, and review requirements. Section 915.407-5-70 establishes the policy that DOE contractors have acceptable estimating systems. It adds definitions, describes applicability requirements, system criteria, and provides procedures for addressing significant deficiencies in estimating system.

The applicable contract is subject to estimating system disclosure, maintenance, and review requirements for prime contractors (large business to include contractor teaming arrangement, as defined at 48 CFR 9.601(1)) when the total contract value exceeds \$50 million, including options; or when the prime contract totaling \$10 million or more including options (but less than \$50 million) is awarded to a large business, to include a contractor teaming arrangement and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist). Also, Subpart 952 is amended to add the related clause 952.215-71 Cost

Estimating System Requirements. A contractor's acceptable estimating system accurately describes the policies, procedures, and practices that the contractor currently uses in preparing cost proposal (budgeting planning controls, generating estimates of costs and other data included in proposals) with sufficient detail for the Government to reasonably make an informed judgment regarding the acceptability of the contractor's estimating practices.

In the event any significant deficiencies are found in the estimating system, the contracting officer will provide to the contractor an initial determination of a significant deficiency and allow the contractor to respond within 30 days if the contractor disagrees. If the contracting officer does not receive a written response from the contractor within 30 days, the contractor will be deemed to agree with the initial determination. The contracting officer will evaluate the contractor's response or the contractor's lack of response and notify the contractor of a final determination concerning any remaining significant deficiencies, adequacy of any proposed or completed corrective action, and system disapproval if one or more significant deficiencies remain. If the contractor receives a final determination, the contractor shall, within 45 days, correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies. When the contracting officer makes a final determination to disapprove the contractor's estimating system, the contracting officer will withhold payments in accordance with the clause 952.242-71, Contractor Business Systems.

2. Section 915.408-70 is amended by revising the language to add instructions on when to use the cost estimating clause.

3. Subchapter E is amended to add a new part 934—Major System Acquisition and Subpart 934.2—Earned Value Management System, and Sections 934.201-70 and 934.203. Subpart 952 is amended to add the related provision and clause, 952.234-70 Notice of Earned Value Management System, and 952.234-71 Earned Value Management System, respectively. The Subpart and Sections add DEAR text, a provision, and a clause addressing earned value management policy for DOE contracts. The rule supplements the final Federal Acquisition Regulation (FAR) rule published at 71 FR 38238 on July 5, 2006, and establishes DOE

specific earned value management requirements, as permitted by the FAR. This section establishes policy that DOE contractors have an acceptable earned value management system (EVMS). It adds definitions, applicability requirements, system criteria, and provides procedures for addressing significant deficiencies in estimating systems.

EVMS requirements apply to Capital Asset Projects on cost or incentive contracts and subcontracts based on dollar thresholds. For contracts valued at \$20,000,000 or more, the contractor shall have an EVMS determined to be in compliance with the guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, EVMS (ANSI/EIA-748). In addition, for contracts valued at \$20,000,000 but not exceeding \$50,000,000, the contractor shall conduct self-certification review and periodic surveillance reviews.

When the contractor has two or more contracts in support of capital asset projects at DOE and the total contract value for a contract is \$20,000,000 or greater and the combined total contract values for these contracts is \$50,000,000 or more, those contracts shall be subject to certification and surveillance reviews for contract values for \$50,000,000 and above. For example, the contractor has 3 contracts in support of a DOE capital asset projects. Contract A is for \$15,000,000. Contract B is for \$21,000,000. Contract C is for \$30,000,000. Contracts B and C are each by themselves \$20,000,000 or greater. The combined total contract values for these two contracts (B at \$21,000,000 and C at \$30,000,000) is \$50,000,000 or more. Therefore, DOE would conduct certification reviews and surveillance reviews for these 2 contracts.

When the contract value is \$50,000,000 but not exceeding \$100,000,000, the applicable DOE Program Office will conduct certification reviews and periodic surveillance reviews to ensure continued compliance with ANSI/EIA-748.

When the contract value is \$100,000,000 or more, DOE Office of Acquisition and Project Management will conduct certification reviews and periodic surveillance reviews to ensure continued compliance with ANSI/EIA-748.

Also for solicitations and contracts valued at \$20,000,000 or more, DOE will use the provision 952.234-70, Notice of Earned Value Management System, instead of the provisions at FAR 52.234-2, Notice of Earned Value Management System—Pre-Award IBR, and FAR

52.234-3, Notice of Earned Value Management System—Post-Award IBR; and the clause at 952.234-71, Earned Value Management System, instead of the clause at FAR 52.234-4, Earned Value Management System. For proposals in the amount of \$50,000,000 or more, the provision 952.234-70, Notice of Earned Value Management System, requires the offeror to comply with the EVMS guidelines of the ANSI/EIA-748. If offeror proposes to use a system that has not been determined to be in compliance with ANSI/EIA-748, the offeror shall submit a comprehensive plan for compliance with the guidelines in ANSI/EIA-748.

For a contract valued at \$50 million or more, the clause 952.234-71, Earned Value Management System, requires the contractor to use an EVMS that has been determined to be acceptable by DOE. If, at the time of award, the contractor's EVMS has not been determined by DOE to be in compliance with the EVMS guidelines, the contractor shall apply its current system to the contract and shall take necessary actions to meet the milestones in the contractor's EVMS plan.

In the event any significant deficiencies are found in the earned value management system, the contracting officer will provide to the contractor an initial determination of a significant deficiency and allow the contractor 30 days to respond if the contractor disagrees. If there is no written response from the contractor within 30 days, it will indicate that the contractor agrees with the initial determination. The contracting officer will evaluate the contractor's response or the contractor's lack of response and notify the contractor of a final determination concerning any remaining significant deficiencies; adequacy of any proposed or completed corrective action; system noncompliance when the EVMS fails to comply with ANSI/EIA-748 guidelines; and system disapproval if EVMS validation is not successfully completed or that there is one or more significant deficiencies in guidelines.

The contracting officer's final determination of the contractor's EVMS will indicate that the system is acceptable and approved with no significant deficiencies remaining, or that the system contains one or more significant deficiencies in high-risk guidelines in ANSI/EIA-748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). When the contracting officer determines that the existing earned value management system contains one or more significant deficiencies in one or more of the

remaining 16 guidelines in ANSI/EIA-748 standards, the contracting officer shall use discretion to disapprove the system based on input received from functional specialists and the auditor.

The contractor will have 45 days to either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies. When the contracting officer makes a final determination to disapprove the contractor's system, the contracting officer will withhold payments in accordance with the clause 952.242-71, Contractor Business Systems.

4. Part 942 is amended to add a new Subpart 942.70—Contractor Business System, Sections 942.7001 through 942.7005. Subpart 952 is amended to add the related clause 952.242-71, Contractor Business System. The proposed amendments will permit a contracting officer to withhold payment not to exceed five percent for one or more significant deficiencies in any single contractor business system and not to exceed ten percent for significant deficiencies in multiple contractor business systems after making a final determination to disapprove a contractor's business system for designated fixed-price contracts awarded to a large business on the basis of adequate price competition with or without submission of cost or pricing data; or for covered contract(s) subject to the Cost Accounting Standards under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201-1(a) and are not exempted at (b)(1) through (14).

In solicitations and contracts in support of a Capital Asset Project (other than a management and operating contract), as prescribed in DOE Order 413.3B, or for a non-capital asset project, for prime contractors (large business to include contractor teaming arrangements), when the total contract value exceeds \$50 million, including options; or when the prime contract totaling \$10 million or more, including options, (but less than \$50 million) is awarded to a large business, to include a contractor teaming arrangement and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist) use the clause 952.242-71, Contractor Business System. Also, the solicitation or contract will include any of the following clauses: 952.215-71, Cost Estimating System Requirements; 952.234-71, Earned Value Management System; 952.242-72, Accounting System Administration; 952.244-71, Contractor

Purchasing System Administration; and 952.245-70, Contractor Property Management System Administration.

The requirements of this subpart 942.70 will not apply to acquisitions for—

- Small business set-asides;
- Energy savings performance contracts as required by the Energy Policy Act of 1992;
- Services for—
  - “Advisory and assistance services” as defined at 48 CFR 2.101, unless otherwise designated as applicable by the Senior Procurement Executive or the Head of the Contracting Activity;
  - Security Guards;
  - Housekeeping;
  - Education and training;
  - National Environmental Policy Act of 1969 Support; or
  - Utilities;
- Office of the Deputy Administrator for Naval Reactors;
- Interagency acquisitions in accordance with 48 CFR 17.5; or
- Orders against another Federal agency contract, e.g. Federal Supply Services (48 CFR 8.4).

During contract performance, the contracting officer, or designee, shall evaluate the contractor's business system performance and compliance in accordance with 48 CFR 42.15 and DOE procedures. At the end of contract performance, if significant deficiencies remain in the disapproved system or systems and payment withholdings are in effect, the payment withholdings will be released during contract closeout. However, the release of the payment withholdings from one contract will not mean the system is approved. If there are other contracts where payment withholdings are in effect, the payment withholdings will continue on those contracts. These payment withholdings are contract financing payments; therefore, these payments withholdings are not subject to the interest penalty provisions of the Prompt Payment Act.

5. Part 942 is amended to add a new Subpart 942.71—Contractor Accounting System and Related Controls, Sections 942.7101, 942.7102 and 942.7103.

Subpart 952 is amended to add the related clause 952.242-72, Accounting System Administration. The proposed amendments will require DOE contractors to have acceptable accounting systems. It adds definitions, describes applicability requirements, system criteria, and provides procedures for addressing significant deficiencies in contractor accounting systems.

In solicitations and contracts in support of a Capital Asset Project, (other than a management and operating

contract), as prescribed in DOE Order 413.3B, or for a non-capital asset project, for prime contractors, (large business to include contractor teaming arrangements), when the total contract value exceeds \$50 million, including options; or when the prime contract totaling \$10 million or more, including options, (but less than \$50 million) is awarded to a large business, to include a contractor teaming arrangement and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist) and the contract will be either a cost-reimbursement, incentive type, time-and-materials, or labor-hour contract; or a contractor with progress payments made on the basis of cost incurred by the contractor or on a percentage or stage of completion, or fixed-price contracts awarded on the basis of adequate price competition without submission of cost or pricing data with a large business, to include contractor teaming arrangement, use the clause 952.242-72, Accounting System Administration. The clause requires the contractor to establish and maintain an acceptable accounting system in accordance with the system criteria described in the clause.

In the event any significant deficiencies are found in the accounting system, the contracting officer will provide to the contractor an initial determination of a significant deficiency and allows the contractor to respond within 30 days if the contractor disagrees. If there is no written response from the contractor within 30 days, it will indicate that the contractor agrees with the initial determination. The contracting officer will evaluate the contractor's response or the contractor's lack of response and notify the contractor of a final determination concerning any remaining significant deficiencies, adequacy of any proposed or completed corrective action, and system disapproval if one or more significant deficiencies remain. If the contractor receives a final determination, the contractor shall within 45 days either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies. When the contracting officer makes a final determination to disapprove the contractor's accounting system, the contracting officer will withhold payments in accordance with the clause 952.242-71, Contractor Business System.

6. Subchapter G is amended to add a new Part 944—Subcontracting Policies and Procedures, Subpart 944.3—

Contractors' Purchasing System Review, and Sections 944.301, 944.303, 944.305, 944.305-70 and 944.305-71. Subpart 952 is amended to add the related clause 952.244-71, Contractor Purchasing System Administration. The proposed amendment requires that DOE contractors have acceptable purchasing system. The amendment add definitions, describe applicability requirements, define system criteria, and provide procedures for addressing significant deficiencies in contractor purchasing systems.

In solicitations and contracts in support of a Capital Asset Project (other than a management and operating contract), as prescribed in DOE Order 413.3B, or for a non-capital asset project, for prime contractors (large business to include contractor teaming arrangements), when the total contract value exceeds \$50 million, including options; or when the prime contract totaling \$10 million or more, including options, (but less than \$50 million) is awarded to a large business, to include a contractor teaming arrangement and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist) and the contract contains the clause at 48 CFR 52.244-2 Subcontracts, use the clause 952.244-71, Contractor Purchasing System Administration. The clause requires the contractor to establish and maintain an acceptable purchasing system in accordance with the system criteria described in the clause.

In the event any significant deficiencies are found in the purchasing system, the contracting officer will provide to the contractor an initial determination of a significant deficiency and allows the contractor to respond within 30 days if the contractor disagrees. If there is no written response from the contractor within 30 days, it will indicate that the contractor agrees with the initial determination. The contracting officer will evaluate the contractor's response or the contractor's lack of response and notify the contractor of a final determination concerning any remaining significant deficiencies, adequacy of any proposed or completed corrective action, and system disapproval if one or more significant deficiencies remain. If the contractor receives a final determination, the contractor shall within 45 days either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies. When the contracting officer makes a final determination to disapprove the

contractor's purchasing system, the contracting officer will withhold payments in accordance with the clause 952.242-71, Contractor Business System.

7. Part 945 is amended to add new Sections 945.105, and 945.107. Subpart 952 is amended to add the related clause 952.245-70, Contractor Property Management System Administration. The proposed amendments requires that DOE contractors have acceptable property management systems. The amendments add definitions, describe applicability requirements, define system criteria, and provide procedures for addressing significant deficiencies in the contractor property management systems.

In solicitations and contracts in support of a Capital Asset Project (other than a management and operating contract), as prescribed in DOE Order 413.3B, or for a non-capital asset project, for prime contractors (large business to include contractor teaming arrangements), when the total contract value exceeds \$50 million, including options; or when the prime contract totaling \$10 million or more, including options, (but less than \$50 million) is awarded to a large business, to include a contractor teaming arrangement and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist and the contract contains the clause at 48 CFR 52.245-1, Government Property, use the clause 952.245-70, Contractor Property Management System. The clause requires the contractor to establish and maintain an acceptable property management system in accordance with the system criteria described in the clause.

In the event any significant deficiencies are found in the property management system, the contracting officer will provide the contractor an initial determination of a significant deficiency and allow the contractor 30 days to respond within if the contractor disagrees. If there is no written response from the contractor within 30 days, it will indicate that the contractor agrees with the initial determination. The contracting officer will evaluate the contractor's response or the contractor's lack of response and notify the contractor of a final determination concerning any remaining significant deficiencies, adequacy of any proposed or completed corrective action, and system disapproval if one or more significant deficiencies remain. If the contractor receives a final determination, the contractor shall within 45 days either correct the

significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies. When the contracting officer makes a final determination to disapprove the contractor's property management system, the contracting officer will withhold payments in accordance with the clause 952.242-71, Contractor Business System.

### III. Procedural Requirements

#### A. Review Under Executive Orders 12866 and 13563

Today's regulatory action has been determined to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this proposed rule was reviewed under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future

benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's NOPR is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

#### B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction.

With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the United States 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 if it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

#### C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless

the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel’s Web site at <http://energy.gov/gc/guidance-opinions-0>.

Today’s proposed rule establishes a definition for contractor business systems and implements compliance mechanisms to improve DOE oversight of those contractor business systems. The requirements of the rule will apply to solicitations and contracts that are subject to the Cost Accounting Standards (CAS) under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201–1 (see the FAR Appendix), other than in contracts with educational institutions or Federally Funded Research and Development Centers (FFRDCs) operated by educational institutions, and include one or more of the defined contractor business systems. Contracts and subcontracts with small businesses are exempt from CAS requirements. This rule would not have a significant economic impact on small entities because it does not apply to small businesses. Consequently, this proposed rule is exempt from the requirements of the Regulatory Flexibility Act.

#### D. Review Under the Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies because the proposed rule contains information collection requirements. DOE invites comments on the following aspects of the proposed rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DOE, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

The following is a summary of the information collection requirement: The business systems clause in this proposed rule contains a requirement

for contractors to respond to initial and final determinations of deficiencies. The information that contractors will be required to submit to respond to deficiencies in one of the five business systems defined in this rule has been approved by the Office of Management and Budget (OMB) is the Accounting Systems—OMB Clearance 9000–0011 concerning preaward surveys. DOE estimates that there will be 5 new contracts awarded per year, which will have these 5 clauses. DOE is also proposing a new information collection requirement as follows:

*Title:* Department of Energy Acquisition Regulation (DEAR) Business Systems—Definition and Administration.

*Type of Request:* New request.

The information that contractors will be required to submit to respond to deficiencies in contractors’ cost estimating system is estimated as follows:

*Number of Respondents:* 5.

*Responses per Respondent:* 2.

*Annual Responses:* 10.

*Average Burden per Response:* 1.2 hours.

*Annual Burden Hours:* 12 hours.

The information that contractors will be required to submit to respond to deficiencies in contractors’ earned value management system (EVMS) is estimated as follows:

*Number of Respondents:* 5.

*Responses per Respondent:* 2.

*Annual Responses:* 10.

*Burden per Response:* 10.4 hours.

*Annual Burden Hours:* 104 hours.

The information that contractors will be required to submit to respond to deficiencies in contractors’ accounting systems is estimated as follows:

*Number of Respondents:* 5.

*Responses per Respondent:* 2.

*Annual Responses:* 10.

*Average Burden per Response:* 1.2 hours.

*Annual Burden Hours:* 12 hours.

The information that contractors will be required to submit to respond to deficiencies in contractors’ purchasing system is estimated as follows:

*Number of Respondents:* 5.

*Responses per Respondent:* 2.

*Annual Responses:* 10.

*Average Burden per Response:* 1.2 hours.

*Annual Burden Hours:* 12 hours.

The information that contractors will be required to submit to respond to deficiencies in contractors’ property management system is estimated as follows:

*Number of Respondents:* 5.

*Responses per Respondent:* 2.

*Annual Responses:* 10.

*Average Burden per Response:* 1.2 hours.

*Annual Burden Hours:* 12 hours.

*Needs and Uses:* DOE needs the information required by the business system clause in this proposed rule to mitigate the risk of unallowable and unreasonable costs on Government contracts when a contractor has one or more deficiencies in a business system.

*Affected Public:* The business system clause (952.242–71) will be used in solicitations and contracts that include any of the following clauses:

(1) 952.215–71, Cost Estimating System Requirements;

(2) 952.234–71, Earned Value Management System;

(3) 952.242–72, Accounting System Administration;

(4) 952.244–71, Contractor Purchasing System Administration; and

(5) 952.245–70, Contractor Property Management System Administration.

*Frequency:* On occasion.

Written comments and recommendations on the proposed information collection should be sent to: DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street NW., Washington, DC 20503.

The Desk Officer may be telephoned at 202–395–4718 or contacted by email at [chad\\_s\\_whiteman@omb.eop.gov](mailto:chad_s_whiteman@omb.eop.gov).

Please send a copy by mail to the U.S. Department of Energy, Office of Acquisition and Project Management, Attn: MA–611, Ms. Barbara Binney, 1000 Independence Avenue SW., Washington, DC 20585; or email to: [DEARulemaking@hq.doe.gov](mailto:DEARulemaking@hq.doe.gov). Include DEAR: Contractor Business Systems—Proposed Information Collection RIN 1991–AC01 in the subject line of the message.

Comments can be received from 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the U.S. Department of Energy, Office of Acquisition and Project Management, Attn: MA–611, Ms. Barbara Binney, 1000 Independence Avenue SW., Washington, DC 20585; or email to [DEARulemaking@hq.doe.gov](mailto:DEARulemaking@hq.doe.gov). Include DEAR: Contractor Business Systems—Proposed Information Collection RIN 1991–AC01 in the subject line of the message.

*E. Review Under the National Environmental Policy Act*

DOE has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.). Specifically, this proposed rule is categorically excluded from NEPA review because the amendments to the DEAR are strictly procedural (categorical exclusion A6). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

*F. Review Under Executive Order 13132*

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order requires agencies to have an accountability process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.

On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined the proposed rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

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

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires a Federal agency to perform a written 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. Costs imposed by this proposed rule would be reimbursed under the contract. This proposed rule

does not impose any unfunded mandates.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any rulemaking or policy that may affect family well-being. This rulemaking will have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 13211*

Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB), a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order, (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution and use. Today's proposed rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*J. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed the proposed rule under the

OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Approval by the Office of the Secretary of Energy*

Issuance of this proposed rule has been approved by the Office of the Secretary of Energy.

**List of Subjects in 48 CFR Parts 915, 934, 942, 944, 945 and 952**

Government procurement.

Issued in Washington, DC, on March 24, 2014.

**Paul Bosco,**

*Director, Office of Acquisition and Project Management, Department of Energy.*

**Joseph Waddell,**

*Deputy Associate Administrator, Acquisition and Project Management, National Nuclear Security Administration.*

For reasons set out in the preamble, the DOE is proposing to amend Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below.

- 1. The authority citations for parts 915, 942, 945, and 952 continue to read as follows:

**Authority:** 42 U.S.C. 7101 et seq. and 50 U.S.C. 2401 et seq.

**PART 915—CONTRACTING BY NEGOTIATION**

**Subpart 915.4—Contract Pricing**

- 2. Add sections 915.407, 915.407-5, and 915.407-5-70 to subpart 915.4 to read as follows:

**915.407 Special cost or pricing areas.**

**915.407-5 Estimating system.**

**915.407-5-70 Disclosure, maintenance, and review requirements.**

(a) *Definitions.* (1) *Acceptable estimating system* is defined in the clause at 952.215-71, Cost Estimating System Requirements.

(2) *Contractor* means a business unit as defined in 48 CFR 2.101.

(3) *Estimating system* is as defined in the clause at 952.215-71, Cost Estimating System Requirements.

(4) *Significant deficiency* is defined in the clause at 952.215-71, Cost Estimating System Requirements.

(b) *Applicability.* (1) DOE policy is that contractors have acceptable estimating systems that consistently produce well-supported proposals that are acceptable as a basis for negotiation of fair and reasonable prices.

(2) The estimating system requirements apply when a large business contractor, to include a contractor teaming arrangement, as defined at 48 CFR 9.601(1), performs a

contract in support of a Capital Asset Project, (other than a management and operating contract), as prescribed in DOE Order (DOE O) 413.3B, or current version, or a non-capital asset project. See 942.7003 for exceptions. The applicable contract is subject to estimating system disclosure, maintenance, and review requirements—

- (i) For a DOE prime contract totaling \$50 million, including options; or
- (ii) For a DOE prime contract totaling \$10 million or more including options (but less than \$50 million) and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist).

(c) *Policy.* (1) When the solicitation or contract includes the clause 952.242–71 Contractor Business System and related clauses, the contracting officer shall—

- (i) Through use of the clause at 952.215–71, Cost Estimating System Requirements, apply the disclosure, maintenance, and review requirements to large business contractors meeting the criteria in paragraph (b)(2)(i) or (ii) of this section;
- (ii) Ensure that contract, Part I—The Schedule, addresses in the business administration section, or similar section, that the contractor shall submit its cost estimating system for DOE review and acceptance with full implementation of the system to be in place no later than 60 days after contract award;

(iii) Consider whether to apply the disclosure, maintenance, and review requirements to large business contractors under paragraph (b)(2)(ii) of this section; and

(iv) Not apply the disclosure, maintenance, and review requirements to other than large business contractors.

(2) The cognizant contracting officer, in consultation with the auditor, for contractors subject to paragraph (b)(2) of this section, shall—

(i) Determine the acceptability of the disclosure and approve or disapprove the system; and

(ii) Pursue correction of any deficiencies.

(3) The auditor conducts estimating system reviews.

(4) An acceptable system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures.

(5) In evaluating the acceptability of a contractor's estimating system, the contracting officer, in consultation with the auditor, shall determine whether the

contractor's estimating system complies with the system criteria for an acceptable estimating system as prescribed in the clause at 952.215–71, Cost Estimating System Requirements.

(d) *Disposition of findings.*—(1) *Reporting of findings.* The auditor shall document findings and recommendations in a report to the contracting officer. If the auditor identifies any significant deficiencies in the contractor's estimating system, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review all findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's estimating system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at 952.215–71, Cost Estimating System Requirements) due to the contractor's failure to meet one or more of the estimating system criteria in the clause at 952.215–71, the contracting officer shall—

(A) Within 30 days of receiving the report, provide an initial determination of deficiencies in writing, describing each significant deficiency in sufficient detail to allow the contractor to understand the deficiency and provide a copy of the report to the contractor;

(B) Request the contractor respond in writing to the initial determination within 30 days; and

(C) Within 30 days of receiving the contractor's response or if the contractor does not submit a response, the date the response was due, in consultation with the auditor or cognizant functional specialist, evaluate the contractor's response or the contractor's lack of response and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor in writing that—(A) The contractor's estimating system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action.

The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable

corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Disapprove the system in accordance with the clause at 952.215–71, Cost estimating System Requirements; and

(3) Withhold payments in accordance with the clause at 952.242–71, Contractor Business System, if the clause is included in the contract.

(ii) Monitoring a contractor's corrective action and the correction of significant deficiencies.

(A) *Monitoring contractor's corrective action.* The contracting officer or designee shall monitor the contractor's progress in correcting deficiencies. If the contractor fails to make adequate progress, the contracting officer shall take whatever action is necessary to ensure that the contractor corrects the deficiencies. Examples of actions the contracting officer can take include reducing or suspending progress payments (see 48 CFR 32.503–6), implementing the withholding in accordance with 952.242–71, Contractor Business System, if applicable, and recommending non-award of potential contracts.

(B) *Correction of significant deficiencies.* (1) When the contractor notifies the contracting officer, in writing, that the contractor has corrected the significant deficiencies, the contracting officer shall request that the auditor review the correction to determine if the deficiencies have been resolved.

(2) The contracting officer shall determine if the contractor has corrected the deficiencies.

(3) If the contracting officer determines the contractor has corrected the deficiencies, the contracting officer's notification shall be sent to the auditor; invoice approving official; payment office; appropriate action officers responsible for reporting past performance; and the Department of Energy's or National Nuclear Security Administration's Heads of the Contracting Activities and Senior Procurement Executives.

(e) *System approval.* The contracting officer shall promptly approve a previously disapproved estimating system and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(f) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release

withheld payments, to the auditor, invoice approving official, payment office, affected DOE contracting offices, and the Department of Energy's or National Nuclear Security Administration's Heads of the Contracting Activities and Senior Procurement Executives.

■ 3. Revise section 915.408–70 to read as follows:

**915.408–70 Solicitation provisions and contract clauses.**

(a) The contracting officer (after deleting “under the clause at 970.5203–3, Contractor’s Organization” from paragraph (a) if not a management and operating contract) shall insert the clause at 952.215–70, Key Personnel, in contracts under which performance is largely dependent on the expertise of specific key personnel.

(b) Unless one of the exceptions at 942.7003 applies, use the clause at 952.215–71, Cost Estimating System Requirements, in all solicitations and contracts, in support of a Capital Asset Project (other than a management and operating contract), as prescribed in DOE O 413.3B, or current version, or for a non-capital asset project as described at 915.407–5–70(b)(2), for a prime contract, when the total contract value exceeds \$50 million, including options, or when the total contract exceeds \$10 million or more, including options, (but less than \$50 million) and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist or the contractor’s sales are predominantly Government).

■ 4. Add part 934 to Subchapter F to read as follows:

**PART 934—MAJOR SYSTEM ACQUISITION**

**Subpart 934.2—Earned Value Management System**

Sec.

934.201–70 Policy.

934.203 Solicitation provisions and contract clause.

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

**Subpart 934.2—Earned Value Management System**

**934.201–70 Policy.**

(a) The Department of Energy (DOE) applies the earned value management system (EVMS) requirement as follows:

(1) For cost or incentive contracts and subcontracts valued at \$20,000,000 or more, the contractor in support of a Capital Asset Project, as prescribed in DOE Order (DOE O) 413.3B, or current version, shall have an EVMS that has

been determined to be in compliance with the guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, EVMS (ANSI/EIA-748) (current version at time of award) in accordance with the thresholds in paragraphs (a)(1)(i) through (iii) of this section.

(i) For cost or incentive contracts and subcontracts valued at \$20,000,000 but not exceeding \$50,000,000, the contractor shall conduct a self-certification review by an entity independent of the contractor personnel assigned to programs and projects specified in the contract and provide self-certifying documentation of its EVMS compliance with ANSI/EIA-748. The contractor shall conduct periodic surveillance reviews and provide documentation of results to show continued compliance of contractor’s EVMS with ANSI/EIA-748. When the contractor has two or more contracts in support of capital asset projects at DOE and the total contract values are \$20,000,000 or greater per contract for total contract values of \$50,000,000 or more, those contracts shall be subject to certification and surveillance reviews as described in paragraphs (a)(1)(ii) or (iii) of this section.

(ii) For contracts valued at \$50,000,000 but not exceeding \$100,000,000, the contracting officer will receive a copy of the certification review which certifies that the contractor’s EVMS is compliant with ANSI/EIA-748 from the cognizant DOE program office. The cognizant DOE Program Office shall conduct certification reviews and periodic surveillance reviews to ensure continued compliance of contractor’s EVMS with ANSI/EIA-748, the contracting officer will receive a copy of these reviews from the cognizant DOE program office.

(iii) For contracts valued at \$100,000,000 or more, the contracting officer will receive a copy of the certification review which certifies that the contractor’s EVMS is compliant with ANSI/EIA-748 from DOE’s Office of Acquisition and Project Management (OAPM). OAPM shall conduct certification reviews and periodic surveillance reviews to ensure continued compliance of contractor’s EVMS with ANSI/EIA-748, and the contracting officer shall receive a copy of these reviews from OAPM. Also, OAPM shall conduct certification reviews and surveillance reviews and certify the contractor’s EVMS compliance with ANSI/EIA-748 for contracts of lesser value if requested by the contracting officer, the contractor or the DOE program office; or if the

contractor or cognizant DOE program office does not complete its required actions in (a)(1)(i) and (ii) of this section within one year of contract award.

(2) For cost or incentive contracts and subcontracts valued at less than \$20,000,000—

(i) The application of earned value management is optional and is a risk-based decision;

(ii) A decision to apply earned value management shall be documented in the contract file; and

(iii) When the DOE program manager decides to implement earned value management on contracts and subcontracts valued at less than \$20,000,000, a cost-benefit analysis shall be conducted and the documented results provided to the contracting officer for the contract file.

(3) For fixed-price contracts and subcontracts of any dollar value:

(i) The application of earned value management is not required.

(ii) In extraordinary cases where cost/schedule visibility is required and cannot be obtained using other means, the DOE program manager shall request a waiver for individual contracts from the applicable Acquisition Executive (AE), as defined in DOE Order 413.3B, or current version. In these cases, the program manager will conduct a business case analysis that includes rationale as to why a cost or fixed-price incentive contract was not an appropriate contracting vehicle.

(b) Under the provision at 952.234–70, Notice of Earned Value Management System, when an offeror proposes a plan for compliance with the earned value management system guidelines in ANSI/EIA-748, the contracting officer shall obtain the assistance of the cognizant DOE program office or OAPM, as applicable, in determining the adequacy of an earned value management system plan. The Government will review and approve the offeror’s EVMS plan to achieve compliance before contract award. Guidance and instructions for performing EVMS plan reviews can be found at DOE Order 413.3B, Program and Project Management for the Acquisition of Capital Assets, Appendix C, Section 5 and DOE Guide 413.3–10A, Earned Value Management System.

(c) For contracts of \$50,000,000 or more, DOE is responsible for determining the contractor’s earned value management system compliance. Furthermore, when the contractor has two or more contracts in support of capital asset projects at the same DOE site and the total contract values are \$20,000,000 or greater per contract for total contract values of \$50,000,000 or

more, DOE is responsible for determining the contractor's earned value management system compliance.

(d) The cognizant contracting officer, in consultation with the cognizant DOE program office or OAPM (both are herein referred to as functional specialist) or auditor, as applicable, shall—

(1) Determine the acceptability of the contractor's earned value management system through certification reviews and periodic surveillance reviews conducted by the cognizant DOE program office or OAPM, as applicable, and approve or disapprove the system; and

(2) Pursue correction of any deficiencies identified during certification reviews or surveillance reviews.

(e) In evaluating the acceptability of a contractor's earned value management system, the contracting officer, in consultation with the cognizant functional specialist or auditor, as applicable, shall determine whether the contractor's earned value management system complies with the system criteria for an acceptable earned value management system as prescribed in the clause at 952.234-71, Earned Value Management System.

(f) *Disposition of findings*—(1) *Reporting of findings*. The cognizant functional specialist or auditor shall document findings and recommendations in a report to the contracting officer. If the cognizant functional specialist or auditor identifies any significant deficiencies in the contractor's earned value management system, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination*. (i) The contracting officer shall review all findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's earned value management system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at 952.234-71, Earned Value Management System) due to the contractor's failure to meet one or more of the earned value management system criteria in the clause at 952.234-71, the contracting officer shall—

(A) Within 30 days of receiving the report, provide an initial determination of deficiencies, in writing, describing each significant deficiency in sufficient detail to allow the contractor to

understand the deficiencies and provide a copy of the report to the contractor;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(C) Within 30 days of receiving the contractor's response or if the contractor does not submit a response, the date the response was due, in consultation with the auditor or cognizant functional specialist, evaluate the contractor's response and make a final determination.

(3) *Final determination*. (i) The contracting officer, in consultation with the cognizant functional specialist or auditor, shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's earned value management system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Disapprove the system in accordance with the clause at 952.234-71, Earned Value Management System, when initial validation is not successfully completed within the timeframe approved by the contracting officer or the contracting officer determines that the existing earned value management system contains one or more significant deficiencies in the high-risk guidelines in ANSI/EIA 748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). When the contracting officer determines that the existing earned value management system contains one or more significant deficiencies in one or more of the remaining 16 guidelines in ANSI/EIA-748 standards, the contracting officer shall use discretion to disapprove the system based on input received from functional specialists and the auditor; and

(3) Withhold payments in accordance with the clause at 952.242-71, Contractor Business System, if the clause is included in the contract.

(ii) Monitoring contractor's corrective action and the correction of significant deficiencies.

(A) *Monitoring contractor's corrective action*. The contracting officer or designee shall monitor the contractor's

progress in correcting deficiencies. If the contractor fails to make adequate progress, the contracting officer shall take whatever action is necessary to ensure that the contractor corrects the deficiencies. Example of an action the contracting officer can take is to increase the withholding in accordance with 952.242-71, Contractor Business System.

(B) *Correction of significant deficiencies*. (1) When the contractor notifies the contracting officer that the contractor has corrected the significant deficiencies, the contracting officer shall request the cognizant functional specialist or auditor to review the correction to determine if the deficiencies have been resolved.

(2) The contracting officer shall determine if the contractor has corrected the deficiencies.

(3) If the contracting officer determines the contractor has corrected the deficiencies, the contracting officer's notification shall be sent to the cognizant functional specialist, auditor, invoice approving official, payment office, DOE contracting offices having substantial business with the contractor, and the Department of Energy's or National Nuclear Security Administration's Heads of the Contracting Activities and Senior Procurement Executives.

(g) *System approval*. The contracting officer shall promptly approve a previously disapproved earned value management system and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(h) *Contracting officer notifications*. The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor, invoice approving official, payment office, DOE contracting offices having substantial business with the contractor, and the Department of Energy's or National Nuclear Security Administration's Heads of the Contracting Activities and both Senior Procurement Executives.

(i) *Contract reporting*. For a cost reimbursement contract requiring EVMS, the contract shall include instructions to the prime contractor to electronically upload earned value and schedule data into the Project Assessment and Reporting System (PARS II) (or current DOE project performance reporting system) in accordance with the "Contractor Project Performance Upload Requirements"

document maintained by the OAPM. Unless OAPM has granted a temporary exemption, all requested data shall be submitted timely and accurately. Data shall be loaded into PARS II no later than the last workday of every month. This data shall be current as of the close of the previous month's accounting period.

#### **934.203 Solicitation provisions and contract clause.**

For cost or incentive contracts in support of a Capital Asset Project, as prescribed in DOE Order (DOE O) 413.3B, or current version, valued at \$20,000,000 or more, and for other contracts for which EVMS will be applied in accordance with 934.201(a)(1)—

- (a) Use the provision at 952.234–70, Notice of Earned Value Management System, instead of the provisions at FAR 52.234–2, Notice of Earned Value Management System—Pre-Award IBR, and FAR 52.234–3, Notice of Earned Value Management System—Post-Award IBR, in the solicitation; and
- (b) Use the clause at 952.234–71, Earned Value Management System, instead of the clause at FAR 52.234–4, Earned Value Management System, in the solicitation and contract.

### **PART 942—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

■ 5. Add subpart 942.70 to part 942 to read as follows:

#### **Subpart 942.70—Contractor Business System**

Sec.

942.7001 Scope of subpart.

942.7002 Definitions.

942.7003 Exceptions.

942.7004 Contractor business system deficiencies procedures.

942.7005 Contract clause.

#### **Subpart 942.70—Contractor Business System**

##### **942.7001 Scope of subpart.**

This subpart prescribes procedures to implement contractor business system requirements in applicable contracts to include how to determine and withhold payments when the contractor business system has deficiencies.

##### **942.7002 Definitions.**

*Definitions.* As used in this subpart—

*Acceptable contractor business system* and *contractor business system* are defined in the clause at 952.242–71, Contractor Business System.

*Covered contract* means a contract (other than a management and operating contract) that is subject to the Cost

Accounting Standards under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201–1(a) and are not exempted at 9903.201–1(b)(1) through (14) (see the 48 CFR Appendix).

*Significant deficiency* is defined in the clause at 952.242–71, Contractor Business System.

#### **942.7003 Exceptions.**

The requirements of this subpart do not apply to acquisitions for—

- (a) Small business set-asides;
- (b) Energy savings performance contracts as required by the Energy Policy Act of 1992;
- (c) Services for—
  - (1) “Advisory and assistance services” as defined at 48 CFR 2.101, unless otherwise designated as applicable by the Senior Procurement Executive or the Head of the Contracting Activity;
  - (2) Security Guards;
  - (3) Housekeeping;
  - (4) Education and training;
  - (5) National Environmental Policy Act of 1969 Support; or
  - (6) Utilities;
- (d) Office of the Deputy Administrator for Naval Reactors;
- (e) Interagency acquisitions in accordance with 48 CFR 17.5; or
- (f) Orders against another Federal agency contract, e.g. Federal Supply Services (48 CFR 8.4).

#### **942.7004 Contractor business system deficiencies procedures.**

(a) *Determination to withhold payments.* If the contracting officer makes a final determination to disapprove a contractor's business system in accordance with the clause at 952.242–71, Contractor Business System, the contracting officer shall—

(1) Identify if within DOE there is one or more fixed-price contracts awarded on the basis of adequate price competition without submission of cost or pricing data with large businesses or covered contracts containing the clause at 952.242–71, Contractor Business System, from which payments will be withheld. When identifying the contracts from which to withhold payments, the contracting officer shall ensure that the total amount of payment withholding under the clause at 952.242–71, does not exceed 10 percent of progress payments, performance-based payments, and interim payments under cost-reimbursement, labor-hour, and time-and-materials, contracts billed under each of the identified contracts. Similarly, the contracting officer shall ensure that the total amount of payment withholding under the clause at 952.242–71, Contractor Business

System, for each business system does not exceed five percent of progress payments, performance-based payments, and interim payments under cost-reimbursement, labor-hour, and time-and-materials contracts billed under each of the identified covered contracts. The contracting officer has the sole discretion to identify the covered contracts from which to withhold payments.

(2) Promptly notify the contractor, in writing, of the contracting officer's determination to implement payment withholding in accordance with the clause at 952.242–71, Contractor Business System. The notice of payment withholding shall be included in the contracting officer's written final determination for the contractor business system and shall inform the contractor that—

(i) Payments shall be withheld from the contract or contracts identified in the written determination in accordance with the clause at 952.242–71, Contractor Business System, until the contracting officer determines that there are no remaining significant deficiencies; and

(ii) The contracting officer reserves the right to take other actions within the terms and conditions of the contract.

(3) Provide all contracting officers administering the selected contracts from which payments will be withheld, a copy of the determination. The contracting officer shall also provide a copy of the determination to the auditor, invoice approving official, and payment office.

(b) *Monitoring contractor's corrective action.* The contracting officer, in consultation with the auditor, functional specialist, or designee, shall monitor the contractor's progress in correcting the deficiencies. The contracting officer shall notify the contractor of any decision to decrease or increase the amount of payment withholding in accordance with the clause at 952.242–71, Contractor Business System.

(c) *Correction of significant deficiencies.* (1) If the contractor notifies the contracting officer that the contractor has corrected the significant deficiencies, the contracting officer shall request the auditor or functional specialist to review the correction to verify that the deficiencies have been corrected. If, after receipt of verification, the contracting officer determines that the contractor has corrected all significant deficiencies as directed by the contracting officer's final determination, the contracting officer shall discontinue the withholding of payments, release any payments

previously withheld, and approve the system, unless other significant deficiencies remain.

(2) Prior to the receipt of verification, the contracting officer may discontinue withholding payments pending receipt of verification, and release any payments previously withheld, if the contractor submits evidence that the significant deficiencies have been corrected, and the contracting officer, in consultation with the auditor or functional specialist, determines that there is a reasonable expectation that the corrective actions have been implemented and are expected to correct the significant deficiencies.

(3) Within 90 days of receipt of the contractor notification that the contractor has corrected the significant deficiencies, the contracting officer shall—

(i) Make a determination that—

(A) The contractor has corrected all significant deficiencies as directed by the contracting officer's final determination in accordance with paragraph (d)(1) of this section;

(B) There is a reasonable expectation that the corrective actions have been implemented in accordance with paragraph (d)(2) of this section; or

(C) The contractor has not corrected all significant deficiencies as directed by the contracting officer's final determination in accordance with paragraph (d)(1) of this section, or there is not a reasonable expectation that the corrective actions have been implemented in accordance with paragraph (d)(2) of this section; or

(ii) Direct the contractor, in writing, to reduce the percentage withheld on invoices by at least 50 percent, until the contracting officer makes a determination in accordance with paragraph (d)(3)(i) of this section.

(4) If, at any time, the contracting officer determines that the contractor has failed to correct the significant deficiencies identified in the contractor's notification, the contracting officer will continue, reinstate, or increase withholding and direct the contractor, in writing, to continue, reinstate, or increase the percentage withheld on invoices to the percentage initially withheld, until the contracting officer determines that the contractor has corrected all significant deficiencies as directed by the contracting officer's final determination.

(d) *Determinations regarding payment withholding.* The contracting officer shall use the written notification format or similar format to document the contracting officer determinations to initiate payment withholding, reduce payment withholding, and discontinue

payment withholding in accordance with the clause at 952.242-71, Contractor Business System. The final determination regarding payment withholding is not a final decision within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 7101, et seq.).

(1) *Final determination for payment withholding.* Use the sample format or similar format for final determination for payment withholding in accordance with the clause 952.242-71, Contractor Business Systems. Tailor the notice in paragraph (4) to use the appropriate version to reflect invoice payments or advance payments under a special bank account (letter of credit).

[Begin notice]

#### Payment Withholding

(1) The purpose of this final determination is to disapprove your [*identify the contractor business system(s)*] and implement payment withholding per the terms of the clause at 48 CFR 952.242-71, Contractor Business System.

(2) It is my final determination that XXX System(s) contains the following significant deficiencies:

—[*list all significant deficiencies*]

(3) Effective immediately, five percent (or a lesser percentage if five percent will exceed the withhold limitations in the clause 48 CFR 952.242-71) of each request for payment under the contracts in Attachment A will be withheld as described below for significant deficiencies in XXX system. Upon receipt of an acceptable corrective action plan and my determination that this corrective action plan is being effectively implemented, I will issue a notification with respect to reducing the percentage being withheld to two percent until I determine that all significant deficiencies, as identified in this final determination, have been corrected. Failure to follow the accepted corrective action plan will result in an increase in the percentage withheld against each payment under this contract to five percent (or a lesser percentage if five percent will exceed the withhold limitations in clause 48 CFR 952.242-71). [*Repeat this paragraph, as necessary, if multiple withholdings are being applied to multiple systems in accordance with 952.242-71(d)*].

(4) [*For invoice payments use the following paragraph.*] For invoice payments, the Contractor shall apply a five percent (or a lesser percentage if five percent will exceed the withhold limitations in 48 CFR 952.242-71) withhold to the amount requested. For invoices in Vendor Invoicing Payment Electronic Reporting System (VIPERS), the Contractor shall invoice for the net amount due after application of the withhold and show the amount withheld on the current billing, as well as the cumulative amount withheld to date on this contract in accordance with the clause 48 CFR 952.242-71, in the Description field of the VIPERS invoice or as supporting documentation attached to the voucher. When approving the

invoice for payment in the Vendor Invoice Approval System (VIAS), the Contracting Officer or Invoice Approving Official will verify that the Contractor reduced the invoice the five percent (or a lesser percentage if five percent will exceed the withhold limitations in 48 CFR 952.242-71). In the event the Contractor did not submit the invoice with the proper withholding, the Contracting Officer or Invoice Approving Official will reject the invoice and enter the reason for the rejection in the VIAS Comments field. When the Contractor reviews the Invoice Status Report in VIPERS, the reason for the reduced payment will be displayed in the Invoice Description field.

[*For advance payments under a special bank account (letter of credit) use the following paragraph.*] For advance payments under a special bank account (letter of credit), the Contractor shall immediately be subject to the advance approval requirements by the Contracting Officer or Government countersigning agent for cash withdrawals against the letter of credit. Each Contractor

request for cash withdrawal for the net amount due after the withhold shall contain the amount of expenditure, the amount withheld on the current request, as well as the cumulative amount withheld to date on this contract in accordance with the clause 48 CFR 952.242-71, and the net amount requested after application of the withhold. When approving the request for cash withdrawal, the Contracting Officer or Government countersigning agent will verify that the Contractor reduced the request by five percent (or a lesser percentage if five percent will exceed the withhold limitations in 48 CFR 952.242-71). In the event the Contractor did not submit the cash withdrawal request with the proper withholding, the Contracting Officer or Government countersigning agent will reject the request for cash withdrawal for non-compliance with the requirements of this clause in his/her response.

[End of notice]

(2) *Reduction of temporary payment withholding.* Use the sample format or similar format for determination to reduce payment withholding in accordance with the clause 48 CFR 952.242-71, Contractor Business System. Tailor the notice in paragraph (3) to use the appropriate version to reflect invoice payments or advance payments under a special bank account (letter of credit).

[Begin notice]

#### Reduction of Temporary Payment Withholding

(1) The purpose of this determination is to reduce the payment withholding percentage per the terms of the clause 48 CFR 952.242-71, Contractor Business System, as a result of receiving an acceptable corrective action plan from the contractor, dated YYYY/MM/DD, for resolving deficiencies in its XXX system(s) as identified in the Contracting Officer's determination, dated YYYY/MM/DD. This reduction is prospective and previous amounts withheld will not be reduced or released at this time.

(2) Effective immediately, two percent of each request for payment under this contract will be withheld as described below. The two percent being withheld will remain in effect until the Contracting Officer determines that the Contractor has corrected all significant deficiencies as directed by the Contracting Officer's determination. Failure to follow the accepted corrective action plan will result in an increase in the percentage withheld against each payment under this contract to five percent (or a lesser percentage if five percent will exceed the withhold limitations in 48 CFR 952.242-71).

(3) *[For invoice payments use the following paragraph.]* For invoice payments, the Contractor shall apply a two percent withhold to the amount being requested. For invoices in Vendor Invoicing Payment Electronic Reporting System (VIPERS), the Contractor shall invoice for the net amount due after withholding and show the amount withheld on the current billing, as well as the cumulative amount withheld to date on this contract in accordance with the clause 48 CFR 952.242-71, in the Description field of the VIPERS invoice or as supporting documentation attached to the invoice. When approving the invoice for payment in the Vendor Invoice Approval System (VIAS), the Contracting Officer or Invoice Approving Official will verify that the Contractor reduced the invoice the two percent. In the event the Contractor did not submit the invoice with the proper withholding, the Contracting Officer or Invoice Approving Official will reject the invoice and enter the reason for the rejection in the VIAS Comments field. When the Contractor reviews the Invoice Status Report in VIPERS, the reason for the reduced payment will be displayed in the Invoice Description field.

*[For advance payments under a special bank account (letter of credit) use the following paragraph.]* For advance payments under a special bank account (letter of credit), the Contractor shall immediately be subject to the advance approval requirements by the Contracting Officer or Government countersigning agent for cash withdrawals against the letter of credit. Each Contractor request for cash withdrawal for the net amount due after the withhold shall contain the amount of expenditure, the amount withheld on the current request, as well as the cumulative amount withheld to date on this contract in accordance with the clause 48 CFR 952.242-71, and the net amount requested after application of the withhold. When approving the request for cash withdrawal, the Contracting Officer or Government countersigning agent will verify that the Contractor reduced the request by five percent (or a lesser percentage if two percent will exceed the withhold limitations in 48 CFR 952.242-71). In the event the Contractor did not submit the cash withdrawal request with the proper withholding, the Contracting Officer or Government countersigning agent will reject the request for cash withdrawal for non-compliance with the requirements of this clause in his/her response.

[End of notice]

(3) *Discontinuation of payment withholding pending verification.* Use

the sample format or similar format if payment withholding is discontinued after auditor or functional specialist verification and based on evidence that the Contractor has corrected all significant deficiencies, in accordance with clause 48 CFR 952.242-71, Contractor Business System. Tailor the notice in paragraph (3) to use the appropriate version to reflect invoice payments or advance payments under a special bank account (letter of credit).

[Begin notice]

*Discontinuation of Payment Withholding Pending Verification*

(1) The purpose of this determination is to approve your *[identify system(s)]* pending verification, discontinue the payment withhold as identified in the Contracting Officer's determination dated YYYY/MM/DD, and release previous amounts withheld on the contracts in Attachment A, in accordance with clause 48 CFR 952.242-71, Contractor Business System.

(2) The discontinuation of the payment withhold is made pending receipt of verification and based on my review of the evidence submitted by the Contractor that all the Contractor's system(s) deficiencies identified in the Contracting Officer's determination dated YYYY/MM/DD have been corrected.

(3) *[For invoice payments use the following paragraph.]* For invoice payments in Vendor Invoicing Payment Electronic Reporting system (VIPERS), the Contractor is authorized to submit an invoice in the amount of \$XXXXXXX. The billed amount should be submitted on the same type of invoice as the withhold was originally taken, as appropriate.

*[For advance payments under a special bank account (letter of credit) use the following paragraph.]* For advance payments under a special bank account (letter of credit), the Contractor is authorized to submit a request for cash withdrawal for amount of \$XXXXXXX.

[End of notice]

(4) *Discontinuation of Payment Withholding.* Use the sample format or similar format if payment withholding is discontinued after auditor or functional specialist verification that the Contractor has corrected all significant deficiencies, in accordance with clause 48 CFR 952.242-71, Contractor Business System. Tailor the notice in paragraph (3) to use the appropriate version to reflect invoice payments or advance payments under a special bank account (letter of credit).

[Begin notice]

*Discontinuation of Payment Withholding*

(1) The purpose of this determination is to approve your *[identify system(s)]*, discontinue the payment withhold as identified in the Contracting Officer's determination dated YYYY/MM/DD, and release previous amounts withheld on the

contracts in Attachment A, in accordance with clause 48 CFR 952.242-71, Contractor Business System.

(2) The discontinuation of the payment withhold is made based on verification that all the Contractor's system(s) deficiencies identified in the Contracting Officer's final determination dated YYYY/MM/DD have been corrected.

(3) *[For invoice payments use the following paragraph.]* For invoice payments in Vendor Invoicing Payment Electronic Reporting system (VIPERS), the Contractor is authorized to submit an invoice in the amount of \$XXXXXXX. The billed amount should be submitted on the same type of invoice as the withhold was originally taken, as appropriate.

*[For advance payments under a special bank account (letter of credit) use the following paragraph.]* For advance payments under a special bank account (letter of credit), the Contractor is authorized to submit a request for cash withdrawal for amount of \$XXXXXXX.

[End of notice]

(e) *Contractor performance information.* The contracting officer, or designee, shall evaluate the contractor's business system performance and compliance in all evaluations in accordance with 48 CFR 42.15 and DOE procedures.

(f) *Contract closeout.* At the end of contract performance, if significant deficiencies remain in the disapproved system or systems and payment withholdings are in effect, the payment withholdings will be released during contract closeout. However, the release of the payment withholdings from one contract will not mean the system is approved. If there are other contracts where payment withholdings are in effect, the payment withholdings will continue on those contracts. These payment withholdings are contract financing payments; therefore, these payments withholdings are not subject to the interest penalty provisions of the Prompt Payment Act.

**942.7005 Contract clause.**

Unless one of the exceptions at 942.7003 applies, use the clause at 952.242-71, Contractor Business System, in solicitations and contracts in support of a Capital Asset Project (other than a management and operating contract), as prescribed in DOE O 413.3B, or current version, or for a non-capital asset project as described at 915.407-5-70(b)(2), for a prime contract, the total contract value exceeds \$50 million, including options, or when the total contract value exceeds \$10 million or more, including options, (but less than \$50 million) and the contracting officer determines it to be in the best interest of the Government (e.g., significant estimating problems are

believed to exist or the contractor's sales are predominantly Government) when—

(a) The resulting contract will be—

(1) Fixed-price contract awarded to a large business to include contractor teaming arrangement on the basis of adequate price competition without submission of cost or pricing data; or

(2) A covered contract as defined in 942.7001(a); and

(b) The solicitation or contract includes any of the following clauses:

(1) 952.215–71, Cost Estimating System Requirements.

(2) 952.234–71, Earned Value Management System.

(3) 952.242–72, Accounting System Administration.

(4) 952.244–71, Contractor Purchasing System Administration.

(5) 952.245–70, Contractor Property Management System Administration.

■ 6. Add subpart 942.71 to part 942 to read as follows:

#### **Subpart 942.71—Contractor Accounting System and Related Controls**

Sec.

942.7101 Definitions.

942.7102 Policy.

942.7103 Contract clause.

#### **Subpart 942.71—Contractor Accounting System and Related Controls**

##### **942.7101 Definitions.**

As used in this subpart—

*Acceptable accounting system* and *accounting system* are defined in the clause at 952.242–72, Accounting System Administration.

*Significant deficiency* is defined in the clause at 952.242–72, Accounting System Administration.

##### **942.7102 Policy.**

(a) Contractors receiving cost-reimbursement, incentive type, time-and-materials, fixed-price, or labor-hour contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion, shall maintain an accounting system.

(b) When the solicitation or contract includes the clause 952.242–71 Contractor Business System and related clauses, the cognizant contracting officer, in consultation with the auditor or functional specialist, shall—

(1) Ensure that contract, Part I—The Schedule, addresses in the business administration section, or similar section, that the contractor shall submit its accounting system for DOE review and acceptance with full implementation of the system to be in place no later than 60 days after contract award;

(2) Determine the acceptability of a contractor's accounting system and approve or disapprove the system; and

(3) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of a contractor's accounting system, the contracting officer, in consultation with the auditor or functional specialist, shall determine whether the contractor's accounting system complies with the system criteria for an acceptable accounting system as prescribed in the clause at 952.242–72, Accounting System Administration.

(d) *Disposition of findings*—(1)

*Reporting of findings.* The auditor shall document findings and recommendations in a report to the contracting officer. If the auditor identifies any significant accounting system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's accounting system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at 952.242–72, Accounting System Administration) due to the contractor's failure to meet one or more of the accounting system criteria in the clause at 952.242–72, the contracting officer shall—

(A) Within 30 days of receiving the report, provide an initial determination of deficiencies in writing, describing each significant deficiency in sufficient detail to allow the contractor to understand the deficiency and provide a copy of the report to the contractor;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(C) Within 30 days of receiving the contractor's response or if the contractor does not submit a response, the date the response was due, in consultation with the auditor or cognizant functional specialist, evaluate the contractor's response or the contractor's lack of response and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's accounting system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining

significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Make a determination to disapprove the system in accordance with the clause at 952.242–72, Accounting System Administration; and

(3) Withhold payments in accordance with the clause at 952.242–71, Contractor Business System, if the clause is included in the contract.

(ii) Monitoring a contractor's corrective action and the correction of significant deficiencies.

(A) *Monitoring contractor's corrective action.* The contracting officer or designee shall monitor the contractor's progress in correcting deficiencies. If the contractor fails to make adequate progress, the contracting officer shall take whatever action is necessary to ensure that the contractor corrects the deficiencies. Examples of actions the contracting officer can take include disapproving the system; implementing or increasing the withholding in accordance with 952.242–71, Contractor Business System, if applicable; and recommending non-award of potential contracts.

(B) *Correction of significant deficiencies.* (1) When the contractor notifies the contracting officer that the contractor has corrected the significant deficiencies, the contracting officer shall request that the auditor review the correction to determine if the deficiencies have been resolved. (2) The contracting officer shall determine if the contractor has corrected the deficiencies.

(3) If the contracting officer determines the contractor has corrected the deficiencies, the contracting officer's notification shall be sent to the auditor, invoice approving official, payment office, appropriate action officers responsible for reporting past performance, affected DOE contracting offices having substantial business with the contractor, and the Department of Energy's or National Nuclear Security Administration's Heads of the Contracting Activities and Senior Procurement Executives.

(e) *System approval.* The contracting officer shall promptly approve a previously disapproved accounting system and notify the contractor when the contracting officer determines that

there are no remaining significant deficiencies.

(f) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor, invoice approving official, payment office, and affected contracting offices.

(g) *Mitigating the risk of accounting system deficiencies on specific proposals.* (1) The functional specialist or field pricing team shall discuss identified accounting system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

(2) The contracting officer responsible for negotiation of a proposal generated by an accounting system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, *e.g.*—

(i) Allowing the contractor additional time to correct the accounting system deficiency and submit a corrected proposal;

(ii) Considering another type of contract;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the accounting system's deficiency;

(iv) Reducing the negotiation objective for profit or fee; or

(v) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by an accounting system deficiency should—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including certified cost or pricing data, identifying the cost impact adjustment necessitated by the deficient accounting system;

(iii) Provide for the contracting officer to adjust the contract price unilaterally if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

#### 942.7103 Contract clause.

Unless one of the exceptions at 942.7003 applies, use the clause at 952.242-72, Accounting System Administration, in solicitations and contracts when contemplating a contract in support of a Capital Asset Project (other than a management and operating contract), as prescribed in DOE O 413.3B, or current version, or for a non-capital asset project as described at 915.407-5-70(b)(2), for a prime contract, when the total contract value exceeds \$50 million, including options, or when the prime contract totaling \$10 million or more including options (but less than \$50 million) and the contracting officer determines it to be in the best interest of the Government (*e.g.*, significant estimating problems are believed to exist or the contractor's sales are predominantly Government and—

(a) A cost-reimbursement, incentive type, time-and-materials, or labor-hour contract;

(b) A contract with progress payments made on the basis of costs incurred by the contractor or on a percentage or stage of completion; or

(c) A fixed-price contract that is not a small business set-aside.

■ 7. Add part 944 to Subchapter G to read as follows:

## PART 944—SUBCONTRACTING POLICIES AND PROCEDURES

### Subpart 944.3—Contractors' Purchasing System Reviews

#### Sec.

944.301 Objective.

944.303 Extent of review.

944.305 Granting, withholding, or withdrawing approval.

944.305-70 Policy.

944.305-71 Contract clause.

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

### Subpart 944.3—Contractors' Purchasing System Reviews

#### 944.301 Objective.

The contracting officer is responsible for initiating reviews of the contractor's purchasing systems, but other organizations may request that the contracting officer initiate such reviews.

#### 944.303 Extent of review.

In addition to the review requirements of 48 CFR 44.303, the contracting officer shall review the adequacy of rationale documenting commercial item determinations to ensure compliance with the definition of "commercial item" in 48 CFR 2.101.

#### 944.305 Granting, withholding, or withdrawing approval.

#### 944.305-70 Policy.

The contracting officer shall use the days in this subsection instead of the days in 48 CFR 44.305-2(c) and 44.305-3(b) to permit the contractor's response.

(a) When the solicitation or contract includes the clause 952.242-71 Contractor Business Systems and related clauses, the cognizant contracting officer, in consultation with the purchasing system analyst or auditor, shall—

(1) Ensure that contract, Part I—The Schedule, addresses in the business administration section, or similar section, that the contractor shall submit its purchasing system for DOE review and acceptance with full implementation of the system to be in place no later than 60 days after contract award;

(2) Determine the acceptability of the contractor's purchasing system and approve or disapprove the system; and

(3) Pursue correction of any deficiencies.

(b) In evaluating the acceptability of the contractor's purchasing system, the contracting officer, in consultation with the purchasing system analyst or auditor, shall determine whether the contractor's purchasing system complies with the system criteria for an acceptable purchasing system as described in the clause at 952.244-71, Contractor Purchasing System Administration.

(c) *Disposition of findings*—(1) *Reporting of findings.* The purchasing system analyst or auditor shall document findings and recommendations in a report to the contracting officer. If the auditor or purchasing system analyst identifies any significant purchasing system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review all findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor that the contractor's purchasing system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at 952.244-71, Contractor Purchasing System Administration) due to the contractor's failure to meet one or more of the purchasing system criteria in the clause at 952.244-71, the contracting officer shall—

(A) Within 30 days of receiving the report, provide an initial determination of deficiencies in writing, describing each significant deficiency in sufficient detail to allow the contractor to understand the deficiency and provide a copy of the report to the contractor;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(C) Within 30 days of receiving the contractor's response or if the contractor does not submit a response, the date the response was due, in consultation with the auditor or cognizant functional specialist, evaluate the contractor's response or the contractor's lack of response and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's purchasing system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Disapprove the system in accordance with the clause at 952.244–71, Contractor Purchasing System Administration; and

(3) Withhold payments in accordance with the clause at 952.242–71, Contractor Business System, if the clause is included in the contract.

(ii) Monitoring a contractor's corrective action and the correction of significant deficiencies.

(A) *Monitoring contractors' corrective action.* The contracting officer and either the purchasing system analyst or auditor shall monitor the contractor's progress in correcting deficiencies. If the contractor fails to make adequate progress, the contracting officer shall take whatever action is necessary to ensure that the contractor corrects the deficiencies. Examples of actions the contracting officer can take include withdraw or withhold approval of the system or implementing or increasing the withholding in accordance with 952.242–71, Contractor Business System, and recommending non-award of potential contracts.

(B) *Correction of significant deficiencies.* (1) When the contractor

notifies the contracting officer that the contractor has corrected the significant deficiencies, the contracting officer shall request the purchasing system analyst or auditor to review the correction to determine if the deficiencies have been resolved.

(2) The contracting officer shall determine if the contractor has corrected the deficiencies.

(3) If the contracting officer determines the contractor has corrected the deficiencies, the contracting officer's notification shall be sent to the purchasing system analyst, auditor, invoice approving official, payment office, appropriate action officers responsible for reporting past performance, and the Department of Energy's or National Nuclear Security Administration's Heads of the Contracting Activities and Senior Procurement Executives.

(d) *System approval.* The contracting officer shall promptly approve a previously disapproved purchasing system and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(e) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor, invoice approving official, payment office, and affected contracting offices.

(f) *Mitigating the risk of purchasing system deficiencies on specific proposals.*

(1) The functional specialist shall discuss identified purchasing system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

(2) The contracting officer responsible for negotiation of a proposal generated by a purchasing system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.—

(i) Allowing the contractor additional time to correct the purchasing system deficiency and submit a corrected proposal;

(ii) Considering another type of contract, e.g., a fixed-price incentive (firm target) contract instead of firm-fixed-price;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements

affected by the purchasing system's deficiency;

(iv) Segregating the questionable areas as a cost-reimbursable line item;

(v) Reducing the negotiation objective for profit or fee; or

(vi) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by a purchasing system deficiency shall—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including certified cost or pricing data, identifying the cost impact adjustment necessitated by the deficient purchasing system;

(iii) Provide for the contracting officer to adjust the contract price unilaterally if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

#### 944.305–71 Contract clause.

Unless one of the exceptions at 942.7003 applies, use the clause at 952.244–71, Contractor Purchasing System Administration, in solicitations and contracts, in support of a Capital Asset Project (other than a management and operating contract), as prescribed in DOE O 413.3B, or current version, or for a non-capital asset project as described at 915.407–5–70(b)(2), for a prime contract, when the total contract value exceeds \$50 million, including options, or when the prime contract totaling \$10 million or more including options (but less than \$50 million) and the contracting officer determines it to be in the best interest of the Government (significant purchasing problems are believed to exist or the contractor's sales are predominantly Government and containing the clause at 48 CFR 52.244–2, Subcontracts.

## PART 945—GOVERNMENT PROPERTY

■ 8. Add section 945.105 to read as follows:

#### 945.105 Contractor's property management system compliance.

(a) *Definitions—*

(1) *Acceptable property management system and property management system* are defined in the clause at 952.245–70, Contractor Property Management System Administration.

(2) *Significant deficiency* is defined in the clause at 952.245–70, Contractor Property Management System Administration.

(b) *Policy.* When the solicitation or contract includes the clause 952.242–71 Contractor Business System and related clauses, the cognizant contracting officer, in consultation with the property administrator, shall—

(1) Ensure that contract, Part I—The Schedule, addresses in the business administration section, or similar section, that the contractor shall submit its property management system for DOE review and acceptance with full implementation of the system to be in place no later than 60 days after contract award;

(2) Determine the acceptability of the system and approve or disapprove the system; and

(3) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of a contractor's property management system, the contracting officer, in consultation with the property administrator, shall determine whether the contractor's property management system complies with the system criteria for an acceptable property management system as prescribed in the clause at 952.245–70, Contractor Property Management System Administration.

(d) *Disposition of findings*—(1) *Reporting of findings.* The property administrator shall document findings and recommendations in a report to the contracting officer. If the property administrator identifies any significant property system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's property management system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at 952.245–70, Contractor Property Management System Administration) due to the contractor's failure to meet one or more of the property management system criteria in the clause at 952.245–70, the contracting officer shall—

(A) Within 30 days of receiving the report, provide an initial determination of deficiencies in writing, describing each significant deficiency in sufficient detail to allow the contractor to

understand the deficiency and provide a copy of the report to the contractor;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(C) Within 30 days of receiving the contractor's response or if the contractor does not submit a response, the date the response was due, the contracting officer, in consultation with the auditor or cognizant functional specialist, should evaluate the contractor's response or the contractor's lack of response and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's property management system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action.

The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Disapprove the system in accordance with the clause at 952.245–70, Contractor Property Management System Administration; and

(3) Withhold payments in accordance with the clause at 952.242–71, Contractor Business System, if the clause is included in the contract.

(ii) *Monitoring contractor's corrective action.* The contracting officer and property administrator shall monitor the contractor's progress in correcting deficiencies. If the contractor fails to make adequate progress, the contracting officer shall take whatever action is necessary to ensure that the contractor corrects the deficiencies. Examples of actions the contracting officer can take include withdraw or withhold approval of the system; or implementing or increasing the withholding in accordance with the clause at 952.242.71, Contractor Business System, and recommending non-award of potential contracts.

(B) *Correction of significant deficiencies.* (1) When the contractor notifies the contracting officer that the contractor has corrected the significant deficiencies, the contracting officer shall request the property administrator to review the correction to determine if the deficiencies have been resolved.

(2) The contracting officer shall determine if the contractor has corrected the deficiencies.

(3) If the contracting officer determines the contractor has corrected the deficiencies, the contracting officer's notification shall be sent to the property administrator, auditor, invoice approving official, payment office, appropriate action officers responsible for reporting past performance, and the Department of Energy's or National Nuclear Security Administration's Heads of the Contracting Activities and Senior Procurement Executives.

(e) *System approval.* The contracting officer shall promptly approve a previously disapproved property management system and notify the contractor when the contracting officer determines, in consultation with the property administrator, that there are no remaining significant deficiencies.

(f) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor, invoice approving official, payment office, and affected contracting offices.

■ 9. Add section 945.107 to read as follows:

#### 945.107 Contract clauses.

(a) Unless one of the exceptions at 942.7003 applies, use the clause at 952.245–70, Contractor Property Management System Administration, in solicitations and contracts in support of a Capital Asset Project, (other than a management and operating contract as described at 917.6), as prescribed in DOE O 413.3B, or current version, or for a non-capital asset project as described at 915.407–5–70(b)(2), for a prime contract, when the total contract value exceeds \$50 million, including options, or when the prime contract totaling \$10 million or more including options (but less than \$50 million) and the contracting officer determines it to be in the best interest of the Government (significant property problems are believed to exist or the contractor's sales are predominantly Government) and containing the clause at 48 CFR 52.245–1, Government Property.

(b) For negotiated fixed-price contract, not subject to 48 CFR 942.7002, awarded on a basis other than submission of certified cost or pricing data for which Government property is provided, use the clause at 48 CFR 52.245–1, Government Property, without its Alternate I.

## PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Revise section 952.215-70 introductory text to read as follows:

### 952.215-70 Key Personnel.

As prescribed in 915.408-70(a), the contracting officer shall insert the following clause:

\* \* \* \* \*

■ 11. Add section 952.215.71 to read as follows:

### 952.215-71 Cost estimating system requirements.

As prescribed in 915.408-70(b), use the following clause:

#### COST ESTIMATING SYSTEM REQUIREMENTS (xxx 201x)

##### (a) Definitions.

*Acceptable estimating system* means an estimating system that complies with the system criteria in paragraph (d) of this clause, and provides for a system that—

- (1) Is maintained, reliable, and consistently applied;
- (2) Produces verifiable, supportable, documented, and timely cost estimates that are an acceptable basis for negotiation of fair and reasonable prices;
- (3) Is consistent with and integrated with the Contractor's related management systems; and
- (4) Is subject to applicable financial control systems.

*Estimating system* means the Contractor's policies, procedures, and practices for budgeting and planning controls, and generating estimates of costs and other data included in proposals submitted to customers in the expectation of receiving contract awards or contract modifications. Estimating system includes the Contractor's—

- (1) Organizational structure;
- (2) Established lines of authority, duties, and responsibilities;
- (3) Internal controls and managerial reviews;
- (4) Flow of work, coordination, and communication; and
- (5) Budgeting, planning, estimating methods, techniques, accumulation of historical costs, and other analyses used to generate cost estimates.

*Significant deficiency* means a shortcoming in the system that materially affects the ability of officials of the Department of Energy to rely upon information produced by the system that is needed for management purposes.

(b) *General.* The Contractor shall establish, maintain, and comply with an acceptable estimating system.

(c) *Applicability.* Paragraphs (d) and (e) of this clause apply if the Contractor is a large business to include a contractor teaming arrangement, as defined at 48 CFR 9.601(1), performing a contract in support of a Capital Asset Project (other than a management and operating contract as described at 917.6), as prescribed in DOE Order (DOE O) 413.3B, or

current version; or a non-capital asset project and either—

- (1) The total prime contract value exceeds \$50 million, including options; or
- (2) The Contractor was notified, in writing, by the Contracting Officer that paragraphs (d) and (e) of this clause apply.

(d) *System requirements.* (1) The Contractor shall disclose its estimating system to the Contracting Officer, in writing. If the Contractor wishes the Government to protect the information as privileged or confidential, the Contractor must mark the documents with the appropriate legends before submission. If the Contractor plans to adopt the existing system from the previous Contractor, the Contractor is responsible for the system and shall comply with the system requirements required in this clause.

(2) An estimating system disclosure is acceptable when the Contractor has provided the Contracting Officer with documentation no later than 60 days after contract award that—

- (i) Accurately describes those policies, procedures, and practices that the Contractor currently uses in preparing cost proposals; and
- (ii) Provides sufficient detail for the Government to reasonably make an informed judgment regarding the acceptability of the Contractor's estimating practices.

(3) The Contractor shall—

- (i) Comply with its disclosed estimating system; and
- (ii) Disclose significant changes to the cost estimating system to the Contracting Officer on a timely basis.

(4) The Contractor's estimating system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures. An acceptable estimating system shall accomplish the following functions:

- (i) Establish clear responsibility for preparation, review, and approval of cost estimates and budgets.

(ii) Provide a written description of the organization and duties of the personnel responsible for preparing, reviewing, and approving cost estimates and budgets.

(iii) Ensure that relevant personnel have sufficient training, experience, and guidance to perform estimating and budgeting tasks in accordance with the Contractor's established procedures.

(iv) Identify and document the sources of data and the estimating methods and rationale used in developing cost estimates and budgets.

(v) Provide for adequate supervision throughout the estimating and budgeting process.

(vi) Provide for consistent application of estimating and budgeting techniques.

(vii) Provide for detection and timely correction of errors.

(viii) Protect against cost duplication and omissions.

(ix) Provide for the use of historical experience, including historical vendor pricing information, where appropriate.

(x) Require use of appropriate analytical methods.

(xi) Integrate information available from other management systems.

(xii) Require management review, including verification of compliance with the company's estimating and budgeting policies, procedures, and practices.

(xiii) Provide for internal review of, and accountability for, the acceptability of the estimating system, including the budgetary data supporting indirect cost estimates and comparisons of projected results to actual results, and an analysis of any differences.

(xiv) Provide procedures to update cost estimates and notify the Contracting Officer in a timely manner.

(xv) Provide procedures that ensure subcontract prices are reasonable based on a documented review and analysis provided with the prime proposal, when practicable.

(xvi) Provide estimating and budgeting practices that consistently generate sound proposals that are compliant with the provisions of the solicitation and are adequate to serve as a basis to reach a fair and reasonable price.

(xvii) Have an adequate system description, including policies, procedures, and estimating and budgeting practices, that comply with the Federal Acquisition Regulation (48 CFR chapter 1) and Department of Energy Acquisition Regulation (48 CFR chapter 9).

(e) *Significant deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, of any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in the Contractor's estimating system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing. In the event the Contractor did not respond in writing to the initial determination within the response time, this lack of response shall indicate that the Contractor agrees with the initial determination.

(3) The Contracting Officer will evaluate the Contractor's response or the Contractor's lack of response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining significant deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more significant deficiencies remain.

(f) If the Contractor receives the Contracting Officer's final determination of significant deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies.

(g) *Withholding payments.* If the Contracting Officer makes a final determination to disapprove the Contractor's estimating system, and the contract includes

the clause at 952.242-71, Contractor Business System, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

- 12. Add section 952.234.70 to read as follows:

#### **952.234-70 Notice of earned value management system.**

As prescribed in 934.203(a), use the following provision:

#### **NOTICE OF EARNED VALUE MANAGEMENT SYSTEM (xxx 201x)**

(a) If the offeror submits a proposal for a Department of Energy (DOE) Capital Asset Project—

(1) In the amount of \$50,000,000 or more; or

(2) Where the offeror has a contract or other contracts in support of DOE Capital Asset Projects and the total contract values are \$20,000,000 or greater per contract for a total contract values of \$50,000,000 or more—

(i) The offeror shall provide documentation that an authorized government representative has determined that the proposed Earned Value Management System (EVMS) complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA-748) (current version at time of solicitation). The Government reserves the right to perform reviews of the EVMS when deemed necessary to verify compliance.

(ii) If the offeror proposes to use a system that has not been determined to be in compliance with the requirements of paragraph (a)(1) of this provision, the offeror shall submit a comprehensive plan for compliance with the guidelines in ANSI/EIA-748.

(A) The plan shall—

(1) Describe the EVMS the offeror intends to use in performance of the contract, and how the proposed EVMS complies with the EVMS guidelines in ANSI/EIA-748;

(2) Distinguish between the offeror's existing management system and modifications proposed to meet the EVMS guidelines;

(3) Describe the management system and its application in terms of the EVMS guidelines;

(4) Describe the proposed procedure for administration of the EVMS guidelines as applied to subcontractors; and

(5) Describe the process the offeror will use to determine subcontractor compliance with ANSI/EIA-748.

(B) The offeror shall provide information and assistance as required by the Contracting Officer to support review of the plan.

(C) The offeror's EVMS plan must provide milestones that indicate when the offeror anticipates that the EVMS will be compliant with the guidelines in ANSI/EIA-748.

(b) If the offeror submits a proposal in an amount less than \$50,000,000 and does not meet the condition described at (a)(2) above—

(1) The offeror shall submit a written description of the management procedures it

will use and maintain in the performance of any resultant contract to comply with the requirements of the Earned Value Management System clause of the contract. The description shall include—

(i) A matrix that correlates each guideline in ANSI/EIA-748 (current version at time of solicitation) to the corresponding process in the offeror's written management procedures; and

(ii) The process the offeror will use to determine subcontractor compliance with ANSI/EIA-748.

(2) If the offeror proposes to use an EVMS that has been determined by the CFA to be in compliance with the EVMS guidelines in ANSI/EIA-748, the offeror may submit a copy of the documentation of such determination instead of the written description required by paragraph (b)(1) of this provision.

(c) The offeror shall identify the subcontractors (or the subcontracted effort if subcontractors have not been selected) to whom the EVMS requirements will apply. The offeror and the Government shall agree to the contractors or the subcontracted effort selected for application of the EVMS requirements. The offeror shall be responsible for ensuring that the selected subcontractors comply with the requirements of the Earned Value Management System clause of the contract.

(End of provision)

- 13. Add section 952.234.71 to read as follows:

#### **952.234-71 Earned value management system.**

As prescribed in 934.203(b), use the following clause:

#### **EARNED VALUE MANAGEMENT SYSTEM (XXX 201X)**

(a) *Definitions.* As used in this clause—

*Acceptable earned value management system* means an earned value management system that generally complies with system criteria in paragraph (b) of this clause.

*Earned value management system* means an earned value management system that complies with the earned value management system guidelines in the ANSI/EIA-748.

*Over Target Baseline* means an overrun to the Contract Budget Base (CBB) which is formally incorporated into the Performance Measurement Baseline (PMB) for management purposes.

*Over Target Schedule* means the term used to describe a condition where a baseline schedule is time-phased beyond the contract completion date.

*Significant deficiency* means a shortcoming in the system that materially affects the ability of officials of the Department of Energy to rely upon information produced by the system that is needed for management purposes.

(b) *System criteria.* In the performance of this contract, the Contractor shall use—

(1) An Earned Value Management System (EVMS) that complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value

Management Systems (ANSI/EIA-748) (current version at time of award; and

(2) *Management procedures.* (i)

Management procedures provide for generation of timely, reliable, and verifiable information for the Department of Energy (DOE) Integrated Program Management Report (IPMR) data item of this contract.

(ii) The Contractor shall use Department of Energy's (DOE) modified version of Department of Defense's Data Item Description (DID) Integrated Program Management Report (IPMR), DI-MGMT-81861, (DOE version, current version at time of contract award) which contains data for measuring cost and schedule performance for this DOE contract. The Contractor shall submit the data electronically by uploading the data into the Project Assessment and Reporting System (PARS II) in accordance with the "Contractor Project Performance Upload Requirements" document maintained by the DOE Office of Acquisition and Project Management (OAPM). All requested data shall be submitted timely and accurately, and shall be current as of the close of the previous month's accounting period.

(c) If the Contractor has one or more DOE contracts valued at \$20,000,000 or greater per contract for a total contract value of \$50,000,000 or more which support DOE Capital Asset Projects, the Contractor shall use an EVMS that has been determined to be acceptable by DOE. If, at the time of award, the Contractor's EVMS has not been determined by DOE to be in compliance with the EVMS guidelines as stated in paragraph (b)(1) of this clause, the Contractor shall apply its current system to the contract and shall take necessary actions to meet the milestones in the Contractor's EVMS plan.

(d) If this contract has a total value of less than \$50,000,000 and does not meet the condition described at (c) above, the Government will not make a formal determination that the Contractor's EVMS complies with the EVMS guidelines in ANSI/EIA-748 with respect to the contract. The use of the Contractor's EVMS for this contract does not imply a Government determination of the Contractor's compliance with the EVMS guidelines in ANSI/EIA-748 for application to future contracts.

(e) The Contractor shall submit notification of all proposed changes to the EVMS procedures and the impact of those changes to DOE. If this contractor has one or more contracts in support of DOE Capital Asset Projects and the total contract values are \$20,000,000 or greater per contract for total contract values of \$50,000,000 or more, unless a waiver is granted by DOE, any EVMS changes proposed by the Contractor require approval of DOE prior to implementation. DOE will advise the Contractor of the acceptability of such changes as soon as practicable (generally within 30 calendar days) after receipt of the Contractor's notice of proposed changes. If DOE waives the advance approval requirements, the Contractor shall disclose EVMS changes to DOE at least 14 calendar days prior to the effective date of implementation.

(f) *Integrated baseline reviews.* (1) The purpose of the integrated baseline reviews

(IBR) is to verify the technical content and the realism of the related performance budgets, resources, and schedules. It should provide a mutual understanding of the inherent risks in the offerors'/contractors' performance plans and the underlying management control systems, and it should formulate a plan to handle these risks. DOE and the Contractor will use the IBR process described in the National Defense Industrial Association Program Management Systems Committee Integrated Baseline Review (NDIA PMSC IBR) Guide (current version at time of award).

(2) The Government will schedule IBRs as early as practicable, and the review process will be conducted not later than 180 calendar days after—

- (i) Contract award;
- (ii) The exercise of significant contract options; and
- (iii) The incorporation of major modifications.

During such reviews, the Government and the Contractor will jointly assess the Contractor's baseline to be used for performance measurement to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

(g) The Contractor shall provide access to all pertinent records and data requested by the Contracting Officer or duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS complies, and continues to comply, with the performance criteria referenced in paragraph (b) of this clause.

(h) When indicated by contract performance, the Contractor shall submit a request for approval to initiate an over-target baseline or over-target schedule to the Contracting Officer. The request shall include a top-level projection of cost and/or schedule growth, a determination of whether or not performance variances will be retained, and a schedule of implementation for the rebaselining. The Government will acknowledge receipt of the request in a timely manner (generally within 30 calendar days).

(i) *Significant deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, on any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in the Contractor's EVMS. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing. In the event the Contractor did not respond in writing to the initial determination within the response time, this lack of response shall indicate that the Contractor agrees with the initial determination.

(3) The Contracting Officer will evaluate the Contractor's response or the Contractor's lack of response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

- (i) Remaining significant deficiencies;
- (ii) The adequacy of any proposed or completed corrective action;
- (iii) System noncompliance, when the Contractor's existing EVMS fails to comply with the earned value management system guidelines in the ANSI/EIA-748; and
- (iv) System disapproval, if initial EVMS validation is not successfully completed within the timeframe approved by the Contracting Officer, or if the Contracting Officer determines that the Contractor's earned value management system contains one or more significant deficiencies in high-risk guidelines in ANSI/EIA-748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). When the Contracting Officer determines that the existing earned value management system contains one or more significant deficiencies in one or more of the remaining 16 guidelines in ANSI/EIA-748 standards, the contracting officer will use discretion to disapprove the system based on input received from the DOE Office of Acquisition and Project Management or the DOE Program Office, herein referred to as the functional specialists.

(4) If the Contractor receives the Contracting Officer's final determination of significant deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies.

(j) *Withholding payments.* If the Contracting Officer makes a final determination to disapprove the Contractor's EVMS, and the contract includes the clause at 952.242-71, Contractor Business System, the Contracting Officer will withhold payments in accordance with that clause.

(k) With the exception of paragraphs (i) and (j) of this clause, for contracts valued at \$20 million or more requiring EVMS, the contractor shall flow down appropriate EVMS requirements to its subcontractors in order for the contractor to meet all requirements of this clause.

*[Contracting Officer to insert names of subcontractors (or subcontracted effort if subcontractors have not been selected) designated for application of the EVMS requirements of this clause.]*

(l) *Adopting previous Contractor's previously certified earned value management (EVM) process.* If the Contractor plans to adopt the existing system from the previous Contractor or DOE-site, the Contractor is responsible for the system and shall comply with the system requirements required in this clause. The existing system shall utilize the same DOE approved EVM Process Description and the same EVM training as the previous system. The Contractor shall—

(1) Identify the corporate entity which owns the certified EVM process and provide the certification documentation;

(2) Obtain DOE prior approval or Advanced Agreement including DOE approval of process changes and joint surveillance;

(3) Be responsible for compliance with the system criteria required in paragraph (b) of this clause; and

(4) Be responsible for correcting any significant deficiencies previously identified to the previous Contractor by the Contracting Officer in accordance with paragraph (i) of this clause. Within 45 days after receiving a copy of the previous contractor's final determination, the Contractor shall follow paragraph (i)(4) and either correct any significant deficiencies or submit an acceptable corrective action plan. The Contracting Officer or designee, will provide a copy of the previous contractor's final determination.

(End of clause)

■ 14. Add section 952.242.71 to read as follows:

#### **952.242-71 Contractor business system.**

As prescribed in 942.7002, use the following clause:

#### **CONTRACTOR BUSINESS SYSTEM (xxx 201x)**

(a) This clause only applies to fixed-price contract awarded to a large business on the basis of adequate price competition with or without submission of cost or pricing data; or covered contract that is subject to the Cost Accounting Standards under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201-1(a) and is not exempted at 9903.201-1(b)(1) through (14) (see the 48 CFR Appendix).

(b) *Definitions.* As used in this clause—  
*Acceptable contractor business system* means contractor business system that comply with the terms and conditions of the applicable business system clauses listed in the definition of "contractor business system" in this clause.

*Contractor business system* means—

(1) Accounting system, if this contract includes the clause at 48 CFR 952.242-72, Accounting System Administration;

(2) Earned value management system, if this contract includes the clause at 48 CFR 952.234-70, Earned Value Management System;

(3) Estimating system, if this contract includes the clause at 48 CFR 952.215-71, Cost Estimating System Requirements;

(4) Property management system, if this contract includes the clause at 48 CFR 952.245-70, Contractor Property Management System Administration; and

(5) Purchasing system, if this contract includes the clause at 48 CFR 952.244-71, Contractor Purchasing System Administration.

*Significant deficiency*, in the case of a contractor business system, means a shortcoming in the system that materially affects the ability of officials of the Department of Energy to rely upon information produced by the system that is needed for management purposes.

(c) *General.* The Contractor shall establish and maintain acceptable business systems in accordance with the terms and conditions of this contract. If the Contractor plans to adopt any existing business system from the previous Contractor, the Contractor is responsible for the system and shall comply with the system requirements and criteria required in that specific business system clause.

(d) *Significant deficiencies.* (1) The Contractor shall respond, in writing, within 30 days to an initial determination that there are one or more significant deficiencies in one or more of the Contractor's business systems.

(2) The Contracting Officer will evaluate the Contractor's response and notify the Contractor, in writing, of the final determination as to whether the Contractor's business system contains significant deficiencies. If the Contracting Officer determines that the Contractor's business system contains significant deficiencies, the final determination will include a notice to withhold payments.

(e) *Withholding payments.* (1) If the Contracting Officer issues the final determination with a notice to withhold payments for significant deficiencies in a contractor business system required under this contract, the Contracting Officer will direct the Contractor, in writing, to withhold five percent from its invoices until the Contracting Officer has determined that the Contractor has corrected all significant deficiencies as directed by the Contracting Officer's final determination. The Contractor shall, within 45 days of receipt of the notice, either—

- (i) Correct the deficiencies; or
- (ii) Submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies. The plan shall contain—

(A) Root cause(s) identification of the problem(s);

(B) The proposed corrective action(s) to address the root cause(s);

(C) A schedule for implementation; and

(D) The name of the person responsible for the implementation.

(2) If the Contractor submits an acceptable corrective action plan within 45 days of receipt of a notice of the Contracting Officer's intent to withhold payments, and the Contracting Officer, in consultation with the auditor or functional specialist, determines that the Contractor is effectively implementing such plan, the Contracting Officer will direct the Contractor, in writing, to reduce the percentage withheld on invoices to two percent until the Contracting Officer determines the Contractor has corrected all significant deficiencies as directed by the Contracting Officer's final determination. However, if at any time, the Contracting Officer determines that the Contractor has failed to follow the accepted corrective action plan, the Contracting Officer will increase withholding and direct the Contractor, in writing, to increase the percentage withheld on invoices to the percentage initially withheld, until the Contracting Officer determines that the Contractor has corrected all significant deficiencies as directed by the Contracting Officer's final determination.

(3) *Payment withhold percentage limits.*

(i) The total percentage of payments withheld on amounts due on this contract shall not exceed—

(A) Five percent for one or more significant deficiencies in any single contractor business system; and

(B) Ten percent for significant deficiencies in multiple contractor business systems.

(ii) If this contract contains pre-existing withhold, and the application of any subsequent payment withhold will cause withholding under this clause to exceed the payment withhold percentage limits in paragraph (e)(3)(i) of this clause, the Contracting Officer will reduce the payment withhold percentage in the final determination to an amount that will not exceed the payment withhold percentage limits.

(4) For the purpose of this clause, payment means invoicing for any of the following payments authorized under this contract:

- (i) Interim payments under—
- (A) Cost-reimbursement contracts;
- (B) Incentive type contracts;
- (C) Time-and-materials contracts; or
- (D) Labor-hour contracts.
- (ii) Progress payments to include fixed-price contracts.
- (iii) Performance-based payments to include fixed-price contracts.

(5) Payment withholding shall not apply to payments on fixed-price line items where performance is complete and the items were accepted by the Government.

(6) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights or remedies the Government has under this contract.

(7) Notwithstanding the provisions of any clause in this contract providing for interim, partial, or other payment withholding on any basis, the Contracting Officer may withhold payment in accordance with the provisions of this clause.

(8) The payment withholding authorized in this clause is not subject to the interest-penalty provisions of the Prompt Payment Act.

(f) *Correction of deficiencies.* (1) The Contractor shall notify the Contracting Officer, in writing, when the Contractor has corrected the business system's deficiencies.

(2) Once the Contractor has notified the Contracting Officer that all deficiencies have been corrected, the Contracting Officer will take one of the following actions:

(i) If the Contracting Officer determines that the Contractor has corrected all significant deficiencies as directed by the Contracting Officer's final determination, the Contracting Officer will direct the Contractor, in writing, to discontinue the payment withholding from invoices under this contract associated with the Contracting Officer's final determination, and authorize the Contractor to bill for any monies previously withheld that are not also being withheld due to other significant deficiencies. Any payment withholding under this contract due to other significant deficiencies, will remain in effect until the Contracting Officer determines that those significant deficiencies are corrected.

(ii) If the Contracting Officer determines that the Contractor still has significant deficiencies, the Contractor shall continue withholding amounts from its invoices in accordance with paragraph (e) of this clause, and not invoice for any monies previously withheld.

(iii) If the Contracting Officer determines, based on the evidence submitted by the

Contractor, that there is a reasonable expectation that the corrective actions have been implemented and are expected to correct the significant deficiencies, the Contracting Officer will discontinue withholding payments, and release any payments previously withheld directly related to the significant deficiencies identified in the Contractor notification, and direct the Contractor, in writing, to discontinue the payment withholding from invoices associated with the Contracting Officer's final determination, and authorize the Contractor to bill for any monies previously withheld.

(iv) If, within 90 days of receipt of the Contractor notification that the Contractor has corrected the significant deficiencies, the Contracting Officer has not made a determination in accordance with paragraphs (f)(2)(i), (ii), or (iii) of this clause, the Contracting Officer will direct the Contractor, in writing, to reduce the payment withholding from invoices directly related to the significant deficiencies identified in the Contractor notification by a specified percentage that is at least 50 percent, but not authorize the Contractor to bill for any monies previously withheld until the Contracting Officer makes a determination in accordance with paragraphs (f)(2)(i), (ii), or (iii) of this clause.

(v) At any time after the Contracting Officer directs the Contractor to reduce or discontinue the payment withholding from invoices under this contract, if the Contracting Officer determines that the Contractor has failed to correct the significant deficiencies identified in the Contractor's notification, the Contracting Officer will reinstate or increase withholding and direct the Contractor, in writing, to reinstate or increase the percentage withheld on invoices to the percentage initially withheld, until the Contracting Officer determines that the Contractor has corrected all significant deficiencies as directed by the Contracting Officer's final determination.

(End of clause)

■ 15. Add section 952.242.72 to read as follows:

**952.242-72 Accounting system administration.**

As prescribed in 942.7103, use the following clause:

**ACCOUNTING SYSTEM ADMINISTRATION (XXX 201X)**

(a) *Definitions.* As used in this clause—

(1) *Acceptable accounting system* means a system that complies with the system criteria in paragraph (c) of this clause to provide reasonable assurance that—

(i) Applicable laws and regulations are complied with;

(ii) The accounting system and cost data are reliable;

(iii) Risk of misallocations and mischarges are minimized; and

(iv) Contract allocations and charges are consistent with billing procedures.

(2) *Accounting system* means the Contractor's system or systems for accounting methods, procedures, and controls

established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting in compliance with applicable laws, regulations, and management decisions, and may include subsystems for specific areas such as indirect and other direct costs, compensation, billing, labor, and general information technology.

(3) *Significant deficiency* means a shortcoming in the system that materially affects the ability of officials of the Department of Energy to rely upon information produced by the system that is needed for management purposes.

(b) *General.* The Contractor shall establish and maintain an acceptable accounting system. If the Contractor plans to adopt the existing system from the previous Contractor, the Contractor is responsible for the system and shall comply with the system criteria required in this clause. The Contractor shall provide in writing to the Contracting Officer documentation that its accounting system meets the system criteria in paragraph (c) of this clause no later than 60 days after contract award. Failure to maintain an acceptable accounting system, as defined in this clause, shall result in the withholding of payments if the contract includes the clause at 48 CFR 952.242-71, Contractor Business System, and also may result in disapproval of the system.

(c) *System criteria.* The Contractor's accounting system shall provide for—

(1) A sound internal control environment, accounting framework, and organizational structure;

(2) Proper segregation of direct costs from indirect costs;

(3) Identification and accumulation of direct costs by contract;

(4) A logical and consistent method for the accumulation and allocation of indirect costs to intermediate and final cost objectives;

(5) Accumulation of costs under general ledger control;

(6) Reconciliation of subsidiary cost ledgers and cost objectives to general ledger;

(7) Approval and documentation of adjusting entries;

(8) Management reviews or internal audits of the system to ensure compliance with the Contractor's established policies, procedures, and accounting practices;

(9) A timekeeping system that identifies employees' labor by intermediate or final cost objectives;

(10) A labor distribution system that charges direct and indirect labor to the appropriate cost objectives;

(11) Interim (at least monthly) determination of costs charged to a contract through routine posting of books of account;

(12) Exclusion from costs charged to Government contracts of amounts which are not allowable in terms of 48 CFR part 31, Contract Cost Principles and Procedures, and other contract provisions;

(13) Identification of costs by contract line item and by units (as if each unit or line item were a separate contract), if required by the contract;

(14) Segregation of preproduction costs from production costs, as applicable;

(15) Cost accounting information, as required—

(i) By contract clauses concerning limitation of cost (48 CFR 52.232-20), limitation of funds (48 CFR 52.232-22), or allowable cost and payment (48 CFR 52.216-7); and

(ii) To readily calculate indirect cost rates from the books of accounts;

(16) Billings that can be reconciled to the cost accounts for both current and cumulative amounts claimed and comply with contract terms;

(17) Adequate, reliable data for use in pricing follow-on acquisitions; and

(18) Accounting practices in accordance with standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise, Generally Accepted Accounting Principles.

(d) *Significant deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, on any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in the Contractor's accounting system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing. In the event the Contractor did not respond in writing to the initial determination within the response time, this lack of response shall indicate that the Contractor agrees with the initial determination.

(3) The Contracting Officer will evaluate the Contractor's response or the Contractor's lack of response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining significant deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more significant deficiencies remain.

(e) If the Contractor receives the Contracting Officer's final determination of significant deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies.

(f) *Withholding payments.* If the Contracting Officer makes a final determination to disapprove the Contractor's accounting system, and the contract includes the clause 48 CFR 952.242-71, Contractor Business System, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

■ 16. Add section 952.244.71 to read as follows:

#### 952.244-71 Contractor purchasing system administration.

As prescribed in 944.305-71, insert the following clause:

#### CONTRACTOR PURCHASING SYSTEM ADMINISTRATION (XXX 201X)

(a) *Definitions.* As used in this clause—

*Acceptable purchasing system* means a purchasing system that complies with the system criteria in paragraph (c) of this clause.

*Purchasing system* means the Contractor's system or systems for purchasing and subcontracting, including make-or-buy decisions, the selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placing and administering of orders, and expediting delivery of materials.

*Significant deficiency* means a shortcoming in the system that materially affects the ability of officials of the Department of Energy to rely upon information produced by the system that is needed for management purposes.

(b) *General.* The Contractor shall establish and maintain an acceptable purchasing system. If the Contractor plans to adopt the existing system from the previous Contractor, the Contractor is responsible for the system and shall comply with the system criteria required in this clause. The Contractor shall provide in writing to the Contracting Officer documentation that its purchasing system meets the system criteria in paragraph (c) of this clause no later than 60 days after contract award. Failure to maintain an acceptable purchasing system, as defined in this clause, may result in disapproval of the system by the Contracting Officer and/or withholding of payments.

(c) *System criteria.* The Contractor's purchasing system shall—

(1) Have an adequate system description including policies, procedures, and purchasing practices that comply with the Federal Acquisition Regulation (FAR) (48 CFR Chapter 1) and the Department of Energy Acquisition Regulation (48 CFR Chapter 9);

(2) Ensure that all applicable purchase orders and subcontracts contain all flowdown clauses, including terms and conditions and any other clauses needed to carry out the requirements of the prime contract;

(3) Maintain an organization plan that establishes clear lines of authority and responsibility;

(4) Ensure all purchase orders are based on authorized requisitions and include a complete and accurate history of purchase transactions to support vendor selected, price paid, and document the subcontract/purchase order files which are subject to Government review;

(5) Establish and maintain adequate documentation to provide a complete and accurate history of purchase transactions to support vendors selected and prices paid;

(6) Apply a consistent make-or-buy policy that is in the best interest of the Government;

(7) Use competitive sourcing to the maximum extent practicable, and ensure debarred or suspended contractors are properly excluded from contract award;

(8) Evaluate price, quality, delivery, technical capabilities, and financial capabilities of competing vendors to ensure fair and reasonable prices;

(9) Require management level justification and adequate cost or price analysis, as applicable, for any sole or single source award;

(10) Perform timely and adequate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote to ensure fair and reasonable subcontract prices;

(11) Document negotiations in accordance with 48 CFR 15.406-3;

(12) Seek, take, and document economically feasible purchase discounts, including cash discounts, trade discounts, quantity discounts, rebates, freight allowances, and company-wide volume discounts;

(13) Ensure proper type of contract selection and prohibit issuance of cost-plus-a-percentage-of-cost subcontracts;

(14) Maintain subcontract surveillance to ensure timely delivery of an acceptable product and procedures to notify the Government of potential subcontract problems that may impact delivery, quantity, or price;

(15) Document and justify reasons for subcontract changes that affect cost or price;

(16) Notify the Government of the award of all subcontracts that contain the 48 CFR Chapter 1 and 48 CFR Chapter 9 flowdown clauses that allow for Government audit of those subcontracts, and ensure the performance of audits of those subcontracts;

(17) Enforce adequate policies on conflict of interest, gifts, and gratuities, including the requirements of the 41 U.S.C. chapter 87, Kickbacks;

(18) Perform internal audits or management reviews, training, and maintain policies and procedures for the purchasing department to ensure the integrity of the purchasing system;

(19) Establish and maintain policies and procedures to ensure purchase orders and subcontracts contain mandatory and applicable flowdown clauses, as required by the 48 CFR chapter 1, including terms and conditions required by the prime contract and any clauses required to carry out the requirements of the prime contract;

(20) Provide for an organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the best value from responsible and reliable sources;

(21) Establish and maintain selection processes to ensure the most responsive and responsible sources for furnishing required quality parts and materials and to promote competitive sourcing among dependable suppliers so that purchases are reasonably priced and from sources that meet contractor quality requirements;

(22) Establish and maintain procedures to ensure performance of adequate price or cost analysis on purchasing actions;

(23) Establish and maintain procedures to ensure that proper types of subcontracts are selected, and that there are controls over subcontracting, including oversight and surveillance of subcontracted effort; and

(24) Establish and maintain procedures to timely notify the Contracting Officer, in writing, if—

(i) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of the work to be performed under the contract, task

order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or

(ii) Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Significant deficiencies.* (1) The Contracting Officer will provide notification of initial determination to the Contractor, in writing, of any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in the Contractor's purchasing system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing. In the event the Contractor did not respond in writing to the initial determination within the response time, this lack of response shall indicate that the Contractor agrees with the initial determination.

(3) The Contracting Officer will evaluate the Contractor's response or the Contractor's lack of response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining significant deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more significant deficiencies remain.

(e) If the Contractor receives the Contracting Officer's final determination of significant deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(f) *Withholding payments.* If the Contracting Officer makes a final determination to disapprove the Contractor's purchasing system, and the contract includes the clause at 952.242-71, Contractor Business System, the Contracting Officer will withhold payments in accordance with that clause.

(End of clause)

■ 17. Add section 952.245.70 to read as follows:

#### 952.245-70 Contractor property management system administration.

As prescribed in 945.107(a), insert the following clause:

#### CONTRACTOR PROPERTY MANAGEMENT SYSTEM ADMINISTRATION (xxx 201x)

(a) *Definitions.* As used in this clause—

*Acceptable property management system* means a property system that complies with

the system criteria in paragraph (c) of this clause.

*Property management system* means the Contractor's system or systems for managing and controlling Government property.

*Significant deficiency* means a shortcoming in the system that materially affects the ability of officials of the Department of Energy to rely upon information produced by the system that is needed for management purposes.

(b) *General.* The Contractor shall establish and maintain an acceptable property management system. If the Contractor plans to adopt the existing system from the previous Contractor, the Contractor is responsible for the system and shall comply with the system criteria required in this clause. The Contractor shall provide in writing to the Contracting Officer documentation that its property management system meets the system criteria in paragraph (c) of this clause no later than 60 days after contract award. Failure to maintain an acceptable property management system, as defined in this clause, may result in disapproval of the system by the Contracting Officer and/or withholding of payments.

(c) *System criteria.* The Contractor's property management system shall be in accordance with paragraph (f) of the contract clause at 48 CFR 52.245-1.

(d) *Significant deficiencies.* (1) The Contracting Officer will provide an initial determination to the Contractor, in writing, of any significant deficiencies. The initial determination will describe the deficiency in sufficient detail to allow the Contractor to understand the deficiency.

(2) The Contractor shall respond within 30 days to a written initial determination from the Contracting Officer that identifies significant deficiencies in the Contractor's property management system. If the Contractor disagrees with the initial determination, the Contractor shall state, in writing, its rationale for disagreeing. In the event the Contractor did not respond in writing to the initial determination within the response time, this lack of response shall indicate that the Contractor agrees with the initial determination.

(3) The Contracting Officer will evaluate the Contractor's response or the Contractor's lack of response and notify the Contractor, in writing, of the Contracting Officer's final determination concerning—

(i) Remaining significant deficiencies;

(ii) The adequacy of any proposed or completed corrective action; and

(iii) System disapproval, if the Contracting Officer determines that one or more significant deficiencies remain.

(e) If the Contractor receives the Contracting Officer's final determination of significant deficiencies, the Contractor shall, within 45 days of receipt of the final determination, either correct the significant deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the significant deficiencies.

(f) *Withholding payments.* If the Contracting Officer makes a final determination to disapprove the Contractor's property management system, and the

contract includes the clause at 952.242-71, Contractor Business System, the Contracting

Officer will withhold payments in accordance with that clause.

(End of clause)

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