

3-28-84  
Vol. 49 No. 61  
Pages 11799-12184

# FAST TRACK

Wednesday  
March 28, 1984

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## Selected Subjects

### **Air Pollution Control**

Environmental Protection Agency

### **Animal Diseases**

Air Force Department

### **Aviation Safety**

Federal Aviation Administration

### **Credit**

Federal Reserve System

### **Crop Insurance**

Federal Crop Insurance Corporation

### **Dairy Products**

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### **Government Procurement**

Agriculture Department

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General Services Administration

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Environmental Protection Agency

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Questions and requests for specific information may be directed to the telephone numbers listed under **INFORMATION AND ASSISTANCE** in the **READER AIDS** section of this issue.

## Selected Subjects

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### Infants and Children

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### Marine Safety

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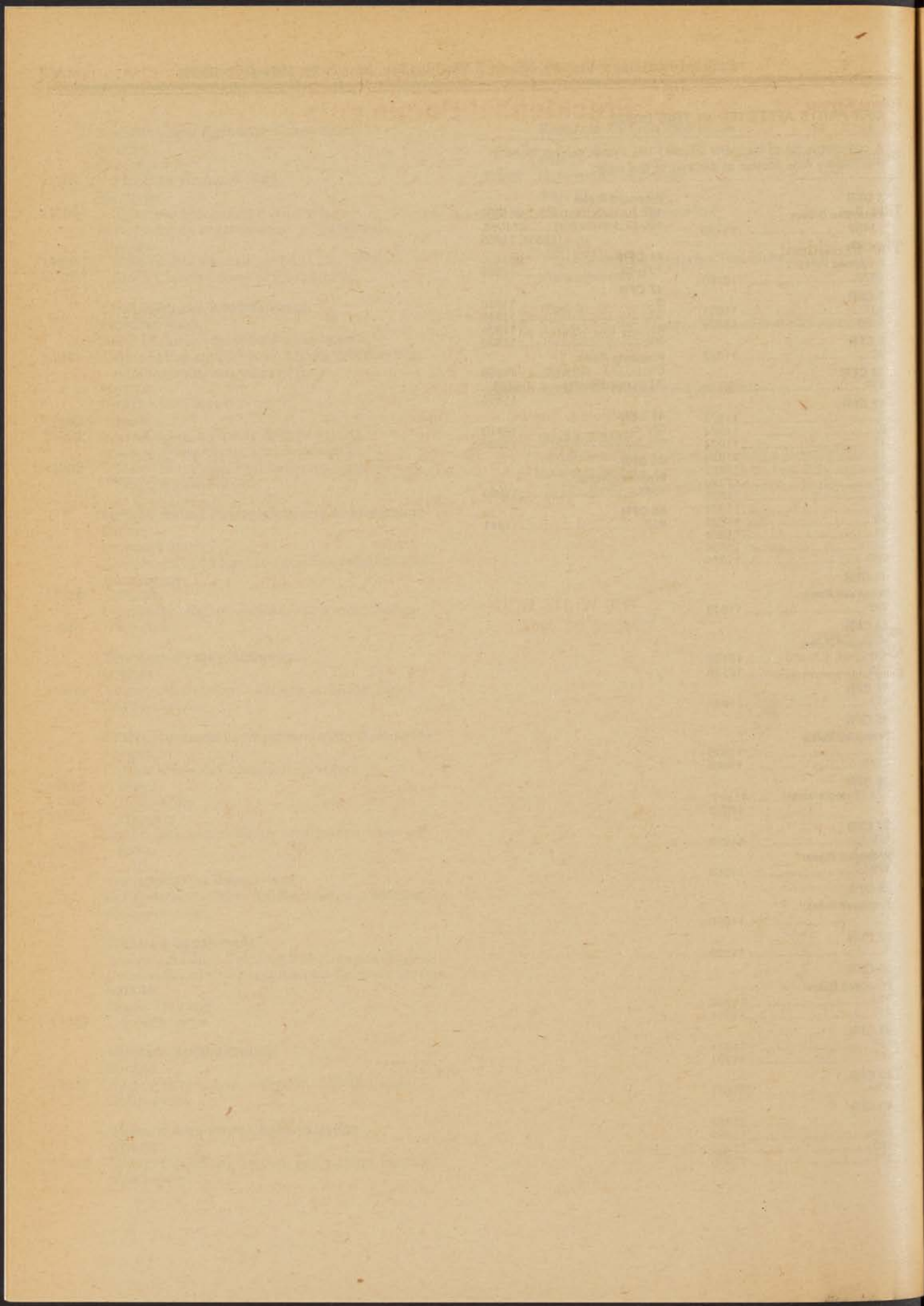


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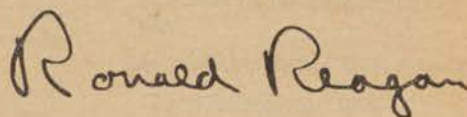
The President

## East-West Foreign Trade Report

By the authority vested in me as President by the Constitution and the statutes of the United States of America, including section 301 of Title 3 of the United States Code (3 U.S.C. 301), and section 411(c) of the Trade Act of 1974 (19 U.S.C. 2441(c)), in order to provide for more efficient reporting to the Congress, it is hereby ordered as follows:

**Section 1.** The reporting functions of the East-West Foreign Trade Board under section 411(c) of the Trade Act of 1974 (19 U.S.C. 2441(c)), as transferred to the President by section 5(c) of Reorganization Plan No. 3 of 1979 (19 U.S.C. 2171 note), are delegated to the United States Trade Representative.

**Sec. 2.** This order is effective upon publication in the **Federal Register**.



THE WHITE HOUSE,  
March 26, 1984.

[FR Doc. 84-8486

Filed 3-28-84; 4:30 pm]

Billing code 3195-01-M



# Notes and a few Miscellaneous Documents

London, 18th May 1841

My dear Mr. Stowe

I have just received your letter of the 10th inst. and am glad to hear that you are interested in the subject of the slave trade. I have been thinking much of late about the subject, and have been reading much of the literature on the subject. I have been particularly struck by the fact that the slave trade is still so prevalent in the world, and that it is still so profitable. I have been thinking much of the fact that the slave trade is still so prevalent in the world, and that it is still so profitable.

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Yours truly,  
Elizabeth Gaskell

The Editor  
of the Anti-Slavery Reporter



# Rules and Regulations

Federal Register

Vol. 49, No. 61

Wednesday, March 28, 1984

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Federal Crop Insurance Corporation

#### 7 CFR Part 427

#### Oat Crop Insurance Regulations

**AGENCY:** Federal Crop Insurance Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Federal Crop Insurance Corporation (FCIC) hereby revises and reissues the Oat Crop Insurance Regulations (7 CFR Part 427), effective for the 1984 and succeeding crop years by: (1) Changing the policy to make it easier to read and understand; (2) eliminating the reduction in production guarantee for unharvested acreage; (3) eliminating the substitute crop provision; (4) adding a 60-day claim for indemnity provision; (5) clarifying the provision determining production to count when small grains are growing with other planted or volunteer crops; (6) adding a section regarding appraisals following the end of the insurance period for unharvested acreage; (7) changing the cancellation and termination for indebtedness dates; (8) revising the unit definition to provide for unit determination when the acreage report is filed; (9) adding three sections concerning descriptive headings, determinations, and notices; and (10) making format and language corrections for purposes of clarification.

In addition, FCIC issues a new subsection in the oat crop insurance regulations to contain the control numbers assigned by the Office of Management and Budget (OMB) to information collection requirements of these regulations. The intended effect of this rule is to update the policy for insuring oats in accordance with Departmental Regulations 1512-1, requiring a review of the regulations as

to need, currency, clarity, and effectiveness, and to comply with OMB regulations requiring publication of OMB control numbers assigned to information collection requirements in these regulations.

**EFFECTIVE DATE:** April 27, 1984.

**FOR FURTHER INFORMATION CONTACT:** Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, D.C. 20250. Telephone (202) 447-3325.

The Impact Statement describing the options considered in developing this action and the impact of implementing each option is available upon request from Peter F. Cole.

**SUPPLEMENTARY INFORMATION:** This action has been reviewed under USDA procedures established in Departmental Regulation 1512-1 (December 15, 1983). This action constitutes a review under such procedures as to the need, currency, clarity, and effectiveness of these regulations. The sunset review date established for these regulations is February 1, 1987.

Merritt W. Sprague, Manager, FCIC, has determined that: (1) This action is not a major rule as defined by Executive Order No. 12291 (February 17, 1981), (2) this action will not increase the Federal paperwork burden for individuals, small business, and other persons, and (3) this action conforms to the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), and other applicable law.

The title and number of the Federal Assistance program to which these regulations apply are: Title-Crop Insurance; Number 10.450.

As set forth in the final rule related notice to 7 CFR Part 3015, Subpart V (48 FR 29116, June 24, 1983), the Federal Crop Insurance Corporation's program and activities, requiring intergovernmental consultation with State and local officials, are excluded from the provisions of Executive Order No. 12372.

It has been determined that this action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Impact Statement was prepared.

On Wednesday, April 13, 1983, FCIC published an interim rule at 48 FR 15869, revising and reissuing the Oat Crop Insurance Regulations (7 CFR Part 427) in accordance with the provisions of Departmental Regulation 1512-1. Public

comment was solicited following the publication and the regulations were scheduled for review; however, no comments were received. In reviewing these regulations prior to issuing this final rule, it was determined that the control numbers assigned by OMB to information collection requirements should be added to the regulations in addition to two other sections regarding determinations and notices. None of these additions have any effect on the terms and conditions of the policy for insuring oats as contained in the regulations but merely serve to clarify determinations made by FCIC and notices required by the policy, and to comply with OMB regulations.

With the exception of the additions referred to above, the interim rule as published is hereby adopted as a final rule.

#### List of Subjects in 7 CFR Part 427

Crop Insurance, Oats.

#### Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation hereby revises and reissues the Oat Crop Insurance Regulations (7 CFR Part 427), effective for the 1984 and succeeding crop years, to read as follows:

#### PART 427—OAT CROP INSURANCE

##### Subpart—Regulations for the 1984 and Succeeding Crop Years

Sec.

- 427.1 Availability of oat crop insurance.
- 427.2 Premium rates, production guarantees, coverage levels, and prices at which indemnities shall be computed.
- 427.3 OMB control numbers.
- 427.4 Creditors.
- 427.5 Good faith reliance on misrepresentation.
- 427.6 The contract.
- 427.7 The application and policy.

Appendix A, Counties designated for oat crop insurance.

**Authority:** Secs. 506, 516, Pub. L. 75-430, 52 Stat. 73, 77, as amended (7 U.S.C. 1506, 1516).

#### § 427.1 Availability of oat in crop insurance.

Insurance shall be offered under the provisions of this subpart on oats in counties within limits prescribed by, and in accordance with the provisions of the



Federal Crop Insurance Act, as amended. The counties shall be designated by the Manager of the Corporation from those approved by the Board of Directors of the Corporation. Before insurance is offered in any county, there shall be published by appendix to this part the names of the counties in which oat insurance will be offered.

**§ 427.2 Premium rates, production guarantees, coverage levels, and prices at which indemnities shall be computed.**

(a) The Manager shall establish premium rates, production guarantees, coverage levels, and prices at which indemnities shall be computed for oats which shall be shown on the county actuarial table on file in the service office and may be changed from year to year.

(b) At the time the application for insurance is made, the applicant shall elect a coverage level and price at which indemnities shall be computed from among those levels and prices shown on the actuarial table for the crop year.

**§ 427.3 OMB control numbers.**

The information collection requirements contained in these regulations (7 CFR Part 427) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Nos. 0563-0003 and 0563-0007.

**§ 427.4 Creditors.**

An interest of a person in an insured crop existing by virtue of a lien, mortgage, garnishment, levy, execution, bankruptcy, or an involuntary transfer shall not entitle the holder of the interest to any benefit under the contract except as provided in the policy.

**§ 427.5 Good faith reliance on misrepresentation.**

Notwithstanding any other provision of the oat insurance contract, whenever (a) an insured person under a contract of crop insurance entered into under these regulations, as a result of a misrepresentation or other erroneous action or advice by an agent or employee of the Corporation: (1) Is indebted to the Corporation for additional premiums, or (2) has suffered a loss to a crop which is not insured, or for which the insured person is not entitled to an indemnity because of failure to comply with the terms of the insurance contract, but which the insured person believes to be insured, or believed the terms of the insurance contract to have been complied with or waived, and (b) the Board of Directors of the Corporation, or the Manager in

cases involving not more than \$100,000 finds: (1) That an agent or employee of the Corporation did in fact make such misrepresentation or take other erroneous action or give erroneous advice, (2) that said insured persons relied thereon in good faith and (3) that to require the payment of the additional premiums or to deny such insured's entitlement to the indemnity would not be fair and equitable, such insured person shall be granted relief the same as if otherwise entitled thereto.

**§ 427.6 The contract.**

(a) The insurance contract shall become effective upon the acceptance by the Corporation of a duly executed application for insurance. The contract shall cover the oat crop as provided in the policy. The contract shall consist of the application, the policy, and the provisions of the county actuarial table. Any changes made in the contract shall not affect its continuity from year to year. The forms referred to in the contract are available at the service office.

**§ 427.7 The application and policy.**

(a) Application for insurance on a form prescribed by the Corporation may be made by any person to cover such person's insurable share in the oat crop as landlord, owner-operator, or tenant. The application shall be submitted to the Corporation at the service office on or before the applicable closing date for the county on file in the service office.

(b) The Corporation may discontinue the acceptance of applications in any county upon its determination that the insurance risk involved is excessive, and also, for the same reason, to reject any individual application. The Manager of the Corporation is authorized in any crop year to extend the closing date for submitting applications or contract changes in any county, by placing the extended date on file in the service office in the county and publishing a notice in the *Federal Register* upon the Manager's determination that no selectivity will result during the period of such extension: *Provided, however*, That if adverse conditions should develop during such period, the Corporation will immediately discontinue the acceptance of applications.

(c) Oat contracts in effect for the 1983 crop year are amended by the substitution of the 1984 contract and are continuous unless terminated in accordance with their terms. A new application is not required by these regulations for the 1984 crop year.

(d) The application for the 1984 and succeeding crop years is found at

Subpart D of Part 400—General Administrative Regulations (7 CFR 400.37, § 400.38; first published at 48 FR 1023, January 10, 1983) and may be amended from time to time for subsequent crop years. The provisions of the Oat Insurance Policy for the 1984 and succeeding crop years, are as follows:

**Department of Agriculture**

**Federal Crop Insurance Corporation**

*Oat—Crop Insurance Policy*

(This is a continuous contract. Refer to Section 15.)

Agreement to insure: We shall provide the insurance described in this policy in return for the premium and your compliance with all applicable provisions.

Throughout this policy, "you" and "your" refer to the insured shown on the accepted Application and "we," "us," and "our" refer to the Federal Crop Insurance Corporation.

**Terms and Conditions**

1. Causes of loss.  
a. The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

- (1) Adverse weather conditions;
- (2) Fire;
- (3) Insects;
- (4) Plant disease;
- (5) Wildlife;
- (6) Earthquake; or
- (7) Volcanic eruption;

unless those causes are excepted, excluded, or limited by the actuarial table or section 9e(6).

b. We shall not insure against any loss of production due to:

- (1) The neglect or malfeasance of you, any member of your household, your tenants, or employees;
- (2) The failure to follow recognized good oat farming practices;
- (3) Damage resulting from the impoundment of water by any governmental, public or private dam or reservoir project; or
- (4) Any cause not specified in section 1a as an insured loss.

a. Crop, acreage, and share insured.

a. The crop insured shall be oats seeded for harvest as grain, oats seeded in the same manner for harvest as silage or hay, and grain mixtures in which oats are the predominant grain; which are grown on insured acreage and for which a guarantee and premium rate are provided by the actuarial table.

b. The acreage insured by each crop year shall be oats planted on insurable acreage as designated by the actuarial table and in which you have a share, as reported by you or as determined by us, whichever we shall elect.

c. The insured share shall be your share as landlord, owner-operator, or tenant in the insured oats at the time of planting.

d. We do not insure any acreage:

- (1) Planted with flax or vetch;
- (2) Where the farming practices carried out are not in accordance with the farming



practices for which the premium rates have been established;

(3) Which is irrigated and an irrigated practice is not provided by the actuarial table unless you elect to insure the acreage as nonirrigated by reporting it as insurable under section 3;

(4) which is destroyed and it is practical to replant to oats but such acreage is not replanted;

(5) Initially planted after the final planting date contained in the actuarial table unless you agree in writing on our form, to coverage reduction;

(6) Of volunteer oats; or

(7) Planted to a type or variety of oats not established as adapted to the area or excluded by the actuarial table.

e. Where insurance is provided for an irrigated practice:

(1) You shall report as irrigated only the acreage for which you have adequate facilities and water, at the time of planting, to carry out a good oat irrigation practice; and

(2) Any loss of production caused by failure to carry out a good oat irrigation practice, except failure of the water supply from an unavoidable cause occurring after

the beginning of planting, shall be considered as due to an uninsured cause. The failure or breakdown of irrigation equipment or facilities shall not be considered as a failure of the water supply from an unavoidable cause.

f. Acreage which is planted for the development or production of hybrid seed or for experimental purposes is not insured unless we agree in writing to insure such acreage.

g. We may limit the insured acreage to any acreage limitation established under any Act of Congress, if we advise you of the limit prior to planting.

3. Report of acreage, share, and practice.

You shall report on our form:

a. All the acreage of oats in the county in which you have a share;

b. The practice; and

c. Your share at the time of planting.

You shall designate separately any acreage that is not insurable. You shall report if you do not have a share in any oats planted in the county. This report shall be submitted annually on or before the reporting date established by the actuarial table. We may determine all indemnities on the basis of

information you have submitted on this report. If you do not submit this report by the reporting date, we may elect to determine by unit the insured acreage, share, and practice or we may deny liability on any unit. Any report submitted by you may be revised only upon our approval.

4. Production guarantees, coverage levels, and prices for computing indemnities.

a. The production guarantees, coverage levels, and prices for computing indemnities are in the actuarial table.

b. Coverage level 2 will apply if you do not elect a coverage level.

c. You may change the coverage level and price election on or before the closing date for submitting applications for the crop year as established by the actuarial table.

5. Annual premium.

a. The annual premium is earned and payable at the time of planting. The amount is computed by multiplying the production guarantee times the price election, times the premium rate, times the insured acreage, times your share at the time of planting, times the applicable premium adjustment percentage contained in the following table.

PREMIUM ADJUSTMENT TABLE <sup>1</sup>

[Percent adjustments for favorable continuous insurance experience]

|                                                    | Numbers of years continuous experience through previous year |     |     |     |     |     |     |     |     |     |     |     |     |     |            |
|----------------------------------------------------|--------------------------------------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|------------|
|                                                    | 0                                                            | 1   | 2   | 3   | 4   | 5   | 6   | 7   | 8   | 9   | 10  | 11  | 12  | 13  | 14 or more |
| Percentage adjustment factor for current crop year |                                                              |     |     |     |     |     |     |     |     |     |     |     |     |     |            |
| Loss ratio <sup>2</sup> through previous crop year |                                                              |     |     |     |     |     |     |     |     |     |     |     |     |     |            |
| .00 to .20                                         | 100                                                          | 95  | 95  | 90  | 90  | 85  | 80  | 75  | 70  | 70  | 65  | 65  | 60  | 60  | 50         |
| .21 to .40                                         | 100                                                          | 100 | 95  | 95  | 90  | 90  | 90  | 85  | 80  | 80  | 75  | 75  | 70  | 70  | 60         |
| .41 to .60                                         | 100                                                          | 100 | 95  | 95  | 95  | 95  | 95  | 90  | 90  | 90  | 85  | 85  | 80  | 80  | 70         |
| .61 to .80                                         | 100                                                          | 100 | 95  | 95  | 95  | 95  | 95  | 95  | 90  | 90  | 90  | 90  | 85  | 85  | 80         |
| .81 to 1.09                                        | 100                                                          | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100        |

[Percent adjustments for unfavorable insurance experience]

|                                                    | Numbers of loss years through previous year <sup>3</sup> |     |     |     |     |     |     |     |     |     |     |     |     |     |          |
|----------------------------------------------------|----------------------------------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------|
|                                                    | 0                                                        | 1   | 2   | 3   | 4   | 5   | 6   | 7   | 8   | 9   | 10  | 11  | 12  | 13  | 14 or 15 |
| Percentage adjustment factor for current crop year |                                                          |     |     |     |     |     |     |     |     |     |     |     |     |     |          |
| Loss ratio <sup>2</sup> through previous crop year |                                                          |     |     |     |     |     |     |     |     |     |     |     |     |     |          |
| 1.10 to 1.19                                       | 100                                                      | 100 | 100 | 102 | 104 | 106 | 108 | 110 | 112 | 114 | 116 | 118 | 120 | 122 | 126      |
| 1.20 to 1.39                                       | 100                                                      | 100 | 100 | 104 | 108 | 112 | 116 | 120 | 124 | 128 | 132 | 136 | 140 | 144 | 152      |
| 1.40 to 1.69                                       | 100                                                      | 100 | 100 | 108 | 116 | 124 | 132 | 140 | 148 | 156 | 164 | 172 | 180 | 188 | 204      |
| 1.70 to 1.99                                       | 100                                                      | 100 | 100 | 112 | 122 | 132 | 142 | 152 | 162 | 172 | 182 | 192 | 202 | 212 | 232      |
| 2.00 to 2.49                                       | 100                                                      | 100 | 100 | 116 | 128 | 140 | 152 | 164 | 176 | 188 | 200 | 212 | 224 | 236 | 260      |
| 2.50 to 3.24                                       | 100                                                      | 100 | 100 | 120 | 134 | 148 | 162 | 176 | 190 | 204 | 218 | 232 | 246 | 260 | 288      |
| 3.25 to 3.99                                       | 100                                                      | 100 | 105 | 124 | 140 | 156 | 172 | 188 | 204 | 220 | 236 | 252 | 268 | 284 | 300      |
| 4.00 to 4.99                                       | 100                                                      | 100 | 110 | 128 | 146 | 164 | 182 | 200 | 218 | 236 | 254 | 272 | 290 | 300 | 300      |
| 5.00 to 5.99                                       | 100                                                      | 100 | 115 | 132 | 152 | 172 | 192 | 212 | 232 | 252 | 272 | 292 | 300 | 300 | 300      |
| 6.00 and up                                        | 100                                                      | 100 | 120 | 136 | 156 | 180 | 202 | 224 | 246 | 268 | 290 | 300 | 300 | 300 | 300      |

<sup>1</sup> For premium adjustment purposes, only the years during which premiums were earned shall be considered.

<sup>2</sup> Loss Ratio means the ratio of indemnity(ies) paid to premium(s) earned.

<sup>3</sup> Only the most recent 15 crop years shall be used to determine the number of "Loss Years". (A crop year is determined to be a "Loss Year" when the amount of indemnity for the year exceeds the premium for the year.)

b. Interest shall accrue at the rate of one and one-half percent (1½%) simple interest per calendar month, or any part thereof, on any unpaid premium balance starting on the first day of the month following the first premium billing date.

c. Any premium adjustment applicable to the contract shall be transferred to:

(1) The contract of your estate or surviving spouse in case of your death;

(2) The contract of the person who succeeds you if such person had previously participated in the farming operation; or

(3) Your contract if you stop farming in one county and start farming in another county.

d. If participation is not continuous, any premium shall be computed on the basis of previous unfavorable insurance experience but no premium reduction under section 5a shall be applicable.

6. Deductions for debt.

Any unpaid amount due us may be deducted from any indemnity payable to you



or from any loan or payment due you under any Act of Congress or program administered by the United States Department of Agriculture or its Agencies.

#### 7. Insurance period.

a. Insurance attaches when the oats are planted except that in counties with an April 15 cancellation date, insurance on fall planted oats shall attach April 16 following planting, provided there is an adequate stand on this date to produce a normal crop.

b. Insurance ends at the earliest of:

- (1) Total destruction of the oats;
- (2) Combining, threshing, harvesting for silage or hay, or removal from the field;
- (3) Final adjustment of a loss; or
- (4) The date shown below of the calendar year in which oats are normally harvested:

- (a) Alaska—September 25;
- (b) All other states—October 31.

#### 8. Notice of damage or loss.

a. In case of damage of probable loss:

- (1) You must give us written notice if:
- (a) During the period before harvest, the oats on any unit are damaged and you decide not to further care for or harvest any part of them;

(b) You want our consent to put the acreage to another use;

(c) You want to harvest the oats for silage or hay. (After such notice is given, we shall appraise the potential grain production. However, if we are unable to do so before harvest, you may harvest the crop provided representative samples are left for appraisal purposes); or

(d) After consent to put acreage to another use is given, additional damage occurs. Insured acreage may not be put to another use until we have appraised the oats and given written consent. We shall not consent to another use until it is too late to replant. You must notify us when such acreage is put to another use.

(2) If you anticipate a loss on any unit, you must give us notice:

(a) At least 15 days before the beginning of harvest; or

(b) Immediately, if probable loss is later determined, and a representative sample of the unharvested wheat (at least 10 feet wide and the entire length of the field) must be left intact for a period of 15 days from the date of notice, unless we give you written consent to harvest the sample.

(3) In addition to the notices required by this section, if you are going to claim an indemnity on any unit, we must be given notice not later than 30 days after the earliest of:

- (a) Total destruction of the oats on the unit;
- (b) Harvest of the unit; or
- (c) The calendar date for the end of the insurance period.

b. You must obtain written consent from us before you destroy any of the oats which are not to be harvested.

c. We may reject any claim for indemnity if any of the requirements of this section or section 9 are not complied with.

#### 9. Claim for indemnity.

a. Any claim for indemnity on a unit shall be submitted to us on our form not later than 60 days after the earliest of:

- (1) Total destruction of the oats on the unit;
- (2) Harvest of the unit; or

(3) The calendar date for the end of the insurance period.

b. We shall not pay any indemnity unless you:

(1) Establish the total production of oats on the unit and that any loss of production has been directly caused by one or more of the insured causes during the insurance period; and

(2) Furnish all information we require concerning the loss.

c. The indemnity shall be determined on each unit by:

(1) Multiplying the insured acreage by the production guarantee;

(2) Subtracting therefrom the total production of oats to be counted (see section 9e);

(3) Multiplying the remainder by the price election; and

(4) Multiplying this result by your share.

d. If the information reported by you results in a lower premium than the actual premium determined to be due, the indemnity shall be reduced proportionately.

e. The total production to be counted for a unit shall include all harvested and appraised production.

(1) Mature oat production:

(a) Which otherwise is not eligible for quality adjustment and which grades No. 4 or better shall be reduced .12 percent for each .1 percentage point of moisture in excess of 14.0 percent; or

(b) Which, due to insurable causes, does not grade No. 4 or better, or is graded smutty, garlicky, or ergoty, in accordance with the Official United States Grain Standards, shall be adjusted by:

(i) Dividing the value per bushel of such oats by the price per bushel of U.S. No. 2 oats; and

(ii) Multiplying the result by the number of bushels of such oats.

The applicable price for No. 2 oats shall be the local market price on the earlier of the day the loss is adjusted or the day such oats were sold.

(2) Any mature production from other crops growing in the oats shall be counted as oats on a weight basis.

(3) Appraised production to be counted shall include:

(a) Potential production lost due to uninsured causes and failure to follow recognized good oat farming practices;

(b) Not less than the guarantee for any acreage which is abandoned or put to another use without our prior written consent or damaged solely by an uninsured cause; and

(c) Any unharvested production.

(4) Any appraisal we have made on insured acreage for which we have given written consent to be put to another use shall be considered production unless such acreage:

(a) Is not put to another use before harvest of oats becomes general in the county;

(b) Is harvested; or

(c) Is further damaged by an insured cause before the acreage is put to another use.

(5) We may determine the amount of production of any unharvested oats on the basis of field appraisals conducted after the end of the insurance period.

(6) When you have elected to exclude hail and fire as insured causes of loss and the

oats are damaged by hail or fire, appraisals for uninsured causes shall be made in accordance with Form FCI-78, "Request To Exclude Hail And Fire".

(7) The commingled production of units will be allocated to such units in proportion to our liability on the harvested acreage of each unit.

f. You shall not abandon any acreage to us.

g. You may not bring suit or action against us unless you have complied with all policy provisions. If a claim is denied, you may sue us in the United States District Court under the provisions of 7 U.S.C. 1508(c). You must bring suit within 12 months of the date notice of denial is mailed to and received by you.

h. We shall pay the loss within 30 days after we reach agreement with you or entry of a final judgment. In no instance will we be liable for interest or damages in connection with any claim for indemnity, whether we approve or disapprove such claim.

i. If you die, disappear, or are judicially declared incompetent, or if you are an entity other than an individual and such entity is dissolved after the oats are planted for any crop year, any indemnity shall be paid to the person(s) we determine to be beneficially entitled thereto.

j. If you have other fire insurance and fire damage occurs during the insurance period, and you have not elected to exclude fire insurance from this policy, we shall be liable for loss due to fire only for the smaller of:

(1) The amount of indemnity determined pursuant to this contract without regard to any other insurance; or

(2) The amount by which the loss from fire exceeds the indemnity paid or payable under such other insurance. For the purposes of this section, the amount of loss from fire shall be the difference between the fair market value of the production on the unit before the fire and after the fire.

#### 10. Concealment or fraud.

We may void the contract on all crops insured without affecting your liability for premiums or waiving any right, including the right to collect any amount due us if, at any time, you have concealed or misrepresented any material fact or committed any fraud relating to the contract. Such avoidance shall be effective as of the beginning of the crop year with respect to which such act or omission occurred.

#### 11. Transfer of right to indemnity on insured share.

If you transfer any part of your share during the crop year, you may transfer your right to an indemnity. The transfer must be on our form and approved by us. We may collect the premium from either you or your transferee or both. The transferee shall have all rights and responsibilities under the contract.

#### 12. Assignment of indemnity.

You may assign to another party your right to an indemnity for the crop year only on our form and with our approval. The assignee shall have the right to submit the loss notices and forms required by the contract.

#### 13. Subrogation. (Recovery of loss from a third party.)

Because you may be able to recover all or a part of your loss from someone other than us,



you must do all you can to preserve any such rights. If we pay you for your loss then your right of recovery shall at our option belong to us. If we recover more than we paid you plus our expenses, the excess shall be paid to you.

#### 14. Records and access to farm.

You shall keep, for two years after the time of loss, records of the harvesting, storage, shipment, sale or other disposition of all oats produced on each unit including separate records showing the same information for production from any uninsured acreage. Any person designated by us shall have access to such records and the farm for purposes related to the contract.

#### 15. Life of contract: Cancellation and termination.

a. This contract shall be in effect for the crop year specified on the application and may not be canceled for such crop year. Thereafter, the contract shall continue in force for each succeeding crop year unless canceled or terminated as provided in this section.

b. This contract may be canceled by either you or us for any succeeding crop year by giving written notice on or before the cancellation date preceding such crop year.

c. This contract shall terminate as to any crop year if any amount due us on this or any other contract with you is not paid on or before the termination date preceding such crop year for the contract on which the amount is due. The date of payment of the amount due:

1. If deducted from an indemnity claim shall be the date you sign the claim; or

2. If deducted from payment under another program administered by the United States Department of Agriculture shall be the date the payment was approved.

d. The cancellation and termination dates are:

| State and county                                                                                                                              | Cancellation and termination dates |
|-----------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|
| New Mexico except Taos County, Oklahoma; and Texas.                                                                                           | August 31.                         |
| Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.                                    | September 30.                      |
| Arizona; California except Del Norte, Humboldt, Lassen, Modoc, Plumas, Shasta, Siskiyou and Trinity Counties.                                 | October 31.                        |
| Del Norte, Humboldt, Lassen, Modoc, Plumas, Shasta, Siskiyou and Trinity Counties, California; Taos County, New Mexico; and all other states. | April 15.                          |

e. If you die or are judicially declared incompetent, or if you are an entity other than an individual and such entity is dissolved, the contract shall terminate as of the date of death, judicial declaration, or dissolution. However, if such event occurs after insurance attaches for a crop year, the contract shall continue in force through the crop year and terminate at the end thereof. Death of a partner in a partnership shall dissolve the partnership unless the partnership agreement provides otherwise. If two or more persons having a joint interest are insured jointly, death of one of the persons shall dissolve the joint entity.

f. The contract shall terminate if no premium is earned for five consecutive years.

#### 16. Contract changes.

We may change any terms and provisions of the contract from year to year. If your price election at which indemnities are computed is no longer offered, the actuarial table will provide the price election which you shall be deemed to have elected. All contract changes shall be available at your service office by December 31 preceding the cancellation date for counties with an April 15 cancellation date and by May 31 preceding the cancellation date for all other counties. Acceptance of any changes shall be conclusively presumed in the absence of a notice from you to cancel the contract.

#### 17. Meaning of terms.

For the purposes of oat crop insurance:

a. "Actuarial table" means the forms and related material for the crop year approved by us which are available for public inspection in your service office, and which show the production guarantees, coverage levels, premium rates, prices for computing indemnities, practices, insurable and uninsurable acreage, and related information regarding oat insurance in the county.

b. "County" means the county shown on the application and any additional land located in a local producing area bordering on the county, as shown by the actuarial table.

c. "Crop year" means the period within which the oats are normally grown and shall be designated by the calendar year in which the oats are normally harvested.

d. "Harvest" of oats on the unit means the completion of combining, threshing or cutting for hay or silage.

e. "Insurable acreage" means the land classified as insurable by us and shown as such by the actuarial table.

f. "Insured" means the person who submitted the application accepted by us.

g. "Person" means an individual, partnership, association, corporation, estate, trust, or other business enterprise or legal entity, and wherever applicable, a State, a political subdivision of a State, or any agency thereof.

h. "Service office" means the office servicing your contract as shown on the application for insurance or such other approved office as may be selected by you or designated by us.

i. "Tenant" means a person who rents land from another person for a share of the oats or a share of the proceeds therefrom.

j. "Unit" means all insurable acreage of oats in the county on the date of planting for the crop year:

(1) In which you have a 100 percent share; or

(2) Which is owned by one entity and operated by another entity on a share basis.

Land rented for cash, a fixed commodity payment, or any consideration other than a share in the oats on such land shall be considered as owned by the lessee. Land which would otherwise be one unit may be divided according to applicable guidelines on file in your service office or by written agreement with us. Units will be determined when the acreage is reported. Errors in reporting such units may be corrected by us to conform to applicable guidelines when adjusting a loss. We may consider any acreage and share thereof reported by or for

your spouse or child or any member of your household to be your bona fide share or the bona fide share of any other person having an interest therein.

#### 18. Descriptive headings.

The descriptive headings of the various policy terms and conditions are formulated for convenience only and are not intended to affect the construction or meaning of any of the provisions of the contract.

#### 19. Determinations.

All determinations required by the policy shall be made by us. If you disagree with our determinations, you may obtain reconsideration of or appeal those determinations in accordance with Appeal Regulations.

#### 20. Notices.

All notices required to be given by you must be in writing and received by your service office within the designated time unless otherwise provided by the notice requirement. Notices required to be given immediately may be by telephone or in person and confirmed in writing. Time of the notice will be determined by the time of our receipt of the written notice.

#### Appendix A—Counties Designated for Oat Crop Insurance

In accordance with the provisions of 7 CFR 427.1, the following counties are designated for oat crop insurance:

|                |            |
|----------------|------------|
| Alabama        |            |
| Baldwin        |            |
| Arkansas       |            |
| Arkansas       |            |
| California     |            |
| Modoc          | Siskiyou   |
| Colorado       |            |
| Idaho          |            |
| Kootenai       |            |
| Illinois       |            |
| Boone          | Lee        |
| Bureau         | McHenry    |
| Carroll        | Mercer     |
| De Kalb        | Ogle       |
| Henry          | Stephenson |
| Jo Daviess     | Warren     |
| Kane           | Whiteside  |
| Knox           | Will       |
| LaSalle        | Winnebago  |
| Iowa           |            |
| (All counties) |            |
| Kansas         |            |
| Dickinson      | Marion     |
| Michigan       |            |
| Allegan        | Jackson    |
| Alpena         | Kent       |
| Barry          | Lapeer     |
| Calhoun        | Lenawee    |
| Clinton        | Montcalm   |
| Eaton          | St. Clair  |
| Genesee        | Sanilac    |
| Huron          | Shiawassee |
| Ionia          | Tuscola    |
| Isabella       | Washtenaw  |



**Minnesota**

All counties except:

|         |             |
|---------|-------------|
| Aitkin  | Koochiching |
| Carlton | Lake        |
| Cook    | Ramsey      |
| Itasca  | St. Louis   |

**Montana**

|              |           |
|--------------|-----------|
| Hill         | Richland  |
| Judith Basin | Roosevelt |
| Phillips     | Valley    |

**Nebraska**

|          |            |
|----------|------------|
| Antelope | Holt       |
| Boone    | Knox       |
| Boyd     | Madison    |
| Burt     | Pierce     |
| Butler   | Platte     |
| Cedar    | Saunders   |
| Colfax   | Sheridan   |
| Cuming   | Stanton    |
| Dakota   | Thuston    |
| Dawes    | Washington |
| Dixon    | Wayne      |
| Gage     |            |

**New York**

|             |          |
|-------------|----------|
| Allegany    | Oneida   |
| Cattaraugus | Onondaga |
| Cayuga      | Ontario  |
| Erie        | Orleans  |
| Genesee     | Otsego   |
| Herkimer    | Seneca   |
| Jefferson   | Steuben  |
| Livingston  | Tompkins |
| Madison     | Wayne    |
| Monroe      | Wyoming  |
| Montgomery  | Yates    |
| Niagara     |          |

**North Carolina**

Rowan

**North Dakota**

(All counties)

**Ohio**

|            |          |
|------------|----------|
| Allen      | Lorain   |
| Ashland    | Mahoning |
| Ashtabula  | Medina   |
| Auglaize   | Mercer   |
| Carroll    | Paulding |
| Columbiana | Portage  |
| Coshocton  | Putnam   |
| Crawford   | Richland |
| Drake      | Seneca   |
| Defiance   | Shelby   |
| Hardin     | Stark    |
| Homes      | Trumbull |
| Huron      | Van Wert |
| Knox       | Wayne    |
| Logan      | Wood     |

**Oregon**

|         |         |
|---------|---------|
| Klamath | Polk    |
| Marion  | Yamhill |

**Pennsylvania**

|           |            |
|-----------|------------|
| Armstrong | Clarion    |
| Bedford   | Columbia   |
| Berks     | Crawford   |
| Bradford  | Cumberland |
| Bulter    | Dauphin    |
| Cambria   | Erie       |
| Centre    | Franklin   |
| Chester   | Indiana    |

Juniata  
Lawrence  
Lebanon  
Lehigh  
Lycoming  
Mercer  
Northumberland  
Perry

Schuylkill  
Snyder  
Somerset  
Tioga  
Union  
Washington  
Westmoreland  
York

**South Carolina**

Sumter

**South Dakota**

All counties except:

|            |            |
|------------|------------|
| Custer     | Shannon    |
| Fall River | Washabaugh |
| Jones      | Washington |

**Texas**

|           |           |
|-----------|-----------|
| Archer    | Hamilton  |
| Bell      | Hill      |
| Bexar     | Hunt      |
| Bosque    | Johnson   |
| Brown     | Kaufman   |
| Coleman   | Lamar     |
| Collin    | Limestone |
| Concho    | McCulloch |
| Cooke     | McLennan  |
| Coryell   | Medina    |
| Dallas    | Runnels   |
| Denton    | San Saba  |
| Erath     | Tarrant   |
| Falls     | Taylor    |
| Gillespie | Uvalde    |

**Washington**

Spokane Stevens

**Wisconsin**

All counties except:

|          |           |
|----------|-----------|
| Ashland  | Menominee |
| Bayfield | Milwaukee |
| Douglas  | Oneida    |
| Florence | Price     |
| Forest   | Sawyer    |
| Iron     | Vilas     |
| Lincoln  |           |

**Wyoming**

Cook

Done in Washington, D.C., on February 13, 1984.

**Peter F. Cole,**

Secretary, Federal Crop Insurance Corporation.

Dated: March 5, 1984.

Approved by:

**Edward Hews,**

Acting Manager.

[FR Doc. 84-6371 Filed 3-27-84; 8:45 am]

BILLING CODE 3410-08-M

**ACTION:** Final rule.

**SUMMARY:** This final decision establishes a Dairy Research and Promotion Order to implement a national program for dairy product promotion, research and nutrition education as provided for in Title I, subtitle B, of the Dairy and Tobacco Adjustment Act of 1983. The program will be funded by a mandatory 15-cent per hundredweight assessment on all milk marketed by producers in the 48 contiguous States and will be administered by a board of 36 dairy farmers appointed by the Secretary.

The order defines the powers and duties of the National Dairy Promotion and Research Board, provides for collection of the 15-cent per hundredweight assessment, specifies the objective of board activities, and provides a mechanism for terminating the activities of the board if the program is defeated in any producer referendum. Additional subparts set forth the rules to govern petitions to modify or to be exempted from the order and the procedures used to certify those milk producer organizations eligible to submit nominations for board membership to the Secretary.

**EFFECTIVE DATES:** All provisions, except the collection of assessments specified in § 1150.152, are effective on and after April 1, 1984. The collection of assessments in effective on and after May 1, 1984.

**FOR FURTHER INFORMATION CONTACT:** Clayton H. Plumb, Chief, Order Formulation Branch, Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447-6274.

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding:

Invitation to submit proposals: Issued December 6, 1983; published, December 9, 1983 (48 FR 55132).

Procedure for certification of milk producer organizations: Issued January 27, 1984; published, February 2, 1984 (49 FR 4068).

Invitation to submit comments and notice of public meeting: Issued January 27, 1984; published February 2, 1984 (49 FR 4080).

This final rule has been reviewed under Executive Order 12291 and has been designated as a "major" rule since it would have an annual impact on the economy of more than \$100 million. Also, this action could have a significant economic impact on a substantial number of small entities. Consequently, a combined regulatory impact analysis and regulatory flexibility analysis has

**Agricultural Marketing Service****7 CFR Part 1150****Dairy Promotion Program; Decision Establishing Final Order Provisions**

**AGENCY:** Agricultural Marketing Service, USDA.



been prepared and is available for review to the public by contacting the person named above.

In information collection requirements that are included in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, (44 U.S.C. Chapter 35) and have been assigned OMB Control Number 0581-0147.

#### Statutory Authority for Final Rule

This final rule is issued pursuant to Title I, subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128 as approved November 29 1983. The declared policy of this statute is to provide for the establishment of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

The statute mandates a deduction of 15-cents per hundredweight from the proceeds of the sale of all milk marketed commercially by producers in the 48 contiguous States. These deductions are to be remitted to a National Dairy Promotion and Research Board established for administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purpose. Where it can be established that milk producers are participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally, such producers shall receive credit in determining the assessment due from such producers for contributing to such programs of up to 10 cents per hundredweight of milk marketed.

In addition, the statute mandates that the Secretary issue a promotion order to become effective not later than 90 days after publishing a proposed order for public comment, which occurred February 2, 1984. Also, within the 60-day period immediately preceding September 30, 1985, the Secretary must conduct a referendum among producers for the purpose of ascertaining whether the promotion order shall be continued.

#### Preliminary Statement

Title I, subtitle B, of the Dairy and Tobacco Adjustment Act of 1983 (Pub. L. 98-180), which was enacted on November 29, 1983, authorizes the establishment of a national program for dairy product promotion, research and nutrition education to be funded by a mandatory assessment on all milk marketed by producers in the 48 contiguous States. The Act also specifies the timetable for implementation of an order to establish the program. The Secretary was required to publish a proposed order within 30 days after it was received and provide an opportunity for public comment. After notice and opportunity for public comment, the Secretary must issue a dairy products promotion and research order to become effective not later than 90 days following publication of the proposal.

To implement this procedure, the Department solicited proposals from interested parties. This invitation to submit proposals was issued on December 6, 1983, and published in the *Federal Register* on December 9, 1983 (48 FR 55132). Interested parties were given until January 6, 1984, to submit proposals.

In response to this notice, one complete proposed order was received. In addition, other more limited proposals concerning certain aspects of the program were received that raised issues and questions concerning the order and its application. The proposed order along with the issues and questions were published in the *Federal Register* on February 2, 1984 (49 FR 4080). Interested parties were asked to submit comments on the proposed order by February 24, 1984. In addition, the Department conducted a public meeting in Alexandria, Virginia, on February 14 and 15, 1984, to give interested parties an opportunity to discuss all issues raised by the proposed order. The record of this public meeting and all comments received from interested parties were utilized in the development of these final rules.

In addition to the proposed order, other rules were necessary to implement the program on the timely basis required by the enabling legislation. The Act requires that the eligibility of any organization to nominate milk producers to serve on the Board must be certified by the Secretary. Interim rules were necessary to implement the application and certification process with respect to the eligibility of organizations to nominate Board members. It was found that because of a statutory deadline, it was impracticable, unnecessary and

contrary to the public interest to give preliminary notice and opportunity for public comment prior to issuance of the rules and good cause was also found for not postponing the effective date until 30 days after publication in the *Federal Register* (5 U.S.C. 553).

The emergency interim final rule provided the procedure for organizations to apply for certification by the Secretary of their eligibility to represent milk producers and to nominate milk producers to serve as members of the National Dairy Promotion and Research Board. Any organization whose membership consisted primarily of milk producers was invited to apply for certification.

In order to be eligible for certification to make nominations to the initial Board, applications for certification were to be received by the Department by March 5, 1984.

Additional rules concerning the procedure for conducting referenda to determine producer approval will be developed at a later time since the initial referendum is not required by the Act until the 60-day period immediately preceding September 30, 1985.

As previously stated, the Dairy and Tobacco Adjustment Act of 1983 mandates the implementation of a national dairy promotion plan. In addition, the legislation specifies many of the provisions to be included in the dairy promotion and research order. The major issues raised in comments and at the public meeting concerned matters of statutory interpretation or operations not addressed by the Act. Most of the comments addressed one or more of the issues set forth in the proposed order document: nature of authorized advertising, Board membership, qualification of State and regional programs, collection of assessments, and expenditures of funds. Consequently, each of these issues will be addressed in the decision which follows.

The decision is divided into seven major issues. The first six deal with the dairy research and promotion order and the seventh with the additional regulatory provisions to implement the program. The major issues identified in this proceeding are:

1. Nature of authorized advertising.
2. Definitions and miscellaneous provisions.
3. Structure of the Board.
4. Powers and duties of the Board.
5. Expenses and collection of assessments.
6. Qualification of State and regional programs.
7. Additional regulatory provisions.



## Findings and Conclusions

Following are the findings and conclusions on the major issues set forth above.

### 1. Nature of Authorized Advertising

The order should not specifically prohibit the expenditure of program funds to promote milk and dairy products on a brand or trade name basis. The initial decision on brand or trade name advertising should be left to the National Dairy Promotion and Research Board, which has the responsibility to administer the order and to conduct a coordinated national program for milk and dairy product promotion, research and nutrition education. The Board should have the authority to consider, and to recommend to the Secretary, possible methods and plans or projects for implementing a promotion program for milk and dairy products on a brand or trade name basis. The Board would have to determine that any such program would tend to generally increase the consumption of milk and dairy products and that such program could be carried out in an equitable manner and without using unfair or deceptive practices. As discussed later, this issue also involves the criteria and procedure for determining if State or regional dairy product promotion programs that provide for brand advertising should be qualified so that producers who fund such programs would be eligible for credits, thereby reducing the amount of their mandatory assessment to fund the national program.

This issue stimulated substantial controversy and was addressed by a large number of interested parties both at the public meeting and in written comments to the Department. Generally, producers propose a generic promotion program with an absolute prohibition against brand name advertising in the order. On the other hand, processors, generally proprietary firms, oppose any prohibition in the order to exclude advertising that makes reference to private brands or trade names and propose that such advertising be specifically provided for in the order.

The Milk Industry Foundation and International Association of Ice Cream Manufacturers (MIF) and other interested parties contend that the expenditure of program funds on brand advertising cannot be prohibited in the order since the Act does not prohibit brand advertising. They contend that both the statutory provisions and the legislative history of the Act make it unlawful for the Secretary to arbitrarily exclude brand advertising in the order

and thereby prohibit the Board from determining whether any specific advertising program would tend to achieve the purposes of the Act. These parties also maintain that brand advertising, rather than being directed towards brand preference, can be effective in increasing total sales of milk and dairy products. They further maintain that brand advertising, in conjunction with a generic program, would encourage processor involvement in promoting dairy products. They maintain that, although generic programs have been successful, they could have been more successful if they had been fully coordinated with the marketing plans and strategies of processors. In this regard, brand advertising advocates offered various general guidelines to implement a jointly funded promotional program. Basically, the concept involves matching processor dollars for promotional programs with dairy farmer funds from the national program. Processors maintained that their contributions would be either in excess of what is currently spent by processors for promotion, or in excess of some prior established norm of advertising expenditures for various categories of milk and dairy products. Thus, they maintain that an incentive would be created for the expenditure of additional funds to promote milk and dairy products, and that such a jointly funded program would be most effective in increasing overall sales. Thus, processors conclude that a jointly funded program would have the greatest impact in carrying out the objectives of the Act to finance and carry out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace.

The National Milk Producers Federation (NMPF) and other interested parties (including producers, processors and representatives of State and regional promotion programs) oppose the expenditure of program funds to promote milk and dairy products on a brand or trade name basis. They maintain that brand advertising results in sales shifts among brands and does not result in an overall increase in sales. Therefore, they maintain that the funding of brand advertising programs would not be consistent with the objective of the Act to increase the overall sales of milk and dairy products. Producer groups further emphasize that the Act requires that the program be funded by producer contributions, and that producers do not want their funds to be used by processors to promote their own private brands of milk and dairy products. These parties also

maintain that it would be impossible to administer any brand advertising program in an equitable manner under the national program. They question how the Board would determine what processors and what brands would receive producer funds for promotion. They maintain that excluded processors would be placed at a competitive disadvantage and that the Board would be subject to extensive litigation by such companies. Producers also maintain that attempting to allocate program funds among all processors and thousands of brands would result in a dissipation of producer contributions to subsidize the advertising of processors. With respect to the concept of processors matching new advertising dollars with producer funds, producers question what procedure would be used to determine what processors would have spent for advertising in the absence of producer contributions. Producers maintain that if the Board has to contend with all the administrative problems inherent in a national program that provides for brand advertising, rapid implementation of an effective dairy product promotion program would be impossible. Producers contend that Congress intended that an effective program to increase consumption of milk and dairy products be implemented expeditiously as evidenced by the specific and limited time span contained in the Act for adoption of a program. Producers also maintain that rapid implementation is necessary to have an ongoing, effective program prior to the initial, required referendum. Producers conclude that the function of the national program is to use producer funds to increase the overall consumption of milk and dairy products through a generic promotion program and that such a program is consistent with the intent and requirements of the Act.

A review of the points raised by the proponents and opponents of brand advertising reveals four significant points. First of all, the Act is silent with respect to the use of program funds to promote milk and dairy products on a brand or trade name basis. Second, the program is funded by producers through a mandatory assessment on all milk marketed and, from the views and comments submitted by producers and their cooperative associations, they do not want to fund a program that promotes milk and dairy products on a brand or trade name basis. Third, there are difficult administrative, enforcement, and legal problems inherent with the implementation of brand or trade name advertising under a national promotion program that cannot



readily be resolved. Fourth, the intent of the enabling legislation must be construed to promote an overall increase in sales of milk and dairy products when viewed in the context of the entire Dairy and Tobacco Adjustment Act that is principally concerned with curtailing the high surplus of milk production and dairy products.

The first of the above points is controlling and, thus, the order should not contain an outright prohibition to the use of national program funds to promote milk and dairy products on a brand or trade name basis. To do so would prohibit the Board from even considering promotional programs that use brand or trade names that might be developed in the future and be beneficial to the entire industry. In effect, the Board will not be foreclosed from considering all options, which appears to be the primary concern of processors at this time.

The remaining three major points were raised by producers in opposition to brand or trade name advertising. At the present time, producers do not wish to fund a brand advertising program because they do not believe that this would result in an overall increase in sales of milk and dairy products. In this regard, nothing has been presented to the Department through all the views and comments received from which it could be concluded that brand advertising has a positive impact on total sales of milk and dairy products. Accordingly, there should be nothing in the order that would require the Board to expend program funds for a brand name advertising program. In fact, it should be the Board's option not to even consider such programs at the national level. If in the future, however, the Board wishes to consider brand advertising programs, it should be able to do so.

The initial decision with respect to this issue should rest with the Board as it is responsible for conducting a coordinated national program for dairy product promotion. As provided in the order, the Board will have the authority to consider, and to recommend to the Secretary, possible methods and plans or projects for implementing promotion programs for milk and dairy products on a brand or trade name basis. Before implementing such a program, the Board would have to determine, and establish to the Secretary, that any such program would tend to generally increase the total sales of milk and dairy products and that such program could be administered and carried out in an

equitable manner and without using unfair or deceptive practices.

As stated previously, this issue also involves the procedure and criteria to be used in determining whether State and regional programs should be qualified for credit purposes under the national program. The Act specifies that producers can obtain a credit for funding qualified programs, thereby reducing the amount of their mandatory contribution that is to accrue to the national program. Consequently, a determination must be made with respect to whether State and regional programs that expend funds for promoting milk and dairy products on a brand or trade name basis will be qualified for credit purposes. The order contained herein provides that the Board must address the issue of whether such programs should be qualified. Until such time as the Board, and ultimately the Secretary, approves such a program, any State or regional program that promotes milk and dairy products on a brand or trade name basis will not be qualified, and producers funding such programs will not be credited for their contributions to such programs.

Generally, the parties that support brand advertising under the national program also support qualification of State and regional programs that fund brand advertising programs. They maintain that it is not the intent of the Act to disrupt active and ongoing State and regional promotional programs or to require that such programs conform to the same type of activities that may be conducted under the national program. They emphasize that the Act requires that nothing in the Act "may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State."

Parties that opposed brand advertising under the national program generally opposed the qualification of State or regional programs that provide for brand advertising for virtually the same reasons presented in the discussion of the nature of authorized advertising under the national program. Basically, producers perceive the crediting of brand advertising under local programs as a dissipation of national program funds to subsidize the advertising of processors for their own benefit and for the benefit of their producer suppliers.

It is clear that the Act does not require, for qualification purposes, that State and regional programs conduct activities that are identical to those that may be conducted under the national

program. However, it is evident that brand advertising conducted at the State or regional level would represent a significant departure from the generic promotion program that NMPF urged under the national program because of the numerous problems inherent in the administration and enforcement of brand or trade name advertising under the national program. Also, such problems associated with brand or trade name advertising that were discussed relative to the national program apply equally as well to State and regional programs. Consequently, a determination must be made on whether State or regional programs should be qualified if brand advertising is conducted.

The order contained herein provides the Secretary with the authority to determine which State and regional programs should be qualified for credit purposes. The qualification procedure and the criteria to be used are discussed under issue number 6. However, with respect to the brand advertising issue, the Board must be given the duty to review such programs and recommend to the Secretary whether they should be qualified for credit purposes. The Board has been given the authority to conduct a coordinated national program, and therefore should be given the opportunity to have an input with respect to the qualification of programs that conduct brand advertising. Generally, the requirements that the Board would need to consider to implement a national advertising program would serve as a benchmark in its deliberations on the qualification of State and regional programs.

The discussion of the nature of advertising under the national program indicated that the Board would have the option to determine when and if brand advertising should be considered. However, there is a greater sense of urgency with respect to the issue at the State and regional level. This is because the order is to be fully operational on May 1, 1984, and because assessments on May production will be due on June 30. Consequently, those responsible for remitting the assessments to the Board will have to know which programs are qualified for credit purposes. Because of the urgency involved, the order provides that, until such time as the Board reviews and makes a recommendation on the issue, any State or regional programs that expend funds to promote milk and dairy products on a brand or trade name basis will not be qualified programs.

From the information contained in views and comments received by the



Department, it appears that promotional programs operated under State or Federal laws do not engage in promoting milk and dairy products on a brand or trade name basis. Consequently, most, if not all, of such programs would be qualified programs. Other regional programs, however, that are operated by processors do emphasize their own particular brands or trade names. Such programs will not be qualified until such time as the Board recommends and the Secretary concurs that they should be qualified. Such a determination on the record is consistent with the record at this point in time. There is no demonstration to substantiate that such programs have a positive impact in increasing total sales of milk and dairy products.

## 2. Definitions and Miscellaneous Provisions

The order includes definitions of nineteen terms. These definitions are helpful tools in regulatory construction and make the order language simpler and easier to understand. Twelve of these terms are defined in the Act. Of the twelve, eight (department, milk, person, dairy products, fluid milk products, producer, research, and nutrition education) are reproduced verbatim from the Act. Proponents of the order recommended that the definitions of dairy products, research and nutrition education differ slightly from the way they appear in the Act. Proponents asserted that these minor changes would clarify what was interpreted as ambiguous statutory language.

Several interested parties objected to the proposed definition of "dairy products." They contended that the proposal to tie "dairy products" to the published standards of identity would unnecessarily restrict the range of products that could be promoted by the Board. One party stated that the proposed definition conflicted with the Board's statutory duty to study casein because casein is not defined in the standards of identity. It is concluded that the definition of "dairy products" should be identical to the definition included in the Act. This definition eliminates any possible regulatory conflicts and gives the Board flexibility to develop programs to promote a wide range of products.

Likewise, the definitions of research and nutrition education are reproduced from the Act. This approach avoids any possibility that the order would be interpreted to place a different meaning on these terms than is intended in the Act.

Four terms are given definitions that are slightly different from the way they appear in the Act. The definitions of "Board" and "United States" are changed by replacing the statutory citations with order citations and the title of the Board is added. The term "Secretary" is broadened to include officers and employees of the Department delegated to act for the Secretary. The definition of "promotion" is changed by adding the word "generally." The change is designed to emphasize that promotion efforts of the Board should be directed toward increasing overall demand for dairy products. These minor alterations were suggested by the producer proponents and no interested parties objected.

Seven terms are defined in the order that do not appear as definitions in the statute: Act, fiscal period, eligible organization, qualified State or regional program, plans and projects, marketing, and cooperative association. These definitions were offered to simplify drafting of the regulatory language. With minor editorial changes, they are adopted as proposed. No parties commented on these definitions.

The final order also contains certain miscellaneous provisions concerning penalties, proceeding after termination, personal liability of Board members and employees, patents and copyrights, amendments, separability, and compliance with the Paperwork Reduction Act. These provisions are necessary because they restate specific statutory requirements and they provide completeness for ease of administration. Other than the provision for penalties and compliance with the Paperwork Reduction Act, they were submitted by the proponents and no interested parties opposed their adoption.

The penalty provision of section 119(b) of the Act is included in § 1150.156 of the order. Although the statute allows these penalties to be imposed on persons who violate the order even if the provisions are not included in the order, including the penalty provision in the order will serve to give all parties additional notice of the consequences of willful violations of the order.

Sections 1150.181 and 1150.182 provide a mechanism for concluding the business of the Board if the program is defeated in a producer referendum. Since continuation of the program is subject to producer approval, the order should contain a method for closing out the program in an orderly fashion. These provisions were proposed by the producer proponents and no interested parties opposed their adoption.

Therefore, they are adopted as proposed, with minor editorial changes.

Section 1150.183 is designed to limit the personal liability of Board members and Board employees for actions taken in their official capacities. This protection from liability would not extend to acts of dishonesty or willful misconduct. This provision was proposed by the National Milk Producers Federation. No additional comments were received on this topic. This provision is included in the order to clarify the personal and official responsibilities of Board members and employees.

The order contains a provision to protect the interests of the Board and the U.S. Government in patents, trademarks and copyrights that result from plans or projects funded by the Board. The language adopted in § 1150.184 was proposed by NMPF. Kraft, Inc., requested that the language be clarified to emphasize that patents and copyrights that relate to a company's branded products that may result from jointly-funded programs remain the property of the company. It is not necessary to address the issue raised by Kraft at this time. The protection of private brand or trade names and any associated patents or copyrights should be addressed in any joint program agreements that are entered into by the Board and private industry. The order need only assert the Board's property interest in materials developed with its funds. Therefore § 1150.184 is adopted as proposed.

Section 1150.186 states that if any part of the order is declared invalid, the remaining provisions shall not be affected. This provision is necessary to allow the program to operate until any legal questions are resolved or changes can be implemented to correct legal deficiencies. No interested party other than the proponent commented on this provision. Since the provision is necessary to effectuate operations of the program, it is adopted as proposed.

Sections 1150.185 and 1150.187 address legal requirements for implementing the order or amendments to the order. The Act gives the Secretary authority to amend the order. Since the Act is silent with regard to procedures to amend the order, it is concluded that any amendments must be promulgated under the informal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 553). Amendments can be proposed by the Board, the Secretary, eligible organizations, cooperatives, or any interested party. Proposed amendments would be subject to the notice and



comment provisions of the Administrative Procedure Act. The Secretary would have the authority to issue interim final rules in emergency situations. Also, regulations issued under the Act are subject to the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Sections 1150.185 and 1150.187 are included so that the order complies with these statutory requirements.

### 3. Structure of the Board

The Act states that the program will be administered by a Board of not less than 36 milk producers appointed by the Secretary. Interested parties raised several issues concerning the structure of this producer Board, including geographic representation, nominations, and conflicts of interest. This part of the decision sets forth the order provisions that establish the Board and its operational procedures and discusses the concerns raised by interested parties.

Section 1150.131 establishes the National Dairy Promotion and Research Board of 36 milk producers. The Act requires that Board members be nominated to represent specific geographic regions and that each member represent an equal proportion of total U.S. milk production. The NMPF proposal adopted in this decision divides the nation into 13 geographical regions. Each region is assigned between one and six Board positions, depending on the volume of milk production. Analysis of this proposal shows that each Board member, in fact, represents approximately one thirty-sixth of the nation's milk supply, which complies with the statutory requirement.

A representative of Farmers Union Milk Marketing Cooperative objected to the variable number of Board members from each region. He suggested that the regions be drawn so that they represent equal amounts of the nation's milk production. Essentially, he proposed that the order provide for six regions, each having six Board positions. In written comments, he withdrew the proposal for alternative regions with regard to Board membership. Farmers Union did submit an alternative proposal concerning membership of the Board's executive committee. This proposal is discussed in the section of this decision on Powers and Duties of the Board.

Other interested parties suggested that Board positions be reserved for consumers, handlers, and other nonmilk producer groups. The Act requires all Board members to be milk producers. Therefore, these suggestions cannot be considered.

The NMPF proposal for a 36-member Board of milk producers representing 13 geographic regions meets the statutory requirements. Since there were no other proposals regarding Board membership that comply with the Act, the NMPF proposal is adopted.

NMPF also proposed that every three to five years, the Board be required to reapportion the Board positions to reflect regional changes in milk production. This provision would assure that the Board would continue to represent milk production across the country. Since this provision is certainly within the spirit of the Act and no opposition comments were received, it is adopted with minor editorial changes.

The Act states that Board members shall serve terms of three years and that no member may serve more than two consecutive terms. Also, the Act states that the initial appointments will be divided proportionately into one-, two-, and three-year terms. Section 1150.132 restates these requirements with some minor clarification. For simplicity, the order states that all terms will expire on April 30 of the designated year, so that all terms will begin on the anniversary of the date when the order became fully effective, May 1, 1984. Also, the order allows a retiring Board member to remain in office until his/her successor is appointed. These minor changes are added for ease of administration. In addition, it is appropriate and consistent with the Act for the Secretary to designate the one-, two-, and three-year terms for the initial Board. These abbreviated terms of service will count as a full term for purposes of the two-term limit.

The Act states that Board members shall be appointed from nominations submitted by eligible organizations. Eligible organizations are organizations that represent dairy farmers as outlined in § 114 of the Act and in §§ 1150.270 through 1150.278 of this Part. If the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, any eligible organization, then the Secretary may select Board members from nominations made by such producers in the manner authorized by the Secretary.

The proposal made by NMPF essentially repeated the statutory language. The proposal also included a paragraph that would allow eligible organizations for any region to caucus and select a single nominee for each position. In addition, the proposal did not include a mechanism for obtaining nominations from producers not represented by the eligible organizations. Although these proposals

do not directly contradict the statute, they would restrict the number of nominees from which the Secretary would select Board members.

The Act gives the Secretary authority to appoint the Board. The Department contends that any regulatory language that tends to restrict the number of nominees to less than two for each Board position contradicts the statutory authority granted to the Secretary. Consequently, the paragraph of § 1150.133 dealing with caucuses of eligible organizations is amended to encourage caucus participants to nominate more than one individual for each position. Also, language is added to allow the Secretary to solicit nominations from milk producers through general farmer organizations or by other means when the Secretary determines that a substantial number of producers are not represented by the eligible organizations. These changes are designed to preserve the Secretary's authority to appoint Board members from a broad list of nominees.

The NMPF proposal also included a provision to have the Department announce anticipated vacancies and require that nominations be submitted to the Secretary sixty days before the anticipated vacancy. No interested parties commented on this provision. This provision is consistent with the Act and is adopted with one change which specifies that the Department should announce vacancies at least 120 days prior to the expiration of terms.

The order should contain a procedure for filling unexpected vacancies. The procedure proposed by NMPF in § 1150.136 of the proposed order would have required the Secretary to select a replacement Board member from a restricted list of previous nominees. For the same reasons given earlier, the authority granted the Secretary to appoint the Board implies a certain flexibility to choose individuals without being restricted to a single nominee. Therefore, the final order contains less restrictive language in § 1150.136.

The order should provide some guidance on potential conflicts of interest of Board members. This issue was raised in the proposed order document and in the oral and written comments. Most interested parties did not believe that conflicts of interest would be a major problem. There was little support from interested parties for a rule which would prohibit a Board member from serving on the board of another dairy promotion organization while serving on the national Board. In fact, several persons suggested that such dual board membership be encouraged



to aid in the coordination of efforts between the national Board and State and regional programs.

Since qualified State and regional programs benefit from this program through the workings of the credit system for producer participation and some of these programs might receive some direct funding from the Board, dual board memberships do raise a possibility of potential conflicts of interest. Without some limit on dual board membership activity, the Board would be open to criticism from the media, interested dairy organizations, and the general public.

Conflict of interest problems can be avoided if members of the Board disclose all relationships they may have with other dairy promotion organizations or an organization that has any relationship with the Board. In addition to disclosure, it is necessary for any member of the Board to abstain from any Board discussion or voting on a matter that involves an organization with whom the Board member has an ongoing relationship. The combination of disclosure and disqualification on matters that may give an appearance of a conflict of interest would diffuse the problem. Consequently, § 1150.134 contains a requirement that nominees agree to the practice of disclosure and disqualification as a condition of appointment.

The proposed § 1150.135 dealing with acceptance of Board positions has been integrated into the nomination process along with the rule on conflicts of interest discussed above. This editorial change simply provides that nominees must agree to serve at the time of nomination. This will speed the appointment process and avoid unnecessary delays.

Section 1150.137 outlines basic procedures for the conduct of Board meetings. The language has been changed from the proposal to clarify the basic rules. All Board members must be given notice of meetings. A majority of the members shall constitute a quorum at any meeting. Any action of the Board requires concurring votes from a majority of the members present. Business can be conducted with affirmative votes of a majority of the Board by mail, telephone or telegraph in emergency situations if all members are notified and given the opportunity to participate and the action is confirmed promptly in writing. Procedures to supplement these basic rules can be adopted by the Board.

Section 1150.138 restates the statutory provision that Board members serve without compensation. The members will be reimbursed for their necessary

and reasonable expenses as approved by the Secretary. This provision was proposed by NMPF and no interested parties opposed its adoption.

#### 4. Powers and Duties of the Board

The provisions of §§ 1150.139 and 1150.140 of the proposed order generally restated the powers and duties specified in section 113 of the Act. Most of the items covered in these sections generated few comments from interested parties and are adopted as proposed. The Board's major responsibility is to develop a program to promote the use of fluid milk and dairy products. The Board can undertake this responsibility itself or it can contract with other parties. In the end, the Board must develop a program along with related budgets and submit both to the Secretary for approval, and carry out those programs approved by the Secretary. The Board must provide the Secretary with notice of all of the meetings, an annual audit, and any other information the Secretary requests.

Also, the Board is given the power to administer the order and to make rules and regulations to effectuate that administration. The Board may disseminate information to dairy farmers and eligible organizations and must publish an annual report of its activities. The Board must require certain information of its contractors and the contractors must agree to make all books and records concerning the contract available for audit by the Board or the Secretary. The Board is directed to encourage coordination among all organizations that promote dairy products.

Three issues concerning powers and duties of the Board did generate comments from interested parties: composition of the executive committee, advisory committees, and Board staff. In addition, two paragraphs have been added to § 1150.140 for completeness.

Composition of the Board's executive committee was a significant issue at the public meeting and in written comments. The Act states that the Board shall appoint an executive committee whose membership "shall equally reflect each of the different regions in the United States in which milk is produced." NMPF proposed that the executive committee be made up of one member from each of the proposed 13 geographic regions used to determine Board membership. A representative of Farmers' Union Milk marketing Cooperative objected to this proposal because the executive committee members would not represent equal portions of the nation's milk production. The spokesman was concerned that the

dairy industry of Wisconsin and the Upper Midwest would be underrepresented on the executive committee. Ten members of Congress submitted comments supporting the Farmers' Union position.

In written comments, Farmers' Union changed their position, proposing that the order not specify the size of the executive committee, but that the Board be given the discretion to appoint an executive committee that "shall equally reflect each of the different regions in the United States in which milk is produced, taking into account the geographic distribution of milk production volume." In addition, Farmers' Union recommended that the word "Area" be substituted for "region" to remove any structural parallel between this section and § 1150.131 dealing with Board membership.

The Act requires the Board to establish an executive committee. However, the size and composition of this committee are not specified because the term "region" is not defined by the Act. Since "region" is not defined with regard to Board membership or executive committee membership, the executive committee structure proposed by NMPF is not required by the Act. Consequently, the final order in § 1150.140(b) requires the Board to establish an executive committee whose membership in the words of the Act "shall equally reflect each of the different regions in the United States in which milk is produced." This language gives the Board flexibility to establish an executive committee of any size that is found to be workable and meets the criteria established by the Act.

NMPF proposed that the Board be given authority to establish advisory committees and to pay the reasonable expenses and fees of the members of such committees. MIF and other industry representatives proposed that the order mandate two advisory committees of industry representatives (one of chief executive officers and one of marketing executives) to be appointed by the Secretary. Although the Act would seem to permit the establishment of advisory committees by the Board, there is no statutory support for the proposal to have members of such committees appointed by the Secretary. Therefore, the MIF proposal cannot be adopted. The order adopted by this decision gives the Board authority to appoint advisory committees and pay their associated costs as proposed by NMPF.

The Act speaks of employees of the Board and thus, by implication, gives the Board authority to hire a staff. The



NMPF proposal gives the Board the authority to appoint or employ such persons as it may deem necessary. One interested party commented on this proposal and suggested that the Board be required to hire a full-time executive director. The Act gives the authority to implement the national dairy promotion program to the Board. The Board should be granted as much flexibility as possible within statutory limits to develop and administer the program as it deems appropriate. The order should give the Board authority to hire a staff but should not dictate the structure of that staff. The Secretary will, however, retain general budgetary oversight over all Board operations.

The Act gives the Board power to receive, investigate and report to the Secretary complaints of violations. This language is repeated in § 1150.139(d) of the order. This provision gives the Board primary responsibility to initiate enforcement of the order.

In addition to the powers and duties already discussed, it is necessary to add two paragraphs to the duties section proposed by NMPF. The first, § 1150.140(f), restates the statutory requirement that the Board undertake studies dealing with use of fluid milk and dairy products by the military and the feasibility of converting surplus nonfat dry milk into casein. The other, § 1150.140(d), states that the Board have an affirmative duty to review all State and regional programs that promote milk and dairy products with brand name advertising and recommend to the Secretary whether these programs should be classified as qualified programs. The rationale for this provision was outlined in the discussion of branded advertising.

#### 5. Expenses and Collection of Assessments

The order specifies that the Board is authorized to incur certain expenses that shall be paid from assessments. The provisions pertaining to expenses are adopted as proposed by NMPF. No views or comments were received to indicate any major dissatisfaction or problems with the proposed provisions.

As proposed, the Board is authorized to incur such expenses as the Secretary finds are reasonable for the Board to exercise its powers and perform its duties in accordance with the order. After the first full year of operation of the order, the Board's administrative expenses are not to exceed 5 percent of the projected revenue of that fiscal year. In addition, the order specifies that the Board must reimburse the Secretary for administrative costs incurred after the order has been promulgated by the

Department. Such administrative costs incurred by the Department include the cost of conducting the required referendum, and any subsequent referendum that might be conducted, to determine whether producers approve the continuation of the order. In addition, the Department's administrative costs include the cost of the reports and studies that are required in section 301(4) of Title III of the Dairy and Tobacco Adjustment Act of 1983. Specifically, this includes the cost of the annual reports that the Secretary must submit to Congress not later than July 1, 1985, and July 1 of each year thereafter, which must include an independent analysis of the effectiveness of the Dairy Research and Promotion Order contained herein.

The assessment provisions represent a major operational section of the order and are contained in § 1150.152. The section, as originally proposed by NMPF, contained provisions to specify who is responsible for making payments to the Board, the rate of such payment, the manner by which producers may obtain credits for participation in another program, when payments must be made, charges on overdue accounts and authority for the Secretary to establish temporary rules to act in place of the Board during the initial implementation period prior to the appointment of the Board.

The order provisions in this section have been altered significantly from the provisions proposed by NMPF. These changes, however, are primarily structural changes to simplify and clarify the reading and meaning of the provisions. Certain provisions have been deleted and others have been placed on other sections. The major concepts of the NMPF proposal, however, are carried out in the revision of the section.

As required by the Act, all producers whose milk is produced in the United States are subject to a mandatory assessment to provide the funds necessary to carry out the order. The provisions specify that persons who pay producers must collect and remit an assessment to the Board, while producers who market milk of their own farm production must remit an assessment directly to the Board.

Several interested parties suggested alternatives that would require that all assessments be remitted to the Secretary rather than the Board, or that State promotion programs collect assessments from persons who pay producers and, in turn, pay the appropriate assessments to the Board. These alternatives are not adopted because the Act specifically states who

shall collect the assessments and that these parties shall remit the assessments to the Board.

The provisions specify that the rate of assessment is 15 cents per hundredweight, but that a producer can obtain a credit of up to 10 cents per hundredweight for contributions to a qualified State or regional program. However, for milk produced during May 1984, the credit can be up to 15 cents per hundredweight under certain conditions. NMPF proposed that the maximum 15-cent credit apply through May 29, 1984, and this has been extended through the entire month. Such extension will simplify the process for persons who are responsible for remitting the assessment to the Board in that they will have to be concerned only with one rate for the entire month.

The provisions that specify the action that must be taken by producers in order to receive a credit for contributions to another program have been modified from those proposed by NMPF in order to simplify the credit process for both producers and handlers.

NMPF proposed that producers certify that they are participating in another program. Such language implied that producers would be required to file a form with the paying handler that identified the other program and the rate of contributions. This requirement would have applied to all producers who are not represented by a cooperative association that could make a certification on behalf of its members.

This process has been modified to specify that a producer who can establish participation in a qualified State or regional program shall receive a credit. A producer will be able to establish participation in a number of different ways. This would include an authorized deduction for participation in another program that is already in existence, a State law that requires a deduction by a handler to fund a qualified program, or a statement to the paying handler by a qualified program indicating that certain producers are participating in such program. Also, as in the NMPF proposal, a cooperative association could establish the participation of its members with paying handlers. It is anticipated that only those producers who make individual payments to a qualified program (other than through a payroll deduction) will have to file a certification with the paying handler. Forms will be provided for this purpose. Also, the qualified program will have to validate the producer's participation. Even in these instances, however, a producer will not have to individually establish



participation in a qualified program if such program takes the initiative to inform the paying handler of the producer's participation. Persons who market milk and dairy products of their own farm production to consumers will have to establish participation in another program with the Board, and participation must be validated by the qualified program in order to receive credit for such participation. Overall, this process of establishing participation in qualified programs should reduce the paperwork burden for both producers and handlers as it incorporates within the credit process payment and funding processes that are already in place.

The NMPF proposed order contained provisions that required certain specific actions by qualified programs that provide for refunds. These included requiring the qualified program to send any requested refunds to the Board, to notify producers that their requested refunds were sent to the Board, and to send any requested refunds to other qualified programs if so designated by the producer. These provisions have been removed from this section of the order as the primary requirement for qualifying a program that provides for refunds is contained in the provisions concerning the qualification of State and regional programs. Basically, in order to be qualified, such programs must agree to send requested refunds to the Board at the time they would normally make the refund to the producer. Other conditions (such as sending a notice to producers or sending funds to other programs) have been deleted since they intrude into the operations of other programs. However, qualified State and regional programs will have the option to send requested refunds to other qualified programs if they desire to do so and are requested to take such action by the producer. Such option is contained in the provisions concerning the qualification of such programs.

As proposed by NMPF, the order provides that the Secretary can act in place of the Board during the initial implementation period of the order. However, this authority is interpreted to apply also in the event the Board has not adopted operating rules at the time that the initial assessments must be remitted under the provisions. In the event that the Secretary must act in place of the Board, an additional provision providing for adjustments of accounts has been established in another section of the order. The provisions apply to the Department and the Board and are necessary to handle overpayments and underpayments.

A provision of the NMPF proposal granting temporary authority for the Secretary to issue credits on behalf of the Board has been deleted. Neither the Secretary nor the Board issues credits. Credits are authorized by the order when the paying handler is determining the amount of money to remit to the Board (or initially to the Secretary), and are based, up to the maximum amount authorized by the order, on the basis of a producer's actual participation in a qualified program.

The order, as was proposed by NMPF, contains a provision that applies a charge on overdue accounts. No opposition was presented to such provision and it is necessary to provide a compliance incentive. In addition, the Act provides for specific penalties for noncompliance and these have been included in the order. Both of these provisions, however, have been deleted from the assessments section and are provided for in another section.

The issue of who has the responsibility to enforce the collection of assessments is not addressed within the assessment provisions of the order. However, a discussion of this issue is appropriate here.

The NMPF proposed that assessments and reports be submitted to the Board, but that no Board member or any other producer have access to confidential information. The proposal specified that the Board had the responsibility to report complaints of violations to the Secretary, but that books and records of handlers must be made available only to the Secretary. The implication of the proposal is that the Secretary would have the primary responsibility to enforce the collection of assessments. MIF further proposed that no confidential information of a handler be disclosed to Board members, agents, appointees or employees of the Board.

Contrary to the above proposals, the Board should have the initial responsibility or duty to enforce the collection of assessments. The Act specifies that assessments shall be remitted to the Board by persons who pay producers. In order to verify the assessments, reports must necessarily also be submitted to the Board. The Act also specifies that the Board is responsible for reporting complaints of violations. Since the Board must report violations and receive reports, the Board has the initial responsibility with respect to any violations of the order. Also, section 113(k) of the Act contemplates review of handler reports by employees of the Board because these employees are subject to the

penalty provisions of the Act for disclosure of confidential information.

The order provides the Board with the authority to conduct a fully coordinated dairy promotion, research, and nutrition education program. For the program to be effective, and in view of the reasons presented above, the Board must have the authority for the initial enforcement of the order provisions. Consequently, the order provides that the Board has the responsibility to enforce the terms and provisions of the order, including the collection of assessments. The Board, however, would have the option to request the assistance of the Secretary to carry out this function since the Act gives the Secretary authority to initiate legal action to enforce the order. Furthermore, the order provides that a handler's books and records shall be made available to employees of the Board, as well as to the Secretary. Any person who willfully violates any provision of the order by refusing to provide needed information or by releasing confidential information is subject to the penalty provision of the Act. It is noted, however, that no Board member shall have access to such confidential information.

#### 6. Qualified State and Regional Programs

Coordination between the national dairy promotion program and existing State and regional programs is given high priority by the Act. To facilitate coordination, the Act allows producers to subtract their contributions to qualified State or regional programs from the 15-cent per hundredweight assessment payable to the national program. This credit system, as previously discussed, allows existing programs to preserve their source of funds and help the national program carry out a coordinated dairy promotion effort.

In addition to the credit mechanism, the Act in section 121(a) states that nothing in the Act may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State. This statutory policy statement implies that the order should provide State and regional programs with as much freedom to continue their present operations as is consistent with a coordinated effort.

The Act does not provide any detailed definition of State and regional programs. It only states that for contributions to be eligible for credits, the program must be "active," "ongoing," and "qualified." The NMPF proposal gives the Secretary authority to



determine qualification. The standards for qualification were (1) the program conduct promotion, research, and nutrition education activities as defined by the order, (2) be active and ongoing, (3) be financed by producers, (4) conduct a program over a major portion of a State or region, (5) not utilize private brand or trade names in advertising, and (6) for programs that allow refunds to producers, an assurance that the refunds would be sent to the national program or another qualified program. Only the prohibition on brand advertising drew significant opposition, although the requirement to be "active and ongoing" and the treatment of refunds generated discussion at the public meeting and in written comments.

The issue of brand advertising has been discussed previously in this decision. It has been determined that authority to qualify State and regional programs will rest with the Secretary, but the Board will be designated to review all programs that conduct brand advertising to determine if they tend to increase the overall demand for milk and dairy products. The Board will send a recommendation on each program to the Secretary who will make the final decision. This procedure will allow the Board to develop a uniform approach to the issue of brand advertising.

NMPF proposed that qualification be granted only to programs that operated in a major portion of a State or region. The Department received opposition comments from producer funded programs that operate in major metropolitan areas that do not provide services over a large geographic area. These programs asserted that they make a significant contribution to dairy promotion and should not be denied qualification because they operate within a small geographic area. The Department does not interpret the statute to mean that these programs should be denied qualification. In addition, the language submitted by NMPF was vague and would be difficult to administer. Therefore, this requirement was deleted from the final order.

Several State and regional programs that are funded by deduction from producer payrolls allow producers to request and receive a refund of their contributions. All programs operated under Federal milk orders provide for refunds as do some State sponsored programs. Coordinating these "voluntary" programs with the mandatory national program is a difficult task. The order must provide a mechanism that assures that every producer will contribute at least 15 cents

per hundredweight to promote dairy products without preempting the operation of existing voluntary programs. As outlined in the discussion of collection of assessments, the simplest and most direct way of accomplishing this goal is to require that all voluntary programs that petition to be qualified so their producer contributors can receive the credit, agree to forward producer refunds (up to 10 cents per hundredweight) to the National Board or at the option of the program and producers, to another qualified program. Although this procedure does preempt some State laws with regard to refunds, this is the only approach that assures that all producers contribute 15 cents per hundredweight to promotion efforts without forcing producers to contribute 15 cents directly to the national program while continuing to fund State or regional programs or denying qualified status to such voluntary programs. Both of the alternatives would be inconsistent with the policy directive to encourage a coordinated promotion effort.

NMPF originally proposed that programs must have been active and ongoing on the date of enactment of the Act to be eligible for qualification. At the public meeting, the proponent amended the proposal to exempt from this provision programs operated under State or Federal law. This exemption was proposed so that the order would not conflict with section 121(a) of the Act dealing with preemption of programs organized under State or Federal law. Four members of the United States Senate submitted comments stating that the intent of the statute was to accommodate programs active at the time of enactment but not programs initiated after that date.

The Department agrees with the interpretation of the statute put forward by NMPF. The Act was designed to accommodate only existing State or regional programs. However, section 121(a) dealing with preemption must be weighed against the other statutory language. The NMPF proposal is a reasonable compromise of these conflicting parts of the Act.

As stated previously, this order attempts to apply the same standards to State and regional programs as are applied to the national program. The Act in section 113(j) prohibits the Board from using any funds to influence governmental policy or action. To provide consistency among all programs, this prohibition should be applied to State and regional programs. This requirement is included as § 1150.153(b)(6).

## 7. Additional Regulatory Provisions

In addition to the order provisions discussed in the first six sections of this decision, certain additional regulations are necessary to implement the national dairy promotion program. These are the procedure for certification of milk producer organizations and the rules of practice governing proceedings on petitions to modify or to be exempted from the order.

The rules of practice governing proceedings on petitions to modify or to be exempted from the order appear in §§ 1150.250 through 1150.252. They were included as a Departmental proposal in the proposed order and notice of public meeting document. No interested party submitted comments on these proposed procedures. Therefore, they are adopted as proposed.

The rules for certification of milk producer organizations appear as §§ 1150.270 through 1150.278. Previously, they were published as an emergency interim final rule. This emergency treatment was necessary because of the implementation deadline imposed by the Act. Interested parties were given an opportunity to comment on the interim rule. No comments were received. The rationale for these rules which were published in the emergency interim final rule document (49 FR 4068) is adopted by this decision. The interim rules are annexed to this order and made final.

## Additional Findings

It is hereby found and determined that because of a statutory deadline, it is impractical, unnecessary and contrary to the public interest to delay the effective date of the issuance of these rules for 30 days after their publication in the *Federal Register*. In order to carry out the statutory timetable for implementation of the order, it is necessary that all of the provisions contained in this Part 1150 be effective on April 1, 1984, except that the provisions in § 1150.152 shall be effective on May 1, 1984.

## List of Subjects in 7 CFR Part 1150

Milk, Dairy products, Promotion and advertising, Research.

Title 7 of the Code of Federal Regulations, Chapter X is amended by adding to Part 1150 "Subpart—Dairy Research and Promotion Order" and "Subpart—Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted From an Order" and revising "Subpart—Procedure for Certification of Milk Producer Organizations" to read as follows:



**PART 1150—DAIRY PROMOTION PROGRAM****Subpart—Dairy Research and Promotion Order****Definitions****Sec.**

- 1150.101 Act.
- 1150.102 Department.
- 1150.103 Secretary.
- 1150.104 Board.
- 1150.105 Person.
- 1150.106 United States.
- 1150.107 Fiscal period.
- 1150.108 Eligible organization.
- 1150.109 Qualified State or regional program.
- 1150.110 Producer.
- 1150.111 Milk.
- 1150.112 Dairy products.
- 1150.113 Fluid milk products.
- 1150.114 Promotion.
- 1150.115 Research.
- 1150.116 Nutrition education.
- 1150.117 Plans and projects.
- 1150.118 Marketing.
- 1150.119 Cooperative association.

**National Dairy Promotion and Research Board**

- 1150.131 Establishment and membership.
- 1150.132 Term of office.
- 1150.133 Nominations.
- 1150.134 Nominee's agreement to serve.
- 1150.135 Appointment.
- 1150.136 Vacancies.
- 1150.137 Procedure.
- 1150.138 Compensation and reimbursement.
- 1150.139 Powers of the Board.
- 1150.140 Duties of the Board.

**Expenses and Assessments**

- 1150.151 Expenses.
- 1150.152 Assessments.
- 1150.153 Qualified State or regional dairy product promotion, research or nutrition education programs.
- 1150.154 Influencing governmental action.
- 1150.155 Adjustment of accounts.
- 1150.156 Charges and penalties.

**Promotion, Research and Nutrition Education**

- 1150.161 Promotion, research and nutrition education.

**Reports, Books and Records**

- 1150.171 Reports.
- 1150.172 Books and records.
- 1150.173 Confidential treatment.

**Miscellaneous**

- 1150.181 Proceedings after termination.
- 1150.182 Effect of termination or amendment.
- 1150.183 Personal liability.
- 1150.184 Patents, copyrights, inventions and publications.
- 1150.185 Amendments.
- 1150.186 Separability.
- 1150.187 Paperwork Reduction Act assigned number.

**Subpart—Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From an Order**

- 1150.250 Words in the singular form.

- 1150.251 Definitions.
- 1150.252 Institution of proceeding.

**Subpart—Procedure for Certification of Milk Producer Organizations**

- 1150.270 General.
- 1150.271 Definitions.
- 1150.272 Responsibility for administration of regulations.
- 1150.273 Application for certification.
- 1150.274 Certification standards.
- 1150.275 Inspection and investigation.
- 1150.276 Review of certification.
- 1150.277 Listing of certified organizations.
- 1150.278 Confidential treatment.

Authority: Pub. L. 98-180, 97 Stat. 1128.

**Subpart—Dairy Research and Promotion Order****Definitions****§ 1150.101 Act.**

"Act" means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto.

**§ 1150.102 Department.**

"Department" means the United States Department of Agriculture.

**§ 1150.103 Secretary.**

"Secretary" means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

**§ 1150.104 Board.**

"Board" means the National Dairy Promotion and Research Board established pursuant to § 1150.131.

**§ 1150.105 Person.**

"Person" means any individual, group of individuals, partnership, corporation, association, cooperative or other entity.

**§ 1150.106 United States.**

"United States" means the 48 contiguous States in the continental United States.

**§ 1150.107 Fiscal period.**

"Fiscal period" means the calendar year or such other annual period as the Board may determine.

**§ 1150.108 Eligible organization.**

"Eligible organization" means any organization which has been certified by the Secretary pursuant to §§ 1150.270 through 1150.278 of this Part.

**§ 1150.109 Qualified State or regional program.**

"Qualified State or regional program" means any State or regional dairy product promotion, research or nutrition

education program which is certified as a qualified program pursuant to § 1150.153.

**§ 1150.110 Producer.**

"Producer" means any person engaged in the production of milk for commercial use.

**§ 1150.111 Milk.**

"Milk" means any class of cow's milk produced in the United States.

**§ 1150.112 Dairy products.**

"Dairy products" means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products.

**§ 1150.113 Fluid milk products.**

"Fluid milk products" means those milk products normally consumed in liquid form as a beverage.

**§ 1150.114 Promotion.**

"Promotion" means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of, and demand for, dairy products generally.

**§ 1150.115 Research.**

"Research" means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for dairy products.

**§ 1150.116 Nutrition education.**

"Nutrition education" means those activities intended to broaden the understanding of sound nutritional principles, including the role of milk and dairy products in a balanced diet.

**§ 1150.117 Plans and projects.**

"Plans and projects" means promotion, research and nutrition education plans, studies or projects pursuant to §§ 1150.139, 1150.140 and 1150.161.

**§ 1150.118 Marketing.**

"Marketing" means the sale or other disposition in commerce of dairy products.

**§ 1150.119 Cooperative association.**

"Cooperative association" means any cooperative marketing association of producers which is organized under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act".



# **National Dairy Promotion and Research Board**

## **§ 1150.131 Establishment and membership.**

(a) There is hereby established a National Dairy Promotion and Research Board of thirty-six members. For purposes of nominating producers to the Board, the United States shall be divided into thirteen geographic regions and the number of Board members from each region shall be as follows:

(1) One member from region number one comprised of the following States: Washington and Oregon.

(2) Four members from region number two comprised of the following State: California.

(3) Two members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah and Wyoming.

(4) Two members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

(5) Four members from region number five comprised of the following States: Minnesota, North Dakota and South Dakota.

(6) Six members from region number six comprised of the following State: Wisconsin.

(7) Three members from region number seven comprised of the following States: Illinois, Iowa, Missouri and Nebraska.

(8) Two members from region number eight comprised of the following States: Alabama, Kentucky, Louisiana, Mississippi and Tennessee.

(9) Three members from region number nine comprised of the following States: Indiana, Michigan, Ohio and West Virginia.

(10) Two members from region number ten comprised of the following States: Florida, Georgia, North Carolina, South Carolina and Virginia.

(11) Three members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Three members from region number twelve comprised of the following State: New York.

(13) One member from region number thirteen comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

(b) The Board shall be composed of milk producers appointed by the Secretary either from nominations submitted pursuant to § 1150.133 or in accordance with § 1150.136. A milk producer may be nominated only to

represent the region in which such producer's milk is produced.

(c) At least every five years, and not more than every three years, the Board shall review the geographic distribution of milk production volume throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of regions and/or a modification of the number of members from regions in order to best reflect the geographic distribution of milk production volume in the United States.

(d) The number of members for each region which shall serve on the Board shall be determined by dividing the total pounds of milk produced in the United States for the calendar year previous to the date of review by 36 which provides a factor of pounds of milk per member, and then dividing the total pounds of milk for each region by such factor.

(e) In determining the volume of milk produced in the United States, the Board and the Secretary shall utilize the information received by the Board pursuant to § 1150.171 and data published by the Department.

## **§ 1150.132 Term of office.**

(a) The members of the Board shall serve for terms of three years, except that the members appointed to the initial Board shall serve proportionately, for terms of one, two and three years.

(b) Each member of the Board shall serve until April 30 of the year in which his/her term expires, except that a retiring member may serve until a successor is appointed.

(c) No member shall serve more than two consecutive terms.

## **§ 1150.133 Nominations.**

Nominations for members of the Board shall be made in the following manner:

(a) Upon effectuation of this provision, the Secretary shall solicit nominations for the initial Board from all eligible organizations. If the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, such eligible organizations, the Secretary shall also solicit nominations from such producers through general farmer organizations or by other means.

(b) After the appointment of the initial Board, the Secretary shall announce at least 120 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in § 1150.133(a). Nominations for such position should be submitted to the Secretary not less than 60 days prior to the expiration of such term.

(c) An eligible organization may submit nominations only for positions on the Board that represent regions in which such eligible organization can establish that it represents a substantial number of producers. If there is more than one Board position for any such region, the organization may submit nominations for each position.

(d) Where there is more than one eligible organization representing producers in a specific region, they may caucus and jointly nominate producers for each position representing that region on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary nominations for each appointment to be made to represent that region.

## **§ 1150.134 Nominee's agreement to serve.**

Any producer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed;

(b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) applies.

## **§ 1150.135 Appointment.**

From the nominations made pursuant to § 1150.133, the Secretary shall appoint the members of the Board on the basis of representation provided for in § 1150.131(a).

## **§ 1150.136 Vacancies.**

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor from the most recent list of nominations for the position or from nominations made by the Board.

## **§ 1150.137 Procedure.**

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Board. Any action of the Board shall require the concurring votes of at least a majority of those present. The Board shall establish rules concerning timely notice of meetings.

(b) The Board may take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph when in the opinion of the chairman of the Board such action must be taken before a meeting can be called.



Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board.

#### § 1150.138 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses, including a per diem allowance as recommended by the Board and approved by the Secretary, incurred by them in the performance of their duties under this subpart.

#### § 1150.139 Powers of the Board.

The Board shall have the following powers:

- (a) To receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals;
- (b) To administer the provisions of this subpart in accordance with its terms and provisions;
- (c) To make rules and regulations to effectuate the terms and provisions of this subpart;
- (d) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;
- (e) To disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other systems;
- (f) To select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable;
- (g) To establish advisory committees of persons other than Board members and pay the necessary and reasonable expenses and fees of the members of such committees;
- (h) To recommend to the Secretary amendments to this subpart; and
- (i) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1150.152 in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in

obligations fully guaranteed as to principal and interest by the United States.

#### § 1150.140 Duties of the Board.

The Board shall have the following duties:

- (a) To meet not less than annually, and to organize and select from among its members a chairman and such other officers as may be necessary;
- (b) To appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;
- (c) To appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each;
- (d) To review all programs that promote milk and dairy products on a brand or trade name basis that have requested certification pursuant to § 1150.153, and to recommend to the Secretary whether such request should be granted;
- (e) To develop and submit to the Secretary for approval, promotion, research, and nutrition education plans or projects resulting from research or studies conducted either by the Board or others;
- (f) To solicit, among other proposals, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use;
- (g) To prepare and submit to the Secretary for approval, budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of promotion, research and nutrition education plans or projects, and also including a general description of the proposed promotion, research and nutrition education programs contemplated therein;
- (h) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and prepare and submit such reports from time to time to the Secretary as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;
- (i) With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy

promotion and research organizations or other organizations or entities for the development and conduct of activities authorized under §§ 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to § 1150.152. Any such contract or agreement shall provide that:

- (1) The contractors shall develop and submit to the Board a plan or project together with a budgets or budget which shall show the estimated cost to be incurred for such plan or project;
- (2) Any such plan or project shall become effective upon approval of the Secretary; and
- (3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party;
- (j) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;
- (k) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards, at least once each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;
- (l) To give the Secretary the same notice of meetings of the Board, committees of the Board and advisory committees as is given to such Board or committee members in order that the Secretary, or a representative of the Secretary, may attend such meetings;
- (m) To submit to the Secretary such information pursuant to this subpart as may be requested; and
- (n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

#### Expenses and Assessments

##### § 1150.151 Expenses.

- (a) The Board is authorized to incur such expenses (including provision for a reasonable reserve) as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and



perform its duties in accordance with the provisions of this subpart. However, after the first full year of operation of the order, administrative expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal year. Such expenses shall be paid from assessments collected pursuant to § 1150.152.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1150.152, for administrative costs incurred by the Department after May 1, 1984.

#### § 1150.152 Assessments.

(a) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

(b) Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(c) In determining the assessment due from each producer pursuant to § 1150.152 (a) and (b), a producer who is participating in a qualified State or regional program(s) shall receive a credit for contributions to such program(s), but not to exceed the following amounts:

(1) In the case of contributions for milk marketed on or before May 31, 1984, up to the actual rate of contribution that was in effect under such program(s) on November 29, 1983, not to exceed 15 cents per hundredweight of milk marketed.

(2) In all other cases, the credit shall not exceed 10 cents per hundredweight of milk marketed.

(d) In order for a producer described in § 1150.152(a) to receive the credit authorized in § 1150.152(c), either the producer or a cooperative association on behalf of the producer must establish to the person responsible for remitting the assessment to the Board that the producer is contributing to a qualified State or regional program. Producers who contribute to a qualified program directly (other than through a payroll deduction) must establish with the person responsible for remitting the assessment to the Board, with validation by the qualified program, that they are making such contributions.

(e) In order for a producer described in § 1150.152(b) to receive the credit authorized in § 1150.152(c), the producer and the applicable qualified State or regional program must establish to the Board that the producer is contributing to a qualified State or regional program.

(f) The collection of assessments pursuant to § 1150.152 (a) and (b) shall begin with respect to milk marketed on and after the effective date of this section and shall continue until terminated by the Secretary. If the Board is not constituted by the date the first assessments are to be collected, the Secretary shall have the authority to receive the assessments on behalf of the Board. The Secretary shall remit such assessments to the Board when it is constituted.

(g) Each person responsible for the remittance of the assessment pursuant to § 1150.152 (a) and (b) shall remit the assessment to the Board not later than the last day of the month following the month in which the milk was marketed.

(h) Money remitted to the Board shall be in the form of a negotiable instrument made payable to "National Dairy Promotion and Research Board." Remittances and reports specified in § 1150.171 shall be mailed to the location designated by the Secretary or the Board.

#### § 1150.153 Qualified State or regional dairy product promotion, research or nutrition education programs.

(a) Any organization which conducts a State or regional dairy product promotion, research or nutrition education program may apply to the Secretary for certification of qualification so that producers may receive credit pursuant to § 1150.152(c) for contributions to such program.

(b) In order to be certified by the Secretary as a qualified program, the program must:

(1) Conduct activities as defined in §§ 1150.114, 1150.115, and 1150.116 that are intended to increase consumption of milk and dairy products generally;

(2) Except for programs operated under the laws of the United States or any State, have been active and ongoing before enactment of the Act;

(3) Be financed primarily by producers, either individually or through cooperative associations;

(4) Not use a private brand or trade name in its advertising and promotion of dairy products unless the Board recommends and the Secretary concurs that such preclusion should not apply;

(5) Certify to the Secretary that any requests from producers for refunds under the program will be honored by forwarding to either the Board or a

qualified State or regional program designated by the producer that portion of such refunds equal to the amount of credit that otherwise would be applicable to that program pursuant to § 1150.152(c); and

(6) Not use program funds for the purpose of influencing governmental policy or action.

#### § 1150.154 Influencing governmental action.

No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this subpart.

#### § 1150.155 Adjustment of accounts.

Whenever the Board or the Department determines through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board, such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1150.152. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

#### § 1150.156 Charges and penalties.

(a) *Late-payment charge.* Any unpaid assessments to the Board pursuant to § 1150.152 shall be increased 1.5 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

(b) *Penalties.* Any person who willfully violates any provision of this subpart shall be assessed a civil penalty by the Secretary of not more than \$1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by this subpart, in addition to the amount due, a



penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States. The remedies provided in this section shall be in addition to, and not exclusive of, other remedies that may be available by law or in equity.

#### Promotion, Research and Nutrition Education

##### § 1150.161 Promotion, research and nutrition education.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any plans or projects authorized in §§ 1150.139, 1150.140 and this section. Such plans or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research and nutrition education with respect to milk and dairy products; and

(2) The establishment and conduct of research and studies with respect to the sale, distribution, marketing and utilization of milk and dairy products and the creation of new products thereof, to the end that marketing and utilization of milk and dairy products may be encouraged, expanded, improved or made more acceptable. Included shall be research and studies of proposals intended to increase the use of fluid milk and dairy products by the military and by persons in developing nations and proposals intended to demonstrate the feasibility of converting nonfat dry milk to casein for domestic and export use.

(b) Each plan or project authorized under § 1150.161(a) shall be periodically reviewed or evaluated by the Board to insure that the plan or project contributes to an effective program of promotion, research and nutrition education. If it is found by the Board that any such plan or project does not further the purposes of the Act, the Board shall terminate such plan or project.

(c) No plan or project authorized under § 1150.161(a) shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

#### Reports, Books and Records

##### § 1150.171 Reports.

Each producer marketing milk of that producer's own production directly to consumers and each person making payment to producers and responsible

for the collection of the assessment under § 1150.152 shall be required to report at the time for remitting assessments to the Board such information as may be required by the Board or by the Secretary. Such information may include but not be limited to the following:

(a) The quantity of milk purchased, initially transferred or which, in any other manner, are subject to the collection of the assessment;

(b) The amount of assessment remitted;

(c) The basis, if necessary, to show why the remittance is less than the number of hundredweights of milk multiplied by 15 cents; and

(d) The date any assessment was paid.

##### § 1150.172 Books and records.

Each person who is subject to this subpart, and other persons subject to § 1150.171, shall maintain and make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued hereunder, including such records as are necessary to verify any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

##### § 1150.173 Confidential treatment.

All information obtained from such books, records or reports under the Act and this subpart shall be kept confidential by all persons, including employees and former employees of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and all employees and all former officers and employees of contracting agencies having access to such information, and shall not be available to Board members. Only those persons having a specific need for such information in order to effectively administer the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the discretion, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the

information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of the subpart violated by such person.

#### Miscellaneous

##### § 1150.181 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to § 1150.140(i);

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research or nutrition education plans or projects authorized pursuant to this subpart.

##### § 1150.182 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant hereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have



arisen or which may hereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary, or of any person, with respect to any such violation.

#### § 1150.183 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly, in any way whatsoever to any person for errors in judgment, mistakes, or other acts of either commission or omission of such member or employee, except for acts of dishonesty or willful misconduct.

#### § 1150.184 Patents, copyrights, inventions and publications.

Any patents, copyrights, trademarks, inventions or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, inure to the benefit of the Board. Upon termination of this subpart, § 1150.181 shall apply to determine disposition of all such property.

#### § 1150.185 Amendments.

The Secretary may from time to time amend provisions of this part. Any interested person or organization affected by the provisions of the Act may propose such amendments to the Secretary.

#### § 1150.186 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

#### § 1150.187 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in §§ 1150.133, 1150.152, 1150.153, 1150.171, 1150.172 and 1150.273 of these regulations (7 CFR Part 1150) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581-0147.

### Subpart—Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From an Order

#### § 1150.250 Words in the singular form.

Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

#### § 1150.251 Definitions.

As used in this subpart:

(a) "Act" means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto;

(b) "Department" means the United States Department of Agriculture;

(c) "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead;

(d) "Judge" means any administrative law judge in the Office of Administrative Law Judges, United States Department of Agriculture;

(e) "Administrator" means the Administrator of the Department's Agricultural Marketing Service, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Administrator's stead;

(f) "Federal Register" means the publication provided for by the Federal Register Act, approved July 26, 1935 (44 U.S.C. 1501-1511), and acts supplementing and amending it;

(g) "Order" means any regulation or any amendment thereto which may be issued pursuant to the Act;

(h) "Person" means any individual, group of individuals, partnership, corporation, association, cooperative, or other entity subject to an order or to whom an order is sought to be made applicable, or on whom an obligation has been imposed or is sought to be imposed under an order;

(i) "Proceeding" means a proceeding before the Secretary arising under Section 118(a) of the Act;

(j) "Hearing" means that part of the proceeding which involves the submission of evidence;

(k) "Party" includes the Department;

(l) "Hearing clerk" means the hearing clerk, United States Department of Agriculture, Washington, D.C.;

(m) "Presiding officer" means the administrative law judge conducting a proceeding under the Act;

(n) "Presiding officer's report" means the presiding officer's report to the

Secretary and includes the presiding officer's proposed (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis therefor, (2) order, and (3) rulings on findings, conclusions and orders submitted by the parties; and

(o) "Petition" includes an amended petition.

#### § 1150.252 Institution of proceeding.

(a) *Filing and service of petitions.* Any person subject to an order desiring to complain that any order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, five copies of a petition in writing addressed to the Secretary, requesting a modification of such order or to be exempted from such order. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the Department's General Counsel, respectively.

(b) *Contents of petitions.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If the petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers and directors; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioners' business and the manner in which petitioner claims to be affected by the terms or provisions of the order or the interpretation or application thereof, which complained of;

(4) A statement of the grounds on which the terms or provisions of the order or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law; and

(5) Requests for the specific relief which the petitioner desires the Secretary to grant.



(c) *An application to dismiss petition—Filing, contents, and responses thereto.* If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the Act or with the requirements of paragraph (b) of this section, the Administrator may, within 30 days after the filing of the petition, file with the hearing clerk an application to dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such application shall specify the grounds of objection to the petition and if based, in whole or in part, on allegations of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The application may be accompanied by a memorandum of law. Upon receipt of such application, the hearing clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition of such application, including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the application to the Secretary for his consideration.

(d) *Further proceedings.* Further proceedings on petitions to modify or to be exempted from any order shall be governed by §§ 900.52(c)(2) through 900.71 of this title (Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders) and as may hereafter be amended, and the same are incorporated herein and made a part hereof by reference. However each reference to "marketing order" in the title shall mean "order."

#### **Subpart—Procedure for Certification of Milk Producer Organizations**

##### **§ 1150.270 General.**

Organizations must be certified by the Secretary that they are eligible to represent milk producers and to participate in the making of nominations of milk producers to serve as members of the National Dairy Promotion and Research Board as provided in the Dairy and Tobacco Adjustment Act of 1983. Certifications of eligibility required of the Secretary shall be conducted in accordance with this subpart.

##### **§ 1150.271 Definitions.**

As used in this subpart:

- (a) "Act" means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto;
- (b) "Department" means the United States Department of Agriculture;
- (c) "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated to act in the Secretary's stead;
- (d) "Dairy Division" means the Dairy Division of the Department's Agricultural Marketing Service;
- (e) "Producer" means any person engaged in the production of milk for commercial use;
- (f) "Dairy products" means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products; and
- (g) "Fluid milk products" means those milk products normally consumed in liquid form as a beverage.

##### **§ 1150.272 Responsibility for administration of regulations.**

The Dairy Division shall have the responsibility for administering the provisions of this subpart.

##### **§ 1150.273 Application for certification.**

Any organization whose membership consists primarily of milk producers may apply for certification. Applicant organizations should supply information for certification using as a guide "Application for Certification of Organizations," Form DA-26. Form DA-26 may be obtained from the Dairy Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D.C. 20250.

##### **§ 1150.274 Certification standards.**

(a) Certification of eligible organizations shall be based, in addition to other available information, on a factual report submitted by the organization, which shall contain information deemed relevant and specified by the Secretary for the making of such determination, including the following:

- (1) Geographic territory covered by the organization's active membership;
- (2) Nature and size of the organization's active membership including the total number of active milk producers represented by the organization;
- (3) Evidence of stability and permanency of the organization;

(4) Sources from which the organization's operating funds are derived;

(5) Functions of the organization; and

(6) The organization's ability and willingness to further the aims and objectives of the Act.

(b) The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk, and whether the primary or overriding interest of the organization is in the production or processing of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

(c) The Secretary shall certify any organization which he finds meets the criteria under this section and his determination as to eligibility shall be final.

##### **§ 1150.275 Inspection and investigation.**

The Secretary shall have the right, at any time after an application is received from an organization, to examine such books, documents, papers, records, files, and facilities of an organization as he deems necessary to verify the information submitted and to procure such other information as may be required to determine whether the organization is eligible for certification.

##### **§ 1150.276 Review of certification.**

Certifications issued pursuant to this subpart are subject to termination or suspension if the organization does not currently meet the certification standards. A certified organization may be requested at any time to supply the Dairy Division with such information as may be required to show that the organization continues to be eligible for certification. Any information submitted to satisfy a request pursuant to this section shall be subject to inspection and investigation as provided in § 1150.275.

##### **§ 1150.277 Listing of certified organizations.**

A copy of each certification shall be furnished by the Dairy Division to the respective organization. Copies also shall be filed in the Dairy Division where they will be available for public inspection.

##### **§ 1150.278 Confidential treatment.**

All documents and other information submitted by applicant organizations and otherwise obtained by the Department by investigation or examination of books, documents, papers, records, files, or facilities shall be kept confidential by all employees of



the Department. Only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in the issuance of general statements based upon the applications of a number of persons, which do not identify the information furnished by any one person.

**Effective date:** All provisions contained in this Part 1150, except the provision in § 1150.152, are effective on and after April 1, 1984. The provisions in § 1150.152 are effective on and after May 1, 1984.

Signed at Washington, D.C., on: March 23, 1984.

C. W. McMillan,

*Assistant Secretary, Marketing and Inspection Services.*

[FR Doc. 84-8267 Filed 3-27-84; 8:45 am]

BILLING CODE 3410-02-M

## Animal and Plant Health Inspection Service

### 9 CFR Part 92

[Docket No. 83-138]

#### Ports Designated for the Importation of Animals

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule.

**SUMMARY:** This document amends the regulations concerning ports designated for the importation of animals by adding Los Angeles, California, to the list of air and ocean ports having Veterinary Services (VS) inspection and quarantine facilities necessary for a quarantine station for the importation of animals. The facility will begin receiving animals on or about April 4, 1984. It is necessary to add Los Angeles to this list to reflect the existence of the VS facility at Los Angeles so that importers can make arrangements for the importation of animals.

This document also announces that it will be necessary to allow quarantine space at the VS facility at Los Angeles on a priority basis for horses that are to participate in the 1984 Olympics in Los Angeles in order to efficiently handle their entry into the United States.

**DATES:** Effective date of this interim rule is March 28, 1984. Written comments must be received on or before May 29, 1984.

**ADDRESS:** Written comments concerning this interim rule should be submitted to Thomas O. Gessel, Director, Regulatory Coordination Staff, APHIS, USDA, Room 728, Federal Building, 6505

Belcrest Road, Hyattsville, MD 20782. Written comments received may be inspected at Room 728 of the Federal Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

#### FOR FURTHER INFORMATION CONTACT:

Dr. M. P. Dulin, Veterinary Services, APHIS, USDA, Room 843, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8170.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in 9 CFR Part 92 (referred to below as the regulations), among other things, list ports which are designated for the importation of animals and birds into the United States. Paragraph (a) of § 92.3 of the regulations lists air and ocean ports having Veterinary Services (VS) inspection and quarantine facilities necessary for quarantine stations. Prior to the effective date of this document, Newburgh, New York, Miami, Florida, and Honolulu, Hawaii, were the only ports listed as air and ocean ports.

VS inspection and quarantine facilities necessary for a quarantine station for animals are being completed in Los Angeles. The facilities are scheduled to begin allowing air and ocean importations of animals on or about April 4, 1984. Therefore, this document amends § 92.3(a) of the regulations to add Los Angeles, California, as an air and ocean port for the importation of animals to reflect the existence of the VS facility at Los Angeles so that importers can make arrangements for the importation of animals.

##### Quarantine Space for Olympic Horses

It is anticipated that approximately 350 horses will be entering the United States from mid June through early August to participate in the 1984 Olympics in Los Angeles. In order to efficiently handle the entry of these animals into the United States, it will be necessary to allow quarantine space at the VS facility at Los Angeles on a priority basis for horses entering the United States for participation in the Olympics. It appears that during the time of the Olympics the space at the VS quarantine facility will be needed almost exclusively for horses imported for the Olympics.

##### Executive Order 12291 and Regulatory Flexibility Act

This action has been reviewed in conformance with Executive Order 12291 and has been determined to be not a "major rule." The Department has determined that this action will not have

an annual effect on the economy of \$100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; and will not cause significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this rulemaking action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

In addition to air and ocean ports, the regulations list Canadian border ports, Mexican border ports, and a number of other ports where Veterinary Services maintains facilities for the importation of certain animals. The regulations also provide a mechanism for allowing the importation of horses or birds at ports with privately operated facilities.

It appears that the addition of the port of Los Angeles to the list of air and ocean ports will not have a significant impact on the importation of animals into the United States. However, it provides another alternative facility for importation of animals and will reduce costs of importation for certain importers. Currently, almost all of the animals imported in the United States at Los Angeles are horses which are imported at one privately operated facility. This addition of a VS facility at the port of Los Angeles will impact on this privately operated facility.

Under these circumstances, Mr. Bert W. Hawkins, Administrator of the Animal and Plant Health Inspection Service, has determined that this action will not have significant economic impact on a substantial number of small entities.

##### Effective Date

Pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that prior notice and other public procedure are unnecessary and contrary to the public interest with respect to the addition of Los Angeles, California, to the list of air and ocean ports in § 92.3(a), and that good cause is found for making this action effective upon publication in the *Federal Register*. Comments concerning the addition of Los Angeles are being solicited for 60 days after publication of the document.

It is necessary to make this rule effective as soon as possible in order to relieve unnecessary restrictions and to reflect the existence of the VS facility at Los Angeles so that importers of animals



can make arrangements to utilize the facility for the importation of animals.

#### List of Subjects in 9 CFR Part 92

Animal diseases, Canada, Imports, Livestock and livestock products, Mexico, Poultry and poultry products, Quarantine, Transportation, Wildlife.

#### PART 92—IMPORTATION OF CERTAIN ANIMALS AND POULTRY AND CERTAIN ANIMAL AND POULTRY PRODUCTS; INSPECTION AND OTHER REQUIREMENTS FOR CERTAIN MEANS OF CONVEYANCE AND SHIPPING CONTAINERS THEREON

Accordingly, 9 CFR Part 92 is amended as follows:

In § 92.3(a), the material following the colon is amended to read: "Los Angeles, California (quarantine space at Los Angeles will be allowed on a priority basis for horses entering the United States for participation in the 1984 Olympics); Miami, Florida; Honolulu, Hawaii; and Newburgh, New York."

Authority: Sec. 2, 32 Stat. 792, as amended; secs. 2, 4, and 11, 76 Stat. 129, 130, 132, (21 U.S.C. 111, 134a, 134c, and 134f); 7 CFR 2.17, 2.51, and 371.2(d).

Done at Washington, D.C., this 23rd day for March, 1984.

J. K. Atwell,

Deputy Administrator, Veterinary Services.

[FR Doc. 84-8333 Filed 3-27-84; 8:45 am]

BILLING CODE 3410-34-M

#### DEPARTMENT OF THE TREASURY

##### Comptroller of the Currency

12 CFR Parts 7, 9, 11, 12, 16, 21, 25, 27, 29, 31, and 32

[Docket No. 84-10]

##### OMB Control Numbers

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** This final rule adds the Office of Management and Budget (OMB) control numbers for information collection requirements contained in Office of the Comptroller of the Currency (Office) interpretive rulings and regulations. This action is necessary to alert the public that the Office has complied with the applicable legal requirements for each collection of information requirements.

**EFFECTIVE DATE:** March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:** John Ference, Financial/Regulatory Analyst, Legislative and Regulatory Analysis Division (202) 447-1177, Office

of the Comptroller of the Currency, 490 L'Enfant Plaza, East SW., Washington, D.C. 20219.

#### SUPPLEMENTARY INFORMATION:

##### Background

On March 31, 1983, OMB published in the *Federal Register* (48 FR 13666), a final rule pertaining to 5 CFR Part 1320 (Controlling Paperwork Burdens on the Public). That regulation requires that all collection of information requirements that have been submitted to OMB for clearance, and that have not been disapproved by OMB, display a currently valid OMB control number.

##### Purpose

This final rule ascribes OMB control numbers to information collection requirements contained in Office interpretive rulings and regulations. In order to avoid any public confusion regarding the status of a collection of information requirement contained in an Office regulation and to comply with the requirements of 12 CFR Part 1320, the Office is issuing this final rule.

Reason for not allowing notices and comment.

Notice and opportunity for public comment was not provided because this final rule is a rule of agency practice, contains only technical changes, and is simply informative and beneficial in nature. No burden of any kind is imposed, and no change in practice or procedure is involved. Notice and public procedure for this final rule are therefore unnecessary. Any delay in providing the information contained in this final rule could result in confusion and thereby be contrary to the public interest. The exceptions to notice and public procedure stated in 5 U.S.C. 553(b)(3) (A) and (B) apply.

##### Regulatory Flexibility Act

Since this final rule is not subject to notice and public comment procedure, preparation of a Regulatory Flexibility Analysis is not required. The Comptroller of the Currency believes however, that this final rule will avoid confusion and will not have any particular effect on small entities.

##### Executive Order 12291.

The Office has determined that this final rule is not subject to Executive Order 12291 because it relates to agency management.

List of Subjects in 12 CFR Parts 7, 9, 11, 12, 16, 21, 25, 27, 29, 31, and 32

National banks, OMB control numbers, Reporting and recordkeeping requirements.

#### Authority and Issuance

For the reasons set forth in the preamble, the Comptroller of the Currency amends 12 CFR Chapter I, Parts, 7, 9, 11, 12, 16, 21, 25, 27, 29, 31, and 32 as follows:

#### PART 7—[AMENDED]

1. The authority citation for Part 7 reads as follows:

Authority: 12 U.S.C. 1 *et seq.*; 12 U.S.C. 93a.

##### § 7.3025 [Amended]

2. Section 7.3025 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0153)

##### § 7.3100 [Amended]

3. Section 7.3100 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0154)

##### § 7.5225 [Amended]

4. Section 7.5225 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0069)

##### § 7.6100 [Amended]

5. Section 7.6100 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0155)

#### PART 9—[AMENDED]

6. The authority citation for Part 9 reads as follows:

Authority: Sec. 1, 77 Stat. 668; 12 U.S.C. 92a; and R.S. 5240 as amended (12 U.S.C. 481), unless otherwise noted.

##### § 9.18 [Amended]

7. Section 9.18 is amended by adding, after the regulatory text, the following:

(The collection of information requirements contained in this section were approved by the Office of Management and Budget as follows: Section 9.18(b)(1)—OMB control number 1557-0141; § 9.18(b)(5)—OMB control number 1557-0140)

#### PART 11—[AMENDED]

8. The authority citation for Part 11 reads as follows:

Authority: 15 U.S.C. 781, 78m, 78n, 78p, 78w)

9. Section 11.1 is revised to read as follows:



**§ 11.1 Scope and OMB control number.**

(a) *Scope.* This part is issued by the Comptroller of the Currency pursuant to section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78) (the "Act") and applies to all securities subject to registration pursuant to section 12(b) or section 12(g) of the Act by a national bank or a bank operating under the Code of Law for the District of Columbia ("bank"). The effective date of this part shall be September 30, 1975.

(b) *OMB control number.* The collection of information requirements contained in this Part were approved by the Office of Management and Budget under OMB control number 1557-0106.

**PART 12—[AMENDED]**

10. The authority citation for Part 12 reads as follows:

Authority: 12 U.S.C. 24 and 12 U.S.C. 92a.

11. Section 12.1 is revised to read as follows:

**§ 12.1 Scope and OMB control number.**

(a) *Scope.* This part is issued by the Comptroller of the Currency pursuant to 12 U.S.C. 24 and 12 U.S.C. 92a and contains rules applicable to recordkeeping and confirmation requirements for certain transactions effected by national banks.

(b) *OMB control number.* The collection of information requirements contained in this Part were approved by the Office of Management and Budget under OMB control number 1557-0142.

**PART 16—[AMENDED]**

12. The authority citation for Part 16 reads as follows:

Authority: 12 U.S.C. 1 *et seq.*

13. Section 16.1 is revised to read as follows:

**§ 16.1 Authority and OMB control numbers.**

(a) *Authority.* This part is issued under the general authority of the national banking laws, R.S. 324 *et seq.* as amended; 12 U.S.C. 1 *et seq.*, and contains rules applicable to the offering of securities.

(b) *OMB control numbers.* The collection of information requirements contained in this part were approved by the Office of Management and Budget and assigned OMB control numbers as follows: Offering Circular—OMB control number 1557-0120; Abbreviated Offering Circular—OMB control number 1557-0121; Offering Document—OMB control number 1557-0122; and Notice of Nonpublic Sales and Exchanges (Notice of Exempt Transactions)—OMB control number 1557-0123.

**PART 21—[AMENDED]**

14. The authority citation for Part 21 reads as follows:

Authority: 12 U.S.C. 1881-1884.

**§ 21.5 [Amended]**

15. Section 21.5 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0072)

**PART 25—[AMENDED]**

16. The authority citation for Part 25 reads as follows:

Authority: Community Reinvestment Act of 1977 (Title VIII, Pub. L. 95-128, 91 Stat. 1147 (12 U.S.C. 2901 *et seq.*); 12 U.S.C. 21, 22, 26, 27, 30, 36, 161, 215, 215a, 481, 1814, 1816, 1828(c), unless otherwise noted.

17. Section 25.1 is revised to read as follows:

**§ 25.1. Authority and OMB control number.**

(a) *Authority.* The Comptroller of the Currency ("Comptroller") issues this part under the authority of the Community Reinvestment Act of 1977 (title VIII of Pub. L. 95-128), and under provisions of title 12 of the United States Code authorizing the Comptroller to charter national banks (sections 21, 22, 26, and 27), to issue certificates to national banks to commence or resume the business of banking (sections 1814, 1816), to consider applications from national banks to relocate a main office (section 30) or to establish or relocate a branch office (section 36), to consider applications for a merger, consolidation, acquisition of assets, or assumption of liabilities where the acquiring, assuming, or resulting bank is a national bank (sections 215, 215a, 1828(c)), to acquire reports of condition (section 161), and to conduct examinations of national banks (section 481).

(b) *OMB control number.* The collection of information requirements contained in this part were approved by the Office of Management and Budget under OMB control number 1557-0159.

**PART 27—[AMENDED]**

18. The authority citation for Part 27 reads as follows:

Authority: 15 U.S.C. 1691 *et seq.*; 12 U.S.C. 1818; 12 U.S.C. 1 *et seq.*; 12 U.S.C. 161; 12 U.S.C. 481; 42 U.S.C. 3601 *et seq.*; 5 U.S.C. 301; 12 CFR 202.

19. Section 27.1 is revised to read as follows:

**§ 27.1. Scope and OMB control number.**

(a) *Scope.* This part applies to the activities of national banks and banks located in the District of Columbia, and their subsidiaries, which make home

loans for the purpose of purchasing, construction-permanent financing, or refinancing of residential real property.

(b) *OMB control number.* The collection of information requirements contained in this part were approved by the Office of Management and Budget under OMB control number 1557-0160.

**PART 29—[AMENDED]**

20. The authority citation for Part 29 reads as follows:

Authority: 12 U.S.C. 1 *et seq.*; 12 U.S.C. 93a; and 12 U.S.C. 371.

**§ 29.7 [Amended]**

21. Section 29.7 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0139)

**§ 29.9 [Amended]**

22. Section 29.9 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0139)

**PART 31—[AMENDED]**

23. The authority citation for Part 31 reads as follows:

Authority: 12 U.S.C. 375a(4), 375(b)(2), 1817(k), and 1972(2)(C)(ii), as amended.

24. Section 31.4 is revised to read as follows:

**§ 31.4. Authority and OMB control number.**

(a) *Authority.* This subpart is issued by the Comptroller of the Currency pursuant to 12 U.S.C. 1817(k) and 12 U.S.C. 1972(2)(C)(ii), as amended.

(b) *OMB control number.* The collection of information requirements contained in this subpart were approved by the Office of Management and Budget under OMB control number 1557-0070.

**§ 31.6 [Amended]**

25. Section 31.6 is amended by removing the parenthetical OMB control number sentence that follows the regulatory text.

**PART 32—[AMENDED]**

26. The authority citation for Part 32 reads as follows:

Authority: 12 U.S.C. 1 *et seq.*; 12 U.S.C. 84; and 12 U.S.C. 93a.

**§ 32.1 Authority, purpose and scope.**

27. Section 32.1 is amended by revising the title to read as set forth above and by removing paragraph (d).



**§ 32.5 [Amended]**

28. Section 32.5 is amended by adding, after the regulatory text, the following:

(Approved by the Office of Management and Budget under control number 1557-0147)

Dated: March 7, 1984.

C. T. Conover,

Comptroller of the Currency.

[FR Doc. 84-8272 Filed 3-27-84; 8:45 am]

BILLING CODE 4810-33-M

**FEDERAL RESERVE SYSTEM****12 CFR Part 220**

[Docket No. R-0389]

**Credit by Brokers and Dealers;  
Complete Revision and Simplification  
of Regulation T Deferral of Effective  
Date**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Deferral of effective date.

**SUMMARY:** The Board is extending, until June 30, 1984, the effective date for compliance with the completely revised Regulation T (governing credit extended by brokers and dealers), which was adopted by the Board on May 16, 1983 (48 FR 23161). The effective date was deferred once before to March 31, 1984 in light of unforeseen operational problems encountered by broker-dealers in conforming their computer systems to the requirements of the revised regulation (48 FR 51768). The Board has been apprised that not all broker-dealers will be able to resolve such problems by March 31, 1984. It is, therefore, deferring until June 30, 1984, the effective date of the newly revised Regulation T.

**DATE:** The effective date for the revised Regulation T (12 CFR Part 220) is deferred until June 30, 1984.

**FOR FURTHER INFORMATION CONTACT:** Robert Lord, Attorney, Division of Banking Supervision and Regulation, (202) 452-2781.

**SUPPLEMENTARY INFORMATION:** On May 16, 1983 the Board adopted a completely revised Regulation T, governing credit extended by brokers and dealers (48 FR 23161, May 24, 1983). The new regulation was to become effective on November 21, 1983 or any earlier date after June 20, 1983, at the option of the creditor. Subsequent to the adoption of revised Regulation T, however, several major broker-dealers informed the Board that due to unforeseen difficulties in programming their computer systems, they would need more time than originally expected to conform their accounts to the requirements of the new regulation.

In requesting a deferred effective date, broker-dealers pointed to, among other things, the special temporary computer programs which had to be developed in order to provide support for the AT&T divestiture transactions. The broker-dealers have stated that an enormous amount of program and systems modifications are needed to adequately support the highly complex cash and margin transactions in the stock of AT&T and the seven new regional companies formed as a result of the divestiture, and for transactions in AT&T options. Because of these operational problems, the effective date of the newly-revised Regulation T was deferred until March 31, 1984 (48 FR 51768 November 14, 1983).

The Board has recently been apprised that not all broker-dealers will be able to adopt their computer systems to the newly revised Regulation by March 31, 1984. Since a significant number of customer accounts will be affected by this inability to comply with the Regulation by March 31, 1984, the Board hereby defers the effective date of the regulation to June 30, 1984. Although the effective date has been deferred to June 30, the Board expects creditors make a good faith effort to comply with the new regulation as soon after March 31, 1984 as possible.

**List of Subjects in 12 CFR Part 220**

Banks, banking, Brokers, Credit, Federal Reserve System, Margin, Margin requirements, Investments, Reporting and recordkeeping requirements, Securities.

By order of the Secretary of the Board of Governors, acting under delegated authority, March 23, 1984.

William W. Wiles,

Secretary of the Board.

[FR Doc. 84-8334 Filed 3-27-84; 8:45 am]

BILLING CODE 6210-01-M

**DEPARTMENT OF COMMERCE****International Trade Administration****15 CFR Part 371**

[Docket No. 40306-23]

**Clarification of Export Licensing  
Policy—General License GLR; Return  
or Replacement of Certain  
Commodities**

**AGENCY:** Office of Export Administration, International Trade Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** This rule, which neither expands nor limits the provisions of the

Export Administration Regulations, amends the Regulations to clarify the procedures for use of General License GLR. This clarification emphasizes that Country Groups S and Z are excluded from the GLR procedures.

**EFFECTIVE DATE:** March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:** Larry Hanrahan, Office of Export Administration (Telephone: (202) 377-3856).

**SUPPLEMENTARY INFORMATION:****Rulemaking Requirements**

In connection with various rulemaking requirements, the Office of Export Administration has determined that:

1. Under section 13(a) of the Export Administration Act of 1979 (Pub. L. 96-72, 50 U.S.C. app. 2401 *et seq.*) ("the Act"), this rule is exempt from the public participation in rulemaking procedures of the Administrative Procedure Act. This rule does not impose new controls on exports, and is therefore exempt from section 13(b) of the Act, which expresses the intent of Congress that where practicable "regulations imposing controls on exports" be published in proposed form.

2. This rule does not impose a burden under Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

3. This rule is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 3501 601 *et seq.*

4. This rule is not a major rule within the meaning of section 1(b) of Executive Order 12291 (46 FR 13193, February 19, 1981), "Federal Regulation."

Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis.

**List of Subjects in 15 CFR Part 371**

Exports.

**PART 371—[AMENDED]**

Accordingly, the Export Administration Regulations (15 CFR Parts 368-399) are amended by adding a sentence to the end of the introductory paragraph of § 371.17 reading as follows:

**§ 371.17 General license GLR; return or replacement of certain commodities.**

\* \* \* This GLR procedure applies to all Country Groups except S and Z.

**Authority:** Section 13 and 15, Pub. L. 96-72, 93 Stat. 503, as amended (50 U.S.C. app. 2401 *et seq.*); Executive Order No. 12214 (45 FR 29783, May 6, 1980). Executive Order No. 12541 of December 20, 1983 (48 FR 56563, December 22, 1983).



Dated: March 6, 1984.

John K. Boidock,  
Director, Office of Export Administration,  
International Trade Administration.

[FR Doc. 84-8311 Filed 3-27-84; 8:45 am]

BILLING CODE 3510-DT-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 271

[Docket No. RM79-76-172; Texas-21  
Addition Order No. 364]

#### High-Cost Gas Produced From Tight Formations: Texas

Issued March 27, 1984.

**AGENCY:** Federal Energy Regulatory  
Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission is authorized by section 107(c)(5) of the Natural Gas Policy Act of 1978 to designate certain types of natural gas as high-cost gas where the Commission determines that the gas is produced under conditions which present extraordinary risks or costs. Under section 107(c)(5), the Commission issued a final regulation designating natural gas produced for tight formations as high-cost gas which may receive (18 CFR 271.703 (1983)). This rule established procedures for formations as high-cost gas which may receive established procedures for jurisdictional agencies to submit to the Commission recommendations of areas for designation as tight formations. This final order adopts the recommendation of the Railroad Commission of Texas that an additional area of the James Limestone Formation located in Shelby County, Texas be designated as a tight formation under § 271.703(d).

**EFFECTIVE DATE:** This rule is effective April 26, 1984.

**FOR FURTHER INFORMATION CONTACT:** Elisabeth Pendley, (202) 357-8476, or Walter W. Lawson, (202) 357-8556.

#### Final Rule

The Commission hereby amends § 271.703(d) of its regulations (18 CFR 271.703(d) (1983)) to include the James Limestone Formation as a designated tight formation eligible for incentive pricing under § 271.703. The amendment was proposed in a Notice of Proposed Rulemaking by the Director, Office of Pipeline and Producer Regulation, issued February 28, 1983 (48 FR 32510, March 4,

1983)<sup>1</sup> based on a recommendation by the Railroad Commission of Texas (Texas) in accordance with § 271.703, that the James Limestone Formation, located in Hidalgo County, Texas be designated as a tight formation.

Evidence submitted by Texas supports the assertion that the James Limestone Formation, located in Shelby County, Texas meets the guidelines contained in § 271.703(c)(2).<sup>2</sup> The Commission adopts the Texas recommendation.

This amendment shall become effective April 26, 1984.

#### List of Subjects in 18 CFR Part 271

Natural gas, Incentive price, Tight formations.

In consideration of the foregoing, Part 271 of Subchapter H, Chapter I, Code of Federal Regulations, is amended as set forth below.

By the Commission.

Lois D. Cashell,

Acting Secretary.

#### PART 271—[AMENDED]

Section 271.703 is amended to read as follows:

1. The authority citation for Part 271 reads as follows:

**Authority:** Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*; Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432; Administrative Procedure Act, 5 U.S.C. 553.

2. Section 271.703 is amended by revising paragraph (d)(92) to read as follows:

#### § 271.703 Tight formations.

(d) *Designated tight formations.*

(92) *James Limestone Formation in Texas.* RM79-76-172 (Texas-21).

(i) *Southern Shelby and Northern San Augustine Counties.*—(A) *Delineation of formation.* The James Limestone Formation is found in northern San Augustine County and southern Shelby County, in Railroad District No. 6 in Texas. The area includes 67,900 acres surrounding and extending northwest of the city of San Augustine, Texas.

<sup>1</sup> The notice also included the James Limestone Formation in Nacogdoches County. On January 4, 1984 Texas requested that the Nacogdoches County section of the tight formation be excluded until additional data is submitted. Comments on the proposed rule were invited and one comment supporting the recommendation was received. No party requested a public hearing and no hearing was held.

<sup>2</sup> The Commission previously designated a portion of the James Limestone Formation in San Augustine and Shelby Counties as a tight formation in Order No. 246 (Texas-21) on August 4, 1982.

(B) *Depth.* The top of the James Limestone Formation ranges from —6,700 feet subsea in the north to —7,750 feet subsea in the south, with a thickness of approximately 202 feet.

(ii) *Shelby County.*—(A) *Delineation of Formation.* The James Limestone Formation is located in Shelby County, Railroad Commission District 6, East Texas. The James Limestone Formation is included as a subdivision of the Trinity Group of Lower Cretaceous (Commanchean) Age.

(B) *Depth.* The James Limestone Formation ranges from approximately —5,100 feet subsea in the North to —6,700 feet subsea in the south. The James Limestone overlies the Pine Island Shale and underlies the Bexar Shale.

[FR Doc. 84-8234 Filed 3-27-84; 8:45 am]

BILLING CODE 6717-01-M

#### 18 CFR Part 271

[Docket No. RM79-76-220; Texas 10—  
Addition III; Order No. 366]

#### High-Cost Gas Produced From Tight Formations: Texas

Issued March 27, 1984.

**AGENCY:** Federal Energy Regulatory  
Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission is authorized by section 107(c)(5) of the Natural Gas Policy Act of 1978 to designate certain types of natural gas as high-cost gas where the Commission determines that the gas is produced under conditions which present extraordinary risks or costs. Under section 107(c)(5), the Commission issued a final regulation designating natural gas produced from tight formations as high-cost gas which may receive an incentive price (18 CFR 271.703) (1983)). This rule established procedures for jurisdictional agencies to submit to the Commission recommendations of areas for designation as tight formations. This final order adopts the recommendation of the State of Texas that an additional area of Edwards Limestone Formation located in Karnes County, Texas, be designated as a tight formation under § 271.703(d).

**EFFECTIVE DATE:** This rule is effective April 26, 1984.

**FOR FURTHER INFORMATION CONTACT:** Kevin R. Rees, (202) 357-5420 or Walter Lawson, (202) 357-8556.



**Final Rule**

The Commission hereby amends § 271.703(d) of its regulations (18 CFR 271.703(d) (1983)) to include an additional area of the Edwards Limestone Formation as a designated tight formation eligible for incentive pricing under § 271.703. The amendment was proposed in a Notice of Proposed Rulemaking by the Director, Office of Pipeline and Producer Regulation, issued December 6, 1983 (48 FR 54,651)<sup>1</sup> based on a recommendation by the Texas Railroad Commission (Texas) in accordance with § 271.703, that the Edwards Limestone Formation, located in Karnes County, Texas, be designated as a tight formation.

Evidence submitted by Texas supports the assertion that the additional area of the Edwards Limestone Formation located in Karnes County, Texas, meets the guidelines contained in § 271.703(c)(2). The Commission adopts the Texas recommendation.

This amendment shall become effective April 26, 1984.

**List of Subjects in 18 CFR Part 271**

Natural gas, Incentive price, Tight formations.

In consideration of the foregoing, Part 271 of Subchapter H, Chapter I, Code of Federal Regulations, is amended as set forth below.

By the Commission.

Lois D. Cashell,  
Acting Secretary.

**PART 271—[AMENDED]**

1. The authority for Part 271 reads as follows:

**Authority:** Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*; Natural Gas Policy Act, 15 U.S.C. 3301-3432; Administrative Procedure Act, 5 U.S.C. 553.

2. Section 271.703 is amended by adding paragraph (d)(48)(iv) to read as follows:

**§ 271.703 Tight formations.**

(d) *Designated tight formations.*

(48) *The Edwards Limestone Formation in Texas.*

RM79-76-220 (Texas 10). \* \* \*  
(iv) *Karnes County.*—(A) *Delineation of formation.* The Edwards Limestone Formation is located in Karnes County, Texas, Railroad Commission District 2. The designated area is all that portion of

the Kennedy S.W. (Edwards) Field within the area encompassed by a circle 1.5 miles radially distant from and centered upon the Estelle Rolf Gas Unit No. 2, Well No. 2. The Estelle Rolf Gas Unit No. 2, Well No. 2 is located in the Carlos Martinez Survey A-6, Estelle Rolf lease, at a point 660 feet from the southwest lease line and 1,250 feet from the southeast lease line.

(B) *Depth.* The top of the designated portion of the Edwards Limestone Formation ranges from 12,500 feet to 13,500 feet below sea level. The average depth to the top of the Edwards Limestone Formation in the designated area is 13,042 feet.

[FR Doc. 84-8236 Filed 3-27-84; 8:45 am]

**BILLING CODE 6717-01-M**

**18 CFR Part 271**

[Docket No. RM79-76-211; Virginia-2; Order No. 365]

**High-Cost Gas Produced From Tight Formations; Virginia**

Issued March 27, 1984.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission is authorized by section 107(c)(5) of the Natural Gas Policy Act of 1978 to designate certain types of natural gas as high-cost gas where the Commission determines that the gas is produced under conditions which present extraordinary risks or costs. Under section 107(c)(5), the Commission issued a final regulation designating natural gas produced from tight formations as high-cost gas which may receive an incentive price (18 CFR 271.703 (1983)). This rule established procedures for jurisdictional agencies to submit to the Commission recommendations of areas for designation as tight formations. This final order adopts the recommendation of the Commonwealth of Virginia, Department of Labor and Industry, Division of Mines and Quarries that the Lower Mississippian Little Valley Formation located in Scott and Washington Counties, Virginia, be designated as a tight formation under § 271.703(d).

**EFFECTIVE DATE:** This rule is effective April 26, 1984.

**FOR FURTHER INFORMATION CONTACT:** Tom Rattray, (202) 357-5447 or Walter W. Lawson, (202) 357-8556.

**Final Rule**

The Commission hereby amends § 271.703(d) of its regulations (18 CFR 271.703(d)(1983)) to include the lower Mississippian Little Valley Formation as a designated tight formation eligible for incentive pricing under § 271.703. The amendment was proposed in a Notice of Proposed Rulemaking by the Director, Office of Pipeline and Producer Regulation, issued October 5, 1983 (48 FR 46071, October 11, 1983)<sup>1</sup> based on a recommendation by the Commonwealth of Virginia, Department of Labor and Industry, Division of Mines and Quarries (Virginia) in accordance with § 271.703, that a portion of the Lower Mississippian Little Valley Formation, located in Scott and Washington Counties, Virginia, be designated as a tight formation.

Evidence submitted by Virginia supports the assertion that the Lower Mississippian Little Valley Formation located in Scott and Washington Counties, Virginia, meets the guidelines contained in § 271.703(c)(2). The Commission adopts Virginia's recommendation.

This amendment shall become effective April 26, 1984.

**List of Subjects in 18 CFR Part 271**

Natural gas, Incentive price, Tight formations.

In consideration of the foregoing, Part 271 of Subchapter H, Chapter I, Code of Federal Regulations, is amended as set forth below.

By the Commission.

Lois D. Cashell,  
Acting Secretary.

**PART 271—[AMENDED]**

Section 271.703 is amended as follows:  
1. The authority citation for Part 271 reads as follows:

**Authority:** Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*; Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432; Administrative Procedure Act, 5 U.S.C. 553.)

2. Section 271.703 is amended by adding paragraph (d)(160) to read as follows:

**§ 271.703 Tight formations.**

(d) *Designated tight formations.*

(160) *Lower Mississippian Little Valley Formation in Virginia.* RM79-76-211 (Virginia-2).

<sup>1</sup> Comments on the proposed rule were invited and one comment supporting the recommendation was received. No party requested a public hearing and no hearing was held.

<sup>1</sup> Comments on the proposed rule were invited and none were received. No party requested a public hearing and no hearing was held.



(i) *Delineation of formation.* The Lower Mississippian Little Valley Formation is found in Scott and Washington Counties, Virginia. The designated area consists of approximately 89 square miles comprising all of the Mendota and Wallace quadrangles south of the Holston River in Virginia.

(ii) *Depth.* The average depth to the top of the Lower Mississippian Little Valley Formation is 3,191 feet. The formation has an average thickness of 673 feet.

[FR Doc. 84-8235 Filed 3-27-84; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 520

#### Oral Dosage Form New Animal Drugs Not Subject to Certification; Cythioate Oral Liquid and Tablets

##### Correction

In FR Doc. 84-3915 beginning on page 5614 in the issue of Tuesday, February 14, 1984, make the following correction: In column two, sixth line from the bottom, "45 FR 42036" should read "45 FR 40236".

BILLING CODE 1505-01-M

## DEPARTMENT OF THE TREASURY

### Bureau of Alcohol, Tobacco and Firearms

#### 27 CFR Part 9

[T.D. ATF-169; Reference Notice No. 477]

#### Southeastern New England Viticultural Area

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

**ACTION:** Final rule, Treasury decision.

**SUMMARY:** This rule establishes a viticultural area located in Connecticut, Rhode Island, and Massachusetts known as "Southeastern New England." This final rule is the result of a petition submitted by Mr. James Mitchell, of Sakonnet Vineyards, Little Compton, Rhode Island, and of written comments received in response to the proposed regulation.

The Bureau of Alcohol, Tobacco and Firearms believes the establishment of Southeastern New England as a viticultural area and its subsequent use as an appellation of origin in wine

labeling and advertising will allow wineries to designate their specific grape-growing area and will help consumers identify the wines they purchase.

**EFFECTIVE DATE:** April 27, 1984.

**FOR FURTHER INFORMATION CONTACT:** Charles N. Bacon, FAA, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226, Telephone: (202) 566-7626.

#### SUPPLEMENTARY INFORMATION:

##### Background

ATF regulations in 27 CFR Part 4 allow the establishment of definite viticultural areas. These regulations also allow the name of an approved viticultural area to be used as an appellation of origin on wine labels and in wine advertisements. Section 9.11, Title 27, CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographical features. Under 27 CFR 4.25a(e)(2), any interested person may petition ATF to establish a grape-growing region as an American viticultural area. Approved American viticultural areas are listed in 27 CFR Part 9.

*Petition for Southeastern New England.* Mr. James Mitchell, of Sakonnet Vineyards, Little Compton, Rhode Island, petitioned for a viticultural area located in coastal Connecticut, Rhode Island and Massachusetts.

In response to this petition, ATF proposed the Southeastern New England viticultural area in Notice No. 477 on August 4, 1983 (48 FR 35462). In that notice, ATF solicited comments on alternative names or boundaries for the proposed viticultural area. Notice No. 477 also proposed a "Martha's Vineyard" viticultural area which will be the subject of a separate Treasury decision.

*Comments.* ATF received two written responses to the proposed Southeastern New England viticultural area. One comment submitted by Professor Everett R. Emino, Department of Plant Science of the University of Connecticut at Storrs, sought inclusion of the entire coastal plain of Connecticut within the viticultural area. He stated this area experiences the same climate as the portions of Rhode Island and Massachusetts within the proposed area. He also noted that establishment of the proposed area would unfairly disadvantage the Connecticut wine industry relative to Rhode Island and Massachusetts.

Mrs. Hugh P. Connell of Crosswoods Vineyards, North Stonington,

Connecticut, submitted a written comment seeking the inclusion of the coastal plain of Connecticut between the Mystic and Connecticut Rivers. This area extends 10 miles inland from Long Island Sound, and experiences a climate similar to the proposed viticultural area.

##### Name

The name "Southeastern New England" is descriptive of the land adjoining coastal bodies of water in eastern Connecticut, Rhode Island, and Massachusetts south of the Boston area. It has been used by the New England River Basins Commission to describe this portion of New England. No comments were addressed to the name, and ATF is adopting "Southeastern New England" as the name of the viticultural area.

##### Geographic Criteria

Climate distinguishes the Southeastern New England viticultural area from adjacent areas in New England and New York. The U.S. Weather Service categorizes this area as the coastal division of Connecticut, Rhode Island, and Massachusetts. Its climate is moderated by proximity to coastal bodies of water including Long Island Sound, Block Island Sound, Narragansett Bay, Rhode Island Sound, Buzzards Bay, Cape Cod Bay, and Massachusetts Bay.

The entire Southeastern New England viticultural area experiences a low Region I climate on the scale used by Winkler and Amerine of the University of California to measure degree days.

Geographic criteria for inclusion within the Southeastern New England viticultural area include a growing season of 180 days or longer, average annual precipitation of 44 inches, average daily temperatures of 30° F. in January, 70° F. in July, and a mean daily range of temperatures during the growing season of 20° F. or less.

Comments from both the University of Connecticut and from Crosswoods Vineyards favored extending the viticultural area westerly into Connecticut beyond the Mystic River. The comment from Crosswoods Vineyards indicated that the coastal region of Connecticut extends into Fairfield County to the New York boundary, and generally reaches no more than 10 miles inland from Long Island Sound. Their evidence shows that the growing season of 180 days or more generally follows the coastal division in Connecticut, but is wider in the eastern part of the State while narrowing significantly toward the New York border. Other evidence shows the



coastal plain has a mean annual temperature of between 50 and 51° F., and that its rainfall varies between 44 and 50 inches per year.

No comments were submitted relative to the climate in Rhode Island or Massachusetts.

#### Boundaries

Using the geographical criteria presented above, and following the coastal regions of Massachusetts, Rhode Island, and Connecticut, Notice No. 477 proposed boundaries for the Southeastern New England viticultural area. This area included New London County east of the Mystic River and South of the 41° 30' latitude line; Washington, Bristol and Newport Counties and a small portion of Providence County; and Massachusetts south and east of the Amtrak mainline and the Neponset River. All offshore islands between the Neponset River and the Mystic River were included within the proposed area.

Based on the above comments relating to geographic criteria of Connecticut's coastal plain, ATF is extending the viticultural area west to the Quinnipiac River. The boundary begins in New Haven Harbor, follows Connecticut Highways 80, 9, and 82 east to Norwich, follows Connecticut Highway 2 east to Highway 165, and then follows Connecticut and Rhode Island Highway 165 east to U.S. Interstate 95. The remainder of the boundaries are as proposed in Notice No. 477. All offshore islands (including Martha's Vineyard) between the Neponset and Quinnipiac Rivers are included within the viticultural area. For an exact description of the boundary, see § 9.72 set out below.

Although there is evidence that the coastal plain of Connecticut extends through Fairfield County to the New York boundary, ATF notes this plain narrows significantly toward the western end of the State. At the same time, the western coastal plain is heavily urbanized west of the Quinnipiac River. ATF has, therefore, not included the western portion of the coastal plain in the viticultural area.

#### General Information

Within the Southeastern New England viticultural area there are nine bonded wineries with others being established. It is estimated that there are between 200-300 acres of grapes with additional acreage planned in the near future. Vineyards are widely distributed and consist of both French Hybrid grapes and Vinifera grapes, especially Chardonnay, White Riesling, and Pinot Noir. Overall, the Southeastern New

England viticultural area covers approximately 2,930 square miles or 1,875,200 acres.

Approval of the Southeastern New England viticultural area in no way affects the Martha's Vineyard viticultural area which was also proposed in Notice No. 477. A separate final rule will be issued for that area. The proposed Martha's Vineyard viticultural area is included within the Southeastern New England viticultural area.

#### Miscellaneous

ATF does not wish to give the impression that by approving Southeastern New England as a viticultural area, it is approving or endorsing the quality of the wine from the area. ATF is approving this area as being distinct and not better than other areas. By approving this area, wine producers are allowed to claim a distinction on labels and advertisements as to the origin of the grapes. Any commercial advantage gained can only come from consumer acceptance of Southeastern New England wines.

#### Regulatory Flexibility Act

The notice of proposed rulemaking which resulted in this final rule contained a certification under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that if promulgated as a final rule, it would not have a significant impact on a substantial number of small entities. Therefore, the requirement contained in the Regulatory Flexibility Act (5 U.S.C. 603, 604) for a final regulatory flexibility analysis does not apply to this final rule.

#### Compliance With Executive Order 12291

It has been determined that this final regulation is not a "major rule" within the meaning of Executive Order 12291 of February 17, 1981, because it will not have an annual effect on the economy of \$100 million or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR Part 1320, do not apply to this final rule because no

requirement to collect information is imposed.

#### Drafting Information

The principal author of this document is Charles N. Bacon, FAA, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms.

#### List of Subjects in 27 CFR Part 9

Administrative practices and procedures, Consumer protection, Viticultural areas, and Wine.

#### Authority and Issuance

Accordingly, under the authority contained in 27 U.S.C. 205, the Director is amending 27 CFR Part 9 as follows:

### PART 9—AMERICAN VITICULTURAL AREAS

Paragraph 1. The table of sections in 27 CFR Part 9 is amended by adding § 9.72 which reads as follows:

\* \* \*

#### Subpart C—Approved American Viticultural Areas

Paragraph 2. Subpart C is amended by adding § 9.72 which reads as follows:

#### § 9.72 Southeastern New England.

(a) *Name.* The name of the viticultural area described in this section is "Southeastern New England."

(b) *Approved maps.* The approved maps for determining the boundary of the Southeastern New England viticultural area are three U.S.G.S. maps. They are entitled:

(1) "Boston, Mass.; N.H.; Conn.; R.I.; Maine", scaled 1:250,000, edition of 1956, revised 1970;

(2) "Hartford, Conn.; N.Y.; N.J.; Mass.", scaled 1:250,000, edition of 1962, revised 1975; and

(3) "Providence, R.I.; Mass.; Conn.; N.Y.", scaled 1:250,000, edition of 1947, revised 1969.

(c) *Boundaries.* The Southeastern New England viticultural area is located in the counties of New Haven, New London, and Middlesex in Connecticut; in the counties of Bristol, Newport, Providence, and Washington, in Rhode Island; and in the counties of Barnstable, Bristol, Dukes, Nantucket, Norfolk, and Plymouth in Massachusetts. The beginning point is found on the "Hartford" U.S.G.S. map in New Haven Harbor:

(1) Then north following the Quinnipiac River to U.S. Interstate 91;

(2) Then east following U.S. Interstate 91 to Connecticut Highway 80;



(3) Then east following Connecticut Highway 80 to Connecticut Highway 9 near Deep River;

(4) Then north following Connecticut Highway 9 to Connecticut Highway 82;

(5) Then north, east, south and east following Connecticut Highway 82 and 182 to Connecticut Highway 2 in Norwich;

(6) Then east following Connecticut Highway 2 to Connecticut Highway 165;

(7) Then east following Connecticut and Rhode Island Highway 165 to Interstate Highway 95 near Millville;

(8) Then north following Interstate Highway 95 to the Kent County-Washington County boundary;

(9) Then east following the Kent County-Washington County boundary into Narragansett Bay;

(10) Then north through Narragansett Bay, the Providence River, and the Blackstone River to the Rhode Island-Massachusetts State boundary;

(11) Then east and south following the Rhode Island-Massachusetts State boundary to the Norfolk-Bristol (Mass.) County boundary;

(12) Then northeast following the Norfolk-Bristol (Mass.) County boundary to the Amtrak right-of-way (Penn Central on map) northeast of Mansfield;

(13) Then north following the Amtrak right-of-way to the Neponset River immediately east of the Norwood Memorial Airport;

(14) Then northeast following the Neponset River into Dorchester Bay;

(15) Then east following the Norfolk-Suffolk County boundary, and the Plymouth-Suffolk County boundary into Massachusetts Bay;

(16) Then returning to the point of beginning by way of Massachusetts Bay, the Atlantic Ocean, Block Island Sound and Long Island Sound; and including all of the offshore islands in Norfolk, Plymouth, Barnstable, Nantucket, Dukes, and Bristol Counties, Massachusetts; all offshore islands in Rhode Island; and all offshore islands in Connecticut east of the Quinnipiac River.

Signed: March 2, 1984.

Stephen E. Higgins,  
Director.

Approved: March 12, 1984.

Edward T. Stevenson,  
Deputy Assistant Secretary (Operations).

[FR Doc. 84-8252 Filed 3-27-84; 8:45 am]

BILLING CODE 4810-31-M

## DEPARTMENT OF DEFENSE

### Department of the Air Force

#### 32 CFR Part 829

#### Organizing and Operating Off-Base Patrols

**AGENCY:** Department of the Air Force, Defense.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Air Force is amending its regulations by removing Part 829—Organizing and operating off-base patrols, of Chapter VII, Title 32. The source document, Air Force Regulation (AFR) 125-19, has been revised and determined to be for internal guidance only and has no applicability to the general public. This action is a result of departmental review in an effort to insure that only regulations which affect the public are maintained in the Air Force portion of the Code of Federal Regulations.

**EFFECTIVE DATE:** March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas, HQ USAF/SPO, Kirtland AFB, NM 87117, telephone (505) 264-6627.

**SUPPLEMENTARY INFORMATION:**

#### PART 829—[REMOVED]

Accordingly, 32 CFR is amended by removing Part 829.

#### List of Subjects in 32 CFR Part 829

Federal buildings and facilities, Law enforcement officers, Military personnel.

**Authority:** 10 U.S.C. 8012.

Winnibel F. Holmes,

*Air Force Federal Register Liaison Officer.*

[FR Doc. 84-8244 Filed 3-27-84; 8:45 am]

BILLING CODE 3910-01-M

#### 32 CFR Part 932

#### Prevention and Control of Communicable Diseases in Animals

**AGENCY:** Department of the Air Force, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Air Force is amending its regulations by removing Part 932—Prevention and control of communicable diseases in animals, of Chapter VII, Title 32. The source document, Air Force Regulation (AFR) 163-4, has been rescinded. This action is a result of departmental review in an effort to insure that only current regulations are maintained in the Air Force portion of the Code of Federal Regulations.

**EFFECTIVE DATE:** March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:** Col Brooks, HQ USAF/SGB, Bolling AFB, Wash DC 20332, telephone (202) 767-4595.

**SUPPLEMENTARY INFORMATION:**

#### PART 932—[REMOVED]

Accordingly, 32 CFR is amended by removing Part 932.

#### List of Subjects in 32 CFR Part 932

Animal diseases, Communicable diseases.

**Authority:** 10 U.S.C. 8012.

Winnibel F. Holmes,

*Air Force Federal Register Liaison Officer.*

[FR Doc. 84-8243 Filed 3-27-84; 8:45 am]

BILLING CODE 3910-01-M

### Department of the Army; Corps of Engineers

#### 33 CFR Part 209

#### Shipping Safety Fairways, Port Hueneme, California

**AGENCY:** Army Corps of Engineers, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Army is deleting the regulations which establish a shipping safety fairway in the approach to Port Hueneme, California. This shipping safety fairway has been established by the U.S. Coast Guard under its authorities and accordingly, the fairway established by the Army is no longer needed.

**EFFECTIVE DATE:** These rules are effective on March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ralph T. Eppard, Office of the Chief of Engineers, ATTN: DAEN-CWO-N, Washington, D.C. 20314 or telephone (202) 272-0199.

**SUPPLEMENTARY INFORMATION:** The Corps of Engineers has determined that notice of proposed rulemaking is unnecessary and that these rules shall be effective upon publication in the *Federal Register* since these rules have been replaced by rules published by the Coast Guard in 33 CFR 166.300. Port Hueneme Shipping Safety Fairways were established by the Corps of Engineers in 33 CFR 209.138 under authority of the Outer Continental Shelf Lands Act (67 Stat. 463; 43 U.S.C. 1333(e)). The Corps established the fairways as specific areas where fixed structures would not be permitted. Pursuant to the Ports and Waterways Safety Act, the Coast Guard was



subsequently given specific authority to establish vessel routing measures, including fairways. The Coast Guard published final rules establishing the Port Hueneme Shipping Safety Fairway in the Federal Register on 24 October 1983 (48 FR 49018-19) in 33 CFR 166.300. Accordingly, the regulations which establish the Port Hueneme Shipping Safety Fairway in 33 CFR 209.138 are no longer necessary and are revoked.

**Note.**—The Corps of Engineers has determined that this document does not contain a major rule requiring a regulatory impact analysis under Executive Order 12291 because it will not result in an annual effect on the economy of \$100 million or more and it will not result in a major increase in costs or prices. The Corps also certifies that this rule will not have a significant economic impact on a substantial number of entities and thus, does not require the preparation of a regulatory flexibility analysis.

#### List of Subjects in 33 CFR Part 209

Marine safety, Shipping safety fairways, Anchorage areas.

#### PART 209—[AMENDED]

Section 209.138 is removed from 33 CFR as follow:

#### § 209.138 Shipping Safety Fairway in the Pacific Ocean at Port Hueneme, California [Removed].

Authority: 43 U.S.C. 1333(e).

Dated: February 8, 1984.

John F. Wall,

Major General, USA, Director of Civil Works.

[FR Doc. 84-8259 Filed 3-27-84; 8:45 am]

BILLING CODE 3710-92-M

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

#### [A-5-FRL 2524-6]

#### Approval and Promulgation of Implementation Plans; Michigan

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final disapproval.

**SUMMARY:** On December 17, 1982 (47 FR 56518), EPA proposed to approve a State Consent Order No. 16-1982 for Great Lakes Steel (GLS), a Division of the National Steel Corporation (National Steel), as a revision to the Michigan State Implementation Plan (SIP). On February 18, 1983 (48 FR 7210), EPA published a supplemental proposed rulemaking notice, announcing the availability of the short term ambient equivalence demonstration and presented the results of its review. EPA

has reviewed all public comments received and is today announcing its disapproval of Michigan's proposed SIP revision request for GLS because the proposal does not satisfy all the requirements of EPA's proposed Emissions Trading Policy Statement (ETPS), (April 7, 1982, 47 FR 15076).

**DATE:** This action is effective April 27, 1984.

**ADDRESSES:** Copies of the SIP revision and other materials relating to this rulemaking are available at the following addresses (It is recommended that you telephone the contact person listed below, before visiting the Region V Office):

Environmental Protection Agency, Air and Radiation Branch, Region V, Regulatory Analysis Section, 230 South Dearborn Street, Chicago, Illinois 60604

Michigan Department of Natural Resources, Air Quality Division, 7150 Harris Drive, Lansing, Michigan 48909

Written comments should be sent to:

Gary Gulezian, Chief, Regulatory Analysis Section (5AR-26), Air and Radiation Branch, Environmental Protection Agency, 230 South Dearborn, Chicago, Illinois 60604

#### FOR FURTHER INFORMATION CONTACT:

Toni Lesser, Regulatory Specialist, Regulatory Analysis Section (5AR-26), Air and Radiation Branch, Region V, Environmental Protection Agency, 230 South Dearborn, Chicago, Illinois 60604, (312) 886-6037.

**SUPPLEMENTARY INFORMATION:** On June 24, 1982, the State of Michigan submitted Consent Order No. 16-1982 for GLS, as a revision to the Michigan SIP. The Consent Order contained an alternate emission control plan (AECIP) or "bubble" requiring that all controls be implemented by December 31, 1982. GLS is a Division of National Steel, which operates integrated iron and steel making facilities in Ecorse and Zug Island in River Rouge, Michigan. These plants are located in the Detroit Total Suspended Particulate (TSP) primary nonattainment area. EPA's approval of the control strategy for the Detroit primary TSP nonattainment area is discussed in the May 22, 1981, Federal Register (46 FR 27923).

On December 17, 1982 (47 FR 56518), EPA proposed approval of Michigan's request for a revision to its SIP for GLS's AECIP. In that notice, EPA also indicated that the short-term ambient equivalence demonstration for GLS was scheduled to be completed during the public comment period of the proposed rulemaking and that the public would be given an opportunity to review the results of the

short-term modeling prior to EPA's final rulemaking. On February 18, 1983 (48 FR 7210), EPA published a supplemental proposed rulemaking announcing the availability of the short-term ambient equivalence demonstration and EPA's review of the demonstration. That notice also provided an additional public comment period on all elements of the GLS revision.

The December 17, 1982 (47 FR 56518), and February 18, 1983 (48 FR 7210), Federal Register notices, along with EPA's technical support document of September 10, 1982, contain a detailed description of the GLS AECIP. EPA's technical support document of September 28, 1983 contains a detailed presentation of the issues and responses to the public comments received.

During the two comment periods, EPA received a total of 11 comments and one additional comment letter by National Steel after the close of the second comment period. Despite the fact that this comment was received after the close of the public comment period, it was considered by EPA in the development of its final rulemaking. Nine of the comments did not raise technical issues but cited economic benefits of the GLS AECIP. EPA cannot consider comments relating to the economic benefits of a proposed bubble SIP revision if the proposed SIP revision does not protect the National Ambient Air Quality Standards (NAAQS) and comply with the April 7, 1982, proposed ETPS. A summary of EPA's response to the remaining comments is presented below.

**Comment:** The State of Michigan objected to EPA's statement that Consent Order No. 16-1982 provides an AECIP or "bubble" which will result in reduction of particulate emissions in the Detroit primary nonattainment area. The commenter states that the Michigan Air Pollution Control Commission (MAPCC) rules contain no provisions for particulate bubbles.

**Response:** The State was correct in citing that it has no explicit provisions for approving particulate bubbles. However, EPA believes that the appropriate criteria for reviewing a SIP revision of this type, which involves increasing emissions at some points and decreasing emissions at other points, and which is not accompanied by a demonstration that the NAAQS will be attained and maintained are contained in the proposed ETPS.

**Comment:** The Natural Resources Defense Council (NRDC) stated that the modeling analysis done in support of the GLS bubble proposal, by a combination of errors in data and programming and



the use of invalid and undocumented assumptions, understates the ambient impact of this SIP revision. Specifically, NRDC notes the following problems in the short-term ambient equivalence demonstration:

(a) The impacts of all process sources are considerably understated due to the use of erroneously low emission rates for these sources;

(b) The choice of particle size distributions underestimates the impacts of the basic oxygen furnace (BOF) shop and blast furnace casthouses, and overstates the impacts from open dust sources;

(c) The Universal Transverse Mercator (UTM) coordinates (i.e. source location) input for the casthouses and open dust sources are in error; and

(d) TSP impacts for similar sources from previous EPA studies suggest much higher impacts than those predicted by GLS for its process sources.

Response: EPA agrees that National Steel's inadvertent input of improper process source emission rates into the ISC model resulted in a severe underestimate of the TSP concentrations from the process sources. EPA subsequently performed an analysis correcting this error as well as the incorrect source coordinates. The reanalysis showed substantial impacts from the casthouses which are unlikely to be offset by any credit for control greater than the Reasonably Available Control Technology (RACT) level on the Zug Island open dust sources. In addition, a significant increase in TSP concentrations as defined by the ETPS (i.e., greater than  $10/\mu\text{g}/\text{m}^3$  on a 24-hour basis) due to less-than-RACT controls at the No. 2 BOF Shop was predicted. If particle size distributions assumed for similar type sources at a steel mill in Ohio are input to the ISC model, the predicted TSP concentration increases are enhanced further. EPA recognizes that National Steel failed to document the support for the particle size distributions but, at the time of the initial analysis, EPA did not consider these inputs to be critical to the demonstration because of the low magnitude of the predicted concentrations.

The correction of the errors in the short-term ambient equivalence demonstration leads to the conclusion that the GLS bubble, as presently configured, does not satisfy the ambient tests specified in the proposed ETPS and technical clarifying memorandum (February 17, 1983). Therefore, without a demonstration that greater-than-RACT level emissions will not significantly contribute to periods of violations of the

TSP NAAQS, EPA cannot approve the proposed bubble.

EPA has reviewed the NRDC's criticism of certain emission factor assumptions relating to the process fugitive sources involved in the proposed bubble. In regard to the blast furnace casthouses, EPA agrees with NRDC that an uncontrolled emission factor of 0.6 lb/ton of hot metal is more technically supportable than the 0.5 lb/ton used. For the electric arc furnace shop, EPA again agrees with the commenter that RACT for secondary emission control can achieve 0.005 gr/dscf instead of the 0.02 gr/dscf assumed. For the bubble overall, correction of these assumptions results in: (1) An increase in total uncontrolled emissions, (2) a reduction in the RACT emission baseline, and (3) a total emissions trade of less than one-for-one. If these changes were made to the input for the short-term modeling, they would undoubtedly make more unfavorable the already significant adverse modeled impacts.

EPA has considered the NRDC's criticism of the emission factor assumptions used for the No. 2 BOF shop. While it does not agree with NRDC's position regarding the uncontrolled factors, EPA does acknowledge that some revision to the factors used might be justified. EPA has undertaken a thorough review of this subject in regard to BOFs in general and will make the results of that study available at a later date. Regarding the assumptions which EPA used for BOF charging and tapping control under the bubble, EPA here also acknowledges that some revision might be justified based on further detailed study of the shop. However, EPA has not undertaken such a study because the other problems with the bubble as discussed in this notice make the bubble unapprovable.

Comment: NRDC commented that the modeling fails to demonstrate that the plan as revised is adequate to attain the primary air quality standards because the modeling does not consider the impacts from all of the emission sources in the area affected by GLS's plants. NRDC believes SIP relaxations must be supported by a demonstration that the SIP as revised is adequate to protect the ambient standards. Also, NRDC contends that a large enough meteorological data base (e.g., five years) should be used so that variations in meteorology from year to year are not ignored in judging the SIP's adequacy and that there is no justification for the limited modeling requirements in EPA's ETPS for areas such as Wayne County, where the standards have not been attained and the SIP has not been

approved as adequate to attain the standards.

Response: EPA solicited public comment on the generic issue raised by the commenter of whether emission trades should be allowed in areas where the standards have not been attained and/or the SIP has not been approved or shown to be sufficient to attain and maintain the standards, (August 31, 1983, 48 FR 39580). At the time the agency proposed to approve this SIP revision, its position on this issue was that such trades could be considered if they provided emission reductions and ambient concentrations equivalent to those obtained if the sources complied with RACT. This was based on the view that a showing of ambient equivalence to a RACT baseline would be adequate to assure that a bubble would not interfere with attainment or reasonable further progress toward attainment. The Level II modeling procedures specified in the proposed ETPS address only the sources involved in the trade and require only a limited meteorological data base. As explained in the proposed ETPS, EPA believes this limited modeling is adequate to demonstrate ambient equivalence to the appropriate baseline in certain circumstances. However, since National Steel has not demonstrated the required ambient equivalence, EPA must disapprove this bubble.

Comment: National Steel commented that since, after the submission of the original AECP the blast furnace casthouses have been controlled, they will likely propose a revised, much more limited, bubble involving control of emissions from the Zug Island roads in lieu of additional controls on the No. 2 BOF. National Steel believes this trade satisfies the requirements in the April 7, 1982, ETPS for a Level II air quality equivalence demonstration by meeting the following two conditions:

1. There is no increase in baseline emissions.
2. There is no significant air quality impact at the receptor of maximum impact on either an annual or 24-hour basis.

Response: Before EPA can formally entertain a revised AECP involving only roof monitor emissions from the No. 2 BOF Shop while excluding consideration of any blast furnace casthouse emissions, the State of Michigan must make such a request to EPA. Bubbles are revisions to the State's SIP and must be formally submitted to EPA as any other revision request. EPA's analysis and that summarized by the commenter suggest that an alternative bubble proposal involving only the No. 2 BOF



Shop would result in TSP concentrations increases over RACT levels near or above the 10ug/m<sup>3</sup> significance level as defined by the ETPS.

Comment: National Steel commented that recent analysis of ambient air quality data indicates that the area around the Ecorse plant, which includes the No. 2 BOF Shop, meet EPA's criteria for redesignation to attainment for the primary TSP NAAQS.

Response: Before EPA could redesignate this area to primary attainment, a demonstration must be provided which shows that:

(a) Legally enforceable, permanent emission reductions are responsible for the recent air quality improvement,

(b) The available monitoring data are representative of the worst case air quality in the area, and

(c) Existing sources in the area to be redesignated do not significantly contribute to violations of the primary standards elsewhere in the surrounding area.

These requirements are consistent with the Agency's redesignation criteria noted in the memorandum "Section 107 Designation Policy Summary," dated April 21, 1983, and no such demonstration has been provided to EPA for this area.

Comment: NRDC commented that paving and dust suppressant applications are reasonably available and cost-effective control techniques, that would provide greater emission reduction than a program of watering, which EPA determined was the minimum requirement of the rule.

Response: EPA believe that it was incorrect to assume that watering was the minimum RACT requirement of Michigan's Rules 336.1371 and 336.1372. In approving these rules on November 15, 1982 (47 FR 51398), EPA was affirming that RACT for open dust sources is represented by a range of control techniques from which an appropriate program must be formulated based on site-specific considerations. EPA notes that in this regard the agency expects to solicit comment soon on whether it should withdraw its approval of the Michigan Rules.

EPA now believes that the site-specific factors that warrant the consideration of different control techniques under the rule must be presented by the State or company in a demonstration that any alternative program for which emission trading credits are sought does in fact offer emission reduction greater-than-RACT. In this case, no such demonstration or site-specific information regarding the cost-effectiveness of the alternative control program was submitted by the

State or the company to allow EPA to determine whether it meets the definition of RACT or goes beyond the RACT requirements and therefore provides potential emission reduction credit. Because of the lack of such a demonstration, EPA does not believe that it is possible to consider the AECF as a program which provides for emission reductions beyond those required by RACT. EPA now believes that in the absence of site-specific information to the contrary, the RACT baseline should be set at the level achievable by the AECF, since the control techniques that would be used under the AECF are among those listed under the RACT-based Michigan rule.

In summary, EPA has reviewed all comments received and is taking final action to disapprove Michigan's proposed SIP revision request for GLS since the proposal does not satisfy all the requirements of EPA's proposed ETPS.

Under Executive Order 12291, today's action is not "Major". It has been submitted to the Office of Management and Budget (OMB) for review. Any comments from OMB to EPA, and any EPA response, are available for public inspection at the EPA Region V Office listed above.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit May 29, 1984. This action may not be challenged later in proceeding to enforce its requirements. (See 307(b)(2))

#### List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons, Intergovernmental relations.

This notice is issued under authority of sections 110 and 172 of the Clean Air Act, as amended (42 U.S.C. 7410 and 7502).

Dated: March 22, 1984.  
William D. Ruckelshaus,  
Administrator.

#### PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

40 CFR Part 52 is amended by adding paragraph (c) to § 52.1173 to read as follows:

##### Subpart X—Michigan

##### § 52.1173 Control Strategy: Particulates

\* \* \* \* \*

(c) *Disapprovals.* EPA disapproves the following specific revisions to the Michigan Plan:

(1) The State submitted Consent Order No. 16-1982 on June 24, 1982, Great Lakes Steel, a Division of the National Steel Corporation as a revision to the Michigan State Implementation Plan. EPA disapproves this revision, because it does not satisfy all the requirements of EPA's proposed Emission Trading Policy Statement of April 7, 1982 (47 FR 15076).

[FR Doc. 84-8136 Filed 3-27-84; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 158

[OPP-240053; PH-FRL 2550-3]

#### Pesticide Guidelines; Notification to the Secretary of Agriculture of Final Regulation Specifying the Data Requirements for Registration of Pesticide Products

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule—related notice.

**SUMMARY:** Notice is given that the Administrator of EPA has forwarded to the Secretary of the U.S. Department of Agriculture a final regulation specifying the data requirements for the registration of pesticide products under the Federal Insecticide, Fungicide and Rodenticide Act.

**FOR FURTHER INFORMATION CONTACT:** Fred S. Betz, Hazard Evaluation Division (TS-769), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2 Room 821A, Arlington, Virginia 22202, (Tel. 703-557-9307).

**SUPPLEMENTARY INFORMATION:** Sec. 25(a)(2)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (Pub. L. 92-516, 86 Stat. 973; Pub. L. 94-140, 89 Stat. 753; 7 U.S.C. 136 et seq.) provides that the Administrator shall provide the Secretary of Agriculture with a copy of any final regulation at least 30 days prior to signing it for publication in the *Federal Register*. If the Secretary comments in writing to the Administrator regarding any such proposed regulation within 15 days after receiving it, the Administrator shall publish in the *Federal Register* (with the final regulation) the comments of the Secretary, if requested by the Secretary, and the response of the Administrator concerning the Secretary's comments. If the Secretary does not comment in writing to the Administrator within 15 days after receiving it, the Administrator may sign



such regulation for publication in the *Federal Register* at any time after such 15-day period notwithstanding the foregoing 30-day time requirement. The time requirements may, however, be waived or modified to the extent agreed upon by the Administrator and the Secretary.

In accordance with Sec. 25(a)(3) of FIFRA, EPA has also furnished a copy of this final regulation to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition and Forestry of the Senate.

This regulation is designated as Part 158 of 40 CFR, and is titled "Data Requirements for Registration".

(Sec. 25 [Pub. L. 92-515, 86 Stat. 973; Pub. L. 94-140, 89 Stat. 753 (7 U.S.C. 136 et seq.)])

Dated: March 7, 1984.

Edwin L. Johnson,

Director, Office of Pesticide Programs.

(FR Doc. 84-7848 Filed 3-27-84; 8:45 am)

BILLING CODE 6560-50-M

#### 40 CFR Part 180

[PP 3F2865/R651; PH-FRL 2553-2]

#### Exemptions From Tolerances for Pesticide Chemicals in or on Raw Agricultural Commodities; Bentazon

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** This rule establishes tolerances for the combined residues of the herbicide bentazon and its 6- and 8-hydroxy metabolites in or on the raw agricultural commodities sorghum, grain; sorghum, forage; and sorghum, fodder. This regulation to establish maximum permissible residues of the herbicide in or on these commodities was requested pursuant to a petition by BASF Wyandotte Corp.

**EFFECTIVE DATE:** Effective on March 28, 1984.

**ADDRESS:** Written objections may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, D.C. 20460.

**FOR FURTHER INFORMATION CONTACT:** By mail: Robert J. Taylor, Product Manager (PM) 25, Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 243, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703-557-1800).

**SUPPLEMENTARY INFORMATION:** EPA issued a notice published in the *Federal*

*Register* of June 8, 1983 (48 FR 26535), which announced that BASF Wyandotte Corp., 100 Cherry Hill Rd., P.O. Box 181, Parsippany, NJ 07054, had filed pesticide petition 3F2865 with the Agency proposing to amend 40 CFR 180.355 by establishing tolerances for the combined residues of the herbicide bentazon (3-isopropyl-1-H-3,1,3-benzothiadiazin-4-(3H)-one-2,2-dioxide) and its 6- and 8-hydroxy metabolites in or on the commodities sorghum fodder and grain at 0.05 part per million (ppm) and sorghum forage at 0.20 ppm.

No comments were received in response to this notice of filing.

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerances are sought. The toxicology data considered in support of the tolerances include several acute studies; a 90-day dog-feeding study with a no-observed-effect level (NOEL) of 7.5 milligrams per kilogram per day (mg/kg/day); a teratology study (rat) with no observed teratogenic effects at 200 mg/kg/day (highest dose tested) and a NOEL of 66.7 mg/kg/day for maternal toxicity and fetotoxic effects; a 3-generation reproduction study (rat) with a NOEL greater than 9 mg/kg; an 18-month mouse-feeding study with no observed oncogenic effects at all levels tested (0, 100, 350, 1,600 ppm); a 2-year rat-feeding study with a systemic NOEL of 17.5 mg/kg/day and no observed oncogenic effects at all levels tested (0, 100, 350, 1,600 ppm); and a dominant-lethal mouse study negative at 195 mg/kg/day (highest dose tested).

The acceptable daily intake (ADI) is based on the 2-year rat-feeding study (NOEL of 17.5 mg/kg/day) and using a 100-fold safety factor is calculated to be 1.1750 mg/kg/day. The maximum permitted intake (MPI) for a 60-kg human is calculated at 10.5 mg/day. The theoretical maximum residue contribution (TMRC) for existing tolerances for a 1.5-kg diet is calculated to be 0.0584 mg/day. The current action will use less than 1 percent of the ADI. Published tolerances use 0.56 percent of the ADI.

A teratology study in a second species, a chronic study in a second species, and additional mutagenicity data are lacking. The company has been notified and has agreed to perform the studies.

The nature of the residue is adequately understood, and an adequate analytical method, gas chromatography using a sulfur-specific flame photometric detector, is available for enforcement purposes. There are currently no actions pending against the

continued registration of this chemical. The established tolerances for residues in eggs, meat, milk, or poultry are adequate to cover secondary residues resulting from the proposed use as delineated in 40 CFR 180.6(a)(2).

Based on the above information considered by the Agency, it is concluded that the tolerances established by amending 40 CFR Part 180 will protect the public health and are established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this regulation in the *Federal Register*, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-534, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).

(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346a(e)))

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

Dated: March 14, 1984.

Edwin L. Johnson,

Director, Office of Pesticide Programs.

#### PART 180—[AMENDED]

Therefore, 40 CFR 180.355(a) is amended by adding and alphabetically inserting the new raw agricultural commodities, to read as follows:

#### § 180.355 Bentazon; tolerances for residues.

(a) \* \* \*



| Commodities          | Parts per million |
|----------------------|-------------------|
| Sorghum, fodder..... | 0.05              |
| Sorghum, forage..... | 0.20              |
| Sorghum, grain.....  | 0.05              |

[FR Doc. 84-6139 Filed 3-27-84; 8:45 am]

BILLING CODE 6560-50-M

**40 CFR Part 271**

[SW-3-FRL 2554-1]

**West Virginia; Phase I and II, Components A and B, Interim Authorization of the State Hazardous Waste Management Program****AGENCY:** Environmental Protection Agency.**ACTION:** Approval of State Program.

**SUMMARY:** Pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA) provisions, the State of West Virginia has applied for Interim Authorization Phase I and Phase II, Components A and B. The Environmental Protection Agency (EPA) has reviewed West Virginia's application for Phases I and II, Components A and B, Interim Authorization, and has determined that West Virginia's hazardous waste program is substantially equivalent to the Federal program.

The State of West Virginia is hereby granted Interim Authorization for Phases I and II, Components A and B to operate the State's hazardous waste program in lieu of the Federal program.

**EFFECTIVE DATE:** March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:** Anthony J. Donatoni, Chief, State Programs Section, Waste Management Branch, U.S. EPA Region III, 6th and Walnut Streets, Philadelphia, PA 19106 (215) 597-7937.

**SUPPLEMENTARY INFORMATION:****Background**

In the May 19, 1980 Federal Register (45 FR 33063) the Environmental Protection Agency promulgated regulations, pursuant to Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA) as amended, to protect human health and the environment from the improper management of hazardous waste. Includes in these regulations, which became effective November 19, 1980, were provisions for a transitional stage in which States would be granted interim authorization. The Interim Authorization program is being implemented in two phases

corresponding to the two stages in which the underlying Federal program has taken effect. Phase I of the Federal program, published in the May 19, 1980 Federal Register (45 FR 33063), includes regulations pertaining to the identification and listing of hazardous wastes; standards applicable to generators and transporters of hazardous waste, including a manifest system; and the "interim status" standards applicable to existing hazardous waste management facilities before they receive permits.

In the January 26, 1981 Federal Register (26 FR 7965), the Environmental Protection Agency announced the availability of portions of the second phase of Interim Authorization. Phase II of the Federal program includes permitting procedures and standards for hazardous waste management facilities. EPA made the second phase of Interim Authorization available in components in order to authorize State programs as expeditiously as possible and because some of the standards for hazardous waste treatment, storage, and disposal facilities (40 CFR Part 264) have been promulgated at different times. Component A, published in the Federal Register January 12, 1981 (46 FR 2802), contains standards for permitting containers, tanks, surface impoundments, and waste piles. Component B, published in the Federal Register January 23, 1981 (46 FR 7666), contains standards for permitting hazardous waste incinerators. Component C, published in the Federal Register July 26, 1982 (47 FR 32274), contains standards for permitting surface impoundments, waste piles, land treatment facilities and landfills. These Component C standards for permitting surface impoundments and waste piles superseded the Component A standards for permitting storage and treatment in surface impoundments and waste piles published on January 12, 1981. The State of West Virginia applied for Phase I and Phase II, Components A and B, Interim Authorization which would enable them to permit storage and treatment in containers and tanks and to permit hazardous waste incinerators in lieu of the Federal program.

On September 15, 1983, EPA published a notice in the Federal Register inviting the public to comment on West Virginia's application for Interim Authorization, Phases I and II, Components A and B, at a public hearing on October 18, 1983. This notice also invited the public to submit written comments on West Virginia's application to Region III by October 25, 1983. Notice was also given in eight major daily newspapers in West

Virginia and was mailed to persons on both the State and EPA mailing lists.

**Discussion**

The State of West Virginia submitted an application for Phase I and Phase II, Components A and B, Interim Authorization on August 19, 1983. Although the application was complete, the State had not yet addressed some of the comments submitted by EPA on the earlier draft application. At the public hearing, the State indicated their intent to make certain revisions to its regulations to conform to the Federal program. These revisions were accomplished by the issuance of emergency regulations. The rule making process has also been initiated for permanent regulations. The State has agreed to voluntarily and immediately relinquish Interim Authorization if permanent regulations, substantially equivalent to the Federal program, do not become effective prior to the expiration of the emergency regulations. West Virginia has now adequately addressed EPA's comments and has made needed conforming revisions to the Memorandum of Agreement and the Attorney General's Statement. The State's program is substantially equivalent to the Federal program.

**Responsiveness Summary**

Region III held the public hearing on West Virginia's application for Phase I and Phase II, Components A and B, Interim Authorization, in Charleston, WV. Sixteen (16) members of the public attended, in addition to Region III and State agency representatives. Two presentations were made at the hearing: the first by a representative of the Environmental Control Committees of the West Virginia Manufacturers Association and the State Chamber of Commerce, and the second by a representative of the West Virginia Citizen Action Group and the West Virginia Highlands Conservancy. Both commenters were generally supportive of the State receiving Interim Authorization. Subsequent to the hearing, both commenters submitted written documentation further outlining their comments raised at the hearing. In addition, one written comment was received from the legal representative of the Appalachian Power Company and the Ohio Power Company, which did not oppose Interim Authorization. The public comment period closed on October 25, 1983.

**Response**

One comment questioned whether the Air Pollution Control Commission



(APCC) had exceeded its statutory authority under the Hazardous Waste Management Act (HWMA) when it promulgated regulations on the identification and listing of hazardous waste, a responsibility designated to the Director of the Department of Natural Resources (DNR) in Section 20-5E-6 of the HWMA. The regulations of the APCC have been amended to include by reference the criteria, characteristics and lists of hazardous waste in DNR's regulations.

Another comment questioned the suitability of the APCC having promulgated its regulation to manage hazardous waste facilities under the authority of both W. Va. Code Chapter 16, Article 20, and W. Va. Code Chapter 20, Article 5E. The Attorney General has certified that Article 20, Section 5E (the Hazardous Waste Management Act) provides authority for the required elements of an approved program. He also certified that the enforcement authority under Article 20, Section 5E, will be fully available. EPA believes that the additional citation of Chapter 16, Article 20, as authority for this regulation does not preclude interim authorization.

There was a comment indicating concern that the application was based upon regulations that were no longer jointly promulgated. Both DNR and the Water Resources Board originally issued Series VII of the regulations. Subsequently, the Board withdrew its participation in the regulations (except for a groundwater protection standard). The Attorney General has certified that the program being approved is supported by statutory authority and EPA has determined that the State program is substantially equivalent to the Federal program.

In 1982, DNR conducted a survey of hazardous waste generators, transporters and treatment, storage, and disposal facilities. Information from this survey was used to estimate available revenue to the State in its application for Interim Authorization. One comment expressed concern about the accuracy of the data as to the number of facilities, quantity of waste reported, and the possible revenues to be generated from permit application fees. EPA has carefully reviewed the current budget and believes it is adequate to effectively implement the hazardous waste program, even if such discrepancies exist. During FY 1984, DNR will investigate any discrepancies in the report and correct any errors accordingly.

Another comment objected to the fact that the State's regulatory program is more stringent than the Federal program

in some areas. However, under Section 3009 of RCRA, the State has the authority to adopt regulations which are more stringent. Therefore, EPA cannot disapprove State programs solely on the basis that they are more stringent than the Federal program.

There was some concern raised regarding the authority of West Virginia's Hazardous Waste Management Act (HWMA). However, in his statement, the West Virginia Attorney General certified that, in his opinion, the HWMA is adequate for Interim Authorization and that regulations promulgated pursuant to HWMA are substantially equivalent to the analogous Federal regulations. EPA has accepted this opinion.

Another comment concerned the development of a form for the Part B permit application by APCC prior to EPA authorization. EPA does not have a form for these applications and, therefore, does not require the State to develop one. Both EPA and the State require the permit applicant to submit information outlined in the permitting regulations as part of the Part B permit application.

One commenter questioned the resources which the State has allocated to the hazardous waste management program (and the subsequent effects on West Virginia's permitting and compliance inspection efforts). EPA believes that the State has an acceptable resource base to qualify for Phase I and Phase II, Components A and B, Interim Authorization. Furthermore, it is EPA's opinion that West Virginia has the appropriate number of staff and skill mix to adequately perform compliance monitoring inspections and process storage and incineration permits during FY 1984. The Agency will be carefully assessing the performance of the State in conducting the delegated program and the results of this evaluation will be factored into our decision on Final Authorization.

There was one comment on DNR's revision of hazardous waste number D007 in Section 3.03.05, Table I, from Chromium (VI) to Chromium (total). EPA's listing is for total chromium. The State currently lists total chromium. Therefore, West Virginia's regulation is equivalent to the Federal regulation. The State chose to change its listing after EPA identified this difference between the State and Federal listings.

Another concern was raised that the application should be amended to include the recently negotiated Memorandum of Understanding (MOU) between the Department of Highways (DOH) and DNR. The responsibilities of DOH and DNR are outlined in the

Program Description which is a part of the application. The MOU has been made a part of the State's file.

DNR's authority to regulate the transportation of hazardous waste by air was questioned. However, Section 5 of DNR's regulation adopts and incorporates by reference 40 CFR Part 263, as applicable to air transportation. The West Virginia Attorney General certified that Section 20-5E-6(12) empowers the Director "to promulgate such other rules and regulations as necessary to effectuate the purpose of the Act," and that "this statutory authority is sufficient and does allow the Director of DNR to promulgate such rules and regulations governing the transportation of hazardous waste by water and air as may be necessary to make the West Virginia program equivalent to and consistent with the federal program." EPA has accepted this opinion.

#### Decision

I have determined that West Virginia's program is substantially equivalent to the Federal program for Phase I and Phase II, Components A and B, Interim Authorization, as defined in 40 CFR Part 271, Subpart B (formerly 40 CFR Part 123, Subpart F). In accordance with Section 3006(c) of RCRA, West Virginia is hereby granted Interim Authorization to operate its hazardous waste program in lieu of Phase I and Phase II, Components A and B of the Federal hazardous waste program.

#### Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

#### Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of small entities. The authorization suspends the applicability of certain Federal regulations in favor of West Virginia's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

#### List of Subjects in 40 CFR Part 271

Hazardous materials, Indian lands, Reporting and recordkeeping requirements, Waste supply,



Intergovernmental relations, Penalties, Confidential business information.

#### Authority

This notice is issued under the authority of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 and Solid Waste Disposal Act Amendments of 1980, 42 U.S.C. 6901 et seq.

Dated: March 7, 1984.

Thomas P. Eichler,  
Regional Administrator.

[FR Doc. 84-8280 Filed 3-27-84; 8:45 am]

BILLING CODE 6560-50-M

#### GENERAL SERVICES ADMINISTRATION

#### 41 CFR Part 101-49

[FPMR Amdt. H-148]

#### Redefinition of "Minimal Value" Associated With the Receipt and Retention of Foreign Gift Items

AGENCY: Office of Federal Supply and Services, GSA.

ACTION: Final rule.

SUMMARY: In accordance with Pub. L. 95-105, this regulation amends FPMR Part 101-49 by redefining the "minimal value" associated with the receipt and retention of foreign gifts by United States officials from foreign governments from \$140 to \$165.

EFFECTIVE DATE: March 28, 1984.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Stanley M. Duda, Director,  
Utilization Division (703-577-0807).

SUPPLEMENTARY INFORMATION: GSA has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs to consumers or others; or significant adverse effects. GSA has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

#### List of Subjects in 41 CFR Part 101-49

Utilization, Donation, and Disposal of foreign gifts and decorations. Decorations, Medals, Awards, Foreign relations, Government property.

#### PART 101-49—UTILIZATION, DONATION, AND DISPOSAL OF FOREIGN GIFTS AND DECORATIONS

Title 41, Part 101-49 of the Code of Federal Regulations is amended as follows:

1. Authority: Sec. 205(c) 63 Stat. 390; 40 U.S.C. 486(c); Sec. 515, 91 Stat. 862; 5 U.S.C. 7342.

2. Section 101-49.001-5 is amended by revising the introductory text to read as follows:

#### § 101-49.001-5 Minimal value.

"Minimal value" means a retail value in the United States at the time of acceptance of \$165 or less, except that:

Dated: February 10, 1984.

Ray Kline,

Acting Administrator of General Services.

[FR Doc. 84-8299 Filed 3-27-84; 8:45 am]

BILLING CODE 6820-24-M

#### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Parts 2, 81, and 83

[Docket No. 83-664, FCC 84-15]

#### Frequency Allocations and Treaty Matters; General Rules and Regulations; Stations on Shipboard in the Maritime Services; Stations on Land in the Maritime Services and Alaska-Public Fixed Stations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the rules by changing the use of marine VHF Channel 88 in the Puget Sound area and its approaches, within 75 miles of the U.S./Canada border. Currently, this Channel is available for commercial use (ship-to-ship). The commercial use has caused harmful interference to Canadian public correspondence stations near the border, according to the British Columbia Telephone Company. We are therefore amending the rules to make Channel 88 available to ships within 75 miles of the border for public correspondence with Canadian coast stations. This action is intended to rectify the interference problem in the interest of both the Canadian and the U.S. maritime community. This document includes two other minor changes involving Limited Coast and Marine Utility station eligibility requirements and A3A emission specifications. This last change removes an unnecessary regulation which has burdened manufacturers and licensees.

EFFECTIVE DATE: February 27, 1984.

FOR FURTHER INFORMATION CONTACT:  
Maureen Cesaitis, Private Radio Bureau,  
202-632-7175.

#### List of Subjects

#### 47 CFR Part 2

Radio.

#### 47 CFR Part 81

Communication equipment, Radio.

#### 47 CFR Part 83

Canada, Radio, Ship stations, Vessels.

#### Report and Order (Proceeding Terminated)

In the matter of amendment of Parts 2, 81, and 83 of the Commission's rules concerning the use of marine VHF Channel 88 in the Puget Sound area, eligibility for Limited Coast and Marine Utility stations, and deletion of all A3A emission requirements; PR Docket No. 83-664, FCC 84-15.

Adopted: January 16, 1984.

Released: January 19, 1984.

By the Commission.

#### Summary

1. In this Report and Order we are amending the Commission's rules to discontinue use of simplex marine VHF Channel 88A (157.425 MHz) for commercial intership communications in the Puget Sound waters<sup>1</sup> within 75 miles of the United States/Canada border. Instead, ships within this 75 miles area will be allowed to use Channel 88 for public correspondence with Canadian coast stations. In this proceeding we are also clarifying the rules concerning eligibility for Limited Coast and Marine Utility stations and deleting the requirement that single sideband radios be capable of operating in the A3A mode. We released a *Notice of Proposed Rule Making* (NPRM, FCC 83-299, 48 FR 32610) in this proceeding on July 12, 1983.

#### Marine Ch. 88

2. Marine Channel 88 consists of a frequency pair: a ship station transmit frequency (157.425 MHz) and a coast station transmit frequency (162.025 MHz). The ship station frequency, which may also be used in a simplex mode, is sometimes referred to as Channel 88A. Channel 88A may be used by commercial fishing vessels and their associated aircraft (e.g., fish spotting). In 1976 the Commission amended its rules to allow public correspondence use of Channel 88 in the Great Lakes and the

<sup>1</sup>For purposes of this rule making proceeding, the "Puget Sound" includes the area of the Puget Sound and the Strait of Juan de Fuca and its approaches.



St. Lawrence Seaway between U.S. vessels and Canadian coast stations.

3. The Commission proposed to change the use of Channel 88A in the Puget Sound in response to a petition from the North Pacific Marine Radio Council (NPMRC). Enclosed with the NPMRC's correspondence was a letter from the British Columbia Telephone Co. (B. C. Telephone Co.) alleging that U.S. vessels were causing interference on 157.425 MHz. The B. C. Telephone Company uses the frequency pair for public correspondence, in accordance with the international Radio Regulations. A long comment period was allowed to insure that commercial interests which might be affected by this change would have an opportunity to file comments after reading or hearing about the NPRM from the local media. The local FCC field office disseminated copies of the NPRM to a broad population of local interests. The NPRM also received wide media coverage in the Seattle area where over 500 copies were distributed.

4. No one filed comments opposing the reallocation of Channel 88A in the Puget Sound. Thus we infer that this change in the rules will have little or no impact on our licensees. As stated previously in the NPRM, there are ten other channels which will remain available for commercial intership communications. With the adoption of this amendment, the rules governing the use of Channel 88 in the Puget Sound area, the Great Lakes, and the St. Lawrence Seaway will be consistent.

#### *Limited Coast/Marine Utility Station Eligibility Requirements*

5. In the NPRM, we proposed to rewrite the rules (Section 81.351) governing the eligibility requirements for Limited Coast stations and Marine Utility stations to specifically include companies servicing radio equipment on non-commercial vessels. This rule amendment was proposed in response to a number of requests from such users. This minor rule amendment did not generate any adverse public comment and is therefore being made.

#### *A3A Emission*

6. The third change proposed in the NPRM concerned the requirement in Parts 81 and 83 of our rules that single sideband radios have an A3A emission capability. Manufacturers of this equipment stated that there is no need for such voice single sideband reduced carrier operation. Rockwell International Corporation (Rockwell) filed comments in support of the Commission's proposal to remove the A3A capability. Rockwell pointed out

that the International Telecommunication Union at its 1983 Mobile Services World Administrative Radio Conference eliminated similar requirements from its Radio Regulations. We are therefore removing this obsolete requirement from our rules as part of our general effort to eliminate unnecessary and outmoded regulations. However, there will be no prohibition against the continued manufacture and use of equipment with this emission capability, and existing equipment will not be affected in any way. We also have taken this opportunity to reorganize and clarify § 83.137 (Modulation requirements) which previously contained, among other things, the A3A requirement.

8. We have determined the Section 603 and 604 of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) do not apply to this rule making proceeding because it limits the use of only one channel in the Puget Sound waters. There are ten other channels available for this use, and the limitation only affects the part of the sound within 75 miles of the U.S./Canada border. Therefore, it will not have a significant economic impact on a substantial number of small entities. The other two changes will have a small beneficial effect on large and small business alike.

9. Regarding questions on matters covered in this document contact Maureen Cesaitis, (202) 632-7175.

10. Accordingly, it is ordered, That under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r), the Commission's rules are amended as set forth in the Appendix, effective February 27, 1984.

11. It is further ordered, That a copy of this Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

12. It is further ordered, That this proceeding be terminated.

Federal Communications Commission.

William J. Tricarico,  
Secretary.

#### **Appendix**

Parts 2, 81, and 83 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

#### **PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS GENERAL RULES AND REGULATIONS**

Section 2.106 is modified by revising footnote US223 as follows:

##### **§ 2.106 Table of frequency allocations.**

\* \* \* \* \*

#### **United States Footnotes**

\* \* \* \* \*

US223 Within 75 miles of the United States/Canada border on the Great Lakes, the St. Lawrence Seaway, and the Puget Sound and the Strait of Juan de Fuca and its approaches, use of coast transmit frequency 162.025 MHz and ship station transmit frequency 157.425 MHz (VHF maritime mobile service Channel 88) may be authorized for use by the maritime service for public correspondence.

\* \* \* \* \*

#### **PART 81—STATIONS ON LAND IN THE MARITIME SERVICES AND ALASKA-PUBLIC FIXED STATIONS**

##### **§ 81.142 [Amended]**

1. Section 81.142 is amended by removing paragraph (c)(3).

2. Section 81.351 is amended by adding new paragraphs (a)(7) through (a)(9), removing paragraph (b), and redesignating paragraph (c) as paragraph (b), and revising it, as follows:

##### **§ 81.351 Supplemental eligibility requirements.**

(a) \* \* \*

(7) A person controlling moorage facilities,

(8) A person performing the function of service and supply to vessels other than commercial transport vessels,

(9) A nonprofit corporation or association organized to provide noncommercial communications to vessels other than commercial transport vessels.

(b) Each application for station authorization for a limited coast station or a marine-utility station shall be accompanied by a written statement in detail sufficient to indicate clearly the applicant's eligibility under paragraph (a) of this section.

#### **PART 83—STATIONS ON SHIPBOARD IN THE MARITIME SERVICES**

1. Section 83.137 is amended by revising paragraphs (a), (b) and (c) introductory text and (c)(3), by adding a new paragraph (c)(4) and (d), and by removing paragraphs (e), (f), (g), (h), (i), and (j), including the footnote.

##### **§ 83.137 Modulation requirements.**

(a) Transmitters must comply with the following emission requirements:

(1) Transmitters using A3 emission shall be capable of proper technical operation with modulation of 75 percent on peaks but not more than 100 percent on negative peaks. Each such transmitter shall be so adjusted that the transmission of speech and the international radiotelephone alarm



signal, if provision is made for transmission of the signal, normal produce peak modulation percentages within those limits.

(2) Transmitters using F3 emission in the band 156-162 MHz, or emissions F1, F3, F4 in the band 218-220 MHz, shall be capable of proper technical operation with a frequency deviation of  $\pm 5$  kHz, which is defined as 100 percent modulation. In general, transmitters shall be adjusted so that transmission of speech normally produces peak modulation percentages between 75 and 100 percent.

(b) Radiotelephone transmitters shall automatically prevent modulation in excess of 100 percent when using A3 or F3 emissions. This requirement shall not apply to survival craft station transmitters or to transmitters not required to be type accepted or with a transmitter power not exceeding 3 watts. In the event the operation of any licensed radiotelephone transmitter causes harmful interference to any authorized radio service by reason of excessive modulation, the Commission may, in its discretion, require that the use of such transmitter be discontinued until it will automatically prevent modulation in excess of 100 percent.

(c) Single sideband transmitters shall be capable of operating as follows:

(3) In single sideband operation, the sideband on the higher frequency side of the carrier frequency shall be transmitted.

(4) Single sideband transmitters shall automatically limit the peak envelope power to the authorized transmitter power.

(d)(1) Emergency position indicating radiobeacon (EPIRB) stations operating on the frequencies 121.5 and 243 MHz shall employ a distinctive emission consisting of amplitude modulation of the carrier with an audio frequency sweeping downward over a range of not less than 700 Hz, within the range 1600 to 300 Hz, with a sweep rate between 2 and 4 times per second. The modulation applied to the carrier shall be in accordance with that specified in the Radio Technical Commission for Aeronautics (RTCA) Document Numbers D0-145 or D0-146.

(2) EPIRB stations operating on the frequencies 156.75 and 156.8 MHz shall employ the international Radiotelephone Two Tone Alarm signal to frequency modulate the carrier frequencies.

(i) The EPIRB signal transmitted on the frequencies 156.75 and 156.8 MHz shall consist of two substantially sinusoidal audio frequency tones transmitted alternately. One tone shall have frequency of 2200 Hz and the other

a frequency of 1300 Hz, the duration of each tone shall be 250 milliseconds. The frequency tolerance of the tones and the tolerance of the tone duration shall be  $\pm 5$  percent.

(ii) An EPIRB sequence consists of 6 time periods of specified durations. The EPIRB shall transmit during 4 of the time periods and remain silent during the other 2. The nominal period of each successive sequence shall be increased by extending the duration of the "off" periods ( $t_4$  to  $t_6$ ) during which the device is not transmitting a signal. The duration to  $t_4$  and  $t_6$  shall be incrementally increased in proportion to the time the device is continuously activated. The duration of each time period with a  $\pm 5$  percent tolerance, the number of sequences, and the frequency are specified in the table below.

| Time period | Transmission frequency in MHz                                                                      | Duration in seconds (No. of sequences) |
|-------------|----------------------------------------------------------------------------------------------------|----------------------------------------|
| 1           | 1.5                                                                                                | 156.8                                  |
| 2           | 14.5                                                                                               | 156.75                                 |
| 3           | 1.5                                                                                                | 156.8                                  |
| 4           | ( <sup>1</sup> ) 40.0<br>( <sup>2</sup> ) 80.0<br>( <sup>3</sup> ) 160.0<br>( <sup>4</sup> ) 320.0 | None                                   |
| 5           | 14.5                                                                                               | 156.75                                 |
| 6           | ( <sup>5</sup> )                                                                                   | None                                   |

(<sup>1</sup>) 16 sequences.  
(<sup>2</sup>) 32 sequences.  
(<sup>3</sup>) 64 sequences.  
(<sup>4</sup>) 83.2 sequences.  
(<sup>5</sup>) Same as time period 4.

2. Section 83.351 is amended by revising paragraphs (b) (33) and (44) to read as follows:

#### § 83.351 Frequencies available.

(b) \* \* \*

(33) Except within 75 miles of the United States/Canada border in the area of the Puget Sound and the Strait of Juan de Fuca and its approaches, the Great Lakes, and the St. Lawrence Seaway, available for intership and commercial communications. Except in the Puget Sound and the Strait of Juan de Fuca and its approaches and the Great Lakes, also available for communications between commercial fishing vessels and associated aircraft while engaged in commercial fishing activities.

(44) Within 75 miles of the United States/Canada border, in the area of the Puget Sound and the Strait of Juan de Fuca and its approaches, on the Great Lakes, and the St. Lawrence Seaway, 157.425 MHz is half of the duplex pair designated as Channel 88. In this area, Channel 88 is available for use by ship stations for public correspondence communications only.

3. In Section 83.1012, paragraph (b) is

amended by adding new language to footnotes 1 and 2, the revised footnotes read as follows:

#### § 83.1012 (VHF Marine Rule 12) What channels may I use?

(b) \* \* \*

<sup>1</sup> Not available in the Great Lakes, the St. Lawrence Seaway, or the Puget Sound and the Strait of Juan de Fuca and its approaches.

<sup>2</sup> Only for use in Great Lakes, St. Lawrence Seaway, and Puget Sound and the Strait of Juan de Fuca and its approaches.

[FR Doc. 84-7218 Filed 3-27-84; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 83-493; RM-4393]

#### FM Broadcast Station in Gulf Breeze, Florida; Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action assigns FM Channel 237A to Gulf Breeze, Florida, as its first FM channel assignment in response to a petition filed by Eugene Hobdy.

DATE: Effective: May 29, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

#### Report and Order Proceeding Terminated

In the matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations (Gulf Breeze, Florida), MM Docket No. 83-493, RM-4393.

Adopted: March 12, 1984.

Released: March 21, 1984.

By the Chief, Policy and Rules Division.

1. The Commission has before it the *Notice of Proposed Rule Making*, 48 FR 27567, published June 16, 1983, issued in response to a petition for rule making filed by Eugene Hobdy ("Hobdy") proposing to amend the FM Table of Assignments, § 73.202(b) of the Commission's Rules, by assigning FM Channel 237A to Gulf Breeze, Florida, as its first FM channel assignment. In response to the *Notice*, Hobdy filed comments and restated his intention to apply for FM Channel 237A at Gulf Breeze. Supporting comments were filed by Breeze Broadcasting Corp. also



indicating an interest in applying. Capitol Broadcasting Corp. ("Capitol"), licensee of FM Station WKSJ, Mobile, Alabama, filed opposing comments and a counterproposal. Reply comments were filed by Hobdy.

2. Channel 237A can be assigned to Gulf Breeze in conformity with the Commission's minimum distance separation requirements at a site located approximately 5.6 miles northeast of the city. As stated in the Notice, this restriction is necessary to avoid short-spacing to the present site of Station WKSJ-FM (Channel 235), Mobile, Alabama.

3. In its comments, Capitol states that on July 5th, 1983, it filed an application to change the transmitter site of WKSJ-FM. Capitol argues that the assignment of Channel 237A to Gulf Breeze will preclude the proposed relocation of WKSJ because of a 26.6 mile short-spacing. As a counterproposal, Capitol suggests that pursuant to the proposed guidelines in Docket No. 80-90, there are several channels available in Gulf Breeze which would allow both the relocation of WKSJ-FM and the assignment of a new channel to Gulf Breeze.

4. In reply comments, Hobdy opposes the counterproposal on the grounds that requested channel assignments in Docket 80-90 may not be made for several years and proposals for Gulf Breeze would have to compete with numerous other proposals within the general rule making. Consequently, Hobdy asserts, if the counterproposal is adopted it may be several years before Gulf Breeze would have an available FM channel. Hobdy concludes that, Section 307(b) of the Communications Act of 1934, as amended, requires that a move of the WKSJ transmitter-antenna site must wait until the Docket 80-90 standards are adopted so that Hobdy's proposal to bring a first FM service to Gulf Breeze may be adopted immediately.

5. We agree with Hobdy, that Capitol's reliance on the channels that will be made available pursuant to Docket 80-90 is premature. Although the Commission adopted a *Report and Order* in BC Docket 80-90, which will authorize new frequencies nationwide, those rules are not effective as yet. The Commission is expecting to make these rules effective early this year. Thereafter, the public will be notified when petitions based on 80-90 rules would be accepted.

6. Concerning Capitol's counterproposal, the issue here is whether Capitol's site preference should be permitted to take precedence over an assignment which could provide Gulf

Breeze with its first local FM service? In *Lockhart, Texas*, we held *inter alia*, that a site preference for an existing station is not sufficient justification to deny a first assignment to another city. See, *Report and Order*, 81 F.C.C. 2d 171 (1980). We believe *Lockhart* is controlling here. Capitol offers no evidence demonstrating how the public interest will be better served by its proposed move. Furthermore the new channel availability envisioned under the rules adopted in BC Docket 80-90 would delay service at Gulf Breeze for an undetermined period. Thus we believe the public would be benefitted by the assignment of FM Channel 237A to Gulf Breeze, as its first assignment.

7. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303 (g) and (r) and 307(b) of the Communications Act of 1934, as amended, and §§ 0.61, 0.204(b) and 0.283 of the Commission's Rules, it is ordered, That effective May 29, 1984, the FM Table of Assignments, § 73.202(b) of the Commission's Rules, is amended as follows for the community listed:

| City                      | Channel No. |
|---------------------------|-------------|
| Gulf Breeze, Florida..... | 237A        |

8. It is further ordered that this proceeding is terminated.

9. For further information concerning this proceeding contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

Federal Communications Commission.

Roderick K. Porter,  
Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 84-8319 Filed 3-27-84; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 652

[Docket No. 21130-239]

#### Atlantic Surf Clam and Ocean Quahog Fisheries

**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.

**ACTION:** Final rule; technical amendment opening area to fishing.

**SUMMARY:** NOAA issues this technical amendment deleting from regulations the previously closed area known as the "Philadelphia and du Pont closure," thereby reopening an area closed to surf clam and ocean quahog fishing due to

environmental degradation. The area is being reopened because studies conducted by the U.S. Public Health Service show that the level of shellfish contamination has dropped to the extent that shellfish in the area no longer pose a health risk. Reopening of the area will allow fishermen to harvest any legal-sized surf clams or ocean quahogs which may occur in the area.

**EFFECTIVE DATE:** March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:** Bruce Nicholls, Surf Clam Management Coordinator, National Marine Fisheries Service, Northeast Region, State Fish Pier, Gloucester, Massachusetts 01930; telephone 617-281-3600.

**SUPPLEMENTARY INFORMATION:** Final regulations implementing Amendment 3 to the Fishery Management Plan for Atlantic Surf Clam and Ocean Quahog Fisheries were published on January 29, 1982 (47 FR 4268). Section 652.23(a) of the regulations provides for the closure of areas to surf clam and ocean quahog fishing because of adverse environmental conditions. That section also provides that the areas will remain closed until the Secretary of Commerce determines that the adverse environmental conditions have been corrected. One of the identified closed areas, described at § 652.23(a)(3), is the ocean dumpsite known as the Philadelphia and du Pont Closure. The area was closed to shellfishing in 1976 because of the presence of chemical and sewage sludge contaminants. Waste disposal in the area ceased in 1980. The Public Health Service of the Department of Health and Human Services is the agency which monitors recovery of degraded dumpsite areas. Sampling was conducted by the Northeast Technical Services Unit of that agency in 1983, which analysed for the presence of coliform bacteria and found excellent bacteriological water quality. The analysis showed that water conditions had nearly returned to pre-dumping conditions, and that shellfish harvesting in the area no longer posed a health risk. Accordingly, the Public Health Service has cancelled its notice of closure of the area to shellfish harvesting, and the Secretary is reopening the area to surf clam fishing as stipulated in the surf clam fishery regulations. Also, § 652.23 of the implementing regulations is amended by deleting § 652.23(a)(3) and redesignating (a)(4) as (a)(3).

This action is taken under the authority of 50 CFR Part 652 and is taken in compliance with Executive Order 12291.



**List of Subjects in 50 CFR Part 652**

Fisheries, Reporting and  
recordkeeping requirements.

Dated: March 23, 1984.

**Carmen J. Blondin,**

*Deputy Assistant Administrator for Fisheries  
Resource Management, National Marine  
Fisheries Service.*

**PART 652—[AMENDED]**

For the reasons set out in the  
preamble, NOAA is amending 50 CFR  
Part 652 as set forth below:

1. The authority citation for Part 652  
reads as follows:

Authority: 16 U.S.C. 1801 *et seq.*

**§ 652.23 [Amended]**

2. Section 652.23 is amended by  
removing the existing paragraph (a)(3)  
and redesignating existing paragraph  
(a)(4) as (a)(3).

[FR Doc. 84-8273 Filed 3-26-84; 12:55 p.m.]

**BILLING CODE 3510-27-M**



# Proposed Rules

Federal Register

Vol. 49, No. 61

Wednesday, March 28, 1984

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 107

#### Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies

**AGENCY:** Small Business Administration.

**ACTION:** Notice of extension of comment period on advance notice of proposed rulemaking.

**SUMMARY:** On February 10, 1984, SBA published in the *Federal Register* an Advance Notice of proposed rulemaking regarding Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies (see 49 FR 5230).

That publication provided that comments on the advance notice would be received for a period of 60 days from date of publication. This notice extends the comment period pertaining to the advance notice for an additional 30 days due to request from industry for additional time.

**DATE:** Comments on the above-referenced proposed rule must be received by May 10, 1984.

**ADDRESS:** Written comments should be directed to Mr. Thomas C. Bresnan, Staff Accountant, Small Business Administration, Office of Finance and Investment, 1441 L Street, NW., Washington, D.C. 20416.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas C. Bresnan, telephone (202) 653-6782.

**SUPPLEMENTARY INFORMATION:** In order to provide more time for public comment on the above-referenced proposed rule, SBA is hereby extending the comment period relative to the proposal for an additional 30 days. The public is encouraged to supply comments in writing to the address indicated above so that a complete record on this important advance notice can be established.

Dated: March 19, 1984.

James C. Sanders,  
Administrator.

[FR Doc. 84-8276 Filed 3-27-84; 8:45 am]

BILLING CODE 8025-01-M

## FEDERAL TRADE COMMISSION

### 16 CFR Part 13

[File No. 832 3100]

#### Adria Laboratories, Inc.; Proposed Consent Agreement With Analysis To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** In settlement of alleged violation of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require a Dublin, Ohio manufacturer and seller of over-the-counter drugs, among other things, to cease promoting "Efficin," or any other over-the-counter internal analgesic containing magnesium salicylate, by representing that the product contains no aspirin or by comparing the product's safety to any product containing aspirin, unless such representations are accompanied by prescribed disclosure warnings and substantiated by reliable and competent scientific evidence.

**DATE:** Comments must be received on or before May 29, 1984.

**ADDRESS:** Comments should be directed to: FTC/S, Office of the Secretary, Washington, D.C. 20580.

**FOR FURTHER INFORMATION CONTACT:** FTC/PA, T. Bringier McConnell, Washington, D.C. 20580, (202) 724-1098.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist and an explanation thereof, having been filed with an accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at

its principal office in accordance with Section 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

### List of Subjects in 16 CFR Part 13

Over-the-counter drugs, Trade practices.

### Before Federal Trade Commission

[File No. 832-3100]

#### Agreement Containing Consent Order To Cease and Desist

In the matter of Adria Laboratories, Inc., a corporation.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Adria Laboratories, Inc. ("Adria"), a corporation, and it now appearing that Adria, hereinafter sometimes referred to as proposed respondent, is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated.

It is hereby agreed by and between Adria Laboratories, Inc., its duly authorized officer, its attorney, and counsel for the Federal Trade Commission that:

1. Proposed respondent Adria Laboratories, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 5000 Post Road, in the City of Dublin, State of Ohio.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:  
(a) Any further procedural steps;  
(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The



Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent of the factual allegations of the proposed complaint, except for jurisdictional facts, or that the law has been violated as alleged in the draft complaint here attached.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. It understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

## Order

### I

It is ordered that respondent Adria Laboratories, Inc. a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of Efficin or any other over-the-counter internal analgesic containing magnesium salicylate affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the product contains no aspirin, or any other representation, directly or by implication, comparing the product's safety to any product containing aspirin, unless the following statement is clearly and prominently disclosed:

A. "Efficin (or other product's name) has side effects similar to aspirin."

B. If Efficin's (or other product's) label discloses that consumers should not take the product if they have stomach distress, ulcers or bleeding problems except under the direction and supervision of a physician, respondent may substitute the following statement for the disclosure required in PART I(A): "Efficin (or other product's name) is similar to aspirin. Read label including warnings."

C. If Efficin's (or other product's) package insert discloses that consumers should not take the product if they have stomach distress, ulcers or bleeding problems except under the direction and supervision of a physician, respondent may substitute the following statement for the disclosure required in Part I(A): "Efficin (or other product's name) is similar to aspirin. Read and save package insert including warnings."

D. Such other statement approved by the Federal Trade Commission in advance, or

E. Such other statement as respondent can demonstrate (based on consumer surveys whose design is adequate and previously approved by the Federal Trade Commission) will convey the same messages as conveyed by the statement in Parts I(A), I(B), or I(C) as applicable.

Provided that it shall not violate this Part to distribute packages of Efficin that were fully packaged as of October 18, 1983, that do not contain a disclosure statement required by this Part.

### II

A. It is further ordered that respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of any over-the-counter drug product affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning the safety of such product or from comparing any such product to any product or products of one or more competitors concerning safety, unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for such representation, consisting of reliable and competent scientific evidence that substantiates each such representation.

B. To the extent the evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" for purposes of Part II (A) only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

### III

It is further ordered that respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

### IV

It is further ordered that respondent shall forthwith distribute a copy of this order to each of its operating divisions involved in the marketing of over-the-counter drugs.

### V

It is further ordered that respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.



## VI

It is further ordered that, for the period of three years after it last disseminated the advertisements of the products covered by this order, respondent shall maintain accurate records:

1. Of all materials that were relied upon by respondent in disseminating any representation covered by this order.
2. Of all test reports, studies, surveys, or demonstrations in its possession or control or of which it has knowledge that contradict any representation made by respondent that is covered by this order.

These records may be inspected by the staff of the Commission upon reasonable notice.

#### Analysis Of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from Adria Laboratories, Inc. ("Adria").

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The complaint charges the respondent Adria with disseminating advertisements containing several false, misleading and unsubstantiated representations regarding Effcin. The complaint alleges that, contrary to fact, respondent's advertisements claimed that Effcin is not associated with most of the side effects and contraindications as aspirin. In addition, the complaint charges respondent with advertising the claims that use of Effcin poses a lesser risk of suffering the side effects associated with aspirin than does use of aspirin and that the side effects associated with both aspirin and Effcin are less severe with Effcin than with aspirin. The advertisements represented, directly or by implication, that respondent had a reasonable basis for these claims when in fact respondent did not rely on a reasonable basis for them. Accordingly, disseminating these representations constitutes unfair or deceptive acts or practices.

The complaint also alleges that Adria's advertising for Effcin failed to

disclose that Effcin is similar to aspirin, and that the ingredient in Effcin has been associated with many of the same side effects and contraindications as aspirin. In light of respondent's claims about the relative safety of Effcin over aspirin, respondent's failure to disclose the similarities between Effcin and aspirin in its advertising is an omission of a material fact, and consequently this advertising is false within the meaning of Section 12 of the Federal Trade Commission Act.

The consent order contains various provisions designed to remedy the alleged advertising violations.

Part I of the order prohibits Adria from promoting Effcin or any other over-the-counter internal analgesic containing magnesium salicylate by representing that the product contains no aspirin or by making any representation that otherwise compares the product's safety to any product containing aspirin unless certain information is clearly and prominently disclosed. Specifically, one of the three following disclosures must be made.

- (1) "Effcin (or other product's name) has side effects similar to aspirin."
- (2) If Effcin's (or other product's) label discloses that consumers should not take the product if they have stomach distress, ulcers or bleeding problems except under the direction and supervision of a physician, respondent may substitute the following statement: "Effcin (or other product's name) is similar to aspirin. Read label including warning."
- (3) If Effcin's (or other product's) package insert discloses that consumers should not take the product if they have stomach distress, ulcers or bleeding problems except under the direction and supervision of physician, respondent may substitute the following statement: "Effcin (or other product's name) is similar to aspirin. Read and save package insert including warnings."

Alternatively, Adria may use any disclosure approved in advance by the Commission or any statement that respondent can demonstrate (based on adequately designed consumer surveys approved in advance by the Commission) will convey the same message as the statements specified in the Paragraph I of the order. Part I permits Adria to distribute Effcin which was fully packaged as of October 18, 1983, without making the disclosures on the product packaging that would otherwise be required by Part I. Any advertising disseminated during the period this inventory is distributed,

however, would not be exempted from the disclosure requirements contained in Part I. Rather, the order proviso, together with the requirements found in Part I, requires Adria to make the disclosure statement set out in Paragraph I(A) (or an equivalent statement, pursuant to Paragraphs I(D) or I(E)) in connection with any advertising claims covered by Part I of the order.

Paragraph II (A) of the order prohibits Adria from promoting Effcin or any other over-the-counter internal analgesic containing magnesium salicylate by making any representation, directly or by implication, concerning the safety of the product or comparative safety of competitive products unless respondent has a reasonable basis for these representations. Paragraph II(A) also specifies that a reasonable basis consists of reliable and competent scientific evidence that substantiates each representation. To the extent that respondent's reasonable basis consists of scientific or professional tests and studies Paragraph II(B) requires that they be conducted and evaluated objectively by qualified persons using generally accepted procedures.

Paragraph III requires respondent to notify the Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance obligations arising out of the order.

Paragraph IV requires respondent to distribute a copy of the order to each of its operating divisions involved in the marketing of over-the-counter drugs.

Paragraph V requires respondent to file a compliance report with the Commission sixty (60) days after the order becomes final.

Paragraph VI requires respondent to maintain records of all substantiation related to the requirements of the order for three (3) years after the dissemination of any advertisements. These records may be inspected by Commission staff on reasonable notice.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Emily H. Rock,

Secretary.

[FR Doc. 84-8250 Filed 3-27-84; 8:45 am]

BILLING CODE 5750-01-M



# CONSUMER PRODUCT SAFETY COMMISSION

## 16 CFR Part 1145

### Proposed Rule To Regulate Under the Consumer Product Safety Act Risks of Injury That May Be Associated With Baby Bassinets Having Legs That Collapse

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission has learned of instances where baby bassinets have collapsed because their supporting legs gave way. As a result, infants occupying the bassinets have fallen and suffered injuries. Should regulatory action become necessary to address any risk of injury associated with baby bassinets having legs that collapse, the Commission proposes to regulate any such risk of injury under the provisions of the Consumer Product Safety Commission Act (CPSA) rather than the Federal Hazardous Substances Act (FHSA). The Commission preliminarily determines that this transfer is in the public interest because, if the Commission finds regulation of such risks of injury is necessary, public notification and remedial action can be accomplished more effectively and expeditiously under the CPSA than under the FHSA.

**DATE:** Comments concerning this proposal must be received in the Office of the Secretary by April 27, 1984.

**ADDRESS:** Written comments should be addressed to the Secretary of the Commission, Sadye E. Dunn, Consumer Product Safety Commission, Washington, D.C. 20207.

**FOR FURTHER INFORMATION CONTACT:** Lynn Lichtenstein, Directorate for Compliance and Administrative Litigation, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 492-6626.

**SUPPLEMENTARY INFORMATION:** The Commission proposes to regulate under the CPSA rather than the FHSA possible risks of death and injury such as concussion, fractured skull, hemorrhage, anoxia and related trauma associated with baby bassinets having legs that collapse.

Section 30(d) of the CPSA (15 U.S.C. 3079(d)) on which this proposed rule is based, provides that a risk of injury associated with a consumer product which could be eliminated or reduced to a sufficient extent by action under the FHSA, may be regulated under the CPSA if the Commission, by rule, finds that it is in the public interest to regulate such risks of injury under the CPSA.

The Commission has examined the applicable statutes and has considered the facts regarding possible risks of death or injury associated with baby bassinets having legs that collapse thus endangering the infant using the bassinet. The Commission has preliminarily determined that it is in the public interest to regulate under the CPSA rather than the FHSA the risks of injury noted here because public notification and remedial action can be accomplished more effectively and expeditiously under the CPSA.

#### A. Background

**The product**—A bassinet is a small sleeping container used in the home and elsewhere for infants during the first several months after birth. A bassinet may be stationary or equipped with wheels for mobility. To enhance portability and storage in small spaces, many bassinets have folding legs.

The size of the sleeping container may vary, but it is usually about 36 inches long by about 20 inches wide by about 12 inches deep. The sleeping container is often made of wicker or plastic shaped like wicker, and resembles a basket.

The sleeping container is mounted on four legs, which may have castor wheels to facilitate movement from place to place. (See figure 1.) Some bassinets are constructed with the two legs at each end connected by a horizontal cross member which allows the legs to fold as a pair. On these bassinets, each leg in a pair may have an individual leg brace consisting of two steel links connected by a center pivot. (See figure 1.) When the legs of these bassinets are fully extended, the links of the leg brace form a straight line. The links of the brace may have intermeshing dimples or some other mechanism for locking the brace. (See figure 2A.) When the two links of the brace are moved in an upward direction, the legs will fold under the sleeping container. (See figure 2B.)

When a leg brace is in a straight line it can resist compressive forces either from movement of the infant within the bassinet or an adult pushing the bassinet from one room to another. If a leg brace which is designed to reach a straight line is not fully opened into its straight line position, or if the interlocking dimples are small and shallow, the legs of the bassinet can collapse inward (toward the center of the bassinet). Bending stress on the links due to offset at their outer ends may also cause the leg braces to separate and allow folding of the links either upward or downward. Folding of the links in turn results in collapse of the legs and the bassinet. Collapse of the

legs may also be more likely when the brace is constructed of thin-gauge steel.

**The hazard**—The Commission has learned of the deaths of three infants that are associated with collapse of baby bassinets. The reports indicate that, while the children were in them, the bassinets' legs collapsed. Each infant may have suffered internal cranial hemorrhaging from the blow to the head when falling, and anoxia (inability to breathe) because of being thrown head downward and remaining in that position. From consumer complaints and Commission investigations, the Commission has also learned of additional incidents involving bassinets having legs that collapsed which resulted in minor or no injuries.

All these incidents, fatal or otherwise, appear to have occurred after the baby moved about in the bassinet, or when an adult pushed the bassinet from one room to another over doorsills or other routine obstructions. The incidents indicate that the braces on the legs of the bassinets loosened, detached, or otherwise failed to perform their intended function of keeping the legs fully extended so that the bassinet could be moved around in the home until such time as the user desired to fold the legs under the sleeping container.

Based on the nature of the occurrences, it appears that an infant can suffer concussion, fractured skull, hemorrhage and other related injuries because of the unanticipated collapsing of the legs on some bassinets. The staff is continuing to update its information on injuries associated with leg collapse of baby bassinets.

#### B. Regulation Under FHSA

At this time, the baby bassinets described above could be subject to regulation by the Consumer Product Safety Commission under provisions of the Federal Hazardous Substances Act (FHSA, 15 U.S.C. 1261 *et seq.*) as articles intended for use by children.

In accordance with provisions of section 3 (e) through (i) of the FHSA (15 U.S.C. 1262 (e), (f), (g), (i)), the Commission could begin a proceeding for the issuance of a rule to declare that the bassinets described in this notice present a mechanical hazard. If issued on a final basis, such a rule would have the effect of classifying these children's articles as "banned hazardous substances" as that term is used in section 2(q)(1)(A) of the FHSA (15 U.S.C. 1261(q)(1)(A)), and would prohibit the distribution or sale of these products in the United States, as well as their importation into this country. If a children's article presents an "imminent



hazard to the public health," provisions of section 3(e)(2) of the FHSA (15 U.S.C. 1262(e)(2)) authorize the Commission to issue an immediate order declaring the product to be a banned hazardous substance pending completion of a proceeding to issue a banning rule.

A final rule issued under provisions of sections 3 (e) through (i) of the FHSA would also make the products in question subject to provisions of section 15 of the FHSA (15 U.S.C. 1274). That section authorizes the Commission to determine, after affording all interested persons opportunity for a hearing, that notification to the public of the hazard presented by a product which is a "banned hazardous substance" is necessary in order to adequately protect the public. That section also authorizes the Commission, after affording all interested persons opportunity for a hearing (which could be combined with a hearing regarding the need for public notification), to require the manufacturer, distributor or dealer of a product which is a banned hazardous substance to elect to repair or replace the product, or to refund the purchase price of the product.

However, the provisions of section 15 of the FHSA concerning public notification and corrective action would be applicable to the products which are the subject of this notice only if the Commission had first issued a rule under provisions of sections 3 (e) through (i) of the FHSA to announce the Commission's determination that the products present a mechanical hazard or had published an order to declare that such products present an imminent hazard to the public health.

A proceeding to issue a rule under provisions of sections 3 (e) through (i) of the FHSA is initiated by publication of an advance notice of proposed rulemaking in the *Federal Register* to invite comments from all interested persons about the risk of injury associated with the product which is the subject of the proceeding and possible means of addressing that risk of injury, including voluntary standards now in existence or which might be developed. If, after consideration of all information received in response to the advance notice of proposed rulemaking, the Commission decides to continue the proceeding, publication of a second notice in the *Federal Register* is required to propose the rule and invite written comments on the proposal. The Commission must then analyze all comments received in response to the proposal; describe the costs and benefits of the rule; again consider alternative means to address the risk of injury,

including voluntary standards; and publish a third notice in the *Federal Register* to issue the rule on a final basis.

In summary, the Commission is authorized under the FHSA to issue a regulation declaring baby bassinets having legs that collapse to be banned hazardous substances. The rulemaking must consist of three stages—an advance notice of proposed rulemaking with public comment, a notice of proposed rulemaking with public comment, and a final rule that analyzes the public comments and includes a detailed regulatory analysis. Once rulemaking is completed, a process that could take two or more years, the Commission could initiate a proceeding to seek public notice and recall of the banned bassinets, a process which itself would likely take about one year. In appropriate circumstances, the Commission could declare a product to be an imminent hazard to the public health, either before or during the rulemaking proceeding, which would have the effect of immediately banning the product and allowing the public notice and recall proceeding to be started. Whether or not a product is declared to be an imminent hazard, however, the rulemaking is expected to be continued.

### C. Regulation Under CPSA

The CPSA has provisions which authorize the Commission in certain cases to obtain an administrative order for public notification of the hazard presented by a product and for repair, or replacement of the product, or refund of the purchase price of the product without any necessity of first completing a rulemaking proceeding. Under the FHSA, the Commission may not initiate a proceeding to obtain public notification or corrective action with regard to a hazard presented by a toy or children's article until the Commission has issued a final banning rule (unless the Commission publishes an order declaring the product to be an imminent hazard to the public health).

Section 15 of the CPSA (15 U.S.C. 2064) confers upon the Commission the authority to order public notification of the hazard presented by a product if the Commission determines, after affording all interested persons opportunity for a hearing, that the product presents a "substantial product hazard," and that notification is required in order to adequately protect the public from that substantial product hazard. Additionally, section 15 of the CPSA authorizes the Commission to order any manufacturer, importer, distributor, or retailer of a product to elect to repair or

replace the product, or to refund the purchase price of the product, if the Commission determines, after affording all interested persons opportunity for a hearing, that the product presents a "substantial product hazard," and that issuance of such an order is in the public interest.

If the products described in this notice were subject to regulation under the CPSA, no requirement for rulemaking would exist in order to invoke the provisions of section 15 of that Act.

Additionally, provisions of section 12 of the CPSA (15 U.S.C. 2061) authorize the Commission to file an action in a United States district court against a manufacturer, importer, distributor, or retailer of a consumer product which presents an imminent and unreasonable risk of death or severe personal injury. The court has the authority to order the recall of the product, its repair or replacement, or refund of the purchase price. The court also has authority to order a firm to undertake extensive notification efforts to advise purchasers and the general public of the nature of the risk and of the firm's obligation for remedial action. The Commission may file an action under section 12 of the CPSA without any requirement for having first undertaken a rulemaking proceeding. No corresponding provisions exist in the FHSA.

In summary, under the CPSA, the Commission may regulate a product in one or more different ways. First, after giving interested persons an opportunity for a hearing, the Commission may order that notice and recall be provided by firms manufacturing, importing, or distributing a product that presents a substantial product hazard. Unlike the FHSA, there are no requirements that the product first be declared a banned hazardous substance or that it first be subject to a consumer product safety rule. Second, the Commission may file an action in a United States district court if a product presents an imminent and unreasonable risk of death or severe personal injury. The court has the authority to order the recall of the product, its repair or replacement, or refund of the purchase price. Third, the Commission may undertake rulemaking to declare the product a banned hazardous product or to subject the product to a consumer product safety standard.

Because notification to the public of any hazard which may be presented by the products described in this notice and remedial action with regard to those products could be accomplished more effectively and expeditiously under the CPSA than under the FHSA, the



Commission preliminarily determines that it would be in the public interest to regulate under the CPSA rather than the FHSA any risk of strangulation which may be associated with the baby bassinets described in this notice.

#### D. Impact of Small Businesses

Section 603 of the Regulatory Flexibility Act (RFA, 5 U.S.C. 603) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis of the impact of any proposed rule on small entities, including small businesses. Section 605(b) of the RFA provides that an agency is not required to prepare a regulatory flexibility analysis if the agency certifies that the rule, if issued on a final basis, will not have a significant economic impact on a substantial number of small entities.

The regulation proposed below, if issued on a final basis, will not by itself impose any legal or other obligation on any person or firm. The rule would simply express the Commission's determination that any action taken to eliminate or reduce the risk of injury with which it is concerned will be taken following the procedures set forth in the CPSA rather than the FHSA.

If the Commission issues a final rule based on the proposal published below, and then determines that it should act to eliminate or reduce the risk of injury which is the subject of the rule, the Commission will be required to initiate the follow through to completion appropriate judicial or administrative proceedings under one or more sections of the CPSA before it can impose any obligation on any person or firm.

Since a final rule based on the proposal imposes no obligation on any person or firm, the Commission hereby certifies that it will have a significant economic impact on a substantial number of small businesses.

#### E. Environmental Considerations

The regulation proposed below falls within the categories of the Commission actions described in 16 CFR 1021.5(c) that have little or no potential for affecting the human environment. For this reason, neither an environmental assessment nor an environmental impact statement is required.

#### F. Conclusion and Proposal

After consideration of the information set forth above, and provisions of the FHSA and the CPSA, the Commission preliminarily finds that if regulatory action is needed to address risks of death and injury associated with baby bassinets having legs that collapse, it would be in the public interest to regulate such risks under the CPSA rather than under the FHSA. The FHSA would allow the product to be banned by a rulemaking procedure that would likely take at least two years. Following that, the Commission could, if appropriate, begin a proceeding to order firms to give notice of the risk and to recall the product, a process which itself could take about one year. Thus, if public notice and recall were found to be the appropriate remedies, it would take about three years to obtain these remedies under the FHSA. Although the process could be shortened, as discussed above, by declaring the product to be an imminent hazard to the public health, the Commission does not believe, based on presently available information, that such action would be appropriate for these products. Under the CPSA, as discussed above, no rulemaking is necessary before public notice or recall is sought. Thus, if public notice or recall is found to be necessary because the product presents a substantial product hazard, either or both could be obtained at least two years sooner under the CPSA.

For these reasons, the Commission hereby proposes to regulate under the CPSA rather than the FHSA all possible risks of death or injury which may be associated with bassinets having legs that collapse. Until issuance of any final regulation under section 30(d) of the CPSA, the Commission has authority to regulate under the FHSA any risk of injury described in this notice which bassinets may present. Any other risks of injury that may be associated with this product continue to be subject to regulation under the FHSA.

#### List of Subjects in 16 CFR Part 1145

Administrative practice and procedure, Consumer protection, Infants and children.

#### PART 1145—REGULATION OF PRODUCTS SUBJECT TO OTHER ACTS UNDER THE CONSUMER PRODUCT SAFETY ACT

Therefore, under provisions of the Consumer Product Safety Act (section 30(d), Pub. L. 92-573, 86 Stat. 1207, as amended Pub. L. 94-284, 90 Stat. 503, Pub. L. 97-35, 95 Stat. 703; 15 U.S.C. 2079(d)), the Commission proposes to amend the Code of Federal Regulations, Title 16, Chapter II, Subchapter B, Part 1145, by adding a new § 1145.15, as follows:

##### \* \* \* \* \*

#### § 1145.15 Baby bassinets having legs that collapse; risks of death or injury.

(a) The Commission finds that it is in the public interest to regulate under the Consumer Product Safety Act, rather than under the Federal Hazardous Substances Act, risks of death or injury associated with baby bassinets having hinged legs that collapse when the braces on such legs give way, become loose, detach, or otherwise fail to perform their intended function of keeping the legs fully extended until such time as the user desires to fold the legs.

(b) Therefore, if the Commission finds regulation to be necessary, the risks of death or injury associated with baby bassinets having any of the failures described in § 1145.15(a) shall be regulated only under one or more provisions of the Consumer Product Safety Act.

Interested persons are invited to submit written comments by April 27, 1984. Comments may be accompanied by written data, views, and arguments, and should be addressed to the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207.

Received comments may be seen in the Office of the Secretary, Eighth Floor, 1111 18th Street, NW., Washington, D.C., between 8:30 a.m. and 5:00 p.m., Monday through Friday.

(Sec. 30(d), Pub. L. 92-573, 86 Stat. 1207, as amended Pub. L. 94-284, 90 Stat. 503, Pub. L. 97-35, 95 Stat. 703; 15 U.S.C. 2079(d))

Dated: March 15, 1984.

Sadye E. Dunn,  
Secretary, Consumer Product Safety  
Commission.

BILLING CODE 6355-01-M



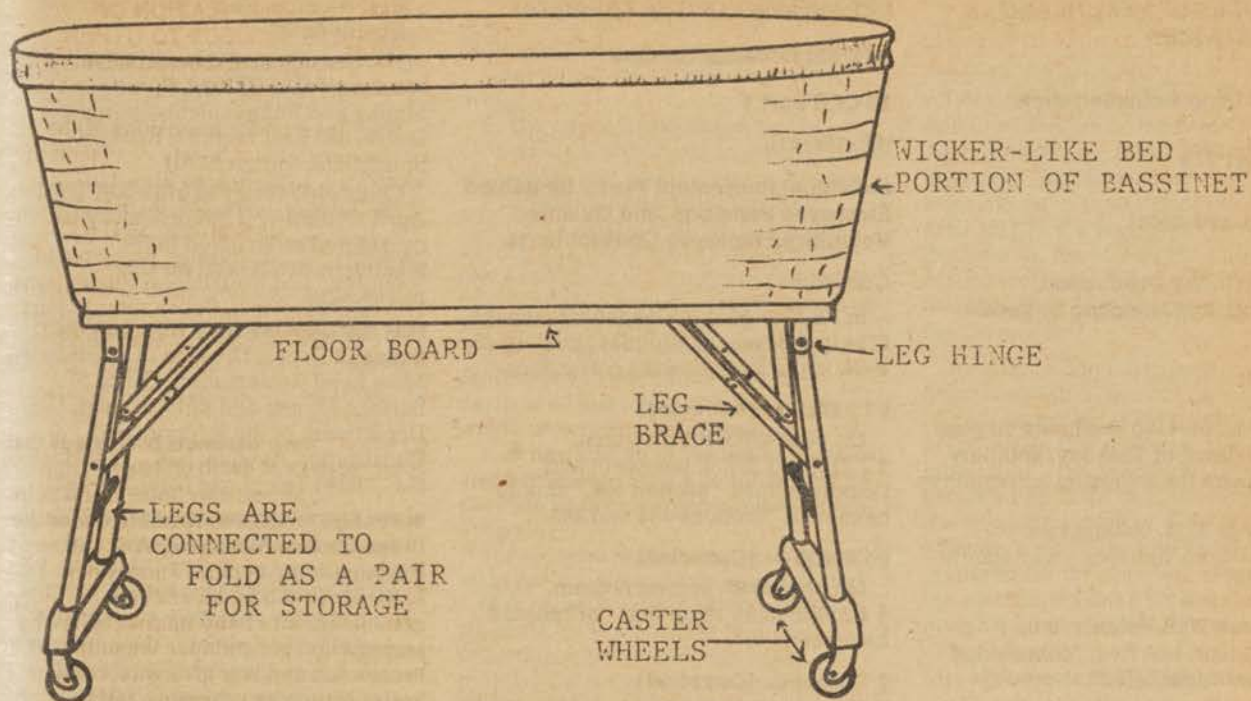


FIGURE 1 - GENERAL ARRANGEMENT OF A TYPICAL BASSINET

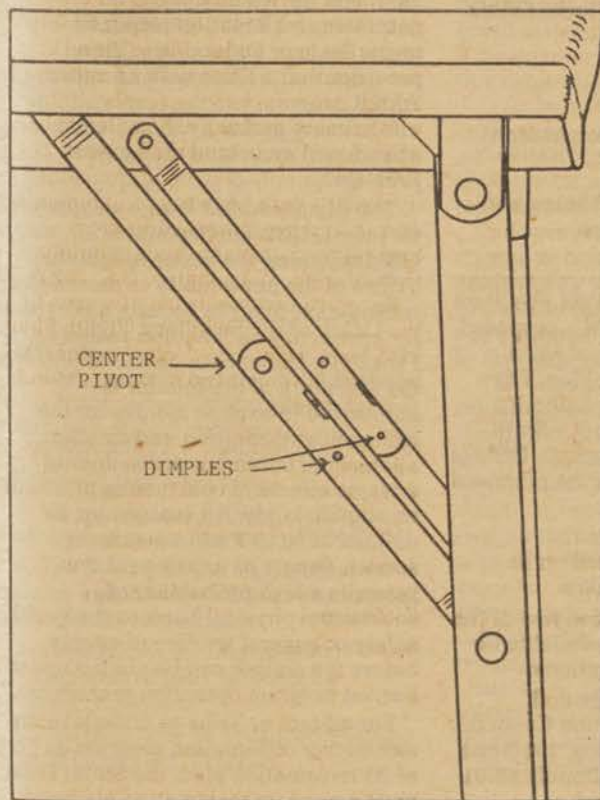


FIGURE 2A - LEG BRACES IN "LOCKED" POSITION

[FR Doc. 84-7459 Filed 3-27-84; 8:45 am]

BILLING CODE 6355-01-C

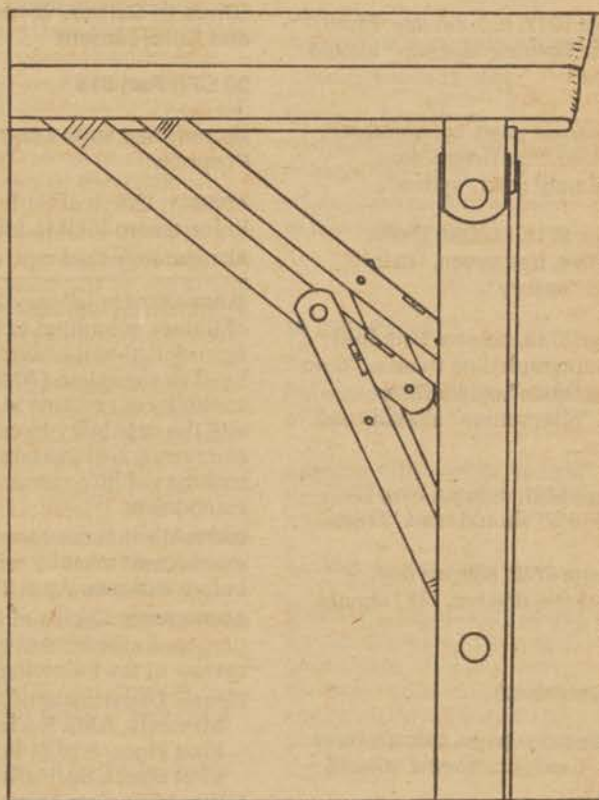


FIGURE 2B - LEG BRACES IN "UNLOCKED" POSITION



# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

### 21 CFR Part 179

[Docket No. 81N-0004]

#### Irradiation in the Production, Processing, and Handling of Food

##### Correction

In FR Doc. 84-4150 beginning on page 5714 in the issue of Tuesday, February 14, 1984, make the following corrections:

1. On page 5715, column two, paragraph three, line five, "wa" should read "was".

2. On page 5716, column two, paragraph four, line five, "concluded" should read "concluded".

3. On the same page, column three, first complete paragraph, line two, "coincluded" should read "concluded".

4. On the same page, column three, paragraph two, line twelve, "doese" should read "doses".

5. On page 5717, column one, fourth line from the bottom, "species" should read "spices".

6. On the same page, column three, paragraph two, line twenty-four, "species" should read "spices".

7. On page 5718, column three, paragraph two, line seven, "insure" should read "ensure".

8. On page 5719, column two, first complete paragraph, line twelve, "does" should read "dose", and in line seventeen, "alternative" should read "alternative".

9. On page 5721, column two, "7a", line two, "Fuits" should read "Fruits".

10. On page 5722, column one, paragraph three, line ten, "th" should read "to".

##### § 179.26 [Corrected]

11. On the same page, column three, § 179.26(c), line four, "foood" should read "food".

BILLING CODE 1505-01-M

# DEPARTMENT OF THE TREASURY

## Internal Revenue Service

### 26 CFR Part 1

[EE-148-81]

#### Individual Retirement Plans, Simplified Employee Pensions, and Qualified Voluntary Employee Contributions

##### Correction

In FR Doc. 84-1786 beginning on page 2794 in the issue of Monday, January 23, 1984, make the following corrections:

##### § 1.219(a)-1 [Corrected]

On page 2795, third column, § 1.219(a)-1 (b)(3), nineteenth and twentieth lines, "section 405." should have read "sections 404 and 405."

##### § 1.219(a)-3 [Corrected]

On page 2797, second column, § 1.219(a)-3(a), tenth line, "of" should have read "to".

##### § 1.219(a)-5 [Corrected]

On page 2800, first column, § 1.219(a)-5 (d)(2)(ii), second line, "of" should have read "or".

BILLING CODE 1505-01-M

# DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

### 30 CFR Part 913

#### Abandoned Mine Land Reclamation Program

**AGENCY:** Office of Surface Mining and Enforcement (OSM), Interior.

**ACTION:** Proposed rule.

**SUMMARY:** On January 19, 1984, the State of Illinois submitted to OSM a proposed amendment to its Abandoned Mine Land Reclamation (AMLR) Plan. The amendment pertains to the authority and the capability to conduct a State emergency reclamation program. OSM is seeking public comment on the proposed amendment.

**DATE:** Written comments on the amendment must be received on or before 5:00 p.m. April 27, 1984.

**ADDRESSES:** Copies of the full text of the proposed amendment are available for review at the following locations:

Illinois Department of Mines and Minerals, AML Reclamation Council, First Floor, Alzina Building, 100 North First Street, Springfield, Illinois 62701  
Office of Surface Mining and Enforcement, Springfield Office, 600

East Monroe, Room 20, Springfield, Illinois 62701

Written comments must be mailed or hand carried to: Office of Surface Mining and Enforcement, Springfield Office, 600 East Monroe, Room 20, Springfield, Illinois 62701

Comments received after 5:00 p.m., April 27, 1984 will not ordinarily be considered or included in the administrative record for this rulemaking.

#### FOR FURTHER INFORMATION CONTACT:

James D. Evans, Division of Abandoned Mine Land Reclamation, Office of Surface Mining and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, D.C. 20240 Telephone (202) 343-7921.

**SUPPLEMENTARY INFORMATION:** Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*, establishes an abandoned mine land reclamation program for the purposes of reclaiming and restoring lands and water resources adversely affected by past mining. This program is funded by a reclamation fee imposed upon the production of coal. Lands and water eligible for reclamation are those that were mined or affected by mining and abandoned or left in an inadequate reclamation status prior to August 3, 1977, and for which there is no continuing reclamation responsibility under State or Federal law. Title IV provides that a State with an approved AMLR program has the responsibility and primary authority to implement an abandoned mine land reclamation program.

The Illinois AMLR Plan was approved on June 1, 1982. On September 19, 1983, OSM informed the States and Indian Tribes of the opportunity to amend their reclamation plans to include a provision for emergency reclamation programs (47 FR 42729). Under Section 410 of SMCRA, the Secretary of the Interior is authorized to expend monies for the emergency restoration, reclamation, abatement, control or prevention of adverse effects of coal mining practices on eligible lands. An emergency, as defined in 30 CFR 870.5 means "a sudden danger or impairment that presents a high probability of substantial physical harm to the health, safety or general welfare of people before the danger can be abated under normal program operation procedures."

For a State or Tribe to undertake an emergency reclamation program as part of its reclamation plan, the State/Tribe must amend its reclamation plan and demonstrate that it has the statutory



authority to undertake emergencies, the technical capability to design and supervise the emergency work and the administrative and procurement procedures to quickly respond to emergencies either directly or through contractors.

On January 19, 1984, Illinois submitted a proposed amendment to the Plan. An approved State AMLR Plan can be amended under the provisions of 30 CFR 884.15. Under these provisions, if the amendment or revision changes the objectives, scope, or major policies followed by the State in the conduct of its reclamation program, the Director should follow the procedures set out in 30 CFR 884.14 in approving an amendment or revisions of a State reclamation plan. This notice of proposed rulemaking begins the process of review of the proposed amendment.

Representatives of OSM's Field Office Director will be available to meet Monday through Friday, excluding holidays, between 8:00 a.m. and 4:00 p.m. at the address indicated above under "ADDRESSES," at the request of members of the public to receive their advice and recommendations concerning the proposed Illinois amendment. Persons wishing to meet with representatives of the Field Director's Office during this time period may place such request with William E. Bye, telephone (217) 492-4483.

The Department intends to continue to discuss the State's amendment with representatives of the State throughout the review process. All contacts between Departmental personnel and representatives of the State will be conducted in accordance with OSM's guidelines on contacts with States published September 19, 1979, at 44 FR 54444.

The Illinois amendment can be approved if:

1. The Assistant Secretary finds that the public has been given adequate notice and opportunity to comment, and the record does not reflect major unresolved controversies.
2. Views of other Federal agencies have been solicited and considered.
3. The State had the legal authority, policies and administrative structure to carry out the amendment.
4. The amendment meets all requirements of the OSM, AMLR program provisions.
5. The State has an approved Surface Mining Regulatory Program.

6. It is determined that the amendment is in compliance with all applicable State and Federal laws and regulations.

Contents of the Illinois amendment are:

1. The agency designated by the Governor as authorized to receive grants and administer an emergency program.
2. A legal opinion from the State Attorney General that the designated agency has the authority under State law to conduct the emergency program in accordance with the requirements of Section 410 of Title IV of the Act.
3. A description of the policies and procedures to be followed by the designated agency in conducting the emergency reclamation program.
4. A description of the administrative and managerial structure to be used in conducting the emergency reclamation program.
5. A general description of emergency reclamation activities to be conducted.
6. A narrative description which supports State's position that the procedures, personnel, and other proposed aspects of its program give evidence of its abilities to promptly and effectively mitigate the full range of emergency conditions anticipated in the State.

The Office of Surface Mining has examined this proposed rulemaking under Section 1(b) of Executive order No. 12291 (February 17, 1981) and has determined that, based on available quantitative data, it does not constitute a major rule. The reasons underlying this determination are as follows:

1. Approval will not have an effect on costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; and
2. Approval will not have adverse effects on competition, employment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This proposed rulemaking has been examined pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., and the Office of Surface Mining has determined that the rule will not have significant economic effects on a substantial number of small entities. The reason for this determination is that approval will not have demographic effects, direct costs, information collection and recordkeeping requirements, indirect costs, nonquantifiable cost, competitive effects, enforcement costs or aggregate effects on small entities.

Further, the Office of Surface Mining

has determined that the Illinois amendment does not have a significant effect on the quality of the human environment because the decision relates only to the policies, procedures and organization of the State's Abandoned Mine Land Reclamation program. Therefore, under the Department of the Interior Manual DM 5162.3(a)(1), the Assistant Secretary's decision on the Illinois amendment is categorically excluded from the National Environmental Policy Act requirements.

As a result, no environmental assessment (EA) or environmental impact statement (EIS) has been prepared on this action. It should be noted that a programmatic EIS was prepared by OSM in conjunction with the implementation of Title IV. Moreover, an EA or an EIS has been prepared for the approval of grants for the abandoned mine land reclamation projects under 30 CFR Part 886.

#### List of Subjects in 30 CFR Part 913

Coal mining, Intergovernmental regulations, Surface mining, Underground mining.

Authority: Pub. L. 95-87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.).

Dated: March 22, 1984.

Dean Hunt,

Acting Director, Office of Surface Mining.

Dated: March 22, 1984.

Garrey E. Carruthers,

Assistant Secretary, Land and Minerals Management.

[FR Doc. 84-6328 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-05-M

#### 30 CFR Part 917

#### Permanent State Regulatory Program of Kentucky

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule.

SUMMARY: OSM is proposing to modify the deadline for Kentucky (1) to promulgate rules governing the training, examination and certification of blasters and (2) to develop and adopt a program to examine and certify all persons who are directly responsible for the use of



explosives in a surface coal mining operation. On January 20, 1984, Kentucky requested an extension of time for the development of a blaster certification program until March 4, 1985. The State later modified its extension request to a nine month extension until December 4, 1984. All States with regulatory programs approved under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) are required to develop and adopt a blaster certification program by March 4, 1984. Section 850.12(b) of OSM's regulations provides that the Director, OSM, may approve an extension of time for a State to develop and adopt a program upon a demonstration of good cause.

**DATE:** Comments must be received by April 27, 1984 at the address below, no later than 5:00 p.m.

**ADDRESSES:** Written comments should be mailed or hand delivered to W. H. Tipton, Director, Lexington Field Office, Office of Surface Mining, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504.

**FOR FURTHER INFORMATION CONTACT:** Mr. W. W. Tipton, Director, Lexington Field Office, Office of Surface Mining, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504; Telephone: (606) 233-7327.

**SUPPLEMENTARY INFORMATION:** On March 4, 1983, OSM issued final rules effective April 14, 1983, establishing the Federal standards for the training and certification of blasters at 30 CFR Chapter M (48 FR 9486). Section 850.12 of these regulations stipulates that the regulatory authority in each State with an approved program under SMCRA shall develop and adopt a program to examine and certify all persons who are directly responsible for the use of explosives in a surface coal mining operation within 12 months after approval of a State program or within 12 months after publication date of OSM's rule at 30 CFR Part 850, whichever is later. In the case of Kentucky's program, the applicable date is 12 months after publication date of OSM's rule, or March 4, 1984.

On January 20, 1984, Kentucky requested an extension of the March 4, 1984 deadline until March 4, 1985, to submit its blaster certification program. Subsequently, the State modified the request to extend the deadline to December 4, 1984 (KY Administrative Record No. 567). The State's letter of January 20, 1984, stated that the extension was needed for the State regulatory authority (Department for Surface Mining Reclamation and

Enforcement) to work out procedures with the Kentucky Department of Mines and Minerals which presently certifies Kentucky blasters. Also, the letter stated that most of the State's efforts in the past year have been directed toward permitting.

Therefore, OSM is seeking comment on the State's request for additional time to develop and adopt a blaster certification program. Section 850.12(b) of OSM's regulations provides that the Director, OSM, may approve an extension of time for a State to develop and adopt a program upon a demonstration of good cause.

## VI. Additional Determinations

1. *Compliance with the National Environmental Policy Act:* The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

2. *Executive Order No. 12291 and the Regulatory Flexibility Act:* On August 28, 1981, the Office of Management and Budget (OMB) granted OSM an exemption from Sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

3. *Paperwork Reduction Act:* This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

## List of Subjects in 30 CFR Part 917

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

**Authority:** Pub. L. 95-87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*).

**Dated:** March 23, 1984.

**Dean Hunt**

*Acting Director, Office of Surface Mining.*

[FR Doc. 84-8281 Filed 3-27-84; 8:45 am]

**BILLING CODE 4310-05-M**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 162

[OPP-250054; PH-FRL 2550-21]

### Pesticide Guidelines; Notification to the Secretary of Agriculture of Proposed Regulation Rescinding the Efficacy Data Waiver for Vertebrate Control Products

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule—related notice.

**SUMMARY:** Notice is given that the Administrator of EPA has forwarded to the Secretary of the U.S. Department of Agriculture a proposed regulation amending the condition regulations to rescind the efficacy data waiver for vertebrate control products.

**FOR FURTHER INFORMATION CONTACT:** Jean M. Frane, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, Room 1114, Arlington, Virginia 22202 (Tel. 703-557-0592).

**SUPPLEMENTARY INFORMATION:** Sec. 25(a)(2)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (Pub. L. 92-516, 86 Stat. 973; Pub. L. 94-140, 89 Stat. 753; 7 U.S.C. 136 *et seq.*) provides that the Administrator shall provide the Secretary of Agriculture with a copy of any proposed regulation at least 60 days prior to signing it for publication in the *Federal Register*. If the Secretary comments in writing to the Administrator regarding any such proposed regulation within 30 days after receiving it, the Administrator shall publish in the *Federal Register* (with the proposed regulation) the comments of the Secretary, if requested by the Secretary, and the response of the Administrator concerning the Secretary's comments. If the Secretary does not comment in writing to the Administrator within 30 days after receiving it, the Administrator may sign such regulation for publication in the *Federal Register* at any time after such 30-day period notwithstanding the foregoing 60-day time requirement. The time requirements may, however, be waived or modified to the extent agreed upon by the Administrator and the Secretary.

In accordance with Sec. 25(a)(3) of FIFRA, EPA has also furnished a copy of this proposed regulation to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition and Forestry of the Senate.

This regulation is designated as Part 162 of 40 CFR, and is titled "Rescission of



**Efficacy Data Waiver for Vertebrate Control Products."**

(Sec. 25 [Pub. L. 92-515, 86 Stat. 973; Pub. L. 94-140, 89 Stat. 753 (7 U.S.C. 136 et seq.)])

Dated: March 7, 1984.

**Edwin L. Johnson,***Director, Office of Pesticide Programs.*

[FR Doc. 84-7847 Filed 3-27-84; 8:45 am]

BILLING CODE 6560-50-M

**40 CFR Part 180****[PP 6E1831/P331; PH-FRL 2552-6]****Dinoseb; Proposed Tolerance****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** This document proposes that tolerances be established for residues of the pesticide dinoseb in or on the raw agricultural commodities pasture grasses and pasture grasses hay. The proposed regulation to establish maximum permissible levels for residues of the pesticide in or on the commodities was requested in a petition submitted by the Interregional Research Project No. 4 (IR-4).

**DATE:** Comments must be received on or before April 27, 1984.

**ADDRESS:** By mail, submit written comments identified by the document control number (PP 6E1831/P331) to: Information Service Section, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460. In person, bring comments to: Rm. 236, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A sanitized copy of any material containing Confidential Business Information must be provided by the submitter for inclusion in the public record. Information not marked "confidential" may be disclosed publicly by EPA without prior notice.

**FOR FURTHER INFORMATION CONTACT:** Donald Stubbs (703-557-1192).

**SUPPLEMENTARY INFORMATION:** The Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, has submitted pesticide petition 6E1831 to EPA on behalf of Dr. Robert H.

Kupleian, National Director, IR-4 Project, and the Agricultural Experiment Stations of New York, Vermont, and West Virginia.

This petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of a tolerance for residues of the pesticide dinoseb (2-sec-butyl-4,6-dinitrophenol) in or on the raw agricultural commodity forage grasses at 0.1 part per million (ppm). The petition was later amended to propose tolerances for 0.1 ppm dinoseb in or on the raw agricultural commodities pasture grasses and pasture grasses hay from application of phenol or its readily hydrolyzable salts, ammonium salt or sodium salt.

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerances are sought. The toxicological data considered in support of the proposed tolerance were a 6-month rat feeding study with a no-observed-effect level (NOEL) of 5.0 milligrams (mg)/kilogram (kg)/day (100 ppm); a 3-month dog feeding study with a NOEL of 7.5 mg/kg/day (300 ppm); a second 3-month dog feeding study with a NOEL of 2.5 mg/kg/day (100 ppm); and teratology studies with NOEL's greater than 15 mg/kg/day for teratogenic effects and 5.0 mg/kg/day for fetotoxic effects in rats and a NOEL of 32 mg/kg/day (highest level tested) for teratogenic effects in mice. Studies considered desirable but currently lacking include chronic feeding studies in at least two species, including one non-rodent species; oncogenic potential evaluation; a multigeneration reproduction study; and mutagenicity testing.

The provisional acceptable daily intake (PADI), based on 3-month dog feeding study (NOEL of 2.5 mg/kg/day) and using a 2000-fold safety factor, is calculated to be 0.0013 mg/kg of body weight (bw)/day. The maximum permitted intake (MPI) for a 60-kg human is calculated to be 0.075 mg/day. The theoretical maximum residue contribution (TMRC) from existing tolerances for a 1.5-kg daily diet is calculated to be 0.054 mg/day; the proposed tolerances will not contribute to the TMRC since there is no reasonable expectation of finite residues in meat, milk, poultry, or eggs resulting from the feed use of treated pasture grasses or pasture grasses hay.

The nature of the residues is adequately understood and an adequate analytical method, gas chromatography, is available for enforcement purposes.

Although there are presently no action pending against the continued registration of this chemical, concern was expressed about the presence of *N*-nitrosamine impurities in dinoseb formulations containing the alkanolamine salt. EPA has determined that dinitroaniline compounds and secondary or tertiary alkylamines or alkanolamines may pose more of an *N*-nitroso problem than other compounds and is requesting the submission of analytical chemistry data for pesticide products containing these classes of compounds. Since the petitioner has proposed the use of alternate formulations of the pesticide, dinoseb phenol and ammonium or sodium salts of dinoseb, rather than the alkanolamine salt, additional analytical chemistry data are not required at this time.

Based on the above information considered by the Agency, the tolerances established by amending 40 CFR 180.281 would protect the public health. It is proposed, therefore, that the tolerances be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this notice in the *Federal Register* that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 6E1831/P331]. All written comments filed in response to this petition will be available in the Program Management and Support Division, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-534, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).



## List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346a(e))).

Dated: March 14, 1984.

Douglas D. Campt,

Director, Registration Division, Office of Pesticide Programs.

## PART 180—[AMENDED]

Therefore, it is proposed that 40 CFR 180.281 be amended by designating the existing text as paragraph (a) and by adding new paragraph (b), to read as follows:

## § 180.281 Dinoseb; tolerances for residues.

(a) \* \* \*

(b) Tolerances are established for residues of the herbicide, insecticide, and fungicide dinoseb (2-sec-butyl-4,6-dinitrophenol) from application of its phenol or its readily hydrolyzable salts (ammonium salt or sodium salt) in or on the following raw agricultural commodities:

| Commodities                | Parts per million |
|----------------------------|-------------------|
| Grasses, pasture.....      | 0.1               |
| Grasses, pasture, hay..... | 0.1               |

[FR Doc. 84-8141 Filed 3-27-84; 8:45 am]

BILLING CODE 5560-50-M

## 40 CFR Part 180

[PP 3E2862/P330; PH-FRL 2552-8]

## Methyl 3-[(Dimethoxyphosphinyl)Oxy]Butanoate, Alpha and Beta Isomers; Proposed Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** This document proposes that a tolerance be established for residues of the insecticide methyl 3-[(dimethoxyphosphinyl)oxy]butanoate, alpha and beta isomers in or on the raw agricultural commodity watercress. The proposed regulation to establish a maximum permissible level for residues of the insecticide in or on the commodity was requested in a petition submitted by the Interregional Research Project No. 4 (IR-4).

**DATE:** Comments must be received on or before April 27, 1984.

**ADDRESSES:** By mail, submit written comments identified by the document control number (PP 3E2862/P330) to:

Information Services Section; Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

In person, bring comments to: Rm. 236, CM#2, 1921 Jefferson Davis Highway; Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A sanitized copy of any material containing Confidential Business Information must be provided by the submitter for inclusion in the public record. Information not marked "confidential" may be disclosed publicly by EPA without prior notice.

**FOR FURTHER INFORMATION CONTACT:** Donald Stubbs (703-557-1192).

**SUPPLEMENTARY INFORMATION:** The Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, has submitted pesticide petition 3E2862 to EPA on behalf of the IR-4 Technical Committee and the Agricultural Experiment Stations of Alabama, Florida, Pennsylvania, Tennessee, and West Virginia.

The petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of a tolerance for residues of the insecticide methyl 3-[(dimethoxyphosphinyl)oxy]butanoate, alpha and beta isomers in or on the raw agricultural commodity watercress at 1.5 per million (ppm). The petition was later amended to propose a tolerance at 2.0 ppm.

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought. The toxicological data considered in support of the proposed tolerance were a 2-year rat feeding study with a no-observed-effect level (NOEL) for cholinesterase inhibition (ChE) of 0.025 milligram (mg)/kilogram (kg)/day (0.5 ppm) and negative for oncogenic effects at all levels fed (0, 0.5, 1.5, 5 and 15 ppm); a 2-year dog feeding study with a ChE NOEL of 0.025 mg/kg/day (0.5 ppm); a 3-generation reproduction study in rats with no reproductive effects at 1.2 mg/kg (24 ppm); and rabbit teratology study, negative for teratogenic effects at 1.0 mg/kg. Studies considered desirable but lacking include an oncogenicity study in

a second species, a delay neurotoxicity study, and a general metabolism study.

The acceptable daily intake (ADI), based on the 2-year rat feeding study (NOEL of 0.025 mg/kg/day) and using a 10-fold safety factor, is calculated to be 0.0025 mg/kg of body weight (bw)/day. The maximum permitted intake (MPI) for a 60-kg human is calculated to be 0.15 mg/day. The theoretical maximum residue contribution (TMRC) from existing tolerances for a 1.5-kg daily diet is calculated to be 0.1765 mg/day; the current action will increase the TMRC by 0.0009 mg/day (0.5 percent) and will utilize an additional 0.6 percent of the ADI. The tolerance that will be established by this proposed rule is considered to pose a negligible incremental risk since dietary exposure will not be significantly increased.

The nature of the residues is adequately understood and an adequate analytical method, gas chromatography, is available for enforcement purposes. There should be no problem with secondary residues in meat, milk, poultry, or eggs since watercress is not considered a livestock feed item. There are currently no actions pending against the continued registration of this chemical.

Based on the above information considered by the Agency, the tolerance established by amending 40 CFR 180.157 would protect the public health. It is proposed, therefore, that the tolerance be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this notice in the Federal Register that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 3E2862/P330]. All written comments filed in response to this petition will be available in the Program Management and Support Division, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-534, 94 Stat. 1164, 5 U.S.C. 601-612), the



Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

Dated: March 14, 1984.

Douglas D. Campit,

Director, Registration Division, Office of Pesticide Programs.

#### PART 180—[AMENDED]

Therefore, it is proposed that 40 CFR 180.157 be amended by adding and alphabetically inserting the raw agricultural commodity watercress, to read as follows:

§ 180.157 Methyl 3-[(dimethoxyphosphoryl)oxy]butanoate, alpha and beta isomers; tolerances for residues.

| Commodities | Parts per million |
|-------------|-------------------|
| Watercress  | 2.0               |

(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346a(e)))

FR Doc. 84-8140 Filed 3-27-84; 8:45 am

BILLING CODE 5560-50-M

#### 40 CFR Part 180

([00000/P333; PH-FRL 2554-2])

#### Potassium Carbonate and Sodium Sesquicarbonate Proposed Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** This document proposes to add potassium carbonate and sodium sesquicarbonate to the pesticide chemicals listed as generally recognized as safe (GRAS) when used as plant desiccants for the purposes of section 408(a) of the Federal Food, Drug, and Cosmetic Act. This proposed amendment was requested by EPA.

**DATE:** Written comments must be received on or before April 27, 1984.

Information submitted as a comment concerning this notice may be claimed confidential by making any part or all of

that information as "Confidential Business Information." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A sanitized copy of any material containing Confidential Business Information must be provided by the submitter for inclusion in the public record. Information not marked "confidential" may be disclosed publicly by EPA without prior notice.

**ADDRESS:** By mail, submit written comments identified by the document control number ([00000/P333]) to: Information Services Section, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

**FOR FURTHER INFORMATION CONTACT:** Henry M. Jacoby (703-557-1900).

**SUPPLEMENTARY INFORMATION:** This proposed rule is sought in conjunction with the anticipated use of a mixture of potassium carbonate, sodium sesquicarbonate, and sodium carbonate for the purpose of accelerating the field drying (desiccation) of freshly cut hay. Potassium carbonate ( $K_2CO_3$ ) is already exempted from the requirement of a tolerance under 40 CFR 180.1001(d) when used in accordance with good agricultural practice as an inert (or occasionally active) ingredient (specifically a buffering agent) in pesticide formulations applied to growing crops. Potassium carbonate is routinely used in foods such as beverages, soft candy, baked goods, and frostings at levels ranging from 0.01 percent (100 parts per million (ppm)) to 1.13 percent (11,300 ppm). Sodium sesquicarbonate ( $Na_2CO_3 \cdot NaHCO_3 \cdot 2H_2O$ ) is a molecule containing sodium bicarbonate, sodium carbonate, and water and is naturally occurring or can be produced synthetically.

In 1975, the Select Committee on GRAS Substances (SCOGS) determined that there was no evidence in the available information on carbonates and bicarbonates, including the two subject chemicals, that demonstrated or suggested reasonable grounds to suspect a hazard to the public used (on food) at levels that are current or that might reasonably be expected in the future. Both chemicals are GRAS under 21 CFR Part 182 as multiple-purpose GRAS food substances when used in accordance with good manufacturing practice. As part of a chemical family routinely used in foods, the various carbonates function as nutrient and/or dietary supplements, neutralizing agents, or leavening agents.

Based on the report of the SCOGS committee concerning potassium

carbonate and sodium sesquicarbonate, the Agency has no reason to believe that these two chemicals are not GRAS substances.

Based on the long history of safe use of these chemicals in foods and on their GRAS status under 21 CFR 182.1619 (potassium carbonate) and 21 CFR 182.1792 (sodium sesquicarbonate), the Agency concludes that neither material should be considered as poisonous or deleterious, and that they are recognized by experts as safe pursuant to 40 CFR 180.2. The opinions of such experts on these chemicals are published in the NTIS Monograph #PB-254 535 (Evaluation of Health Aspects of Carbonates and Bicarbonates as Food Ingredients), FASEB, 1975.

The subject materials are considered useful for the purpose for which this regulation is being sought, and the Agency has concluded that it will protect the public health. It is proposed, therefore, that the regulation be established as set forth below.

Any person who has registered or submitted an application for the registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this notice in the *Federal Register* that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [00000/P333]. All written comments filed in response to this proposed regulation will be available for public review in the office of Henry M. Jacoby at the above address from 8 a.m. to 4 p.m., Monday through Friday, except for legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-534, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).



(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346a(e))

**List of Subjects in 40 CFR Part 180**

Administrative practices and procedures, Agricultural commodities, Pesticides and pests.

Dated: March 16, 1984.

Douglas D. Camp,

Director, Registration Division, Office of Pesticide Programs.

**PART 180—[AMENDED]**

Therefore, it is proposed that 40 CFR 180.2(a) be revised, to read as follows:

**§ 180.2 Pesticide chemical considered safe.**

(a) As a general rule, pesticide chemicals other than benzaldehyde (when used as a bee repellent in the harvesting of honey), ferrous sulfate, lime, lime-sulfur, potassium carbonate, potassium polysulfide, potassium sorbate, sodium carbonate, sodium chloride, sodium hypochlorite, sodium polysulfide, sodium sesquicarbonate, sorbic acid, sulfur, and, when used as postharvest fungicides, citric acid, fumaric acid, oil of lemons, oil of orange, sodium benzoate, and sodium propionate are not for the purposes of section 408(a) of the Act generally recognized as safe.

[FR Doc. 84-8279 Filed 3-27-84; 8:45 am]

BILLING CODE 6520-50-M

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Ch. I**

[CC Docket No. 79-252; FCC 84-82]

**Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations**

**AGENCY:** Federal Communications Commission.

**ACTION:** Fourth further notice of proposed rulemaking.

**SUMMARY:** In Docket No. 79-252 the Commission has determined that it would forbear from regulating the rates and facilities of all resale common carriers and the specialized common carriers. In this Notice, the Commission seeks comments on its proposal to require those carriers to cancel any tariffs they presently have on file with the Commission and to file no further tariffs. This action is proposed to reduce regulatory burden.

**DATES:** Comments must be received by April 30, 1984 and replies by May 15, 1984.

**ADDRESS:** Federal Communications Commission, Washington, D.C. 20554.

**FOR FURTHER INFORMATION CONTACT:** Beverly Baker, Common Carrier Bureau, (202) 632-6917.

**Fourth Further Notice of Proposed Rulemaking**

In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor; CC Docket No. 79-252.

Adopted: March 15, 1984.

Released: March 22, 1984.

By the Commission.

1. In the Competitive Carrier Rulemaking,<sup>1</sup> the Commission has adjusted its common carrier tariff and facilities regulatory requirements in light of the development of competition in interexchange telecommunications services. In the *First Report and Order* in this proceeding, the Commission streamlined the regulatory requirements applied to the specialized common carrier and the terrestrial resellers.<sup>2</sup> In the *Second Report and Order*, the Commission decided to forbear from regulating tariffs and facilities of terrestrial resellers.<sup>3</sup> In the *Fourth Report and Order* the Commission found, after three years' experience with streamlined regulation, that for some carriers there was no evidence that even this minimal regulation regarding tariffs and facilities was necessary or useful to protect the public against unreasonable pricing practices or imprudent investments.<sup>4</sup> Accordingly, the

<sup>1</sup>Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Common Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), *recon.* FCC 83-69, released March 21, 1983; Second Further Notice of Proposed Rulemaking, FCC 82-187, released April 21, 1982; Third Further Notice of Proposed Rulemaking, Mimeo CC 33457, released June 14, 1983, 48 FR 28282 (June 21, 1983); Third Report and Order, Mimeo 012, released October 6, 1983; and Fourth Report and Order, FCC 83-481, released November 2, 1983, petitions for reconsideration filed December 19, 1983.

<sup>2</sup>The specialized common carriers are providers of terrestrial voice and data services. They include such carriers as: MCI Telecommunications Corporation, GTE-SPRINT, United States Transmission Systems, Inc., Goeken Communications, Inc., and Western Telecommunications. Resellers are carriers that lease all of the circuits they use to provide service to their customers from underlying carriers.

<sup>3</sup>In response to the *Second Report and Order*, fifteen carriers cancelled the tariffs they had on file with the Commission.

<sup>4</sup>Carriers subject to streamlined regulatory requirements could file tariffs on 14 days' notice, the tariffs would be presumed to be lawful, and extensive cost support data would not be required. In addition, those carriers could, without advance authorization from the Commission, expand their facilities anywhere within the continental United

Commission determined that it would forbear from requiring tariffs or facilities applications from the specialized common carriers and all resellers, including the domestic satellite resellers, resellers owned by or affiliated with exchange telephone companies, and domestic record carrier resellers not covered by the interconnection requirements of the Record Carrier Competition Act.<sup>5</sup> On the basis of this extensive record and for the reasons discussed below, we are here proposing that all tariffs which carriers treated by forbearance have on file with the Commission be cancelled and that no further tariffs be accepted for filing from those carriers.

2. Maintaining these documents at the Commission's offices entails certain costs such as the cost of storage space and the cost of staff time necessary to review the form of filed tariffs, to organize the materials for public inspection, to review special permission requests and to respond to questions from members of the public concerning the tariffs. More importantly, the presence of effective tariffs on Commission premises might mislead the public, state regulators and others to the belief that the FCC had, in fact, substantively evaluated them and found no objection. As the Commission stated in the *Second Report and Order*, the unnecessary application of traditional regulatory tools inhibits development of competition and results in unnecessary burdens inevitably borne by the consuming public. The elimination of these requirements would encourage the offering of services in greater diversity, more rapidly and at lower prices. Successful market performance, the Commission stated, should depend on carrier performance and not on an unintended Commission "stamp of approval" 91 FCC 2d at 72-73. The continued presence of tariffs at the Commission, by giving the appearance of such a "stamp of approval," could well lull customers into believing that their own comparisons and evaluations of various service offerings were unnecessary and, thus, would inhibit the development of a vigorously competitive market. Since the rate levels and practices in these tariffs will no longer be analyzed by the Commission staff, it would seem to be unnecessary to continue to incur these costs and risks. Of course, no action of the Commission

States and discontinue service on 31 days' notice to the Commission.

<sup>5</sup>Pub. L. No. 97-130, 95 Stat. 1687 (1981). The Commission has not altered regulatory requirements applicable to international services. See *Fourth Report and Order*, para. 4 n. 5 and para. 37.



would prohibit any carriers from keeping these materials or any other materials regarding their service offerings, pricing policies and terms of service on file in a tariff format and available for public inspection at their own offices.

3. We are, therefore, proposing that all carriers subject to forbearance be required by a date certain to cancel their tariffs on file with this Commission by supplement effective upon five days' notice. We invite comment from interested parties on this proposal.

4. **Regulatory Flexibility Analysis.** By this Notice of Proposed Rulemaking, the Commission seeks to determine whether it is in the public interest to discontinue maintaining at the Commission tariffs of carriers over which the Commission is no longer exercising its regulatory jurisdiction as to rates and facilities. If adopted, this proposal would result in the cancellation of the tariffs of approximately 120 specialized common carriers and resellers of common carrier services. The proposal would eliminate all federal tariff filings by these companies. The proposal would not establish any additional federal rules requiring recordkeeping, reporting or other compliance measure. There are no other federal rules which overlap, duplicate or conflict with this proposal. There are no significant alternatives to this proposal which would accomplish the Commission's objective.

5. This proceeding is instituted pursuant to the provisions contained in 47 U.S.C. 154(i) and 403.

6. Comments must be filed by April 30, 1984 and replies by May 15, 1984.

7. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed

written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must also state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally § 1.1231 of the Commission's Rules, 47 CFR 1.1231. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

8. In accordance with the provision of 47 CFR 1.1419(b), an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D.C. 1919 M Street, NW.

9. It is hereby ordered that the Secretary shall cause this fourth further Notices of Proposed Rulemaking to be published in the **Federal Register**.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 84-8317 Filed 3-27-84; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 84-278; RM-4551; 4728]

#### FM Broadcast Station in Appalachicola, Florida; Proposed Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This action proposes to assign FM Channel 265A and 288A to Appalachicola, Florida, in response to separate petitions filed by Richard L. Plessinger and B.F.J. Timm. The proposed assignments could provide a first and second FM service to that community.

**DATES:** Comments must be filed on or before May 14, 1984, and reply comments on or before May 29, 1984.

**ADDRESS:** Federal Communications Commission, Washington, D.C. 20554.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

#### List of Subject in 47 CFR Part 73

Radio broadcasting.

#### Notice of Proposed Rule Making

In the Matter of amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations (Appalachicola, Florida) MM Docket No. 84-278, RM-4551, RM-4728.

Adopted: March 12, 1984.

Released: March 21, 1984.

By the Chief, Policy and Rules Division.

1. The Commission has before it for consideration two separate petitions for rule making requesting the assignment of Class A channels to Appalachicola, Florida. The first petition filed by Richard L. Plessinger ("Plessinger") (RM-4551), seeks the assignment of FM channel 265A, while the second petitioner, B.F.J. Timm ("Timm") (RM-4728), requests the allocation of FM Channel 288A. Each petitioner stated their intention to apply for the channel, if assigned.

2. Both channels can be assigned in compliance with the minimum distance separation requirements. Plessinger specified a slightly different set of coordinates (6.2 miles east) than those used by the Commission for the assignment. Petitioner should be aware that the use of a site too far removed from the community may present a problem in providing city grade coverage to community.

3. In view of the fact that the proposed assignments could provide a first and second local FM service to Appalachicola, Florida, the Commission believes it is appropriate to propose amending the FM Table of Assignments, § 73.202(b) of the Commission's Rules, with respect to the following community:



| City                   | Channel No. |                 |
|------------------------|-------------|-----------------|
|                        | Present     | Proposed        |
| Appalachicola, Florida |             | 256A, and 288A. |

4. The Commission's authority to institute rule making proceedings showing required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

5. Interested parties may file comments on or before May 14, 1984, and reply comments on or before May 29, 1984, and are advised to read the Appendix for the proper procedures. A copy of such comments should be served on the petitioners as follows: Richard L. Plessinger, 1591 Boyle Road, Hamilton, Ohio 45013

Herbert M. Schulkind, Esquire, Fly, Shuebruk, Gaguine, Boros, Schulkind & Braun, 1211 Connecticut Avenue, NW., Suite 401, Washington, D.C. 20036 (Counsel for B.F.J. Timm).

6. The Commission had determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Assignments, § 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend §§ 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is not longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

Roderick K. Porter,

Chief, Policy and Rules Division, Mass Media Bureau.

## Appendix

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended, and §§ 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Assignments, § 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed assignment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is assigned, and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See § 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to assign a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in § 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice*

of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See § 1.420 (a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of § 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, NW., Washington, D.C.

[FR Doc. 84-8323 Filed 3-27-84; 8:45 am]

BILLING CODE 6712-01-M

## 47 CFR Part 73

[MM Docket No. 83-97; RM-4235; RM-4428]

### FM Broadcast Stations Pullman, Washington, and Moscow, Idaho; Proposed Changes Made in Table of Assignments

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This action proposes to substitute Channel 291 for Channel 280A at Moscow, Idaho, and to modify the license for Station KRPL-FM accordingly, in response to a counterproposal filed by the licensee, KRPL, Inc.

DATES: Comments must be filed on or before May 14, 1984, and reply comments on or before May 29, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

### List of Subjects in 47 CFR Part 73

Radio broadcasting.

### Further Notice of Proposed Rule Making

In the Matter of Amendment of § 73.202(b), Table of Assignments, FM Broadcast Stations



(Pullman, Washington, and Moscow, Idaho,<sup>1</sup> MM Docket No. 83-97, RM-4235, RM-4428.

Adopted: March 14, 1984.

Released: March 21, 1984.

By the Chief, Policy and Rules Division.

1. In response to the *Notice of Proposed Rule Making*, 48 FR 8503, published March 1, 1983, proposing the assignment of Channel 258 to Pullman, Washington, KRPL, Inc.,<sup>2</sup> filed a counterproposal urging the Commission to assign Channel 258 to Moscow, Idaho, instead, as a substitute for Channel 280A. The channel cannot be assigned to both communities because of mileage separation requirements. We undertook to identify any other channels available for assignment to either city and have determined that Channel 291 can be assigned to Moscow. A site restriction of 3.3 miles south of the city is needed to avoid short spacing to Canadian Channel 291B, Creston, British Columbia, and to Station KEZE(FM) (construction permit) for Channel 289 at Spokane, Washington. Generally, we would not propose a substitute channel which cannot be used at the same site as the licensee's existing station. However, petitioner had requested Channel 258 as a substitute even though that channel involved a move of 1.3 miles northwest from the present location.

2. In conformity with Commission precedent, it is necessary to issue a *Further Notice of Proposed Rule Making* to allow interested parties an opportunity to express their interest in Channel 291. The earlier *Notice* did not provide this opportunity because it only pertained to Pullman. In a separate action, the Commission has assigned Channel 258 to Pullman, Washington.

3. KRPL, Inc. in its counterproposal alleges that its station's coverage area is inadequate. It claims that Moscow is characterized by hills, valleys and small communities which cannot be provided an adequate signal from a Class A facility. It further states that in order to remain competitive in the Pullman-Moscow market, it will be necessary to increase its operating power by going from a Class A to a Class C channel.

4. Canadian concurrence has been obtained in the assignment of Channel 291 to Moscow, Idaho.

5. In accordance with our established policy, we shall propose to modify the license of Station KRPL-FM to specify operation on Channel 291. However, if another party should indicate an interest in the Class C assignment, the modification may not be implemented.

Instead, the channel would be open to competing applications. See *Cheyenne, Wyoming*, 62 F.C.C. 2d 63 (1976) and *Modification of FM Station Licenses*, 43 FR 55585, published December 14, 1983.

6. In view of the need for a wide coverage area FM station, the Commission proposes to amend the FM Table of Assignments, § 73.202(b) of the Rules, as it pertains to Moscow, Idaho, as follows:

| City               | Channel No. |          |
|--------------------|-------------|----------|
|                    | Present     | Proposed |
| Moscow, Idaho..... | 280A        | 291      |

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

8. Interested parties may file comments on or before May 14, 1984, and reply comments on or before May 29, 1984, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows: Haley, Bader & Potts, c/o Michael H. Bader, 2000 M Street, NW., Washington, D.C. 20036.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Assignments, § 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend §§ 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, published February 9, 1981.

10. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte*

presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

Roderick K. Porter,

Chief, Policy and Rules Division, Mass Media Bureau.

## Appendix

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303 (g) and (r), and 307(b) of the Communications Act of 1934, and amended, and §§ 0.61, 0.204(b) and 0.263 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Assignments, § 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of the Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed assignment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is assigned, and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See § 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to assign a

<sup>1</sup> This community has been added to the caption.

<sup>2</sup> KRPL, Inc. is the licensee of Station KRPL-FM, Moscow, Idaho.



different channel than was requested for any of the communities involved.

**4. Comments and Reply Comments; Service.** Pursuant to applicable procedures set out in §§ 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the persons(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See § 1.420 (a), (b) and (c) of the Commission's Rules.)

**5. Number of Copies.** In accordance with the provisions of § 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

**6. Public Inspection of Filings.** All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street NW., Washington, D.C.

[FR Doc. 84-8318 Filed 3-27-84; 8:45 am]

BILLING CODE 6712-01-M

## INTERSTATE COMMERCE COMMISSION

### 49 CFR Part 1033

[Service Order No. 1473 (Sub-No. 1)]

**Rail Carriers; Various Railroads Authorized To Use Tracks and/or Facilities of the Chicago, Rock Island & Pacific Railroad Co., Debtor (William M. Gibbons, Trustee); Decision**

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Discontinuance of proceeding.

**SUMMARY:** The Commission requested information and comments on whether interim carriers providing service over lines of the Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) under section 122 of the Rock Island Railroad Transition and Employee Assistance Act and which are utilizing the Rock Island formula, should be permitted to annualize their expenses, and on

whether changes in the reporting time limits are appropriate. This decision describes the results of our review of the information filed pursuant to that request.

**DATES:** This decision shall be effective on March 27, 1984.

**FOR FURTHER INFORMATION CONTACT:** Melvin F. Clemens, Jr., (202) 275-7840 or 275-1559.

**SUPPLEMENTARY INFORMATION:** By notice served September 15, 1982 [47 FR 41144, September 17, 1982], the Commission indicated its intent to reconsider its previous decision in this matter [47 FR 4261, January 29, 1982] as to whether interim operators, which are providing service over lines of the Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) (Rock Island), under Section 122 of the Rock Island Transition and Employee Assistance Act (RITEA) (Pub. L. 96-254) and which are utilizing the Rock Island Formula (Formula) for compensating the Trustee, should have the present reporting time limit changed to permit additional reporting time for their operations, and should be permitted to annualize expenses associated with those operations when determining net revenues.

The initial complaints from interim operators utilizing the Formula indicated that it was virtually impossible to report on revenues derived from interim operations within fifteen days of the close of a month, particularly where those operations were integrated into their system operations. The comments received on the Commission's notice essentially affirmed the railroads' previous assertions that the reporting time is too short, and that there is need for greater equity in applying the revenue portion of the Formula. The comments were received from the Cadillac and Lake City Railway Company (CLK), Chessie System Railroads (Baltimore and Ohio Railroad Company (BO)), Norfolk and Western Railway Company (NW), and the North Central Oklahoma, Inc. (NCOK). No comments were received from the Trustee of the Chicago, Rock Island and Pacific Railroad Company, or any other party opposing the proposed changes.

The NW, the principal operator utilizing the formula, has instituted a specialized computer reporting system for its operations over Rock Island lines. This system compiles net revenue data for three month intervals and determines the proper net revenue payment for that interval within 120 days of the close of each quarterly period. NW considers this to be the minimum time required for it to report

on the net revenue portion of its operations, even though its reporting of switching and loaded cars handled can be accomplished sooner.

NW supports the annualization of revenues and expenses, and recommends that this reporting be allowed without the requirement of an individualized showing of need. NW believes that the elimination of such a showing would further reduce the Commission's regulatory burden without unduly prejudicing the Trustee.

Since submitting their comments, the carriers utilizing the Rock Island Formula advised the Commission of their negotiations with the Trustee, and subsequent lease and/or purchase agreements for the Rock Island property covered by the service order. With the exception of NW, all involved carriers have consummated lease agreements with the Trustee which contain provisions for compensating the Estate for the use of Rock Island property. Further, on September 1, 1983, the NW filed an application under Section 17(b) of the Milwaukee Railroad Restructuring Act (MRRA), 45 U.S.C. 915(b), as modified by section 111 of the RITEA, 45 U.S.C. 1009, and 49 CFR Part 1180, Supart B, to purchase the line in the Lake Calumet switching district covered by Service Order No. 1473. The application was filed in response to Order No. 593 entered on August 17, 1983, by the United States District Court for the Northern District of Illinois (Judge Frank T. McGarr) which has jurisdiction over the bankruptcy estate of the Rock Island.

On October 12, 1983, the Commission issued its decision in Finance Docket No. 30281 recommending that the Court authorize NW's acquisition of the Rock Island line, and on November 2, 1983, NW and Rock Island closed on the purchase.

### Conclusion

Since the carriers are no longer utilizing the Rock Island Formula, the question of annualizing expenses in the proceeding is moot. Under these circumstances, no further Commission action is required and this proceeding should be discontinued.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

### It is Ordered:

1. This proceeding is discontinued.
2. This decision is effective on its date of service.

A copy of this order shall be served on the Association of American Railroads and each of the respondents.



Notice shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, DC, and by publication in the **Federal Register**.

Decided: March 21, 1984.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Commissioner Gradison did not participate.

**James H. Bayne,**

*Acting Secretary.*

[FR Doc. 84-8270 Filed 3-27-84; 8:45 am]

BILLING CODE 7035-01-M



# Notices

Federal Register

Vol. 49, No. 61

Wednesday, March 28, 1984

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### Section 22 Import Fees; Determination of Quarterly Import Fees on Sugar

**AGENCY:** Office of the Secretary, USDA.

**ACTION:** Notice.

**SUMMARY:** Headnote 4(c) of Part 3 of the Appendix to the Tariff Schedules of the United States (TSUS) requires the Secretary of Agriculture to determine on a quarterly basis the amount of the fees which shall be imposed on imports of raw and refined sugar (TSUS items 956.05, 956.15, 957.15) under the authority of section 22 of the Agricultural Adjustment Act of 1933, as amended. This notice announces those determinations for the second calendar quarter of 1984.

**EFFECTIVE DATE:** April 1, 1984.

**FOR FURTHER INFORMATION CONTACT:** Robert G. Harper, Foreign Agricultural Service, Department of Agriculture, Washington, D.C. 20250 (202-382-9061).

**SUPPLEMENTARY INFORMATION:** By Presidential Proclamation No. 5164, dated March 20, 1984, Headnote 4 of Part 3 of the Appendix to the TSUS was amended to provide that quarterly adjusted fees shall be imposed on imports of raw and refined sugar (TSUS items 956.05, 956.15, and 957.15). Paragraph (c)(ii) of Headnote 4 provides that the quarterly adjusted fee for item 956.15 shall be the amount by which the average of the adjusted daily spot (domestic) price quotations for raw sugar for the 20 consecutive market days immediately preceding the 20th day of the month preceding the calendar quarter during which the fee shall be applicable (as reported by the New York Coffee, Sugar, and Cocoa Exchange), expressed in United States cents per pound, in bulk, is less than the market stabilization price. The market stabilization price for the second

calendar quarter of 1984 is 21.17 cents per pound. However, whenever the average of the daily spot price quotations for 10 consecutive market days within any calendar quarter: (1) Exceeds the market stabilization price by more than one cent, the fee then in effect shall be decreased by one cent; or (2) is less than the market stabilization price by more than one cent, the fee then in effect shall be increased by one cent. Paragraph (c)(i) of Headnote 4 further provides that the quarterly adjusted fee for items 956.05 and 957.15 shall be the amount of the fee for item 956.15 plus one cent.

The average of the adjusted daily spot (domestic) price quotations for raw sugar for the applicable period prior to the second calendar quarter of 1984 has been calculated to be 22.0170 cents per pound. This results in a fee of 0.00 cent per pound for item 956.15, since the adjusted average spot price is greater than 21.17 cents. Accordingly, the fee for items 956.05 and 957.15 for the second calendar quarter of 1984 is 1.00 cent per pound.

Headnote 4(c) requires the Secretary of Agriculture to determine and announce the amount of the quarterly fees no later than the 25th day of the month preceding the calendar quarter during which the fees shall be applicable. The Secretary is also required to certify the amount of such fees to the Commissioner of Customs and file notice thereof with the Federal Register prior to the beginning of the calendar quarter during which the fees shall be applicable. This notice is therefore being issued in order to comply with the requirements of Headnote 4(c).

Notice is hereby given that, in accordance with the requirements of Headnote 4(c) of Part 3 of the Appendix to the Tariff Schedules of the United States, it is determined that the quarterly adjusted fees for raw and refined sugar (TSUS items 956.05, 956.15, and 957.15) for the second calendar quarter of 1984 shall be as follows:

| Item        | Fee (cents per pound) |
|-------------|-----------------------|
| 956.05..... | 1.00                  |
| 956.15..... | 0.00                  |
| 957.15..... | 1.00                  |

The amounts of such fees have been certified to the Commissioner of Customs in accordance with paragraph (c)(v) of Headnote 4.

Signed at Washington, D.C., on March 23, 1984.

Richard E. Lyng,

Acting Secretary of Agriculture.

[FR Doc. 84-8321 Filed 3-23-84; 3:51 pm]

BILLING CODE 3410-10-M

## Agricultural Stabilization and Conservation Service

### Flue-Cured Tobacco; 1984-85 National Marketing Quota for Flue-Cured Tobacco

**AGENCY:** Agricultural Stabilization and Conservation Service, USDA.

**ACTION:** Notice of Determination of 1984-85 Marketing Quota.

**SUMMARY:** The purpose of this notice is to affirm determinations which have been made with respect to the 1984 crop of flue-cured tobacco in accordance with the Agricultural Adjustment Act of 1938, as amended. As announced on December 15, 1983, the 1984 marketing quota for flue-cured tobacco is 805 million pounds, approximately 11½ percent below last year's quota. In addition, the national acreage allotment for the 1984 crop of flue-cured tobacco is 404,725.99 acres.

**EFFECTIVE DATE:** December 15, 1983.

**FOR FURTHER INFORMATION CONTACT:** Robert L. Traczy, Agricultural Economist Analysis Division, ASCS, Room 3736-South Building, P.O. Box 2415, Washington, D.C. 20013, (202) 447-5187. The Final Regulatory Impact Analysis describing the options considered in developing this notice and the impact of implementing each option is available on request from Robert L. Traczy.

**SUPPLEMENTARY INFORMATION:** This notice has been reviewed under USDA procedures established in accordance with Executive Order 12291 and Departmental Regulation No. 1512-1 and has been classified "not major." This action has been classified "not major" since implementation of these determinations will not result in: (1) an annual effect on the economy of \$100 million or more, (2) a major increase in costs or prices for consumers, individual



industries, Federal, State or local governments, or geographical region, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The title and number of the Federal Assistance Program to which this notice applies are: Title—Commodity Loan and Purchases; Number 10.051, as set forth in the Catalog of Federal Domestic Assistance.

It has been determined that the Regulatory Flexibility Act is not applicable to this notice since the Agricultural Stabilization and Conservation Service (ASCS) is not required by 5 U.S.C. 553 or any provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this notice.

This notice of determination is issued in accordance with the Agricultural Adjustment Act of 1938, as amended (hereinafter referred to as the "1938 Act") in order to announce for the 1984 marketing year for flue-cured tobacco the following:

1. The amount of the reserve supply level;
2. The amount of the total supply;
3. The amount of the national marketing quota;
4. The national average yield goal;
5. The national acreage allotment;
6. The national acreage reserve;
- A. For establishing acreage allotments for new farms, and
- B. For making corrections and adjusting inequities in old farms;
7. The national acreage factor; and
8. The national yield factor.

Marketing quotas on an acreage-poundage basis were proclaimed by the Secretary of Agriculture for flue-cured tobacco for the 1983-84, 1984-85, and 1985-86 marketing years (See 48 FR 1781). Since at least one-third of the flue-cured tobacco producers voting in a marketing quota referendum on December 16, 1982, did not vote to disapprove such marketing quotas, such marketing quota is in effect for the 1984-85 marketing year (See 48 FR 21608).

The determinations set forth in this notice have been made on the basis of the latest available statistics of the Federal Government and after due consideration of data, views, and recommendations received from flue-cured tobacco producers and others pursuant to a proposed Notice of Determination (48 FR 46401) which was published on October 12, 1983.

## Discussion

During the comment period, 27 written responses were received from farmers, members of the trade (including associations), and farm groups. Of the 24 respondents who commented on the level of the 1984 quota, 17 recommended that the quota remain unchanged from the 1983 level. The other 7 who commented on the quota level recommended quotas ranging from a 5 to 16 percent decrease in quota.

In addition, two meetings were held to allow interested persons to give their views orally. The vast majority of these individuals and organizations favored the same quota level for the 1984 marketing year as the level which was applicable to the 1983 marketing year.

Because the total supply is significantly above the reserve supply level and those supplies are well distributed among the grades, the flue-cured tobacco marketing quota has been reduced by 11½ percent for the 1984 marketing year.

Section 317(a)(1) of the 1938 Act (7 U.S.C. 1314c(a)(1)) provides, in part, that the national marketing quota for a marketing year for flue-cured tobacco is the amount of flue-cured tobacco produced in the United States which the Secretary estimates will be utilized during the marketing year in the United States and will be exported during the marketing year, adjusted upward or downward in such amount as the Secretary determines is desirable for the purpose of maintaining an adequate supply or for effecting an orderly reduction of supplies to the reserve supply level. The 1938 Act further provides that any such downward adjustment shall not exceed 15 percent of such estimated utilization and exports.

The "reserve supply level" is defined in section 301(b)(14)(B) of the 1938 Act as the normal supply plus 5 percent thereof, to assure a supply adequate to meet domestic consumption and export needs in years of drought, flood, or other adverse conditions, as well as in years of plenty.

The "normal supply" is defined in section 301(b)(10)(B) of the 1938 Act as a normal year's domestic consumption and exports, plus 175 percent of a normal year's domestic consumption and 65 percent of a normal year's exports as an allowance for normal carryover.

A "normal year's domestic consumption" is defined in Section 301(b)(11)(B) of the 1938 Act as the yearly average quantity of tobacco produced in the United States and consumed in the United States during

the 10 marketing years immediately preceding the marketing year in which such consumption is determined, adjusted for current trends in such consumption.

A "normal year's exports" is defined in section 301(b)(12) of the 1938 Act as the yearly average quantity of tobacco produced in the United States which was exported from the United States during the 10 marketing years immediately preceding the marketing year in which such exports are determined, adjusted for current trends in such exports.

The yearly average domestic consumption of flue-cured tobacco during the 10 marketing years preceding the 1983-84 marketing year was 591 million pounds, and the yearly average exports during such period amounted to 533 million pounds. Both domestic consumption and exports have shown downward trends. Accordingly, a normal year's exports equal 530 million pounds while a normal year's domestic consumption has been established at 500 million pounds. These normal year's consumption and exports result in a reserve supply level for flue-cured tobacco of 2,363 million pounds.

"Total supply" is defined in Section 301(b)(16)(B) of the 1938 Act as the carryover at the beginning of the marketing year (July 1) plus the estimated production in the United States during the calendar year in which the marketing year begins. The carryover of flue-cured tobacco in the inventories of manufacturers and dealers, including Commodity Credit Corporation (CCC) loan stocks, amounted to 2,204 million pounds, farm sales weight on July 1, 1983.

The 1983 crop marketings of flue-cured tobacco are currently estimated at 855 million pounds. The sum of the carryover of flue-cured tobacco plus the 1983 crop marketings totals 3,059 million pounds and represents the total supply of flue-cured tobacco for the 1983-84 marketing year. This amount exceeds the reserve supply level by 696 million pounds.

It is estimated that 455 million pounds of flue-cured tobacco will be utilized in the United States during the 1984-85 marketing year and 460 million pounds will be exported. Because the total supply is substantially in excess of the reserve supply level, it is deemed desirable to make a downward adjustment of 110 million pounds from the estimated utilization in order to determine the 1984 flue-cured tobacco marketing quota. Accordingly, the national marketing quota for flue-cured tobacco for the marketing year



beginning July 1, 1984, is 805 million pounds.

Section 317(a) of the 1938 Act (7 U.S.C. 1314c(a)), provides that, beginning in 1983 and at 5 year intervals thereafter, the farm acreage allotment and preliminary farm yield for each farm be adjusted to reflect increases or decreases in the past 5 years' moving county average yield per acre and the national average yield goal shall be adjusted to the past 5 years' moving national average yield. Accordingly, it has been determined that the national average yield goal of 1989 pounds per acre for the 1983-84 marketing years will be the national average yield goal for the 1984-85 marketing year.

In accordance with section 317(a)(3) of the 1938 Act (7 U.S.C. 1314c(a)(3)), the national acreage allotment for the 1984 crop of flue-cured tobacco is determined to be 404,725.99 acres, which is the result of dividing the national marketing quota by the national average yield goal.

In accordance with section 317(e) of the 1938 Act (7 U.S.C. 1314c(e)), the Secretary is authorized to establish a national reserve from the national acreage allotment in an amount equivalent to not more than 3 percent of the national acreage allotment for the purposes of making corrections in farm acreage allotments, adjusting for inequities, and establishing allotments for new farms. It has been determined that a national reserve for the 1984 crop of flue-cured tobacco of 475 acres is adequate for these purposes.

#### Determinations 1984-85 marketing year

Accordingly, the following determinations have been made for flue-cured tobacco for the marketing year beginning July 1, 1984:

(a) *Reserve supply level.* The reserve supply level has been determined to be 2,363 million pounds based upon a normal year's domestic consumption of 500 million pounds and a normal year's exports of 530 million pounds.

(b) *National marketing quota.* The national marketing quota on an acreage-poundage basis for the marketing year beginning July 1, 1984 has been determined to be 805 million pounds. This quota is based on an estimated consumption in the United States in such marketing year of 455 million pounds and estimated exports in such marketing year of 460 million pounds, with a 110 million pound downward adjustment in order to effect an orderly reduction of supplies toward the reserve supply level.

(c) *National average yield goal.* The national average yield goal has been determined to be 1,989 pounds. This goal

is based on the 5-year national average yield for the 1977-81 marketing years.

(d) *National acreage allotment.* The national acreage allotment on an acreage-poundage basis has been determined to be 404,725.99 acres. This allotment is determined by dividing the national marketing quota of 805 million pounds by the national average yield goal of 1,989 pounds.

(e) *National reserve.* The national reserve for making corrections and adjusting inequities in old farm acreage allotments and for establishing allotments for new farms has been determined to be 475 acres.

(f) *National acreage factor.* The national acreage factor has been determined to be .884.

(g) *National yield factor.* The national yield factor has been determined to be .9020.

(h) *Types of tobacco.* Types 11, 12, 13, and 14 of tobacco shall constitute one kind of tobacco for the 1983-84, 1984-85, and 1985-86 marketing years.

(Secs. 301, 313, 317, 375, 52 Stat. 38, 47, 66, as amended, 79 Stat. 66 [7 U.S.C. 1301, 1313, 1314c, 1375])

Signed at Washington, D.C. on March 9, 1984.

Richard E. Lyng,

Acting Secretary.

[FR Doc. 84-8337 Filed 3-27-84; 8:45 am]

BILLING CODE 3410-05-M

#### CIVIL RIGHTS COMMISSION

##### Rhode Island Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Rhode Island Advisory Committee to the Commission will convene at 12:00 noon and will end at 2:00 p.m., on April 18, 1984, at the Brown University—Wilson Laboratory, Seminar Room B-2, Brown Street (between Angel and Waterman), Providence, Rhode Island 02912. The purpose of the meeting is to discuss the monitoring of the "Greenhouse Compact" and the revised draft of the redistricting report.

Persons desiring additional information, or planning a presentation to the Committee, should contact the Chairperson, Dorothy Zimmering, at (401) 245-3515 or the New England Regional Office at (617) 223-4671.

The meeting will be conducted pursuant to the provisions of the Rules and Regulations of the Commission.

Dated at Washington, D.C., March 23, 1984.

John I. Binkley,

Advisory Committee Management Officer.

[FR Doc. 84-8271 Filed 3-27-84; 8:45 am]

BILLING CODE 6335-01-M

#### DEPARTMENT OF COMMERCE

##### International Trade Administration

[C-351-008]

##### Carbon Steel Plate From Brazil; Intention To Terminate Suspension Agreement

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of intention to terminate suspension agreement.

SUMMARY: The Department of Commerce has begun an administrative review of the agreement suspending the countervailing duty investigation on carbon steel plate from Brazil. In the course of that review, we have found evidence that the Government of Brazil has failed to comply with the terms of the agreement. Therefore, we are proposing to terminate the suspension agreement. Interested parties are invited to comment on this proposal.

EFFECTIVE DATE: March 28, 1984.

FOR FURTHER INFORMATION CONTACT: Peggy Clarke or Brian Kelly, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230; telephone: (202) 377-2786.

##### SUPPLEMENTARY INFORMATION:

##### Background

On September 7, 1982, the Department of Commerce ("the Department") published in the *Federal Register* (47 FR 39394) a notice suspending the countervailing duty investigation on carbon steel plate from Brazil and announced its intent to conduct an administrative review of the suspension agreement. The Department subsequently received a request from the petitioners that the investigation be continued, and on January 20, 1983, published a notice of final affirmative determination (48 FR 2568). The International Trade Commission published a final affirmative injury determination on March 16, 1983 (48 FR 11190).

##### Scope of the Agreement

Imports covered by the agreement are shipments of Brazilian carbon steel plate. The term "carbon steel plate" covers hot-rolled carbon steel products



whether or not corrugated or crimped, not pickled, not cold-rolled, not in coils, not cut, not pressed, and not stamped to non-rectangular shape, 0.1875 inch or more in thickness and over 8 inches in width, currently classifiable under items 607.6615 or 607.9400 of the Tariff Schedules of the United States Annotated ("TSUSA"); and hot or cold-rolled carbon steel plate that has been coated or plated with zinc, including any material which has been painted or otherwise covered after having been coated or plated with zinc, currently classifiable under items 608.0710 or 608.1100 of the TSUSA. Semifinished products of solid rectangular cross section with a width at least four times the thickness, in the as cast condition or processed only through primary mill hot-rolling, are not included.

#### Reasons for Terminating the Agreement

Under the terms of the agreement, the Brazilian government was to impose an export tax on all shipments of carbon steel plate exported to the United States on or after October 1, 1982. The initial tax rate for imposition was 12.16 percent of the f.o.b. invoice price of the exports. In February 1983, the Brazilian government increased this tax to 12.53 percent.

In the course of the administrative review, we found that the exporters paid no tax before May 16, 1983. On May 16, exporters paid back taxes. However, the tax payments were not subjected to monetary correction, interest, or other penalties.

We believe the word "imposition" in the agreement means timely collection of the export taxes. The general procedure agreed to by the Department and the Brazilian government for tax collection is that the tax is due 45 days after the end of the month in which the shipment occurs. Under this arrangement payment of taxes on all shipments from October 1, 1982 through February 28, 1983 was up to five months late. We preliminarily determine that the late payment of these export taxes, particularly without monetary correction, interest, or penalties, constitutes a violation of the agreement.

The Brazilian government is required to submit quarterly letters certifying compliance with the agreement. The letters are due 15 days after the end of each quarter. We note that the certification letters due on July 15, 1983 and October 15, 1983 were several weeks late.

#### Intention To Terminate

For these reasons, we believe the Brazilian government has failed to comply with the terms of the suspension

agreement. We propose to terminate it and to issue a countervailing duty order.

Accordingly, as required by section 704(a)(1)(A)(i) of the Tariff Act of 1930 ("the Tariff Act"), the Department intends to instruct the Customs Service to suspend liquidation of all entries of carbon steel plate from Brazil that are entered, or withdrawn from warehouse, for consumption beginning 90 days prior to publication of a notice terminating the agreement. Further, we intend to instruct the Customs Service to require a cash deposit or bond for each such entry of 11.75 percent of the f.o.b. invoice price, the subsidy rate found in the Department's final affirmative determination.

Interested parties may submit written comments on this proposed termination within 15 days of the date of publication of this notice and may request disclosure and/or a hearing within 5 days of the date of publication. Any hearing, if requested, will be held 20 days after the date of publication of this notice or the first workday thereafter. Any request for an administrative protective order must be made no later than 5 days after the date of publication. The Department will publish its final decision, including its analysis of issues raised in any such written comments or at a hearing.

This notice is published in accordance with section 704(i)(1) of the Tariff Act (19 U.S.C. 1671c) and § 855.32 of the Commerce Regulations.

Dated: March 23, 1984.

Alan F. Holmer,  
Deputy Assistant Secretary, Import  
Administration.

[FR Doc. 84-8292 Filed 3-27-84; 8:45 am]  
BILLING CODE 3510-DS-M

[C-351-011]

#### Carbon Steel Wire Rod From Brazil; Intention To Terminate suspension Agreement

**AGENCY:** International Trade  
Administration, Commerce.

**ACTION:** Notice of intention to terminate  
suspension agreement.

**SUMMARY:** The Department of Commerce has begun an administrative review of the agreement suspending the countervailing duty investigation on carbon steel wire rod from Brazil. In the course of that review, we have found evidence that the Government of Brazil has failed to comply with the terms of the agreement. Therefore, we are proposing to terminate the suspension agreement. Interested parties are invited to comment on this proposal.

**EFFECTIVE DATE:** March 28, 1984.

**FOR FURTHER INFORMATION CONTACT:**  
Barbara Williams or Brian Kelly, Office  
of Compliance, International Trade  
Administration, U.S. Department of  
Commerce, Washington, D.C. 20230;  
telephone: (202) 377-2786.

#### SUPPLEMENTARY INFORMATION:

##### Background

On September 27, 1982, the Department of Commerce ("the Department") published in the Federal Register (47 FR 42399) a notice suspending the countervailing duty investigation on carbon steel wire rod from Brazil and announced its intent to conduct an administrative review of the suspension agreement.

##### Scope of the Agreement

Imports covered by the agreement are shipments of Brazilian carbon steel wire rod. The term "carbon steel wire rod" covers a coiled, semi-finished, hot-rolled carbon steel product of approximately round solid cross section, not under 0.02 inch nor over 0.74 inch in diameter, not tempered, not treated, and not partly manufactured, and valued over 4 cents per pound, as currently classifiable in item 607.1700 of the Tariff Schedules of the United States Annotated.

#### Reasons for Terminating the Agreement

Under the terms of the agreement, the Brazilian government was to impose an export tax on all shipments of carbon steel wire rod exported to the United States on or after October 20, 1982. The initial tax rate for imposition was 14.90 percent of the f.o.b. invoice price of the export. In February 1983, the Brazilian government increased this tax to 15.50 percent.

In the course of the administrative review, we found that the exporters paid no tax before May 16, 1983. On May 16, exporters paid back taxes, however, the tax payments were not subjected to monetary correction, interest, or other penalties.

We believe the word "imposition" in the agreement means timely collection of the export taxes. The general procedure agreed to by the Department and the Brazilian government for tax collection is that the tax is due 45 days after the end of the month in which the shipment occurs. Under this arrangement payment of taxes on all shipments from October 20, 1982 through February 28, 1983 was up to five months late. We preliminarily determine that the late payment of these export taxes, particularly without monetary



correction, interest, or penalties, constitutes a violation of the agreement.

The Brazilian government is required to submit quarterly letters certifying compliance with the agreement. The letters are due 15 days after the end of each quarter. We note that the certification letters due on July 15, 1983 and October 15, 1983 were several weeks late.

#### Intention To Terminate.

For these reasons, we believe the Brazilian government has failed to comply with the terms of the suspension agreement. We propose to terminate it. As provided by section 704(i)(B) of the Tariff Act of 1930 ("the Tariff Act"), this would require that we resume the investigation as if the affirmative preliminary determination under section 703(b) were made on the effective date of any termination.

Accordingly, as required by section 704(i)(1)(A)(i) of the Tariff Act, the Department intends to instruct the Customs Service to suspend liquidation of all entries of carbon steel wire rod from Brazil that are entered, or withdrawn from warehouse, for consumption beginning 90 days prior to publication of a notice terminating the agreement. Further, we intend to instruct the Customs Service to require a cash deposit or bond for each such entry of 14.31 percent of the f.o.b. invoice price, the subsidy rate found in the Department's preliminary affirmative determination (47 FR 30550, July 14, 1982).

Interested parties may submit written comments on this proposed termination within 15 days of the date of publication of this notice and may request disclosure and/or a hearing within 5 days of the date of publication. Any hearing, if requested, will be held 20 days after the date of publication of this notice or the first workday thereafter. Any request for an administrative protective order must be made no later than 5 days after the date of publication. The Department will publish its final decision, including its analysis of issues raised in any such written comments or at a hearing.

This notice is published in accordance with section 704(i)(1) of the Tariff Act (19 U.S.C. 1671c) and § 355.32 of the Commerce Regulations.

Dated: March 23, 1984.

Alan F. Holmer,  
Deputy Assistant Secretary, Import  
Administration.

[FR Doc. 84-8293 Filed 3-27-84; 8:45 am]

BILLING CODE 3510-DS-M

#### Texas A&M University; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 a.m. and 5:00 p.m. in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, D.C.

Docket No. 82-00351. Applicant: Texas A&M University, College Station, TX 77843. Instrument: 2 Wavemakers, Wave Height Gauge. Manufacturer: Seasim Controls Limited, United Kingdom. Intended use: See notice at 47 FR 49055.

Comments: None received.

Decision: Approved for the wavemakers (including the random signal generator) only. Denied for the wave height gauge.

(1) In the case of the approved instrument, no instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Reasons: The foreign instrument has a wave absorbing capability which absorbs reflection from walls or models. The National Oceanic and Atmospheric Administration advises in its memorandum dated December 8, 1982 that (1) the capability of the foreign instrument described above is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

(2) In the case of the denied instrument, an instrument or apparatus of equivalent scientific value to the foreign instrument, for such purposes as this instrument is intended to be used, is being manufactured in the United States. Reasons: In its request for duty-free entry, the applicant alleges only that "There are no resistance gauges manufactured in the United States." However, the National Oceanic and Atmospheric Administration advises in its memorandum dated December 8, 1982, that Grundy Environmental Systems of San Diego, California manufactures a resistance type wave height gauge. The Department has verified that Grundy does manufacture such a gauge (The Model 9611 Wave and Tide Monitoring System). We therefore

find that the Grundy resistance type wave height gauge is of equivalent scientific value to the foreign instrument for the applicant's intended use.

Frank W. Creel,

Acting Director, Statutory Import Programs  
Staff.

(Catalog of Federal Domestic Assistance  
Program No. 11.105, Importation of Duty-Free  
Educational and Scientific Materials)  
[FR Doc. 84-8291 Filed 3-27-84; 8:45 am]

BILLING CODE 3510-DS-M

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

##### Increasing the Import Limit for Certain Cotton Textile Products Produced or Manufactured in Brazil

March 23, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on March 28, 1984. For further information contact Diana Bass, International Trade Specialist (202) 377-4212.

#### Background

A CITA directive dated March 11, 1983, as amended, established restraint limits for specified categories of cotton and man-made fiber textiles and textile products, including Category 313 (cotton sheeting), produced or manufactured in Brazil and exported during the twelve-month period which began on April 1, 1983. In the CITA directive published below the limit for Category 313 is being increased from 29,098,650 square yards to 31,720,150 square yards by the application of ten percent swing provided under the terms of the Bilateral Cotton and Man-Made Fiber Textile Agreement of March 31, 1982 between the Governments of the United States and the Federative Republic of Brazil.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the *Federal Register* on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1983 (48 FR 55607), and December 30, 1983 (48 FR 57584).

Walter C. Lenahan,

Chairman, Committee for the Implementation  
of Textile Agreements.

March 23, 1984.



# Committee for the Implementation of Textile Agreements

Commissioner of Customs,  
Department of the Treasury, Washington,  
D.C.

This directive further amends, but does not cancel, the directive of March 11, 1983 from the Chairman of the Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton and man-made fiber textiles and textile products, produced or manufactured in Brazil.

Effective on March 28, 1984, you are directed to increase the restraint limit established for Category 313 in the directive of March 11, 1983, as amended, to 31,720,150 square yards<sup>1</sup> according to the terms of the Bilateral Cotton and Man-Made Fiber Textile Agreement of March 31, 1982 between the Governments of the United States and the Federative Republic of Brazil.<sup>2</sup>

The Committee for the Implementation of Textile Agreements has determined that this action falls with the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553.

Sincerely,

Walter C. Lenahan,

Chairman, Committee for the Implementation of Textile Agreements.

(FR Doc. 84-8287 Filed 3-27-84; 8:45 am)

BILLING CODE 3510-DR-M

## Announcing New Limits on Certain Cotton, Wool, and Man-Made Fiber Textile Products Exported From Hong Kong

March 23, 1984.

On September 15, 1983 and January 4, 1984, notices were published in the Federal Register (48 FR 41481 and 49 FR 491) announcing that the Government of the United States had requested consultations with the Government of Hong Kong concerning Categories 314, 337, 359, 361, 369, 459 and 649 under the terms of the bilateral Agreement of June 23, 1982, as amended.

The purpose of this notice is to announce that consultations on these categories have been held and the following limits established for 1983 under the terms of the bilateral agreement.

<sup>1</sup> The level has not been adjusted to account for any imports exported after March 31, 1983.

<sup>2</sup> The agreement provides, in part, that (1) within the aggregate and group limits, specific limits may be exceeded by designated percentages; (2) specific limits may be increased by carryover and carryforward up to 11 percent of the applicable category limit; and (3) administrative arrangements or adjustments may be made to resolve minor problems arising in the implementation of the agreement.

| Category | Unit | 1983 limit |
|----------|------|------------|
| 314..... | Syd  | 5,817,191  |
| 337..... | Doz  | 591,979    |
| 359..... | Lbs  | 9,538,887  |
| 361..... | Nos  | 655,561    |
| 369..... | Lbs  | 7,392,251  |
| 459..... | Lbs  | 425,038    |
| 649..... | Doz  | 512,867    |

Walter C. Lenahan,

Chairman, Committee for the Implementation of Textile Agreements.

(FR Doc. 84-8286 Filed 3-27-84; 8:45 am)

BILLING CODE 3510-DR-M

## Announcing New Import Limits for Certain Wool Apparel Products Produced or Manufactured in Hungary

March 23, 1984.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on March 28, 1984. For further information contact Gordana Slijepcevic, International Trade Specialist, (202) 377-4212.

### Background

In consultations held January 23-24, 1984, the Governments of the United States and the Hungarian People's Republic agreed to amend their Bilateral Wool Textile Agreement of February 15 and 25, 1983 to include specific limits for wool coats in Category 435 and women's, girls' and infants' trousers, slacks and shorts in Category 448, produced or manufactured in Hungary and exported to the United States. In the case of Category 435 the specific limit is 10,561 dozen for goods exported during the thirteen-month period which began on December 1, 1983 and extends through December 31, 1984. For Category 448 the specific limit is 19,000 dozen for goods exported during the twelve-month period which began on January 1, 1984.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983 (48 FR 55607), and December 30, 1983 (48 FR 57584).

**SUPPLEMENTARY INFORMATION:** On December 16, 1983 a letter dated December 13, 1983 from the Chairman of the Committee for the Implementation of Textile Agreements to the Commissioner of Customs was published in the Federal Register (48 FR 55891) which established

limits for certain categories of wool apparel products produced or manufactured in Hungary and exported during the year which began on January 1, 1984. The letter published below amends the letter of December 13, 1983 to include limits for wool apparel products in Categories 435 and 448 during the designated restraint periods.

Walter C. Lenahan,

Chairman, Committee for the Implementation of Textile Agreements.

March 23, 1984.

## Committee for the Implementation of Textile Agreements

Commissioner of Customs,  
Department of the Treasury, Washington,  
D.C.

Dear Mr. Commissioner: This directive amends, but does not cancel, the letter of December 13, 1983 from the Chairman of the Committee for the Implementation of Textile Agreements to the Commissioner of Customs which established levels of restraint for certain specified categories of wool textile products, produced or manufactured in Hungary and exported to the United States during 1984.

Effective on March 28, 1984, the directive of December 13, 1984 is hereby amended to include the following levels of restraint for wool textile products in Categories 435 and 448, exported during the indicated periods:

| Category | Re-<br>straint<br>limit <sup>1</sup><br>(dozen) | Period                         |
|----------|-------------------------------------------------|--------------------------------|
| 435..... | 10,561                                          | Dec. 1, 1983 to Dec. 31, 1984. |
| 448..... | 19,000                                          | Jan. 1, 1984 to Dec. 31, 1984. |

<sup>1</sup> The limits have not been adjusted to reflect any imports exported after November 30, 1983 (Cat. 435) and December 31, 1983 (Cat. 448).

Wool textile products in Categories 435 and 448 which have been exported to the United States prior to December 1, 1983 in the case of Category 435 and prior to January 1, 1984 in the case of Category 448 shall not be subject to this directive.

Wool textile products in Categories 435 and 448 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924) and December 14, 1983 (48 FR 55607), and December 30, 1983 (48 FR 57584).

The action taken with respect to the Government of the Hungarian People's Republic and with respect to imports of wool textile products from Hungary has been



determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

Walter C. Lenahan,  
Chairman, Committee for the Implementation  
of Textile Agreements.

[FR Doc. 84-8284 Filed 3-27-84; 8:45 am]

BILLING CODE 3510-DR-M

### Government of India Officials Authorized To Issue Export Visas and Exempt Certifications

March 22, 1984.

The Government of India has notified the United States Government that the following officials of the Apparel Export Promotion Council are now authorized to issue export visas for cotton, wool and man-made fiber textile products, produced or manufactured in India and exported to the United States under the terms of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of December 21, 1982:

Jacob Thomas, Assistant Director, Air Cargo  
Complex, Palam Airport, New Delhi  
Kanshi Ram, Deputy Director, Air Cargo  
Complex Palam Airport  
Anil Kumar, Assistant Director, Jaipur  
S. C. Gadekar, Assistant Director, Bombay  
K. Vasantha Kumar, Assistant Director,  
Madras

The following new officials have been designated to issue certifications for textile products which are exempt from the limitations of the bilateral agreement:

R. S. Bedi, Assistant Director, Office of  
Development Commissioner (Handicrafts)  
P. K. Khullar, Assistant Director, Office of  
Development Commissioner (Handicrafts)  
R. R. Vasudeva, Assistant Director, Office of  
Development Commissioner (Handicrafts)  
G. K. Ashthana, Assistant Director, Office of  
Development Commissioner (Handicrafts)

The purpose of this notice is to advise the public of the change.

Walter C. Lenahan,  
Chairman, Committee for the Implementation  
of Textile Agreements.

[FR Doc. 84-8285 Filed 3-27-84; 8:45 am]

BILLING CODE 3510-DR-M

### COMPTROLLER OF THE CURRENCY

#### FEDERAL DEPOSIT INSURANCE CORPORATION

#### FEDERAL HOME LOAN BANK BOARD

#### FEDERAL RESERVE SYSTEM

##### Delayed Availability of Funds; Issuance of a Policy Statement

**AGENCY:** Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and Board of Governors of the Federal Reserve System.

**ACTION:** Issuance of a policy statement.

**SUMMARY:** The agencies are issuing this policy statement to encourage and assist industry efforts in voluntarily addressing the problems caused by some financial institutions when they delay a depositor's ability to withdraw funds deposited by check—often called "delayed availability of funds." The policy statement calls for those financial institutions that delay availability to review and disclose their policies, and to refrain from imposing unnecessary delays on all checks, particularly on Social Security and other government checks. In reviewing their availability policies, institutions are asked to consider taking into account factors that indicate whether a given situation presents a risk of loss and to provide a means for depositors to request that an exception be made to the standard hold policy.

**EFFECTIVE DATE:** March 22, 1984.

**FOR FURTHER INFORMATION CONTACT:** William Grant, Office of the Comptroller of the Currency, (202) 447-1938; Paul Sachtleben, Federal Deposit Insurance Corporation, (202) 389-4761; Richard Tucker, Federal Home Loan Bank Board, (202) 377-6211; or Gerald Hurst, Board of Governors of the Federal Reserve System, (202) 452-3667.

**SUPPLEMENTARY INFORMATION:** (1) *General.* Delayed availability—the practice by some financial institutions of delaying a customer's ability to withdraw funds deposited by check for several days after the date of deposit—has been an issue of concern for several years.

Interest in limiting or restricting the delayed availability practice has increased recently both at the state and federal level. Two states, New York and California, have enacted laws addressing the issue and several other states are considering legislation. In addition, there are bills pending in both houses of Congress.

The agencies believe that the practice of delaying availability results in problems for depositors, especially when the policy is inflexible or is not disclosed to depositors in an effective manner. Institutions maintain that the practice of delaying a depositor's ability to withdraw funds beyond the time it takes the institution to receive provisional credit for the check is justified to some extent because of the time it takes for a check to be returned to the institution of first deposit if it is not paid by the paying institution. They state that the only way an institution learns that a deposited check is being returned unpaid is to receive the check back; thus, there is a risk of loss. However, only about one percent of all checks are returned unpaid and only a very small percentage of these checks result in actual losses to financial institutions. While it may be true that the frequency of losses is small because of delayed availability policies and that the potential for losses is much larger, the agencies nevertheless believe that the practice of imposing delays on all deposited checks without regard to whether a particular situation presents a potential risk (for example, the deposit of an unusually large personal check into a new account) does not appear to be justified by the risk of loss. More specifically, for example, there is normally no justification for delaying availability on a Social Security or other government check deposited into an established account beyond the date when an institution receives credit for the check. The real risk of loss in such cases results from fraud, which typically would not be discovered until long after the check has cleared.

The agencies believe that voluntary industry action, rather than mandatory requirements, represents a potential solution to many of the problems caused by delayed availability, without the costs and burdens of a legislative or regulatory approach. The agencies are, therefore, issuing a policy statement that outlines their concerns and recommending actions to be taken by the industry in the hope that it will encourage and assist voluntary industry action.

(2) *Discussion of policy statement.* The policy statement calls on financial institutions that delay availability to take several actions. Institutions are asked to review their policies, consider whether the delay periods can be reduced, and disclose their policies to customers in an effective manner. Institutions are also asked to refrain from imposing unnecessary delays on all checks, particularly delays on



government checks deposited into established accounts beyond the time required for the institutions to receive credit for the checks. In reviewing their policies, institutions are asked to consider various factors that might indicate whether a risk of loss exists in a given situation that justifies a delay in availability and to provide depositors with a means for requesting that an exception be made from the standard hold policies.

The actions recommended are based on the agencies' belief that, although it is appropriate to delay availability in some specific situations, it is not necessary for financial institutions to delay availability on all deposited checks. By pointing out specific actions that institutions can take, the agencies hope that the policy statement will be a basis for industry action. As the statement indicates, the agencies plan to monitor developments in the area to determine whether further steps are needed.

#### Joint Policy Statement on Delayed Availability of Funds

The Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and Federal Reserve Board are issuing this policy statement regarding the practice by financial institutions of delaying a depositor's ability to withdraw funds deposited by check—often called "delayed availability of funds." The agencies are concerned about the problems this practice causes for depositors and believe that voluntary action on the part of all financial institutions to reduce these problems would be the most efficient, least costly, and least burdensome solution.

An increasing number of financial institutions delay a depositor's ability to withdraw funds in order to reduce their risk of loss if a deposited check is returned unpaid. However, financial institutions need not impose such delays on every deposited check in order to reduce the risk. In fact, some delayed availability policies may be inequitable. The agencies believe that there are actions that financial institutions can take now to eliminate some of the problems.

The agencies believe that financial institutions that delay availability should:

(1) Review their policies and consider reducing the delay periods to the extent

possible, consistent with prudent business practices.

(2) Disclose their policies to depositors in an effective manner at the time an account is opened and, when practical, at the time a check is deposited that will be subject to a delay in availability. Institutions might also alert depositors to other ways of transferring funds that do not involve checks, such as through wire transfers or direct deposit through an automated clearing house.

(3) Refrain from imposing unnecessary delays on all checks, particularly delays on Social Security and other government checks deposited into established accounts beyond the time required to receive credit for the checks. (A delay beyond this time is generally inappropriate since the real risk is that of fraud, which ordinarily will not be discovered until long after the check has cleared.)

In reviewing their policies, institutions should take into account factors that indicate whether a given situation presents a risk of loss that justifies a delay in availability. These factors may include, for example, the length of time the account has been maintained, past experience with the depositor, the identity of the drawer, the type of check, and the location of the payor depository institution. In addition, institutions should consider providing, as part of their policy, a means for depositors to request that an exception be made from the standard delay practice and inform depositors of this possibility.

The agencies hope that the problems caused by delayed availability policies can be addressed by voluntary industry action, and urge trade groups and individual institutions to act. The agencies will be monitoring the effectiveness of these voluntary efforts to determine the extent to which disclosure is being made and the nature of specific delayed availability policies. Consumer surveys will also be conducted to determine the level of consumer awareness of delayed availability policies and the extent of consumer problems.

If it appears that voluntary action is inadequate to address the delayed availability issue, the agencies will consider further action to deal with the practice and the problems it causes.

Dated: March 22, 1984.

By order of the Office of the Comptroller of the Currency.

John F. Downey,  
Chief National Bank Examiner.

By order of the Federal Deposit Insurance Corporation.

Hoyle L. Robinson,  
Executive Secretary.

By order of the Federal Home Loan Bank Board.

J. J. Finn,  
Secretary to the Board.

By order of the Board of Governors of the Federal Reserve System.

William W. Wiles,  
Secretary of the Board.

[FR Doc. 84-8257 Filed 3-27-84; 8:45 am]

BILLING CODE 6210-01-M

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Public Information Collection Requirement Submitted to OMB for Review

The Department of Defense has submitted to OMB for review the following request for approval of the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Each entry contains the following information: (1) Type of Submission; (2) Title of Information Collection and Form Number if applicable; (3) Abstract statement of the need for and the uses to be made of the information collected; (4) Type of Respondent; (5) An estimate of the number of responses; (6) An estimate of the total number of hours needed to provide the information; (7) To whom comments regarding the information collection are to be forwarded; and (8) The point of contact from whom a copy of the information proposal may be obtained.

#### New

- Survey of Former Department of Defense Civilian Employees.
- Survey results will provide unique data on characteristics of former Department of Defense (DoD) civilian employees which are related to the willingness of critical-skill holders, to return to DoD and to relocate in order to work, and on policy changes possibly required in order to attract an optimum of skilled employees during mobilization.
- Individuals; 11,994 respondents; 5,997 hours.
- Forward comments to Mr. Edward Springer, OMB Desk Officer, Room 3235, NEOB, Washington, DC 20503, and Mr.



Daniel J. Vitiello, DOD Clearance Officer, WHS/DIOR, Room 1C535, Pentagon, Washington, DC 20301, telephone (202) 694-0187.

A copy of the information collection proposal may be obtained from Mr. Robert L. Newhart, OASD MI&L(PI), Room 3C800, Pentagon, Washington, DC 20301, telephone (202) 695-0643. This information collection will be administered by DoD personnel and is not for contract.

Dated: March 26, 1984.

M. S. Healy,  
OSD Federal Register Liaison Officer,  
Department of Defense.

[FR Doc. 84-8266 Filed 3-27-84; 8:45 am]

BILLING CODE 3810-01-M

## Department of the Air Force

### Public Information Collection Requirement Submitted to OMB for Review

The Department of Defense has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Each entry contains the following information: (1) Type of submission; (2) Title of information collection and form number, if applicable; (3) Abstract statement of the need for and the uses to be made of the information collected; (4) Type of respondent; (5) An estimate of the number of responses; (6) An estimate of the total number of hours needed to provide the information; (7) To whom comments regarding the information collection are to be forwarded; (8) The point of contact from whom a copy of the information proposal may be obtained.

#### New

- Designation for Arrears of Retired Pay (AFAFC Form T-609).
- This form is submitted to the Air Force Accounting and Finance Center (AFAFC/RPT) by Air Force retirees who wish to redesignate the beneficiaries who will receive their Arrears of Pay (AOP—the retired pay due but unpaid at death). Often, the retiree designated the AOP beneficiary years ago, so AFAFC spends time trying to find people who have moved or died. An automated system is being developed to use this information to pay the AOP when a retiree dies.
- Air Force retired members: 525,000 responses; 52,500 hours.
- Forward comments to Edward Springer, OMB Desk Officer, Room 3235, NEOB, Washington, DC 20503, and

Daniel Vitiello, DOD Clearance Officer, WHS/DIOR, Room 1C535, Pentagon, Washington, DC 20301, telephone (202) 694-0187.

A copy of the information collection proposal may be obtained from Mr. John Bender AFAFC/CPR, Denver, CO 80279, telephone (303) 370-7141.

Dated: March 26, 1984.

M. S. Healy,  
OSD Federal Register Liaison Officer,  
Department of Defense.

[FR Doc. 84-8269 Filed 3-27-84; 8:45 am]

BILLING CODE 3910-01-M

## DEPARTMENT OF ENERGY

### Bonneville Power Administration

#### Availability of the Bonneville Acquisition Guide

**AGENCY:** Bonneville Power Administration (BPA), DOE.

**ACTION:** Notice of document availability.

**SUMMARY:** Copies of the Bonneville Acquisition Guide (BAG) which establishes the procedures BPA uses in the solicitation, award, and administration of procurement contracts are now available from BPA for \$20 each.

**ADDRESS:** Copies of the BAG may be obtained by sending a check to the General Accounting Section—DTKC, Bonneville Power Administration, P.O. Box 3621, Portland, OR 97208.

**FOR FURTHER INFORMATION CONTACT:** N. L. Linscott, Contracts Manager at the above address, 503-230-4763.

**SUPPLEMENTARY INFORMATION:** The Bonneville Power Administration was established in 1937 as a Federal Power Marketing agency in the Pacific Northwest. BPA is a nonappropriated fund entity which finances its operations from power revenues. Its procurement operations are conducted under 16 U.S.C. 832a (f) and (g) as well as 40 U.S.C. 474(d)(20). The BAG utilizes the special authorities referred to in the preceding sentence as a basis for establishing BPA procurement policy; however, it follows the format of the Federal Acquisition Regulations to assist offerors in locating pertinent policies.

All BPA procurement solicitations include notice of applicability and availability of the BAG for the information of offerors on particular procurements.

Issued in Portland, Oregon, on March 15, 1984.

Peter T. Johnson,  
Administrator.

[FR Doc. 84-8341 Filed 3-27-84; 8:45 am]

BILLING CODE 6450-01-M

## Federal Energy Regulatory Commission

[Project No. 6446-001]

### Clifford W. Holman; Surrender of Preliminary Permit

March 23, 1984.

Take notice that Clifford W. Holman, Permittee for the Holman Hydro-3 Project No. 6446, has requested that his preliminary permit be terminated. The preliminary permit for Project No. 6446 was issued on November 1, 1982, and would have expired on May 31, 1984. The project would have been located on Johnson Creek in Cowlitz County, Washington.

The Permittee filed the request on February 13, 1984, and the surrender of the preliminary permit for Project No. 6446 is deemed accepted as of February 13, 1984, and effective as of 30 days after the date of this notice.

Lois D. Cashell,  
Acting Secretary.

[FR Doc. 84-8343 Filed 3-27-84; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER84-323-000]

### Florida Power & Light Co.; Filing

March 23, 1984.

The filing Company submits the following:

Take notice that on March 15, 1984, Florida Power & Light Company (FPL) tendered for filing two Exhibits A to its FERC Electric Tariff, First Revised Volume No. 1, for the termination of service to Seminole Electric Cooperative, Inc. at its Bayshore and Slater delivery points. In accordance with the terms of these Exhibits A, all loads previously served at these delivery points have been transferred to a different existing delivery point as of February 27, 1984.

FPL requests an effective date of February 27, 1984, and therefore requests waiver of the Commission's notice requirements.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211



and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before April 11, 1984. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Acting Secretary.

[FR Doc. 84-8344 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. ER84-324-000]

**Florida Power & Light Co.; Filing**

March 23, 1984.

The filing Company submits the following:

Take notice that on March 15, 1984, Florida Power & Light Company (FP&L) tendered for filing a contract executed by both parties entitled "Contract for Interchange Service Between Florida Power & Light Company and City of Starke, Florida."

FP&L requests an effective date of June 1, 1984, and therefore requests waiver of the Commission's notice requirements.

According to FP&L a copy of this filing was served upon the City of Starke.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before April 11, 1984. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Acting Secretary.

[FR Doc. 84-8345 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Project No. 7229-001]

**The Grisdale Hill Co.; Surrender of Preliminary Permit**

March 23, 1984.

Take notice that The Grisdale Hill Company, Permittee for the Bartlett Power Project No. 7229, has requested that its preliminary permit be terminated. The preliminary permit for Project No. 7229 was issued on September 20, 1983, and would have expired on August 31, 1985. The project would have been located on the Salmon River in Clackamas County, Oregon.

The Permittee filed the request on February 7, 1984, and the surrender of the preliminary permit for Project No. 7229 is deemed accepted as of February 7, 1984, and effective as of 30 days after the date of this notice.

Lois D. Cashell,  
Acting Secretary.

[FR Doc. 84-8346 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Project No. 6406-001]

**Langell Valley Irrigation District; Surrender of Preliminary Permit**

March 23, 1984.

Take notice that Langell Valley Irrigation District, Permittee for the Gerber Reservoir Project No. 6406, has requested that its preliminary permit be terminated. The preliminary permit for Project No. 6406 was issued on January 3, 1983, and would have expired on June 30, 1984. The Project would have been located on Upper Miller Creek in Klamath County, Oregon.

The Permittee filed the request on February 13, 1984, and the surrender of the preliminary permit the Project No. 6406 is deemed accepted as of February 13, 1984, and effective as of 30 days after the date of this notice.

Lois D. Cashell,  
Acting Secretary.

[FR Doc. 84-8347 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. TA84-4-1-60-002]

**Locust Ridge Gas Co.; Proposed Changes in FERC Gas Tariff**

March 23, 1984.

Take notice that on March 15, 1984, Locust Ridge Gas Company (Locust Ridge) tendered for filing the following revisions to its FERC Gas Tariff:

**Original Volume No. 3—Second**

Substitute Sixteenth Revised Sheet No. 1A

**Original Volume No. 1—Second**

Substitute Ninth Revised Sheet No. 1A.

Locust Ridge states that these new tariff sheets will have no net effect on the Company's current effective rate. Copies of the filing have been mailed to its jurisdictional customers.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). All such petitions or protests should be filed on or before April 2, 1984. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Acting Secretary.

[FR Doc. 84-8348 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Project No. 4792-001]

**Mac Hydro Power Co.; Inc.; Surrender of Exemption From Licensing**

March 21, 1984.

Take notice that Mac Hydro Power Company, Inc., Exemptee for the proposed Aikens Creek Water Power Project No. 4792, has requested that its exemption be terminated. The exemption from licensing was issued on September 28, 1982, and the project would have been located on Aikens Creek in Humboldt County, California.

The Exemptee filed its request on March 12, 1984. The surrender of the exemption from licensing for Project No. 4792 is deemed accepted as of March 12, 1984 and will be effective 30 days after the date of this notice.

By direction of the Commission.  
Lois D. Cashell,  
Acting Secretary.

[FR Doc. 84-8349 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Project No. 5126-002]

**Mega Hydro Inc.; Surrender of Preliminary Permit**

March 23, 1984.

Take notice that Mega Hydro Inc., Permittee for the proposed West Fork-



Feather River Power Project No. 5126 has requested that its preliminary permit be terminated. The preliminary permit was issued on December 22, 1982, and would have expired on May 31, 1984. The project would have been located on West Fork Creek in Butte County, California. Mega Hydro Inc. cites that the project is not economically feasible for development.

Mega Hydro Inc. filed its request on January 30, 1984, and the surrender of its permit for Project No. 5126 is deemed accepted effective 30 days from the date of this notice.

Lois D. Cashell,  
*Acting Secretary.*

[FR Doc. 84-8350 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. ER84-321-000]

**Pacific Power & Light Co.; Filing**

March 23, 1984.

The filing Company submits the following:

Take notice that on February 24, 1984, Pacific Power & Light Company (PP&L) tendered for filing a Letter Agreement dated, December 2, 1983 between PP&L and the Public Utility District No. 1 of Cowlitz County (The District) and an Amendment (Amendatory Agreement) to the Power Contract dated June 4, 1957 between PP&L and The District.

PP&L states that the Letter Agreement provides for a methodology to determine transfer and motoring losses associated with The District's power allocation from the Swift Hydroelectric Project. PP&L further states that the \$54,000 transfer charge noted in the Letter Agreement is a restatement of the transfer charge contained in PP&L's December 15, 1983 filing under Docket No. ER84-171-000.

PP&L indicates that the Amendatory Agreement reflects The District's withdrawal from the sale of electrical power and energy to PP&L and provides for scheduling, accounting and storage of The District's power allocation from the Swift Hydroelectric Project.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211,

385.214). All such motions or protests should be filed on or before April 6, 1984. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
*Acting Secretary.*

[FR Doc. 84-8351 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Project No. 4916-001]

**Plumas County Flood Control and Water Conservation District; Surrender of Preliminary Permit**

March 23, 1984.

Take notice that Plumas County Flood Control and Water Conservation District (District), Permittee for the proposed Chips Creek Project No. 4916 has requested that its preliminary permit be terminated. The preliminary permit was issued on March 21, 1983, and would have expired on September 30, 1984. The project would have been located on Chips Creek in Plumas County, California. The District cites that the project is within the U.S. Forest Service's Rare II Planning Area which precludes activities necessary to determine the feasibility of the proposed project.

The District filed its request on February 6, 1984, and the surrender of its permit for Project No. 4916 is deemed accepted effective 30 days from the date of this notice.

Lois D. Cashell,  
*Acting Secretary.*

[FR Doc. 84-8352 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. TA84-2-41-001]

**Southwest Gas Corp.; Proposed Changes in FERC Gas Tariff**

March 23, 1984.

Take notice that on March 19, 1984, Southwest Gas Corporation (Southwest) tendered for filing the following revisions to its FERC Gas Tariff, Original Volume No. 1: Substitute Twenty-Second Revised Sheet No. 10.

This filing is in response to the recommendations of the Commission's auditors.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such petitions or protests should be filed on or before April 4, 1984. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
*Acting Secretary.*

[FR Doc. 84-8353 Filed 3-27-84; 8:45 am]  
BILLING CODE 6717-01-M

**Office of Hearings and Appeals**

**Cases Filed; Week of March 2 Through March 9, 1984**

During the week of March 2 through March 9, 1984, the appeals and applications for exception or other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy. Submissions inadvertently omitted from earlier lists have also been included.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585.

Dated: March 21, 1984.  
George B. Breznay,  
*Director, Office of Hearings and Appeals.*



## LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of Mar. 2 through Mar. 9, 1984]

| Date         | Name and location of applicant                            | Case No. | Type of submission                                                                                                                                                                                                                                                                                                                            |
|--------------|-----------------------------------------------------------|----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Mar. 5, 1984 | Industrial Sprinkler Co., Hackensack, N.J.                | HFA-0212 | Appeal of an Information Request Denial. If granted: The February 23, 1984, Freedom of Information Request Denial issued by the Department of Energy would be rescinded and Industrial Sprinkler Company would receive access to documents relating to the DOE's audit of Terminal Construction Company.                                      |
| Mar. 6, 1984 | Economic Regulatory Administration, Washington, D.C.      | HRZ-0191 | Interlocutory Order. If granted: The proposed Remedial Order (Case No. HRO-0156) issued to Gulf Oil Corporation would be modified as follows: the violation time period would be extended, amount of alleged overcharges would be increased, and Subpart V proceedings would be substituted for the remedial measures.                        |
| Do.          | do                                                        | HRD-0203 | Motion for Discovery. If granted: Discovery would be granted to Economic Regulatory Administration regarding issues of marine transportation costs in connection with the Proposed Remedial Order issued to Marathon Oil Company (Case No. HRO-0026).                                                                                         |
| Do.          | Marathon Oil Co., Washington, D.C.                        | HRD-0204 | Motion for Discovery. If granted: Discovery would be granted to Marathon Oil Company in connection with the Statement of Objections submitted in response to a Proposed Remedial Order (Case No. HRO-0026) issued to the firm.                                                                                                                |
| Do.          | do                                                        | HRD-0205 | Motion for Discovery. If granted: Discovery would be granted to Marathon Oil Company, regarding issues of marine transportation costs in connection with the Proposed Remedial Order issued to the firm (Case No. HRO-0026).                                                                                                                  |
| Do.          | Welsch Oil Co., Bellevue, Iowa                            | HEE-0090 | Exception to the Reporting Requirements. If granted: Welsch Oil Company would not be required to file form EIA 782-B "Reseller/Retailer's Monthly Petroleum Products Sales Report".                                                                                                                                                           |
| Mar. 8, 1984 | Ashland Oil, Inc./Atlantic Richfield, Los Angeles, Calif. | HEJ-0047 | Request for Protective Order. If granted: Atlantic Richfield Company would enter into a Protective Order with the Ashland Oil, Inc. regarding the exchange of proprietary information between Atlantic Richfield Company and Ashland Oil, Inc. in connection with Ashland Oil Inc.'s Application for Exception (Case No. BEE-1676).           |
| Do.          | Herbert Holmes, Clarksburg, W. Va.                        | HFA-0213 | Appeal of an Information Request Denial. If granted: The February 27, 1984 Freedom of Information Request Denial issued by the Nevada Operations Office would be rescinded, and Herbert Holmes would receive access to his dosimeter readings and related medical reports resulting from a nuclear test named "Operation Trepidator" in 1955. |
| Mar. 9, 1984 | Texaco, Inc., Washington, D.C.                            | HRR-0085 | Motion for Modification/Rescission. If granted: The February 28, 1984 Decision and Order (Case No. HRZ-0168) issued to the Office of Special Counsel would be modified regarding Texaco, Inc.'s request to reconsider the LOC Code information.                                                                                               |

## REFUND APPLICATIONS RECEIVED

[Week of Mar. 2 to Mar. 9, 1984]

| Date          | Name and refund proceeding/name of refund applicant | Case No.               |
|---------------|-----------------------------------------------------|------------------------|
| Mar. 6, 1984  | Amoco/Asher Oil Co., Amoco/Heilig Oil Co.           | RF21-12287, RF21-12288 |
| Feb. 29, 1984 | Amoco/Capitol Rent A Car, Inc.                      | RF21-12289             |
| Mar. 6, 1984  | Amoco/Doug Asher Oil Co., Inc.                      | RF21-12290             |

[FR Doc. 84-8342 Filed 3-27-84; 8:45 am]

BILLING CODE 6450-01-M

## Western Area Power Administration

## Request for Applications for Short-Term Power From the Navajo Generating Station

**AGENCY:** Western Area Power Administration, Department of Energy.

**ACTION:** Notice of request for applications for short-term power from the Navajo Generating Station.

**SUMMARY:** The Western Area Power Administration (Western), Boulder City Area Office, is requesting applications for Navajo Generating Station (Navajo) power. The general principles under which the power is to be marketed are contained in the General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects (Criteria) published in the Federal Register on May 9, 1983 (48 FR 20881).

Applications are requested for short-term capacity and energy available from Navajo, a feature of the Central Arizona Project (CAP), in accordance with Part IV of the Criteria. Allocations of Navajo power for short-term arrangements will be made after review of applications requested herein.

Allocations of Navajo power for long-term arrangements will be made after the decision relating to the construction of a regulatory storage unit is reached.

Western will immediately begin accepting and reviewing applications for power in accordance with the Criteria.

**ADDRESS:** Applications may be sent to: Mr. Thomas A. Hine, Area Manager, Boulder City Area Office, Western Area Power Administration, P.O. Box 200, Boulder City, NV 89005, (702) 293-8800.

**DATE:** Applications for short-term Navajo power will be accepted through

April 30, 1984. Applications postmarked after that date will not be considered.

**SUPPLEMENTARY INFORMATION:** On May 9, 1983, Western published the General Consolidated Power marketing Criteria or Regulations for Boulder City Area Projects in the Federal Register. The Criteria contains the general power marketing principles for amounts of power available from Navajo. Terms for delivery will be consistent with the Criteria. Charges for capacity and energy will currently be consistent with the United States layoff agreements. These charges currently include an annual generation capacity charge, an annual generation capacity surcharge, a generation operating charge and a generation energy charge. Charges for transmission capacity currently include an annual transmission capacity charge, an annual transmission capacity surcharge, an annual Moenkopi



Substation use charge, and a transmission operating charge.

As stated in the Criteria, the power from Navajo is marketed as contingent power, with the receiver supplying the necessary reserve capacity. Navajo power available for marketing is that amount of power withdrawn from the current layoff contractors that is surplus to the needs of the CAP. It is anticipated that the power to be allocated will be available for the most part during offpeak hours for the startup of CAP, and will be available only during the winter season after CAP pumping is in full operation. The amount available during any hour will be dependent upon Navajo output and CAP load.

The current schedule for withdrawal of Navajo power from the layoff contractors is shown below:

| Withdrawal date | Withdrawal amount (MW) |            |
|-----------------|------------------------|------------|
|                 | Incremental            | Cumulative |
| July 1984       | 16.4                   | 16.4       |
| July 1984       | 8.7                    | 25.1       |
| July 1984       | 13.7                   | 38.8       |
| July 1984       | 11.2                   | 50.0       |
| January 1985    | 316.3                  | 366.3      |
| July 1985       | 41.5                   | 407.8      |
| July 1985       | 61.0                   | 468.8      |
| January 1986    | 31.8                   | 500.6      |
| January 1986    | 46.2                   | 546.8      |

\* The January 1985 withdrawal includes separate planned withdrawals of 4.6 MW for the Protective and Regulatory Pumping Unit, and 40.7 MW for the Yuma Desalting Plant, which have been postponed due to the enactment of Public Law 96-336.

\* Withdrawals from preference contractors will be postponed until May 31, 1987, if power is not needed for CAP.

This schedule is subject to change concurrent with any change in the CAP construction schedule.

The Salt River Project has installed a dynamic participation signal that instantaneously allocates the output of Navajo to the participants in the Navajo Generating Station. Due to the varied output of the powerplant, with variations in coal quality and other factors, each successful applicant must be able to accept such a signal in order to provide system regulation and control. Inasmuch as the output of Navajo is separated into percentages equal to the participation share, Western will allocate Navajo power by percentage of the amount withdrawn.

Applications shall include name and address of the applicant, including contact person, and the amounts of capacity and energy requested for both the summer and winter seasons as defined in the Criteria.

The applications for power shall include the following applicant profile data as approved through November 30,

1984, by the Office of Management and Budget (OMB No. 1904-0037):

1. Eligibility—a statement of eligibility as a preference customer under Reclamation Law and pertinent statutes, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)).

2. Organization—a brief description of the organization that will interact with Western on contract and billing matters.

3. The name, address, and telephone number of a contact person from a consulting firm used, if any.

4. Transmission:

a. Voltage of service required, requested point(s) of delivery, and the capacity desired at each.

b. A description of the transmission arrangements necessary to deliver the power from the project delivery point(s) specified in the Criteria to the applicant's load.

5. Loads:

a. A tabulation showing monthly peak demands and monthly energy usage for calendar years 1981, 1982, and 1983.

b. The applicant's daily peak for system loads for the peak weeks in the summer (March–September) and winter (October–February) seasons for 1981, 1982, and 1983.

6. Resources:

a. List of generating resources, if any, including installed capacity, 1983 plant factor, and location.

b. A listing, if an applicant is applying for power on behalf of others, of the entities represented, the present allocations to those entities of existing Federal resources, and the proposed allocation of the available new resources.

c. A listing of power supply contracts with parties other than Western, which includes the amounts of capacity and energy under contract and termination date of each.

7. The application may also contain any other pertinent information the applicant may wish to provide.

8. The signature and title of an appropriate official who is able to attest to the validity of the data submitted and who is authorized to submit an application for power.

The applications for power will be available for public review at the Boulder City Area Office after May 11, 1984.

Issued at Golden, Colorado, March 16, 1984.

Robert L. McPhail,  
Administrator.

[FR Doc. 84-8340 Filed 3-27-84; 8:45 am]  
BILLING CODE 6450-01-M

## ENVIRONMENTAL PROTECTION AGENCY

[OPP-160640; PH-FRL 2554-6]

### Louisiana Department of Agriculture; Receipt of Application for Specific Exemption To Use a Pesticide for an Unregistered Use; Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

**SUMMARY:** EPA has received a specific exemption request from the Louisiana Department of Agriculture (hereafter referred to as the "Applicant") for a specific exemption to use the active ingredient 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole, plus its metabolites containing the dichlorobenzyl moiety (Tilt, EPA Reg. No. 100-617) to control sheath blight caused by *Rhizoctonia solani*, as well as brown spot caused by *Bipolaris oryzae*, narrow brown spot caused by *Cercospora oryzae*, leaf smut caused by *Entyloma oryzae*, stem rot caused by *Sclerotium oryzae*, blast caused by *Piricularia oryzae* and sheath spot caused by *Rhizoctonia oryzae* on 250,000 acres of rice in Louisiana. EPA is soliciting comment before making the decision whether or not to grant the specific exemption.

**DATE:** Comments must be received on or before April 27, 1984.

**ADDRESS:** Written comments by mail to: Information Services Section, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460. In person, bring comments to: Rm. 236, CM#2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part of all of that information as "Confidential Business Information." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A sanitized copy of any material containing Confidential Business Information must be provided by the submitter for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

#### FOR FURTHER INFORMATION:

By mail: Libby Welch, Registration Division (TS-787C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.



Office location and telephone number:  
Rm. 716C, CM#2, 1921 Jefferson Davis  
Highway, Arlington, VA (703-557-  
1192).

**SUPPLEMENTARY INFORMATION:** Pursuant to section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), the Administrator may, at his discretion, exempt a State agency from any registration provision of FIFRA if he determines that emergency conditions exist which require such exemption.

The Applicant has requested the Administrator to issue a specific exemption to permit the use of Tilt, EPA Reg. No. 100-617, to control sheath blight caused by *Rhizoctonia solani*, as well as brown spot caused by *Bipolaris oryzae*, narrow brown spot caused by *Cercospora oryzae*, leaf smut caused by *Entyloma oryzae*, stem rot caused by *Sclerotium oryzae*, blast caused by *Pyricularia oryzae* and sheath spot caused by *Rhizoctonia oryzae* throughout Louisiana. Information in accordance with 40 CFR Part 166 was submitted as part of this request. Tilt is currently registered for use on grasses grown for seed.

According to the Applicant, approximately 525,000 acres will be planted to rice in Louisiana during the 1984 crop year. It is stated that the Louisiana rice crop has been damaged annually by a number of diseases, primarily sheath blight caused by *Rhizoctonia solani*, but including the other pests named above. The incidence of rice sheath blight has increased since the late 1960's and has severely reduced yields in various locations in the State, according to the Applicant. The organism is soilborne with the primary inoculum being a sclerotium that continues to increase in number with each diseased crop.

The Applicant predicts that this disease situation will continue and even worsen because of the following factors: (1) Resistant long grain rice varieties are currently unavailable and none are anticipated within the near future; (2) the pathogen attacks both rice and soybeans, preventing cultural control through crop rotation; (3) changes in crop rotation from long rice-pasture rotations to rice-rice or rice-soybean rotation have occurred; these rotations have allowed the current buildup of inoculum levels resulting in increasing sheath blight incidence in rice; (4) crop residue destruction has not been effective in controlling this pathogen; burning of rice stubble is not effective in completely destroying the sclerotia, contributes to air pollution, and destroys needed organic matter; incorporation of

residue by tillage serves to replenish the sclerotia reserve in the soil; (5) currently labeled fungicides available for sheath blight control *Rhizoctonia* spp. in rice, but do not provide consistently high levels of control or substantially reduce the number of sclerotia in the stubble. Benlate (benomyl) and Mertect (thiabendazole) are currently labeled for rice sheath blight in Louisiana. The Applicant states that widespread use of benomyl has often resulted in the development of pathogen resistance to the chemical and consequent loss of benomyl as a control measure. The chemical pathways of thiabendazole are very near those of benomyl and similar situations are expected to develop with that compound according to the Applicant. It is estimated that treatment of affected acreage with Tilt in 1984 could save Louisiana growers at least \$9,400,000.

The Applicant proposes to treat 250,000 acres of rice throughout the State. The time of usage will be from May 1, 1984, through September 1, 1984, with no more than 141,000 pounds of active ingredient to be used.

This notice does not constitute a decision by EPA on the application itself. Use of the pesticide Tilt has been determined to be of public interest, and, therefore, the Agency has decided that public notice and opportunity for public comment pursuant to 40 CFR 166.10 is called for as a part of the information adjudication for specific exemptions. Accordingly, interested persons may submit written views on this subject to the Program Management and Support Division at the address above. The comments must be received on or before April 27, 1984, and should bear the identifying notation "OPP-180640." All written comments filed pursuant to this notice will be available for public inspection in Rm. 236, Crystall Mall No. 2, at the address given above, from 8:00 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Agency, accordingly, will review and consider all comments received during the comment period in determining whether to issue the emergency exemption requested by Louisiana.

Dated: March 19, 1984.

Edwin L. Johnson,

Director, Office of Pesticide Programs.

[FR Doc. 84-8356 Filed 3-27-84; 8:45 am]

BILLING CODE 5560-50-M

[WH-FRL 2554-5]

**Draft General National Pollutant Discharge Elimination System (NPDES) Permit for Log Transfer Facilities in the State of Alaska; Change in Comment Period and Hearing**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of Extension of public comment period and postponement of public hearing.

**SUMMARY:** The Regional Administrator of Region 10 is today giving notice that the public comment period (previously noticed at 49 FR 6788, February 23, 1984) for the draft general National Pollutant Discharge Elimination System (NPDES) permit for log transfer facilities in the State of Alaska is extended until May 4, 1984. A public hearing scheduled for March 28, 1984, in Juneau has been rescheduled for April 27, 1984. An informal public workshop to discuss the permit terms and conditions has been scheduled for April 12, 1984, in Juneau. The time and location of these meetings are listed below.

**DATES:** Interested persons may submit comments on the draft general permit to EPA, Region 10, at the address below no later than May 4, 1984. An informal public workshop is scheduled for April 12, 1984, at 9:00 A.M. at the University of Alaska, Bill Ray Center, Room #152, 1108 F Street, Juneau. A public hearing is scheduled for April 27, 1984, at 9:00 A.M., at the Mendenhall Glacier Visitor Center, Juneau, Alaska. Any person wishing to make statement at the hearing must notify Mr. Wally Scarburgh at the address below no later than 4:00 P.M. on April 20. Regional Administrator, U.S. Environmental Protection Agency, Region 10, M/S 430, 1200 Sixth Avenue, Seattle, Washington 98101.

**FOR FURTHER INFORMATION CONTACT:**

Mr. William Lawrence, Alaska Operations Office, Room E 556, Federal Building, 701 C Street, Box 19, Anchorage, Alaska 99513, (907) 271-5083  
Ms. Marcia Lagerloef, Ocean Programs Section, M/S 430, US EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 442-1265  
Mr. Wally Scarburgh, Alaska Operations Office, 3200 Hospital Drive, Suite 101, Juneau, Alaska 99811, (907) 586-7619  
Mr. Edward Ovsenik, Permits Division (EN-336), EPA Headquarters, 401 M Street, S.W., Washington, D.C. 20460, (202) 426-7035



Dated: March 21, 1984

L. Edwin Coate,  
Acting Regional Administrator.

[FR Doc. 84-6357 Filed 3-27-84; 8:45 am]

BILLING CODE 6560-50-M

[OPP-180641 PH-FRL 2552-7]

# **Cyromazine; Issuance of Emergency exemptions for Use of an Unregistered Pesticide**

**AGENCY:** EPA Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has granted specific exemptions for the use of the pesticide chemical cyromazine to the: (1) Maryland and Pennsylvania Departments of Agriculture and the Virginia Department of Agriculture and Consumer Services to control fly larvae in poultry manure. The specific exemptions were authorized for use in 15 counties in Pennsylvania, 3 counties in Maryland and in the affected area of Virginia's Shenandoah Valley to control an outbreak of highly pathogenic avian influenza; and (2) Florida Department of Agriculture and Consumer Services for use on celery, lettuce and fresh-market tomatoes to control leafminers.

**DATES:** 1. The specific exemptions were granted to Pennsylvania on December 9, 1983, to Maryland on January 31, 1984, and to Virginia on February 25, 1984. Pennsylvania's exemption expires on December 9, 1984, or when the emergency situation ceases to exist, whichever occurs first; and Maryland's and Virginia's exemptions expire on January 26, 1985, or when the emergency situation ceases to exist, whichever occurs first.

2. Florida's exemptions for use on celery and lettuce were granted on November 25, 1983, and expire on June 30, 1984; and the tomato exemption was granted on February 9, 1984, and expires on June 15, 1984.

**FOR FURTHER INFORMATION CONTACT:** By mail: Jack E. Housenger, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Office location and telephone number: Rm. 716, CM#2, 1921 Jefferson Davis Highway, Arlington, Va. (703) 557-1192.

**SUPPLEMENTARY INFORMATION:** EPA has granted specific exemptions for the use of the pesticide chemical cyromazine to the Maryland and Pennsylvania Departments of Agriculture and the Virginia Department of Agriculture and Consumer Services to control fly larvae

in poultry manure in areas affected by an outbreak of highly pathogenic avian influenza. EPA has also granted a specific exemption to Florida for the use of cyromazine on celery, lettuce, and tomatoes to control leafminers.

## **Maryland, Pennsylvania, and Virginia**

The Maryland and Pennsylvania Departments of Agriculture and the Virginia Department of Agriculture and Consumer Services have declared the existence of emergency conditions due to outbreaks of the highly pathogenic avian influenza in the poultry flocks in certain areas within their States.

The highly pathogenic avian influenza is a virus which can be transmitted by various mechanisms. One possible mechanism of transmission may be the fly. Therefore, one aspect of the efforts to reduce the spread of the virus is control of the fly population. Each State will use cyromazine in poultry feed as a feed-through pesticide to control fly larvae in poultry manure. Currently registered pesticides will also be used to control adult fly populations as well as other insects. This outbreak of highly pathogenic avian influenza has resulted in mortality of 25 to 60 percent of the poultry population affected.

After reviewing the applications and other available information, EPA has determined that:

1. An outbreak of the highly pathogenic avian influenza has occurred in seven counties in Pennsylvania, in Cecil County in Maryland and in some parts of Virginia's Shenandoah Valley, and as a part of the overall program to help reduce the spread of the virus, immediate control of fly populations is necessary in and around the affected areas.

2. Registered alternatives are not adequately controlling the fly populations which could result in the spread of this highly pathogenic virus.

3. As a result of a risk analysis, it has been determined that the use of cyromazine as proposed will not pose an unreasonable hazard to man or the environment.

Accordingly, Pennsylvania, Maryland, and Virginia have been granted specific exemptions to use the pesticide noted above until December 9, 1984, in Pennsylvania; and January 26, 1985, or when the emergency situation ceases to exist, whichever occurs first, in Maryland and Virginia, to the extent and in the manner set forth in the applications. The specific exemptions are also subject to the following conditions:

1. The unregistered pesticide product Larvadex 0.3% Premix, which contains the active ingredient cyromazine and is

manufactured by the CIBA-GEIGY Corporation, will be used.

2. Larvadex 0.3% Premix will be applied to feed at a rate of one pound of product (0.003 pound active ingredient) per ton of feed.

3. Poultry may be fed treated feed in the Pennsylvania counties affected by the avian flu and their adjoining counties, Adams, Berks, Chester, Cumberland, Dauphin, Delaware, Franklin, Lancaster, Lebanon, Lehigh, Montgomery, Northumberland, Perry, Schuylkill, and York; in the Maryland county of Cecil and the adjoining counties of Harford and Kent; and in Virginia's Shenandoah Valley.

4. Treated feed may be fed only to egg-laying, pullet and broiler poultry.

5. Combined residues of cyromazine and its metabolite melamine will not exceed 0.4 ppm in eggs, meat, fat and meat byproducts of poultry.

6. The EPA shall be immediately informed of any adverse effects resulting from the use of cyromazine in connection with these exemptions.

7. A final report summarizing the results of these programs is required to be submitted after the exemptions expire.

## **Florida**

The Florida Department of Agriculture and Consumer Services has declared the existence of emergency conditions with regard to control of leafminers in celery, lettuce and tomatoes. The leafminer has been a serious problem for Florida growers and has resulted in extreme economic losses on each of these crops in the past when registered alternative pesticides have failed to provide control.

After reviewing the applications and other available information, EPA has determined that:

1. A pest outbreak of the leafminer has occurred and registered alternative pesticides will not provide adequate control.

2. Significant economic losses are anticipated without the use of an effective leafminer control.

3. The use of cyromazine as proposed will not pose an unreasonable hazard to man or the environment.

Accordingly, Florida has been granted specific exemptions to use cyromazine on celery and lettuce until June 30, 1984, and on fresh-market tomatoes until June 15, 1984. The specific exemptions are also subject to the following conditions:

1. The unregistered pesticide product Trigard 75 WP, which contains the active ingredient cyromazine and is manufactured by the CIBA-GEIGY Corporation, will be used.



2. Trigard 75 WP will be applied at a rate of 0.125 pound active ingredient per acre per application.

3. A maximum of 12 applications may be made to celery and tomatoes and a maximum of 8 applications may be made to lettuce.

4. A 14-day preharvest interval will be observed for applications made to celery and lettuce while applications may be made up to the day of harvest for tomatoes.

5. A maximum of 10,000 acres of celery and 12,000 acres of lettuce in the counties of Hendry, Lake, Orange, Palm Beach, Sarasota, and Seminole may be treated. A maximum of 30,000 acres of tomatoes for fresh fruit market only may be treated.

6. Combined residues of cyromazine and its metabolite melamine will not exceed 0.5 ppm in or on celery or lettuce and 1 ppm in or on tomatoes as a result of the approved treatments.

7. The EPA shall be immediately informed of any adverse effects resulting from the use of cyromazine in connection with these exemptions.

8. A final report summarizing the results of these programs is required to be submitted after the exemptions expire.

Dated: March 19, 1984.

Edwin L. Johnson,

Director, Office of Pesticide Programs.

[FR Doc. 84-8138 Filed 3-27-84; 8:45 am]

BILLING CODE 6560-50-M

[OPTS -53057; TSH-FRL 2517-2]

### Premanufacture Notices; Monthly Status Report for December 1983

#### Correction

In FR Doc. 84-2850, beginning on page 4139, in the issue of Thursday, February 2, 1984, make the following corrections:

1. On page 4139, in Table I, in the entries for 84-257 and 84-258, the second line in the identity and generic name column should read "a diisocyanate."

2. On page 4140, in Table I, in the entry for 84-286, in the identity and generic name column, after "aliphatic" add "nitrile".

3. On page 4142, in Table III, in the entry for 83,1156 "cyclopentadieneformaldehyde" should be one word.

4. On page 4143, in Table III, in the entry for 83-1273 "Chromophore" should have an "e" on the end.

BILLING CODE 1505-01-M

[(OPTS-59146A/147A) TSH-FRL 2554-3]

### Certain Chemicals; Approval of Test Marketing Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of six applications for test marketing exemptions (TMEs) under section 5(h)(6) of the Toxic Substances Control Act (TSCA), TME-84-26, TME-84-27, TME-84-28, TME-84-29, TME-84-30, TME-84-31, and TME-84-32. The test marketing conditions are described below.

EFFECTIVE DATE: March 20, 1984.

#### FOR FURTHER INFORMATION CONTACT:

Joe B. Boyd, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Rm. E-202, 401 M St. SW., Washington, DC. 20460 (202-382-3739).

SUPPLEMENTARY INFORMATION: Section 5(h)(1) of TSCA authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test marketing purposes if the Agency finds that the manufacture, processing, distribution in commerce, use and disposal of the substances for test marketing purposes will not present any unreasonable risk of injury to health or the environment. EPA may impose restrictions on test marketing activities and may modify or revoke a test marketing exemption upon receipt of new information which casts significant doubt on its finding that the test marketing activity will not present any unreasonable risk of injury.

EPA hereby approves TME-84-26, TME-84-27, TME-84-28, TME-84-29, TME-84-30, TME-84-31, and TME-84-32. EPA has determined that test marketing of the new chemical substances described below, under the conditions set out in the TME applications, and for the time periods and restrictions (if any) specified below, will not present any unreasonable risk of injury to health or the environment. Production volumes, number of workers exposed to the new chemicals, and the levels and durations of exposure must not exceed those specified in the applications. All other conditions and restrictions described in the applications and in this notice must be met.

#### TME 84-26

Date of Receipt: February 6, 1984.

Notice of Receipt: February 17, 1984 (49 FR 6162).

Applicant: Confidential.

Chemical: (G) Polyamic resin solution.

Use: (G) Specialty coatings.

Production Volume: Confidential.

Number of Customers: Confidential.

Worker Exposure: Manufacture: a total of 4 workers.

Processing: Dermal and inhalation.

Number of workers is confidential.

Test Marketing Period: 18 months.

Commencing on: March 20, 1984.

Risk Assessment: No significant health or environmental concerns were identified. The estimated worker exposure and environmental release of the test market substance are expected to be low. The test market substance will not pose any unreasonable health or environmental risks.

Public Comments: None.

#### TME 84-27

Date of Receipt: February 6, 1984.

Notice of Receipt: February 17, 1984 (49 FR 6162).

Applicant: Confidential.

Chemical: (G) Polyamic resin solution.

Use: (G) Specialty coatings.

Production Volume: Confidential.

Number of Customers: Confidential.

Workers Exposure: Manufacture: a total of 4 workers.

Test Marketing Period: 18 months.

Commencing on: March 20, 1984.

Risk Assessment: No significant health or environmental concerns were identified. The estimated worker exposure and environmental release of the test market substance are expected to be low. The test market substance will not pose any unreasonable health or environmental risks.

Public Comments: None.

#### TME 84-28

Date of Receipt: February 7, 1984.

Notice of Receipt: February 17, 1984 (49 FR 6162).

Applicant: Confidential.

Chemical: (G) Alkyl polyether.

Use: (G) Used in manufacture of an industrial polyurethane.

Production Volume: 20,000 kg.

Number of Customers: Confidential.

Worker Exposure: Manufacture and use: dermal, a total of 10 workers up to 2 hrs/day up to 120 days/yr.

Test Marketing Period: 6 months.

Commencing on: March 20, 1984.

Risk Assessment: No significant health or environmental concerns were identified. The estimated worker exposure and environmental release of the test market substance are expected to be low. The test market substance will not pose any unreasonable health or environmental risks.

Public Comments: None.



**TME 84-29**

*Date of Receipt:* February 7, 1984.  
*Notice of Receipt:* February 17, 1984  
 (49 FR 6162).  
*Applicant:* Confidential.  
*Chemical:* (G) Urethane acrylate.  
*Use:* (G) Resin coating.  
*Production Volume:* 20,000 lbs.  
*Number of Customers:* five.  
*Worker Exposure:* Manufacture: dermal, 10 workers. Processing and use: dermal, 20 workers  
*Test Marketing Period:* 12 months.  
*Commencing on:* March 20, 1984.  
*Risk Assessment:* No significant health or environmental concerns were identified. The estimated worker exposure and environmental release of the test market substance are expected to be low. The test market substance will not pose any unreasonable health or environmental risks.  
*Public Comments:* None.

**TME 84-30**

*Date of Receipt:* February 10, 1984.  
*Notice of Receipt:* February 24, 1984  
 (49 FR 6990).  
*Applicant:* Confidential.  
*Chemical:* (G) Rosin-modified phenolic resin.  
*Use:* Heat set web offset printing inks (80%), Sheet-fed quickset printing inks (20%).  
*Production Volume:* Confidential.  
*Number of Customers:* Six.  
*Worker Exposure:* Manufacture: Dermal and inhalation a total of 4 workers, up to 3 hrs./day, up to 2 days/yr.  
*Test Marketing Period:* 6 months.  
*Commencing on:* March 20, 1984.  
*Risk Assessment:* No significant health or environmental concerns were identified. The estimated worker exposure and environmental release of the test market substance are expected to be low. The test market substance will not pose any unreasonable health or environmental risks.  
*Public Comments:* None.

**TME 84-31**

*Date of Receipt:* February 15, 1984.  
*Notice of Receipt:* February 24, 1984  
 (49 FR 6990).  
*Applicant:* EM Chemicals.  
*Chemical:* (g) Alkylbenzoic acid, 4-alkylphenyl ester.  
*Use:* Used in a mixture for manufacture of liquid crystal displays.  
*Production Volume:* Confidential.  
*Number of Customers:* 15.  
*Worker Exposure:* Manufacture: dermal, a total of 15 workers.  
*Test Marketing Period:* 3 months.  
*Commencing on:* March 20, 1984.  
*Risk Assessment:* No significant health or environmental concerns were

identified. The estimated worker exposure and environmental release of the test market substance are expected to be low. The test market substance will not pose any unreasonable health or environmental risks.  
*Public Comments:* None.

**TME 84-32**

*Date of Receipt:* February 15, 1984.  
*Notice of Receipt:* February 24, 1984  
 (49 FR 6990).  
*Applicant:* EM Chemicals.  
*Chemical:* Alkylbenzoic acid, 4-alkylphenyl ester.  
*Use:* Used in a mixture to manufacture liquid crystal displays.  
*Production Volume:* Confidential.  
*Number of Customers:* 15.  
*Worker Exposure:* Processing and use: dermal, a total of 15 workers up to 8 hrs/day and up to 90 days/yr.  
*Test Marketing Period:* 3 months.  
*Commencing on:* March 20, 1984.  
*Risk Assessment:* No significant health or environmental concerns were identified. The estimated worker exposure and environmental release of the test market substance are expected to be low. The test market substance will not pose any unreasonable health or environmental risks.  
*Public Comments:* None.  
 The Agency reserves the right to rescind approval or modify the conditions and restrictions of an exemption should any new information come to its attention which casts significant doubt on its finding that the test marketing activities will not present any unreasonable risk of injury to health or the environment.

Dated: March 20, 1984.

Don R. Clay,

Director, Office of Toxic Substance.

[FR Doc. 84-8278 Filed 3-27-84; 8:55 am]

BILLING CODE 6550-50-M

[Docket Nos. ECAO-HA-83-2, ECAO-HA-79-7; CORD-FRL-2554-U]

### Health Assessment Document for Ethylene Oxide and Ethylene Dichloride

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of availability of External Review Drafts.

**SUMMARY:** This notice announces the availability of two external review drafts: the Health Assessment Document for Ethylene Oxide and the Health Assessment Document for Ethylene Dichloride. The largest single use of ethylene oxide is as an intermediate in the synthesis of ethylene

glycol. However, small amounts of this epoxide are used as a sterilant or pesticide in commodities, pharmaceuticals, medical devices, tobacco, and other items. A major portion (84%) of the United States' ethylene dichloride production is consumed to make vinyl chloride monomer. It is also used to make chlorinated solvents, vinylidene chloride and ethyleneamines.

Those persons interested in commenting on the scientific merit of these documents will be able to obtain a copy of each document as follows:

(1) The documents will be available in single copy quantity from EPA at the following address: ORD Publications—CERI-FRN, U.S. Environmental Protection Agency, 26 W. St. Clair, Cincinnati, Ohio 45268 [(513) 684-7562].

Requesters should be sure to cite the EPA number assigned to these documents, EPA-600/8-84-009A for ethylene oxide and EPA-600/8-84-006A for ethylene dichloride.

To receive these documents, requesters should send their names and addresses to CERI at this time.

(2) These documents will also be available for public inspection and copying at the EPA Library at Waterside Mall, 401 M. Street, SW., Washington, D.C. 20460.

Commenters are requested to submit separate comments for each document rather than making a combined submission. Comments must be made in writing and addressed to either: Project Officer for Ethylene Oxide or Project Officer for Ethylene Dichloride, Environmental Criteria and Assessment Office (MD-52), U.S. Environmental Protection Agency, Research Triangle Park, N.C. 27711.

After receipt of all public comments on these documents, the Science Advisory Board will hold public meetings to review the documents. Advance notices announcing the time and place and the agenda will be published in the Federal Register.

**DATES:** The Agency will make these documents available for public comment on Monday, April 23, 1984. Comments must be received by close of business on Friday, June 22, 1984, or postmarked by that date.

**SUPPLEMENTARY INFORMATION:** The Office of Health and Environmental Assessment has prepared these health assessments to serve as source documents for EPA use. These health assessment documents were originally developed for use by the Office of Air Quality Planning and Standards to support decision-making regarding



possible regulation of ethylene oxide and ethylene dichloride under the Clean Air Act. However, the scope of these documents has since been expanded to address multimedia aspects.

In the development of these assessment documents, the scientific literature has been inventoried, key studies have been evaluated, and summary/conclusions have been prepared so that the chemicals' toxicity and related characteristics are qualitatively identified. Observed effect levels and other measures of dose-response relationships are discussed, where appropriate, so that the nature of the adverse health responses is placed in perspective with observed environmental levels.

**FOR FURTHER INFORMATION CONTACT:** Ms. Diane Chappell, U.S. Environmental Protection Agency, Environmental Criteria and Assessment Office, MD-52, Research Triangle Park, N.C. 27711 [(919) 541-3637].

Dated: March 23, 1984.

**Bernard D. Goldstein,**  
Assistant Administrator for Research and Development.

[FR Doc. 84-8277 Filed 3-27-84; 8:45 am]  
BILLING CODE 5560-50-M

[FRL 2493-5]

# **Fuels and Fuel Additives; Proposed Revocation of Waiver Granted Under Section 211(f) of the Clean Air Act**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed revocation of waiver.

**SUMMARY:** The Environmental Protection Agency (EPA) is granting a petition for reconsideration and proposing to revoke a waiver granted under section 211(f) of the Clean Air Act to American Methyl Corporation (American Methyl) "for a proprietary fuel known as 'Petrocoal.'" This proposed revocation is based on EPA's analysis of relevant data and information in light of a petition for reconsideration and a supplementary submission by the Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA), as well as comments submitted in response to a solicitation for public comments in the Federal Register on May 2, 1983, 48 FR 19779.

## **Hearing**

Any party desiring to present views orally may request a hearing by

<sup>1</sup> At the time EPA granted the waiver, American Methyl was known as Anafuel Unlimited. For ease of reference, this notice will refer to the company as American Methyl throughout.

contacting Richard G. Kozlowski at the address listed below. The deadline for such a request is April 27, 1984. If EPA receives a timely request, EPA will publish in the Federal Register a notice of its date and location.

**DATE:** Comments should be submitted on or before May 29, 1984, or 30 days after the hearing, should one be held.

**ADDRESS:** Copies of the non-confidential information relative to this waiver application and subsequent submissions are available for inspection in public docket EN-81-8 at the Central Docket Section (LE-131) of EPA, Gallery I—West Tower, 401 M Street, SW., Washington, D.C. 20460, (202) 382-7548, between the hours of 8:00 a.m. and 4:00 p.m. Any comments from interested parties should be addressed to this docket, with a copy forwarded to Richard G. Kozlowski, Director, Field Operations and Support Division (EN-397), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying materials in the docket.

**FOR FURTHER INFORMATION CONTACT:** James W. Caldwell, Chief, Fuels, Section, Field Operations and Support Division (EN-397), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, (202) 382-2635.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Section 211(f)(1) of the Clean Air Act (Act), 42 U.S.C. 7545(f)(1), states that effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce in commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light-duty motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 206 of the Act. Section 211(f)(4) of the Act, 42 U.S.C. 7545(f)(4), provides that the Administrator of EPA, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under section 211(f)(1), if the Administrator determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, or the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the use life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the

emission standards with respect to which it has been certified pursuant to section 206 of the Act. If the Administrator does not act to grant or deny an application within 180 days of receipt of the application, the waiver authorized by section 211(f)(4) shall be treated as granted.

American Methyl submitted an application for a waiver for a proprietary fuel known as "Petrocoal" on February 20, 1981. A Federal Register notice was published April 13, 1981, 46 FR 21695, acknowledging receipt of the application and soliciting comments. With American Methyl's consent, EPA subsequently extended until September 28, 1981 the 180-day review period provided by section 211(f)(4), that would have expired on August 19, 1981. On September 28, 1981, the Administrator granted the waiver, subject to certain conditions. A Federal Register notice of this decision was published on October 5, 1981, 46 FR 48975.

On December 4, 1981, MVMA filed with EPA a petition seeking administrative reconsideration of EPA's decision. In general, MVMA's administrative petition argued that: (1) The Petrocoal waiver was not in the public interest, (2) adverse consequences to vehicle manufacturers and individual car owners would result, and (3) the decision was contrary to applicable provisions of the Act.

Also on December 4, 1981, MVMA on behalf of its member companies, and the General Motors Corporation individually, filed timely petitions for review of the waiver grant in the U.S. Court of Appeals for the District of Columbia Circuit. American Methyl joined in the litigation as an intervenor, and over the next several months the parties discussed approaches to narrow or resolve the outstanding issues. Those discussions did not lead to an agreement, and on February 22, 1983, MVMA submitted to EPA supplementary petition for reconsideration, referencing new data on the effects of methanol in gasoline on automotive evaporative emissions. These data were obtained primarily from studies performed for the Department of Energy and the Coordinating Research Council by Systems Control, Inc., and from studies by E.I. duPont, Inc. (DuPont) in connecting with its August 25, 1982 waiver application to EPA concerning a methanol blend. These data were also based on comments submitted by the California Air Resources Board in connection with DuPont's waiver application. On the basis of this evidence, MVMA argued, among other



things, that evaporative emissions with methanol-gasoline blends are significantly higher than with gasoline, and cannot be controlled by fuel blending, even if volatility is controlled.

In addition, subsequent information indicated that the fuel tested by the applicant and provided by the applicant to the Agency and to General Motors Corporation for testing may not have been the fuel described in the waiver request.

Since the control of evaporative emissions by compliance with American Society for Testing and Materials (ASTM) specifications was a key assumption upon which the waiver was granted, and since the composition of the fuel described or tested is integral to the waiver decision, the new information brought into question the validity of the Agency's waiver grant.

Accordingly, in the *Federal Register* on May 2, 1983, 48 FR 19789, EPA stated that it was considering administrative action to modify or to revoke the waiver under section 211(f) of the Act, or to control or prohibit the sale of Petrocoal under section 211(c) of the Act. The Agency solicited comments, data, and analyses which relate to the waiver or which could be of help to the Agency in determining whether Petrocoal produces any emission product which either causes or contributes to air pollution which may reasonably be anticipated to endanger the public health or welfare, or which will impair to a significant degree the performance of any emission control device or system which is in general use or which is likely to be in general use in a reasonable time, or which would cause or contribute to the failure of a vehicle to meet applicable emissions standards to which it was certified.

## II. New Information

### A. Introduction

Since the Petrocoal waiver was granted on September 28, 1981, new information concerning Petrocoal as well as information concerning the relationship between evaporative emissions and fuel volatility has been obtained. Much of this new information has been received in response to EPA's May 2, 1983 request for comments. In response to this notice, EPA received many comments from motor vehicle manufacturers, oil companies, alternative fuel companies, and a prosecuting attorney.

The major source of new data is a test program on vehicles fueled with alcohol blends conducted by Systems Control, Inc. for the Coordinating Research Council (CRC) under contract with the Department of Energy. The study was

designed to evaluate, for these fuels, such properties as driveability, fuel economy, and emissions performance. The program was divided into two phases: ethanol and methanol blends. The methanol phase of the program included ten vehicles.

While all the data from the CRC tests have been accumulated, CRC has not published a final report. Accordingly, EPA received many reviews, comments, and analyses concerning these data. Detailed analyses were provided by the MVMA, Energy and Environmental Analysis, Inc., the California Air Resources Board, DuPont, and Atlantic Richfield. The comments mainly discuss emissions properties observed for the various methanol blends compared with the base fuel.

One of the methanol blends, labeled MG-3 by the CRC, consists of 9.2 percent methanol and 3.2 percent butanol. This particular blend most closely resembles the Petrocoal fuel, although it does not contain Petrocoal's proprietary inhibitor. In the original application for a waiver, American Methyl suggested that its inhibitor served two purposes: To "control corrosion" in the fuel system and to "Overcome the usual decrease in fuel efficiency of methanol-petroleum blends." Since the inhibitor apparently does not affect short-term evaporative emissions, either in American Methyl's view or based on EPA's independent judgment, the MG-3 fuel data are pertinent to a review of Petrocoal's properties regarding evaporative emissions. Therefore, these data are appropriate for the purpose of evaluating the central argument concerning the relationship between evaporative emissions and volatility with Petrocoal.

Additionally, Toyota presented new data consisting of emissions tests performed on two Toyota vehicles, a 1982 Cressida and 1983 Corolla. These vehicles were tested on an indolene reference fuel and a test fuel almost equivalent to Petrocoal. This test fuel contained 9 percent methanol and 6 percent tertiary-butyl alcohol in unleaded gas. It was blended to be similar in Reid Vapor Pressure to the indolene reference fuel and to a lesser extent to the other distillation specifications. Toyota also presented results concerning fuel deterioration and driveability using and unleaded fuel alone compared to the same unleaded fuel blended with Petrocoal Basic.

There is also new information concerning the composition of the proprietary inhibitor in Petrocoal. A series of reports and affidavits have been received from American Methyl

Corporation and Coal Fuels Corporation. The matter of concern is whether CV-100, a ferrous picrate, is a portion of Petrocoal's proprietary inhibitor. Coal Fuels asserts it must be used in Petrocoal. American Methyl originally argued that CV-100 was a component in Petrocoal, but now assert it is not.

Some new information concerning long-term effects of Petrocoal has also been presented to EPA. Specifically, the California Air Resources Board has commented on its experience with part failures in vehicles fueled with Petrocoal, and Toyota has presented some test results on peroxide formation in vehicles fueled with blends approximating Petrocoal.

### B. Evaporative Emissions

Several important comments were received that discuss the effect on evaporative emissions of Petrocoal and fuels similar to it. The discussion that follows reviews the general nature of the data and supporting analyses; and section C, the effect on vehicle emission standards is discussed.

1. *Coordinating Research Council Data.* CRC's data on methanol blends are particularly important to an examination of effect of Petrocoal on evaporative emissions. This unique importance stems from the close physical control that was exercised over volatility as measured by the Reid Vapor Pressure (RVP) or the Front End of Volatility Index (FEVI) in developing the test and base fuels and the similarity in alcohol composition between certain of the test fuels and Petrocoal. This discussion will therefore review some basic observations regarding the outcomes of the test program. These data are also analyzed in various comments to the docket.

The test fuels and base fuel for this test program are described in Table 1. The test fuels of primary interest to this discussion are MG-1, MG-3, and MG-5, each a blend of methanol and butanol similar to Petrocoal, with MG-3 most like Petrocoal. A review of all three fuels is of interest for what it may reveal of trends and relationships. Both RVP and FEVI are controlled to a narrower range than is common for such studies and a range entirely within typical ASTM Summer specifications. Moreover, the base fuel has the highest RVP of all of the fuels and is exceeded in FEVI by only one of the fuels examined here—MG-5.

The vehicles used in the test program are identified in Table 2. Five of them are closed loop California cars designed to meet a two-gram evaporative



standard, and five are open loop Federal cars designed to meet a six-gram evaporative standard.<sup>2</sup> All are 1980 model year vehicles. Emission levels of the six-gram vehicles may reflect some anticipation of the 1981 Federal shift to a two-gram standard.

The changes in evaporative hydrocarbon emissions with each of the three test fuels relative to the higher RVP base fuel are shown separately in Table 3 for two-gram and six-gram vehicles. When all ten cars are combined, the increases in evaporative emissions for MG-1, MG-3, and MG-5 are, respectively, 47%, 95%, and 146%. Removal of vehicles #3 and #12, vehicles with the sharpest pattern of response to the test fuels, reduces these increases to 35%, 56%, and 94%—still very substantial effects, considering the already largely controlled volatility.

Since MG-3 most closely resembles the fuel tested in the original Petrocoal evaluation (except for the presence in Petrocoal of the proprietary inhibitor, which does not appear to affect evaporative emissions), the data from tests made with this fuel were subjected to the statistical tests usually used by the Agency to evaluate fuel waiver applications.<sup>3</sup> In light of its low volatility, both in absolute terms and relative to the base fuel, MG-3's failure of all three of these tests for evaporative emissions is considered to be very significant.

The paired difference test places a confidence interval about the mean of the vehicle-by-vehicle differences between base and test fuels. The 90% interval for MG-3 was from 1.16 grams to 4.37 grams. The entire interval was above zero, evidence that an increase occurred which was outside of the normal realm to chance variations. MG-3 also failed the sign test, which looks at the preponderance of increases over decreases. This test is particularly useful here in that it gives no special weight to extreme values. The test result was such, with all vehicles showing increases, that there is 99% confidence that an increase actually occurs. The final test, the deteriorated emissions test, evaluates the significance of these increases by adding the difference attributable to the test fuel on a vehicle-by-vehicle basis to the 50,000-mile deteriorated certification level for each

vehicle. The result is compared to applicable standards. This evaluation demonstrates that four of these vehicles, all two-gram cars, exceed the evaporative emission standard when fueled with MG-3. For a sample of ten, any single failure of this test is sufficient to support the conclusion that the fuel causes vehicles to exceed emission standards. Test parameters are set so that there is at least a 90% chance that the fuel will fail the test if 25% or more of the vehicles in the sample fleet fail when using it. Statistical details of this test are developed more fully in the Administrator's decision on Methyl Tertiary Butyl Ether cited above.

To summarize, the Agency's analysis of these data on fuels very similar to Petrocoal seems to demonstrate a failure to meet evaporative hydrocarbon standards using Petrocoal. Control of volatility to ASTM specifications appears to exert insufficient control to assure that use of Petrocoal will not cause or contribute to excessive evaporative emissions.

#### 2. ARCO Petroleum Products Company.

Comments to this docket by ARCO consist, in the main, of a statistical reanalysis of the data from nine different studies that included evaporative emissions measurements. The studies tested a variety of fuels, including gasohol, methanol blends, and methanol-butanol blends as compared with pure hydrocarbon fuels. The primary focus of the effort is on demonstrating the existence of a statistical correlation between fuel volatility (as measured by the Front End Volatility Index (FEVI)<sup>4</sup>) and evaporative emissions as measured in the SHED<sup>5</sup> test. The correlation is shown to exist in all nine of the studies.

A correlation such as that mentioned above can exist and be quite strong without precluding the parallel finding that certain fuel compositions yield higher evaporative emissions than others at controlled volatility. The generally wide volatility range of the studies considered and the tendency of the base or reference fuels to be relatively low in that range also contribute to a situation where the demonstrated existence of a positive correlation between evaporative emissions and FEVI tells little about the complete statistical model that predicts evaporative emissions. Alone among the nine studies, the CRC study of methanol blends provides physical control over volatility and permits direct comparison

of evaporative emissions between Petrocoal-like blends and base fuels. Where that comparison is made by ARCO, the base fuel test results fall entirely below a regression line constructed using methanol fuels to relate evaporative emissions to FEVI (see Figure 9-6, Docket Entry III-D-2). In the absence of some other causal influence than FEVI, the base fuel tests should be distributed more or less evenly above and below the regression line. This distributional anomaly is doubly significant in light of the base fuel's position in the middle of the FEVI range for this study.

In addition to the correlation analysis mentioned above, ARCO made an attempt to determine, where possible, whether base fuels and test fuels differ significantly with respect to the slope of the regression equations relating FEVI and evaporative emissions. That no significant differences were found is not remarkable, given the paucity of data where such comparisons could be made.

ARCO has demonstrated the existence of a positive correlation between FEVI and evaporative emissions where a wide range of volatilities and fuel compositions are involved. The existence of this general relationship is not at issue. The question, rather, is whether controlling the FEVI of high concentration methanol blends to ASTM specifications will adequately control evaporative emissions to within the standard. The question more specifically is whether so controlling the FEVI of Petrocoal blends will control evaporative emissions within standards. The ARCO analysis fails to demonstrate this.

#### 3. E. I. DuPont de Nemours & Company

DuPont's submission undertakes essentially the same demonstration as that made by ARCO—to show that the correlation known to exist with hydrocarbon fuels between volatility and evaporative emissions is also present where alcohol-gasoline blends are involved. DuPont analyzed data from three studies, including the CRC study discussed above. The analysis demonstrates, as expected, the existence of the correlation of evaporative emissions and FEVI. In the plots provided by DuPont, the hydrocarbon fuels have a tendency to have evaporative emissions which are lower than those predicted by the regression line relating emissions and volatility—an indication that a more complex causal process may be involved than the simple bivariate relationship between evaporative emissions and FEVI.

<sup>2</sup> The evaporative emission standard for 1981 and later model year cars is two grams per test measured on the full SHED (Sealed Housing for Evaporative Determination) test. Prior to that, the standard was six grams per test. See 40 CFR 66.0818(b)(1)(i).

<sup>3</sup> See, for example, Application for Methyl Tertiary Butyl Ether—Decision of the Administrator, 44 FR 12242 (March 6, 1979).

<sup>4</sup> Defined as the Reid Vapor Pressure of the fuel plus .13 times the percentage evaporated at 158°F.

<sup>5</sup> Sealed Housing for Evaporative Determinations.



DuPont carried this analysis a step further than other commenters by assessing the adequacy of various volatility measures through the use of multiple regression procedures. This effort resulted in development of a new measure of volatility which correlates more closely with evaporative emissions than either FEVI or RVP, the more commonly used measures.

DuPont's analysis, though laudable for its progress toward a better measure of volatility, still does not demonstrate the equivalence of evaporative emissions from hydrocarbon fuels with those from alcohol fuels even when DuPont's new measure of volatility is controlled. The simple demonstration of a statistical correlation between evaporative emissions and volatility fails to explain away the strong relationship between evaporative emissions and the presence or absence of the high methanol concentrations typical of Petrocoal, even with volatility controlled.

#### 4. Energy and Environmental Analysis

Writing on behalf of Coal Fuels and American Methyl under separate covers, Energy and Environmental Analysis Inc. (EEA) reviewed the engineering aspects of the CRC test program on methanol blends and also performed a statistical analysis of the data.

EEA raised several technical concerns with respect to the CRC test program. EEA contends that certain non-standard equipment installed in the vehicles' fuel systems (primarily the fluidyne fuel flow transducers for Department of Energy (DOE) fuel economy measurements) resulted in fuel leakage and increased evaporative emissions. It is true that CRC encountered some leakage problems. However, the vehicles were checked thoroughly after testing for leaks and when leaks were encountered, the data were not used.

EEA also contends that because the test fuels did not contain corrosion inhibitors, there was a greater possibility of fuel leakage. For the short duration of the test program, the presence or lack of corrosion inhibitors should not have any significant effect. Also, as previously mentioned, the vehicles were monitored very carefully for leakage after each test, and only where no leakage occurred were the data used. EPA therefore concludes that the occurrence of leakage or potential leakage does not compromise the validity of the CRC data for evaluating evaporative emissions effects of the tested fuels.

EEA's statistical analysis of the CRC data is somewhat more sophisticated than the approach used by other commenters and was designed to permit

types of conclusions not possible with a simple bivariate correlation analysis. In essence, the analysis used multiple regression with dummy variables for individual vehicles and for the presence of alcohol in fuels. This approach would appear to permit the examination of the effects on evaporative emissions of any single variable in the equation with the effects of other variables held constant. Of particular interest here, of course, is the ability of the technique to adjust evaporative results for test fuels to the levels that could be expected if the fuels had been blended to the same volatility (measured by FEVI) as that of the based fuel. The analyst would thus statistically remove the effects of differing volatilities in the test program and determine the effects on evaporative emissions of the presence or absence of methanol.

While in most respects this is a rigorous way to approach these data and the substantive concerns in question, there are some problems with application of the statistical method used. The use of a single dummy variable to represent all alcohol fuels simultaneously, regardless of the amount of alcohol, prevents an assessment of the impact of individual test fuels on evaporative emissions, and calls into question the usefulness of the significance test for this variable. It should also be noted that statistical control of volatility is not entirely necessary in this study due to the tight experimental controls that in fact were exercised over this variable, and the fact that the base fuel was near the middle of the FEVI range.

These qualifications aside, this analysis does permit certain important conclusions. First, the relationship between measures of volatility and evaporative emissions (discussed above in connection with the ARCO and DuPont analyses) is here again established in an analysis employing statistical controls over other variables. Second, this analysis quantifies the effect of methanol blends on evaporative emissions in a situation where volatility is controlled, both relative to the base fuel and relative to ASTM specifications.

The emission increase over base fuel levels is established separately for two-gram and six-gram vehicles and averages together the effects of all of the test fuels in the program (including MG-2 and MG-4 in which methanol was used without a cosolvent). For the closed loop two-gram cars, there was a 56% increase of 1.56 grams over base fuel emissions; for the open loop six-gram cars, the increase was 1.35 grams—a 43% increase. The method also

permits determination of the amount by which FEVI would have to be lowered for the test fuels to achieve the same evaporative level as was obtained with the base fuel—a rather substantial 3.8 FEVI points for the two-gram cars and 3.2 points for the six-gram cars. It is important to note that despite the reduced variance of the predictor dummy variable, this effect of methanol blends in producing an evaporative increase at controlled FEVI was statistically significant at the .01 level (99% confidence) or better. While it may be possible to eliminate the increase by reducing FEVI below the level for the base fuel (and hence reducing RVP below the ASTM specification), the necessary compensatory adjustment estimated by EEA's analysis is a drastic one. Therefore, the EEA analysis, while again affirming the relationship between volatility and emissions, additionally demonstrates the upward pressure on evaporative emissions exerted by methanol blends even when RVP or FEVI is controlled.

5. *Toyota*. Toyota's test program was small, but sharply focused on the issues in the request for comments, and thus, is of considerable interest. The data for the emissions tests were developed using a test fuel comprising 9% methanol and 6% butanol whose distillation properties (particularly RVP) were deliberately matched to Indolene, the certification reference fuel. The two vehicles in the program experienced 32% and 105% increases in evaporative emissions over the reference fuel. The larger of the two increases occurred with a carburetor-equipped vehicle, a 1983 Corolla, while the smaller increase occurred with a fuel-injected 1982 Cressida. Toyota notes that the Corolla was induced by the test fuel to fail its two-gram standard.

The test fuel for this program was different from Petrocoal only in the absence of the proprietary inhibitor. It was matched in RVP, and to a lesser extent in other distillation characteristics with the reference fuel and controlled to an RVP level within ASTM summer specifications. Despite these controlled conditions, there was an increase for the carburetor-equipped vehicle very similar in magnitude to those seen with MG-3 and MG-5 in the CRC program. This evidence seems damaging to the proposition that controlling Petrocoal's RVP to ASTM specifications will hold evaporative emissions to the levels obtained with conventional gasolines.



### C. Effect of Petrocoal on Adherence to Standards

Since the effect of a proposed fuel or fuel additive on vehicles' abilities to adhere to applicable vehicle emission standards is the crucial issue under section 211(f), the data and comments that bear upon this question with Petrocoal are examined here.

1. *Energy and Environmental Analysis.* EEA's analysis of the CRC data undertakes a direct examination of the standards question for evaporative emissions by computing vehicle-by-vehicle failure probabilities for the base and for all test fuels aggregated. EEA provided little information on the method use in this analysis, and Agency statisticians were unable to determine how the calculations were made. EEA argues that the failure probabilities for vehicles certified to the six-gram standard are low on both base and test fuels and that the high probabilities for "two-gram" vehicles are not meaningful, since they all failed on the base fuel.

The low failure probabilities asserted for six-gram cars are clearly a function of the large difference between the base fuel evaporative emission certification levels for these vehicles and the standard. The two-gram vehicles' performance on these tests cannot be simply ignored because the specific cars initially failed. Rather, the effect of the high increase in evaporative emissions must be considered.

While the failure probability discussion is not ultimately productive, EEA's larger analysis of the CRC data does provide certain insights relating to this question. The 1.56 gram and 1.32 gram increases computed for two-gram cars, respectively, at controlled FEVI, are quite large relative to the two-gram standard that applies to 1981 and later Federal vehicles. The likelihood that there will be sufficient headroom to cover increases even approaching this magnitude for most of the vehicle fleet slight.<sup>6</sup>

2. *California Air Resources Board (CARB).* CARB uses data from its in-use surveillance testing program to look at the likelihood that Petrocoal induces vehicles to exceed standards. The analysis looks at both evaporative hydrocarbon (HC) emissions and oxides of nitrogen (NO<sub>x</sub>) exhaust emissions. The approach is to apply the percentage increases for the CRC data to the in-use test results from properly maintained cars and then to compare the resulting

failure rates to those obtained in the original tests.

For evaporative emissions, CARB treated hot soak and diurnal measurements separately, later combining them for overall pass/fail determinations. They used an average of the MG-3 and MG-5 results from the CRC data to obtain the increases. The failure rate for the twenty two-gram cars with evaporative measurements went from an initial 20% to 80% when the increases were applied. The Agency repeated the procedure with just the increase attributable to MG-3, which falls entirely within the Petrocoal alcohol composition definition. This effort has the same result—the failure rate still changed from 20% to 80% when the test fuel effect was applied.

NO<sub>x</sub> effects were similarly evaluated, but on larger in-use vehicle samples of 63 and 90 vehicles each. The failure rate for the 1979 vehicles on a 1.5 gram per mile (gpm) California standard went from 21% to 52% when the increase from the two test fuels was added. The 1980 1.0 gpm vehicles' failure rate increased to 72% from 26%.

3. *Toyota.* Since the Toyota test program used a fuel judged identical to Petrocoal in its instantaneous emission effects, and since the CARB analysis renewed Agency concerns about NO<sub>x</sub> emissions, the two Toyota test vehicles' results were appended to those from the earlier tests of Petrocoal by American Methyl, GM, and the Agency on which the original waiver was based. Then, the deteriorated emissions test was performed again. One of the two Toyotas, the carburetor-equipped Corolla, failed this test, bringing the overall rate to 3 out of 18, a more serious failure than the 2 of 16 observed during the original consideration of the Petrocoal waiver. The 73% increase on the Corolla is large enough to cause concern when vehicles are meeting a 1.0 gpm NO<sub>x</sub> standard.

### D. Long-Term Effects

A review of the comments on specific long-term effects of Petrocoal finds two results specific to Petrocoal. The California Air Resources Board (CARB) reports that customer experience now exists documenting long-term deleterious effects of Petrocoal. CARB reports that Newhall, a Petrocoal marketer in California, found numerous complaints about drivability problems when Petrocoal at 12 percent total alcohol was marketed. Further, Newhall reported accelerator pump failures associated with the fuel. Some of the accelerator pumps on the vehicles of Newhall's own employees had to be replaced. Since such failure of

accelerator pumps can cause failure of emission standards, it gives EPA cause for concern regarding the long-term ability of vehicles fueled with Petrocoal to meet applicable emissions standards.<sup>7</sup>

Toyota presents data on laboratory tests of Petrocoal Basic vs. a hydrocarbon fuel, both blended to similar distillation characteristics. It finds the Petrocoal oxidation stability to be almost 50 percent lower than the base gasoline, and the peroxide formation seven times larger with Petrocoal than with the base hydrocarbon fuel. Toyota cites this increased peroxide formation as likely to significantly increase gum generation, which is the cause of rapid deterioration of rubber and metal parts. Further, it may directly cause corrosion of fuel system materials leading to the deterioration of emission control devices and, hence, to increased emissions. Once again, these tests lead EPA to question the ability of vehicles to comply with applicable emissions standards using Petrocoal.

### E. Other Comments to the Docket

The major comments concerning evaporative emissions and emissions durability have been discussed above. Some additional comments which were also presented are discussed here.

Sun Oil, Union Carbide, and American Methyl Corp. presented information or suggested modifications concerning lower levels of alcohol than the 15 percent maximum currently permitted in Petrocoal. Sun Oil, in requesting a rescission of the waiver, presented two technical papers discussing, among other things, materials compatibility. It concludes that data exist to support acceptance of a 3.5 weight percent oxygen limit on alcohol blends for satisfactory drivability. Further, Sun Oil presents its research findings that up to five percent concentrations of methanol are compatible with fuel system parts. Yet, it notes insufficient data have been developed at higher concentrations of methanol, with the literature indicating that such higher percentages could significantly change the properties of elastomers.

Union Carbide, while supportive of Petrocoal, suggested that the volatility of Petrocoal might be too high. It performed a mathematical regression to arrive at a

<sup>6</sup>For example, the average certification level for 49-state 1981-1984 model year GM light-duty vehicles is 1.3 grams. This leaves substantially less headroom than the Petrocoal effects indicated by this EEA analysis would consume.

<sup>7</sup>It should be noted that the information before the Agency at the time of the grant of the waiver included a vehicle fueled with Petrocoal that experienced an accelerator pump failure. EPA discounted the information at the time, because it was a single incident. In light of CARB's comments, the pump failure is more significant.



more optimal set of parameters. It suggested that Petrocoal should be restricted such that total alcohols do not exceed 12.5 percent by volume, methanol content does not exceed 10.9 percent and C-4 content is at least 1.5 percent.

American Methyl, while obviously supporting its own product, did note that it would accept a modification to restrict the maximum allowable alcohol content to 12½ percent.

Some further information came from the Prosecuting Attorney of Genessee County, Michigan. He cited managers of vehicle repair facilities who are seeing damage to fuel systems with the use of methanol fuels. He said they noted deterioration of rubber sealants and suggested that a maximum allowable limit of 5 percent methanol would be appropriate.

### III. Proper Ingredients

A portion of the May 2, 1983 notice requested comments concerning the ingredients that were proper for use in Petrocoal. This request stemmed from the controversy concerning the use of CV-100, an additive containing ferrous picrate. While the ingredients of Petrocoal are proprietary, EPA has been given written permission by American Methyl, the firm which requested the confidential treatment of Petrocoal, to publicly discuss the CV-100 issue.

Affidavits have been presented by both American Methyl and Coal Fuels Corp. discussing the use of this compound. Also, Carvern Petrochemical Co., Ltd. has commented that CV-100, a product it manufactures, is a "very necessary ingredient."

The confidential information submitted by American Methyl with its waiver application disclosing the contents of Petrocoal did not mention CV-100. The fuel registration required by section 211(b) of the Act which was filed with the EPA office at Research Triangle Park, NC, also does not include CV-100, either by its name or chemical identity. American Methyl did at one time want to use CV-100 for blends of gasoline with high volumes of methanol, and argued that ferrous picrate was implicitly covered by the registration and waiver application. It now claims that it does not use the substance.

In the course of vehicle testing required for the waiver application, American Methyl performed tests at Systems Control, Inc., in California. It is generally agreed that the Petrocoal fuel in those tests did not include CV-100. However, it appears that CV-100 may well have been used in Petrocoal samples supplied by American Methyl

and used by EPA in Ann Arbor and General Motors in Warren. American Methyl has stated its belief that CV-100 was not used in these samples, although it has originally intended that it would be added to the fuel sent to General Motors. A Coal Fuels Corporation official, formerly with American Methyl, asserts that CV-100 definitely was used by EPA and General Motors.

Since CV-100 has a metallic ingredient, a chemical test for the ferrous component would still be possible two years later. The Agency has investigated and learned, however, that neither GM, EPA, nor American Methyl still has any of the Petrocoal fuel that was sent either to EPA or General Motors.

Further, the long-term durability information on Petrocoal presented by American Methyl was developed by Dr. Geoff Germane using a fuel that did not contain CV-100. He tested for long-term compatibility of Petrocoal with the metals and polymers in vehicles. His basic conclusion in his April 1, 1981 report was the Petrocoal caused less corrosion than unleaded gasoline on metals, and that Petrocoal and unleaded gasoline has similar effects on fuel system polymers. However, this report clearly did not consider CV-100.

An applicant for a fuel or fuel additive waiver must present emissions test results based on the same fuel as that for which the waiver is sought. In the Petrocoal case, it appears that a different fuel was used for at least some testing. Specifically, a fuel containing CV-100 may well have been used for the GM and EPA tests. The applicant at the time considered CV-100 to be an ingredient in the fuel.

The fact that the GM and EPA emissions tests results with CV-100 did not differ appreciably from those of Petrocoal without the CV-100 is not surprising. CV-100 includes an iron compound, mixed in very small quantities in the finished gasoline. The emission effects would show up after many miles of driving, usually in the form of detrimental catalyst coating and/or engine deposits. For this reason, EPA has required long-term durability tests for metallic additives.

EPA was not aware of the presence of CV-100 in any of the Petrocoal samples. Had EPA known that this metallic compound was present in the samples used in the long-term compatibility tests, it would have required substantiation that Petrocoal with CV-100 would not contribute to a vehicle's failure to meet applicable emissions standards over the 50,000-mile lifetime of vehicles.

MVMA further commented that the parameters used by EPA to describe

Petrocoal were faulty. Specifically, MVMA claimed that the total alcohol allowed (15%) and the maximum ratio of methanol to C-4 alcohols (6.5 to 1) were not based on any fuel actually sampled. The sample of Petrocoal used by EPA's Ann Arbor laboratory was tested by the Department of Energy.\* They reported a volumetric content that was less than 100% as follows: 9.9% methanol, 2.2% butanol, and 82.8% hydrocarbons. They note that "it is not uncommon, however, that the sum of three independent analyses of a complex mixture such as this vary from 100 percent by a few points." The ratio of methanol to butanol was 4.5 to 1. General Motors\* reported a total of 10% alcohol with a methanol/butanol ratio of 2. General Motors noted that the 15% Petrocoal fuel they were sent contained only about 10% total alcohol.

As to the fuel tested by American Methyl, EPA has some reason to think that sample might have contained 11.2% methanol, 3.6% C-4 alcohol, with a ratio of 3.2 to 1.<sup>10</sup> However, GM, upon contact with American Methyl, claimed that it learned that the 15% proprietary additive in Petrocoal contained hydrocarbons in addition to the alcohols and inhibitor. While this would appear to contradict the use of 15% alcohol as claimed by American Methyl, there is no record that American Methyl has attempted to refute GM's assertion. Thus, the total alcohol, in one case, might have reached 15%, but some ambiguity still remains. It appears clear, however, that the highest ratio of methanol to butanol tested was 4.5 to 1, not 6.5 to 1.

### IV. Today's Actions

After reviewing the public comments and other information obtained since the grant of the Petrocoal Waiver, the Agency is granting MVMA's administrative petition for reconsideration of the waiver. New information submitted by MVMA and others seems to disprove the validity of key conclusions on which the waiver was based. Most importantly, the waiver's requirement of adherence to ASTM volatility standards (predominantly RVP) appears to be inadequate to control evaporative emissions of Petrocoal. As a result, EPA can no longer conclude that vehicles

\* Letter from Frank W. Cox, Research Chemist, U.S. Dept. of Energy, to Richard Lawrence (EPA), August, 4, 1981.

\* General Motors Comments to Docket EN-81-8, July 6, 1981.

<sup>10</sup> See note of telephone conversation between Byron Nagata (Anafuel Unlimited) and Barry Nussbaum (EPA), May 4, 1981.



using Petrocoal will meet Clean Air Act emission standards. In addition, there is some evidence that some of the fuel tested at the time of the waiver application was not the same as the fuel described in the waiver. If true, it also calls into question whether the applicant met its burden to demonstrate that its fuel will not result in noncompliance with emission standards. This is in part because, had EPA known that Petrocoal contained the metallic additive CV-100, it would have required the applicant to perform long-term durability tests to assure that emission standards are met over the full useful life of motor vehicles under the Clean Air Act.

American Methyl raised an objection to reconsideration of the Petrocoal waiver in a letter to then-acting Administrator Verstandig, dated April 21, 1983.<sup>11</sup> Although American Methyl did not present the same objection in its response to EPA's requests for comments, it is relevant to address that objection at this time. Specifically, American Methyl argued that the information presented for reconsideration "may not validly be the basis for administrative reconsideration" under section 307(d)(7)(B) of the Act, since the information was presented after the expiration of the 60-day period for seeking judicial review.

The argument is flawed for two reasons. First, section 307(d)(7)(B) does not apply to this reconsideration. Proceedings to waive the prohibitions in section 211(f) of the Act are not among the actions enumerated in section 307(d)(1), which provides an exclusive list of actions that are subject to the requirements of section 307(d). The only such action under section 211 is "the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 211." Section 307(d)(1)(D). A section 211(f) waiver is not a regulation, however.

Secondly, even if section 307(d)(7)(B) applied to this reconsideration, it would not bar these proceedings. That provision only defines the instances in which EPA is compelled to convene a proceeding for reconsideration; it does not prohibit EPA from reconsidering any action based on new information arising after expiration of the period for judicial review.<sup>12</sup>

<sup>11</sup> "Opposition to Request by Motor Vehicle Manufacturers Association for Reconsideration of Grant of Fuel Waiver for Petrocoal Fuel," from Scott N. Stone, attorney for American Methyl Corporation, to Lee Verstandig, Acting Administrator, EPA, April 21, 1983.

<sup>12</sup> American Methyl also argued that MVMA's original petition for reconsideration presented "no legally valid ground for administrative

In reconsidering the Petrocoal waiver, the standard for review of the newly submitted and developed information is that prescribed in section 211(f)(4) of the Act: will the fuel or fuel additive, or its emission products cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance with the emission standards under which the device or system was certified pursuant to section 206 of the Act? If the information available to the Agency indicates that such compliance will be achieved, the waiver will continue in effect. If, however, this information indicates that such compliance will not be achieved, the waiver will be revoked by the Agency.

Based on information submitted in response to the May 2, 1983 Federal Register notice, and other information provided to the Agency since the grant of the Petrocoal waiver, the Agency is today proposing to revoke that waiver. Although evidence continues to demonstrate a correlation between evaporative emissions and volatility in general, serious doubts have been raised as to whether at a given RVP or FEV1 a methanol blend fuel will behave similarly to a hydrocarbon blend fuel with regard to evaporative emissions. Therefore, the ability of ASTM controls on volatility such as those in the Petrocoal waiver to effectively limit evaporative emissions is questionable. Since the available test data show large increases in evaporative emissions with use of fuels similar to Petrocoal, the Agency has concluded that the use of Petrocoal will likely cause vehicles to exceed applicable Clean Air Act emission standards. In addition, new information raises questions concerning Petrocoal's compatibility with certain automotive materials. Finally, as noted, above, conflicting information concerning the content of Petrocoal calls into question whether the manufacturer met its burden of demonstrating compliance with applicable emission standards during the initial waiver process.

reconsideration under the Clean Air Act," since MVMA's original petition (before it was supplemented) purportedly contained no new information which could not have been presented to EPA during the comment period. This argument, also based on section 307(d)(7)(B), is also incorrect for the two reasons discussed immediately above. Moreover, regardless of the merits of American Methyl's argument with respect to MVMA's original petition for reconsideration, the petition as supplemented and the comments in response to the May 2, 1983 Federal Register notice clearly present new information not available to the Agency during the comment period, as discussed elsewhere in this notice.

EPA's conclusions concerning the relationship of volatility and evaporative emissions are based on the submittals discussed in Part II-B of this notice, above. In general, these analyses firmly establish a correlation between fuel volatility as measured by both RVP and the Front End Volatility Index and evaporative emissions. However, when volatility is controlled (either statistically or experimentally) to a comparable level found in reference fuels (which are below ASTM specifications), there is substantial evidence that use of methanol blends at levels similar to Petrocoal leads to evaporative emission levels higher than those of otherwise comparable hydrocarbon fuels. Such higher levels were found in the tests conducted for the Coordinating Research Council and those conducted by Toyota on fuels very similar to Petrocoal. The increases in emission levels found in these testing programs are large enough to statistically significant even with a relatively small sample. Therefore, control of volatility to ASTM specifications does not appear to be sufficient to assure that the use of Petrocoal will not result in excessive evaporative HC emissions, as was assumed by the Agency in its grant of the Petrocoal waiver.

In regard specifically to the ability of vehicles using Petrocoal to meet applicable emission standards, the information discussed above in Part II-C of this notice indicates that even relatively small emission increases may have a substantial effect on failure rates of vehicles subject to a two-gram HC evaporative emission standard. The CRC data (as analyzed by the Agency, EEA, and others) and the Toyota tests evince a relatively large impact of Petrocoal on such emissions compared to the standard. Even assuming a low level of base in-use emissions, these data indicate that use of Petrocoal is likely to cause or contribute to vehicle failures to meet HC evaporative emission standards.

In addition, information submitted to the docket causes the Agency to believe that vehicles using Petrocoal will not be able to meet the NO<sub>x</sub> exhaust emission standard. Although the testing which preceded the grant of the Petrocoal waiver indicated that this fuel was likely to cause failure of that standard, the statistical result with the data then available was marginal. However, the magnitude of increases in NO<sub>x</sub> emission shown in the new CRC and Toyota data provides an additional basis for EPA's belief regarding Petrocoal's effect on conformity to the NO<sub>x</sub>.



Finally, the application by CARB of experimental emission increases to in-use test data provides direct insight into the likely impact of Petrocoal on fleet attainment of both HC evaporative emissions and NO<sub>x</sub> exhaust emission standards. For HC evaporative emissions, in particular, these results point to a substantial incidence of Petrocoal-induced failures.

The Agency is further concerned about the CV-100 question. A waiver applicant must take precautions to assure that representative samples are available to all parties wishing to test the additive in order to respond to the request for public comments. This is especially true when the applicant for a waiver requests confidential treatment of the contents of his product. In this case, some confusion still exists as to the content of Petrocoal, as evidenced by affidavits containing contradictory statements submitted by two different companies. There is a strong possibility that CV-100 was used in some of the tests during the initial waiver process, but not in others. The waiver applicant should have exercised more caution to assure that all parties tested the same material. Lacking such caution, there are serious doubts about the reliability of information submitted to the Administrator during the initial waiver process. As noted above, this discrepancy also calls into question whether the applicant met its statutory burden of demonstration, in light of the fact that additional long-term durability testing would have been required had the Agency known the Petrocoal contained CV-100. Information submitted by Toyota concerning the long-term effects of Petrocoal raises further doubts about the ability of vehicles using Petrocoal to meet applicable emission standards throughout their useful life. This matter is an additional basis for EPA's proposed revocation of the Petrocoal waiver.

Moreover, a review of the data indicates that none of the original samples tested contained the ratio of methanol to cosolvent covered by the waiver request, and at most, only one of the samples contained the percentage of total alcohol covered. This also leads the Agency to believe the requisite burden had not, in fact, been met by American Methyl.

American Methyl has raised two additional issues concerning further action by the Agency on the Petrocoal waiver. First, it has indicated its willingness to agree to a modification of

the Petrocoal waiver so as to reduce the allowable alcohol content of Petrocoal from 15% to 12½%. Second, it has argued that a reconsideration of the Petrocoal waiver based on MVMA's petition would require reconsideration of all section 211(f) waivers granted in the past for similar alcohol-based fuels.

In regard to the proposed modification of the Petrocoal waiver, the Agency does not believe that such an action would be appropriate based on this record. American Methyl has submitted no evidence to indicate that a 12½% alcohol content limitation would eliminate the problems described above concerning the ability of Petrocoal-fueled vehicles to meet applicable emission standards, particularly the HC evaporative emission and NO<sub>x</sub> exhaust emission standards. Absent such evidence, the Agency would have no basis under section 211(f) to approve such a modified Petrocoal waiver.<sup>13</sup>

In regard to American Methyl's second issue, the Agency notes that the company has filed a petition for reconsideration and revocation of a waiver granted to ARCO for a blend of methanol and tertiary butyl alcohol (46 FR 56361, November 16, 1981). Issues raised by that petition will be addressed separately in EPA's response to it. In general, however, the Agency does not believe that a revocation of the

Petrocoal waiver either requires or precludes Agency action to regulate fuel content under the general rulemaking authority of section 211(c) or to reconsider other waivers issued under section 211(f). The information currently available to the Agency demonstrates only that methanol blends at the level allowed by the Petrocoal waiver are likely to cause emission problems. Petrocoal contains methanol at considerably higher levels than allowed by any other waiver granted by EPA. Further examination will be required before EPA can decide whether action to control fuels containing lower levels of methanol is appropriate. Thus, the Agency is not proposing any action other than revocation of the Petrocoal waiver at this time.

(Sec. 211 of the Clean Air Act, 42 U.S.C. 7545)

Dated: March 16, 1984.

William D. Ruckelshaus,  
Administrator.

TABLE 1.—COMPOSITION AND VOLATILITY OF CRC TEST AND BASE FUELS

| Fuel | Percent of |         | Reid vapor pressure | Front end volatility index |
|------|------------|---------|---------------------|----------------------------|
|      | Methanol   | Butanol |                     |                            |
| Base | 0.0        | 0.0     | 9.2                 | 12.3                       |
| MG-1 | 3.6        | 1.3     | 8.1                 | 11.1                       |
| MG-2 | 2.7        | 0.0     | 8.5                 | 11.4                       |
| MG-3 | 9.2        | 3.2     | 7.7                 | 11.6                       |
| MG-4 | 10.0       | 0.0     | 8.6                 | 13.1                       |
| MG-5 | 14.2       | 2.1     | 8.3                 | 14.0                       |

TABLE 2.—CRC TEST PROGRAM VEHICLE CHARACTERISTICS

| Vehicle No. | Manufacturer   | Model   | Standards  | Control system | Displacement (l) | Evaporation standard |
|-------------|----------------|---------|------------|----------------|------------------|----------------------|
| 1           | Chrysler       | Horizon | Federal    | Open loop      | 1.7              | 6                    |
| 2           | Chrysler       | Horizon | Federal    | Open loop      | 1.7              | 6                    |
| 3           | Chrysler       | Omni    | California | Closed loop    | 1.7              | 2                    |
| 4           | Chrysler       | Omni    | California | Closed loop    | 1.7              | 2                    |
| 7           | General Motors | Century | California | Closed loop    | 3.8              | 2                    |
| 8           | General Motors | Century | Federal    | Open loop      | 3.8              | 6                    |
| 10          | Ford           | Pinto   | Federal    | Open loop      | 2.3              | 6                    |
| 11          | Ford           | Pinto   | Federal    | Open loop      | 2.3              | 6                    |
| 12          | Ford           | Pinto   | California | Closed loop    | 2.3              | 2                    |
| 13          | Ford           | Pinto   | California | Closed loop    | 2.3              | 2                    |

TABLE 3.—PERCENT INCREASES OVER BASE FUEL EMISSIONS AND ABSOLUTE MEAN LEVELS FOR THREE TEST FUELS, BY TECHNOLOGY/STANDARD GROUPINGS

| Fuel | Closed loop 2 gram |       | Open loop 6 gram |       |
|------|--------------------|-------|------------------|-------|
|      | Percent            | Grams | Percent          | Grams |
| MG-1 | 59                 | 4.99  | 32               | 3.53  |
| MG-3 | 135                | 7.36  | 49               | 3.99  |
| MG-5 | 202                | 9.44  | 82               | 4.88  |

[FR Doc. 84-7545 Filed 3-27-84; 8:45 am]

BILLING CODE 8560-50-M

<sup>13</sup> Of course, American Methyl is free to develop such data in support of a new waiver application at that (or any other) alcohol level.

[OPTS-59141A/142A/143A; TSH-FRL 2524-3]

### Certain Chemicals; Approval of Test Marketing Exemptions

#### Correction

In FR Doc. 84-3506 beginning on page 4978 in the issue of Thursday, February 9, 1984, make the following corrections:

- On page 4978, in the heading, the docket number should read "[OPTS-59141A/142A/143A; TSH-FRL 2524-3]".
- On page 4979, column three, "TME 94-18" should read "TME 84-18".

BILLING CODE 1505-01-M



[OPP-30237; PH-FRL 2519-1]

**Certain Companies; Applications To Register Pesticide Products Containing New Active Ingredients****Correction**

In FR Doc. 84-3125 beginning on page 4836 in the issue of Wednesday, February 8, 1984, make the following correction:

On page 4837, column one **Application Received**, "3.", line three, the trademark symbol "TM" should appear after "Scout".

BILLING CODE 1505-01-M

[PF-363; PH-FRL 2523-2]

**FMC Corp.; Pesticide Petitions****Correction**

In FR Doc. 84-3384 appearing on page 4840 in the issue of Wednesday, February 8, 1984, make the following correction: In column two, "SUMMARY," line four, "(± +)" should read "(±)".

BILLING CODE 1505-01-M

**FEDERAL RESERVE SYSTEM****Agency Forms Under Review**

March 23, 1984.

**Background**

When executive departments and independent agencies propose public use forms, reporting, or recordkeeping requirements, the Office of Management and Budget (OMB) reviews and acts on those requirements under the Paperwork Reduction Act [44 U.S.C. Chapter 35]. Departments and agencies use a number of techniques to consult with the public on significant reporting requirements before seeking OMB approval. OMB in carrying out its responsibilities under the act also considers comments on the forms and recordkeeping requirements that will affect the public. Reporting or recordkeeping requirements that appear to raise no significant issues are approved promptly. OMB's usual practice is not to take any action on proposed reporting requirements until at least ten working days after notice in the **Federal Register**, but occasionally the public interest requires more rapid action.

**List of Forms Under Review**

Immediately following the submission of a request by the Federal Reserve for OMB approval of a reporting or recordkeeping requirement, a description of the report is published in the **Federal Register**. This information contains the name and telephone number of the Federal Reserve Board clearance officer (from whom a copy of the form and supporting documents is available). The entries are grouped by type of submission—i.e., new forms, revisions, extensions (burden change), extensions (no change), and reinstatements.

Copies of the proposed forms and supporting documents may be obtained from the Federal Reserve Board clearance officer whose name, address, and telephone number appear below. The agency clearance officer will send you a copy of the proposed form, the request for clearance (SF 83), supporting statement, instructions, transmittal letters, and other documents that are submitted to OMB for review.

**FOR FURTHER INFORMATION CONTACT:**

Federal Reserve Board Clearance Officer—Cynthia Glassman—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, D.C. 20551 (202-452-3829)

OMB Reviewer—Judy McIntosh—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, D.C. 20503 (202-395-6880)

**Request for Approval To Implement a One-Time Survey**

1. Report title: One-time Household Survey of Currency and Transactions Account Usage

Agency form number: FR 3030

Frequency: One-time

Reporters: Individuals and households  
Small businesses are not affected.

General description of report:  
Respondent's obligation to reply is voluntary; a pledge of confidentiality on an individual basis is promised.

This survey of households usage of currency and transaction accounts will provide valuable information for monetary policy, research, and operations. The information will be used in analyses developments by the Federal Reserve System and in responses to inquiries from Congress, the U.S. Treasury and the public.

Board of Governors of the Federal Reserve System, March 23, 1984.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 84-8336 Filed 3-27-84; 8:45 am]

BILLING CODE 6210-01-M

**Marshall & Ilsley Corp., et al; Formations, Acquisitions, and Mergers of Bank Holding Companies**

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (49 FR 794) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than April 19, 1984.

**A. Federal Reserve Bank of Chicago** (Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. **Marshall & Ilsley Corporation**, Milwaukee, Wisconsin; to acquire 100 percent of the voting shares of Wauwatosa State Bank, Wauwatosa, Wisconsin.

**B. Federal Reserve Bank of Minneapolis** (Bruce J. Hedblom Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. **Minnesota Assets Management Corporation**, St. Louis Park, Minnesota; to acquire 94.1 percent of the voting shares of Summit State Bank of Richfield, Inc., Richfield, Minnesota. Comments on this application must be received not later than April 20, 1984.



Board of Governors of the Federal Reserve System, March 22, 1984.

**James McAfee,**

*Associate Secretary of the Board.*

[FR Doc. 84-8255 Filed 3-27-84; 8:45 am]

BILLING CODE 6210-01-M

### Citicorp, et al.; Applications To Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (49 FR 794) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (49 FR 794) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than April 17, 1984.

**A. Federal Reserve Bank of New York** (A. Marshall Puckett, Vice President) 33 Liberty Street, New York, New York 10045:

1. *Citicorp*, New York, New York; to engage *de novo* through an unnamed future subsidiary in credit card activities, including the issuance of

credit cards to customers; the servicing of credit card accounts receivable; the soliciting of merchants to participate in credit card programs so that merchants will accept the credit cards from customers.

**B. Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *BankAmerica Corporation*, San Francisco, California; to engage *de novo* through its subsidiary, BA Futures, Incorporated, San Francisco, California, in futures commission merchant activities in the execution and clearance of futures contracts and options on futures contracts for unaffiliated persons.

Board of Governors of the Federal Reserve System, March 22, 1984.

**James McAfee,**

*Associate Secretary of the Board.*

[FR Doc. 84-8256 Filed 3-27-84; 8:45 am]

BILLING CODE 6210-01-M

### DEPARTMENT OF HEALTH AND HUMAN SERVICES

#### Food and Drug Administration

[Docket No. 80N-0012; DESI 9049]

#### Certain Dermatologic/Anti-Infective Drug Products; Drugs for Human Use; Drug Efficacy Study Implementation; Reevaluation

**AGENCY:** Food and Drug Administration.  
**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA): (1) Rescinds a notice of opportunity for a hearing as it pertains to certain combination drug products containing neomycin and a corticosteroid, (2) classifies the drug products as effective for the indication stated below, and (3) announces the conditions for their approval and marketing.

**DATE:** Supplements due on or before May 29, 1984.

**ADDRESSES:** Communications in response to this notice should be identified with reference number DESI 9049, directed to the attention of the appropriate office named below, and addressed to the Food and Drug Administration 5600 Fishers Lane, Rockville, MD 20857.

Supplements to full new drug applications (identify with NDA number): Division of Anti-Infective Drug Products (HFN-140), Center for Drugs and Biologics.

Original abbreviated new drug applications and supplements thereto

(identify as such): Division of Generic Drug Monographs (HFN-530), Center for Drugs and Biologics.

Requests for an opinion of the applicability of this notice to a specific product: Division of Drug Labeling Compliance (HFN-310), Center for Drugs and Biologics.

#### FOR FURTHER INFORMATION CONTACT:

Herbert Gerstzang, Center for Drugs and Biologics (HFN-8), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3650.

**SUPPLEMENTARY INFORMATION:** In a notice published in the *Federal Register* of September 25, 1981 (46 FR 47408), the Director of the Bureau of Drugs (now the Center for Drugs and Biologics) reclassified certain topical anti-infective drug products for dermatologic use to lacking substantial evidence of effectiveness, proposed to withdraw approval of their new drug applications, and offered an opportunity for a hearing on the proposal. Among the drugs included in that notice were products containing neomycin in combination with a corticosteroid. In subsequent *Federal Register* notices (47 FR 17677, 48 FR 334, and 48 FR 3416), the Director withdrew approval of those products for which hearing requests were not submitted or were later withdrawn by the manufacturers. The data and information submitted in support of hearing requests for the drug products listed below have been reviewed, and the Director has determined that insofar as it applies to these drug products, the September 25, 1981 notice of opportunity for a hearing should be rescinded and the products should be reclassified as effective for the treatment of corticosteroid-responsive dermatoses with secondary infection. Other drug products included in the 1981 notice that are the subjects of pending hearing requests will be addressed in future *Federal Register* notices.

(Final rules amending the antibiotic drug regulations have exempted antibiotic-containing drugs for dermatologic use (45 FR 71354, Oct. 28, 1980) and, later, all classes of antibiotic-containing drugs (47 FR 39155, Sept. 7, 1982) from certification requirements. Under these provisions, approved antibiotic form 5's and form 6's are regarded as new drug applications (NDAs) and abbreviated new drug applications (ANDAs), respectively, and subject to section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355). Most of the drug products listed below were being certified until they were exempted from that procedure. The monograph or regulation under which



each was certified (now retained as the public standard for each drug product) is shown below in parentheses following the name and address of the NDA holder. No reference number is included for three drugs which, in the absence of a certification regulation, were released pending a final effectiveness determination. The antibiotic regulations will be amended at a future date to provide the public standards for these drugs.)

1. NDA 50-237; Neo-Cort-Dome Cream 0.5% and 1% and Neomycin-HC Cream 0.5% and 1%, each containing neomycin sulfate EQ 3.5 mg base/Gram (Gm) and 0.5% or 1% hydrocortisone; Miles Pharmaceuticals, 400 Morgan Lane, West Haven, CT 06516.

2. NDA 50-323; NeoDecadron Cream containing neomycin sulfate EQ 3.5 mg base/Gm and dexamethasone sodium phosphate EQ 0.1% phosphate; Merck Sharp & Dohme, Division of Merck & Co., Inc., West Point, PA 19101. (21 CFR 444.542b)

3. NDA 50-345; Cordran-N Ointment containing neomycin sulfate EQ 3.5 mg base/Gm and flurandrenolide 0.05%; Eli Lilly & Co., P.O. Box 618, Indianapolis, IN 46206. (21 CFR 444.542a)

4. NDA 50-346; Cordran-N Cream containing neomycin sulfate EQ 3.5 mg base/Gm and flurandrenolide 0.05%; Eli Lilly & Co.

5. NDA 50-374; Neo-Cortef Lotion containing neomycin sulfate EQ 3.5 mg base/milliliter and hydrocortisone acetate 1%; The Upjohn Co., 7171 Portage Rd., Kalamazoo, MI 49001. (21 CFR 444.542c)

6. ANDA 60-480; Neo-Oxylone Ointment containing neomycin sulfate EQ 3.5 mg base/Gm and fluorometholone 0.025%; The Upjohn Co. (21 CFR 444.542a)

7. ANDA 60-611; Neo-Medrol Acetate Cream containing neomycin sulfate EQ 3.5 mg base/Gm and methylprednisolone acetate 0.25% or 1%; The Upjohn Co. (21 CFR 444.542b)

8. ANDA 60-700; Neo-Synalar Cream containing neomycin sulfate EQ 3.5 mg base/Gm and fluocinolone acetonide 0.025%; Syntex Laboratories, Inc., 3401 Hillview Ave., Palo Alto, CA 94304. (21 CFR 444.542b)

9. ANDA 60-751; Neo-Cortef Ointment containing neomycin sulfate EQ 3.5 mg base/Gm and hydrocortisone acetate 0.5%, 1% or 2.5%; The Upjohn Co. (21 CFR 444.542a)

10. ANDA 60-904; Neomycin Sulfate-Hydrocortisone Ointment containing neomycin sulfate EQ 3.5 mg base/Gm and hydrocortisone 1% formerly marketed by Lemmon Co. (successor to Premo Pharmaceutical Laboratories), P.O. Box 30, Sellersville, PA 18960.

11. ANDA 61-036; Neo-Delta Cortef Ointment containing neomycin sulfate EQ 3.5 mg base/Gm and prednisolone acetate 0.5%; The Upjohn Co. (21 CFR 444.542a)

12. ANDA 61-049; Neo Cortef Cream containing neomycin sulfate EQ 3.5 mg base/Gm and hydrocortisone acetate 1% or 2.5%; The Upjohn Co.

13. ANDA 61-154; Neomycin Sulfate-Hydrocortisone Acetate Ointment containing neomycin sulfate EQ 3.5 mg base/Gm and hydrocortisone acetate 1%; Ambix Laboratories, Division of Organic Corporation of America, 1615 East 51st St., North Bergen, NJ 07047.

14. ANDA 62-104; Neomycin Sulfate-Hydrocortisone Ointment containing neomycin sulfate EQ 3.5 mg base/Gm and hydrocortisone 1%, Clay-Park Laboratories, Inc., 3339 Park Ave., Bronx, NY 10456.

The findings announced in the 1981 notice were based on data submitted up to that time in support of the products' labeled indications. The Director has reevaluated these data plus additional data submitted in response to the 1981 notice in light of comments from the American Academy of Dermatology that the clinical benefit from these products would be expected to be greatest during the early phase of treatment.

For the combination product Neo-Synalar (neomycin sulfate and fluocinolone acetonide), two studies provided substantial evidence of effectiveness of the combination, showing that each component contributes to the beneficial effect in patients with corticosteroid-responsive dermatoses with secondary infection. The Leyden et al. study was a 1-week, multicenter, double-blind, randomized, parallel comparison of Neo-Synalar and Synalar in 240 analyzable patients, 141 of whom had confirmed infections. The Folan et al. study was a 2-week, multicenter, randomized, double-blind comparison of four treatment groups in 105 analyzable patients with paired lesions. The four groups were: (1) Neo-Synalar vs. Synalar (fluocinolone acetonide), (2) Neo-Synalar vs. neomycin, (3) neomycin vs. placebo, and (4) Synalar vs. placebo. Effectiveness of the two components was shown for the first week of therapy only.

The Director has determined that this finding of effectiveness should not be limited to neomycin in combination with one, specific corticosteroid because there is no corticosteroid that is unique with respect to therapeutic and toxic effects. See Haynes, R. C., Jr., and F. Murad, in "The Pharmacologic Basis of Therapeutics," 6th Ed., edited by A. G. Gilman, L. S. Goodman, and A. Gilman, the Macmillan Co., New York, p. 1482,

1980. Therefore, the Director considers the two adequate and well-controlled studies that were submitted in support of the neomycin/fluocinolone combination to provide substantial evidence of effectiveness for the other products listed above, each of which is an ointment, cream, or lotion that contains neomycin with an effective corticosteroid.

Accordingly, the Director reclassifies the drug products listed above as effective for the treatment of corticosteroid-responsive dermatoses with secondary infection. It should be noted, however, that the steroid-antibiotic combination has not been shown to provide greater benefit than the steroid component alone after 7 days of treatment. The Director also rescinds the notice of September 25, 1981, as it pertains to those drug products listed above, provided their new drug applications are supplemented in accord with this notice to delete all indications other than the indication set forth below. If a new drug application is not supplemented, then that drug product will remain subject to the September 25, 1981 notice. Submission of a supplemental new drug application in accord with this notice will constitute a withdrawal of a hearing request previously submitted in response to the September 25, 1981 notice; no further Federal Register notice will be issued for these drug products.

In addition to the holders of the applications specifically named above, this notice applies to any person who manufactures or distributes a drug product that is not the subject of an approved new drug application and that is identical to a drug product named above. It may also be applicable, under 21 CFR 310.6, to a related or similar drug product that is not the subject of an approved new drug application. It is the responsibility of every drug manufacturer or distributor to review this notice to determine whether it covers any drug product that the person manufactures or distributes. Any person may request an opinion of the applicability of this notice to a specific drug product by writing to the Division of Drug Labeling Compliance (address above).

**A. Effectiveness classification.** FDA has reviewed all available evidence and concludes that the drug products are effective for the indication listed in the labeling conditions below.

**B. Conditions for approval and marketing.** FDA is prepared to approve abbreviated new drug applications and supplements to previously approved



new drug applications under conditions described herein.

1. *Form of drug.* These preparations are in cream, ointment, or lotion form suitable for topical administration.

2. *Labeling conditions.* a. The label bears the statement, "Caution: Federal law prohibits dispensing without prescription."

b. The drug is labeled to comply with all requirements of the act and regulations, and the labeling bears adequate information for safe and effective use of the drug. The indication is as follows:

For the treatment of corticosteroid-responsive dermatoses with secondary infection. It has not been demonstrated that this steroid-antibiotic combination provides greater benefit than the steroid component alone after 7 days of treatment. (See "WARNINGS" section).

c. The "WARNINGS" section contains the following statement:

Because of the concern of nephrotoxicity and ototoxicity associated with neomycin, this combination product should not be used over a wide area or for extended periods of time.

3. *Marketing status.* a. Marketing of such drug product that is now the subject of an approved or effective new drug application may be continued provided that on or before May 29, 1984, the holder of the application has submitted: (i) A supplement for revised labeling as needed to be in accord with the labeling conditions described in this notice, and complete container labeling if current container labeling has not been submitted, and (ii) a supplement to provide updating information with respect to items 6 (components), 7 (composition), and 8 (methods, facilities, and controls) of new drug application form FD-356H (21 CFR 314.1(c)).

b. Approval of an abbreviated new drug application (21 CFR 314.2) must be obtained before marketing such products. The requirements for bioavailability testing are waived for topically applied preparations (21 CFR 320.22). Marketing the drug products before approval of a new drug application will subject those products, and those persons who caused the products to be marketed, to regulatory action.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 502, 505, 507, 52 Stat. 1050-1053, 1055-1056 as amended (21 U.S.C. 352, 355, 357)) and under authority delegated to the Director of the National Center for Drugs and Biologics (21 CFR 5.70 and 5.82).

Dated: March 22, 1984.

Harry M. Meyer, Jr.,

Director, Center for Drugs and Biologics.

[FR Doc. 84-8240 Filed 3-23-84; 10:02 am]

BILLING CODE 4160-01-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

#### Colorado; Filing of Plat of Survey

March 21, 1984.

The plat of survey of the following described lands was officially filed in the Colorado State Office, Bureau of Land Management, Denver, Colorado, effective 10:00 a.m., March 21, 1984.

The supplemental plat, showing a subdivision of original lot 2, section 28, T. 2 N., R. 72 W., Sixth Principal Meridian, Colorado, was accepted March 16, 1984.

This supplemental plat was prepared to meet certain administrative needs of this Bureau.

All inquiries about these lands should be sent to the Colorado State Office, Bureau of Land Management, 1037—20th Street, Denver, Colorado 80202.

Timothy A. Kent,

Acting Chief Cadastral Surveyor for Colorado.

[FR Doc. 84-8297 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-84-M

#### [W-87122]

#### Nebraska; Application for Public Lands for State Indemnity Selection

March 21, 1984.

1. Under the provisions of Sections 2275 and 2276 of the Revised Statutes, 43 U.S.C. 851, 852, the State of Nebraska has filed application W-87122 to acquire public lands in lieu of certain school lands that were encumbered by other rights or reservations before the State's title could attach. Pursuant to the provisions of 43 CFR 2091.2-6, the lands described below are segregated from settlement, sale, locations or entry under the public land laws, including the mining laws, but not the mineral leasing laws or Geothermal Steam Act.

2. The following described lands were segregated in accordance with 43 CFR 2091.2-6 as of September 6, 1983:

Sixth Principal Meridian, Nebraska

T. 32 N., R. 14 W.,

Sec. 1, lots 3, 4, and S½NW¼.

T. 33 N., R. 14 W.,

Sec. 15, NW¼SW¼, SE¼SW¼.

T. 27 N., R. 20 W.,

Sec. 21, NW¼.

T. 23 N., R. 21 W.,

Sec. 1, lot 1, SE¼NE¼, and E¼SE¼.

T. 24 N., R. 21 W.,

Sec. 35, NE¼SE¼.

T. 28 N., R. 21 W.,

Sec. 9, W¼SE¼.

T. 26 N., R. 22 W.,

Sec. 33, SW¼SE¼.

T. 33 N., R. 27 W.,

Sec. 8, lot 8.

T. 33 N., R. 29 W.,

Sec. 31, lots 2 and 3.

T. 4 N., R. 30 W.,

Sec. 4, lots 3 and 4;

Sec. 5, lots 1 and 2.

T. 17 N., R. 30 W.,

Sec. 24, SW¼SW¼.

T. 32 N., R. 30 W.,

Sec. 29, N¼SW¼.

T. 33 N., R. 32 W.,

Sec. 31, lots 1, 3, and 4.

T. 19 N., R. 33 W.,

Sec. 26, SW¼NW¼.

T. 6 N., R. 35 W.,

Sec. 17, NE¼NE¼.

T. 31 N., R. 37 W.,

Sec. 30, lot 2.

T. 22 N., R. 47 W.,

Sec. 1, lots 10, 11, 12, 13, and 16;

Sec. 12, lot 1.

T. 20 N., R. 50 W.,

Sec. 2, S½NW¼.

T. 21 N., R. 51 W.,

Sec. 22, E¼SE¼.

T. 22 N., R. 52 W.,

Sec. 35, E¼NE¼, SW¼NE¼, and

NE¼SE¼.

The following described land was segregated in accordance with 43 CFR 2091.2-6 as of March 16, 1984:

T. 33 N., R. 30 W.,

Sec. 31, SW¼SE¼.

The areas described aggregate 1,893.46 acres in Blaine, Brown, Cherry, Hayes, Holt, Hooker, McPherson, Morrill, Red Willow, and Rock Counties, Nebraska.

3. The segregation of the above described public lands shall terminate upon issuance of a document of conveyance to such lands, or upon publication in the *Federal Register* of a notice of termination of the segregation or the expiration of 2 years from the date of the filing of the selection application, whichever occurs first. However, where administrative appeal or review actions have been sought pursuant to Part 4 or Subparts 2450 of 43 CFR, the segregative period shall continue in effect until publication of notice of termination of the segregation in the *Federal Register*.

44. Inquires concerning the segregation of the lands referenced above should be addressed to the Chief, Branch of Land Resources, Bureau of Land Management, Wyoming State



Office, P.O. Box 1828, Cheyenne, Wyoming 82003.

James L. Edlefsen,

Chief, Branch of Land Resources.

[FR Doc. 84-8294 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-22-M

### Wyoming; Rawlins District Advisory Council and Grazing Advisory Board Meeting

**AGENCY:** Bureau of Land Management, Rawlins District Office, Rawlins, Wyoming, Interior.

**ACTION:** Joint meeting of the Rawlins District Advisory Council and Grazing Advisory Board.

**SUMMARY:** Notice is hereby given in accordance with Public Laws 94-463 and 94-579 that a joint meeting of the Rawlins District Multiple Use Advisory Council and Grazing Advisory Board will be held.

**DATE:** April 26, 1984, 9:30 a.m. until 4 p.m.

**ADDRESS:** Bel Air Inn, 23rd and Spruce Streets, Rawlins, Wyoming 82301.

#### FOR FURTHER INFORMATION CONTACT:

David J. Walter, District Manager, Rawlins District, Bureau of Land Management, P.O. Box 670, Rawlins, Wyoming 82301 (307) 324-7171.

**SUPPLEMENTARY INFORMATION:** The meeting will begin at 9:30 a.m. at the Bel Air Inn in Rawlins, Wyoming. The agenda for this meeting will include:

- (1) Cooperative Range Management Agreements (CMAs).
- (2) Lander Resource Management Plan (RMP) Issues.
- (3) Known Geologic Structures (KGSs).
- (4) Status of Coal Unsuitability Petition.
- (5) Stock Driveway Withdrawals.
- (6) Cattleguard Maintenance.
- (7) Changes in the 8100 Program.
- (8) Election of new officers for the Advisory Council.

The primary purpose of the joint meeting is to review and make recommendations on nominations that have been received for CMAs. Issues for the Lander RMP, KGSs, and the coal unsuitability petition will also be discussed at the joint meeting. The remainder of the topics on the agenda are for consideration mainly by the Grazing Advisory Board.

The meeting is open to the public. Interested persons may make oral statements during the public comment period, or file written statements for consideration. Anyone wishing to make an oral statement must notify the District Manager on or before April 19, 1984. Depending on the number of

persons who want to make a statement, a time limit may be established.

Summary minutes will be available for review at the Rawlins District Office. Copies may be obtained for the cost of duplication.

David J. Walter,

District Manager.

[FR Doc. 84-8296 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-22-M

### [OR-19854 (WASH)]

#### Washington; Order Providing for Opening of Lands

##### Correction

In FR Doc. 84-5659, beginning on page 7880, in the issue of Friday, March 2, 1984, make the following corrections:

1. On page 7881, in the first column, the first line of Sec. 8 should read "N $\frac{1}{2}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ ."

2. Also on page 7881, in the first column, in the first line of Sec. 28 there should be a comma between "NW $\frac{1}{4}$ " and "SW $\frac{1}{4}$ ".

Billing Code 1505-01-M

### [M 60266]

#### Montana; Invitation, Coal Exploration License Application

Members of the public are hereby invited to participate with Spring Creek Coal Company in a program for the exploration of coal deposits owned by the United States of America in the following described lands located in Big Horn County, Montana:

T. 8 S., R. 39 E., P.M.M.,  
 Sec. 11: S $\frac{1}{2}$ SW $\frac{1}{4}$ ;  
 Sec. 14: W $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , S $\frac{1}{2}$ ;  
 Sec. 15: S $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ ;  
 Sec. 23: NW $\frac{1}{4}$ .

1,040.00 acres

Any party electing to participate in this exploration program shall notify, in writing both the State Director, Bureau of Land Management, P.O. Box 36800, Billings, Montana 59107; and Spring Creek Coal Company, c/o NERCO Mining Company, 111 S.W. Columbia, Suite 800, Portland, Oregon 97201. Such written notice must refer to serial number M 60266 and be received no later than 30 calendar days after publication of this Notice in the *Federal Register* or 10 calendar days after the last publication of this Notice in the *Hardin Herald*, whichever is later. This Notice will be published for two consecutive weeks.

This proposed exploration program is fully described and will be conducted pursuant to an exploration plan to be

approved by the Bureau of Land Management, Montana State Office, Granite Tower Building, 222 North 32nd Street, Billings, Montana. The exploration plan is available for public inspection at this address.

Dated: March 23, 1984.

George Mowat,

Acting Chief, Branch of Solid Minerals.

[FR Doc. 84-8386 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-DN-M

[Phx 047032]

#### Arizona; Order Providing for Opening of Public Lands

March 20, 1984.

The following described land has been reconveyed to the United States in connection with the issuance of a corrective patent pursuant to Section 316 of the Act of October 21, 1976, 90 Stat. 2770; 43 U.S.C. 1746:

Gila and Salt River Meridian, Arizona

Kaibab National Forest

T. 21 N., R. 2 E.,

Sec. 1, S $\frac{1}{2}$ S $\frac{1}{2}$  of Lot 5.

Containing 5 acres.

Upon acceptance of title to such land, it became part of the Kaibab National Forest and is subject to all the laws, rules, and regulations applicable thereto.

At 10 a.m. on April 19, 1984, the land shall be open to such forms of disposition as may by law be made of national forest lands.

Inquiries concerning the land should be addressed to the Forest Supervisor, Kaibab National Forest, 800 S. 6th Street, Williams, Arizona 86046.

Mario L. Lopez,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 84-8248 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-32-M

#### Colorado; Airport Lease Application; Rio Blanco County, Colorado

Notice is hereby given that pursuant to the Act of May 24, 1928, (49 U.S.C. 211-214), the County of Rio Blanco, Colorado, has applied for an airport lease for the following lands;

##### 6th Principal Meridian

T. 1 N., R. 101 W.,

Section 6, Beginning at the NE corner of Lot 27, Section 6, T. 1 N., R. 101 W. a BLM brass cap; thence N 89 degrees 49'50" W—A distance of 945.91 feet to the NW corner of Lot 8, Section 6, T. 1 N., R. 101 W. a BLM brass cap; thence 500 degrees 2'42" E along the West line of Lot 8, 242.84 feet; thence N 77 degrees 24'5" E a distance of 969.06 feet to a point on the



east line of Lot 27, T. 1 N., R. 101 W.; thence N zero degrees 2'18" W. along the east line of Lot 27 a distance of 28.67 feet to the NE corner of Lot 27 the point of beginning. This parcel contains 2.95 acres more or less.

The purpose of this Notice is to inform the public that the filing of this application segregates the described land from all forms of appropriation under the Public Land Laws.

For a period of 30 days from the date of this Notice, interested persons desiring to express their views should promptly send comments along with their name and address to the Craig District Manager, Bureau of Land Management, 455 Emerson Street, Craig, Colorado 81625.

Larry Bauer,  
Acting District Manager.

[FR Doc. 84-8247 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-JB-M

### Realty Action—Sale; Public Land in Gilliam County, Oregon; Correction

1. In FR Doc. 84-4260 in the issue of Thursday, February 16, 1984, appearing on page 6033, column 1, under the heading from the previous page "Terms and conditions applicable to the sale are:", please add the following after the sentence in item (7) that states in part " \* \* \* prior to the expiration of 30 days from the date of sale."

(8) Bids must be made by the principle or his duly qualified agent by sealed bid and must be accompanied by certified check, postal money order, bank draft or cashier's check made payable to the Bureau of Land Management for not less than one-fifth the amount bid. The sealed envelope must be marked in the lower left-hand corner as follows: "Public Sale Bid Parcel No. \_\_\_\_\_, Serial No. OR 36685, Sale held April 18, 1984."

2. On page 6032, column 2, under Parcel No. 5 where it lists the names of the designated bidders, please change the names Delbert and Cleo Edwards to Dallas and Francis Dalzell.

Gerald E. Magnuson,  
District Manager.

[FR Doc. 84-8249 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-33-M

### Minerals Management Service

#### Outer Continental Shelf Advisory Board Solicitation of Nominations to Regional Technical Working Groups

The Minerals Management Service is accepting nominations for consideration

to fill a number of discretionary vacancies anticipated in 1984 on the North Atlantic, Mid-Atlantic, South Atlantic, Gulf of Mexico, Alaska, and Pacific Regional Technical Working Group (RTWG) Committees of the Outer Continental Shelf (OCS) Advisory Board.

The RTWG's represent one of three types of committees of the OCS Advisory Board. The Board includes, in addition to the RTWG's, a national Scientific Committee and a national OCS Policy Committee. The RTWG's have been established in each of six OCS leasing regions to advise the Director, Minerals Management Service, on technical matters of regional concern regarding both prelease and postlease activities of the OCS oil and gas leasing program.

The Associate Director for Offshore Minerals Management, through the OCS Regional Managers, implements the technical working group program on a regional level in order to facilitate understanding and participation of the parties most immediately affected by minerals leasing decisions and most knowledgeable on the technical aspects of offshore mineral development and its associated impacts. The RTWG's are comprised of Governor's technical representatives from the States within each leasing region; Federal ex officio representatives from the Minerals Management Service, the Fish and Wildlife Service, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, and the U.S. Coast Guard; and discretionary representatives from the oil and gas industry and other private and special interests. This solicitation relates only to the discretionary positions.

Secretarial selections and appointments to the RTWG's will be based on achieving a balance of representation and a range of technical expertise and knowledge relevant to OCS related activities within each region. Discretionary membership appointments are for 2 years. Nominees should be familiar with the OCS oil and gas leasing program and should be able to deal with specific technical problems of exploration, production, and transportation of offshore oil and gas as well as the economic and environmental factors involved. Additionally, nominees should have experience in or a working knowledge of interagency coordination at the Federal or State level and should be representative of one or more of the following disciplines:

- Geology
- Oceanography
- Transportation

- Land-Use Planning
- Economics
- Oil and Gas Industry
- Marine Recreation
- Terrestrial Wildlife
- Fisheries Biology
- Engineering
- Marine Biology
- Environment

This announcement is for recruitment of public and private sector members only. In order to be considered, letters of recommendation should be accompanied by a brief résumé and should be directed to the Manager, at the address listed below, of the OCS office located in the region of the applicant's residence, expertise, and interest. The deadline for receipt of nominations will be May 15, 1984. As the number of potential vacancies and the type of representation sought will differ for each RTWG, interested individuals should contact the appropriate OCS Regional Manager for specific information.

For additional information on individual RTWG's contact one of the OCS Regional Offices listed below:

- North, Mid, and South Atlantic RTWG's:* Manager, Atlantic OCS Office, Attention: RTWG Coordinator, Minerals Management Service, 1951 Kidwell Drive, Suite 601, Vienna, Virginia 22180, (703) 285-2165
- Gulf of Mexico RTWG:* Manager, Gulf of Mexico OCS Office, Attention: RTWG Coordinator, Minerals Management Service, P.O. Box 7944, 3301 N. Causeway Blvd. Metairie, Louisiana 70011, (504) 838-0627
- Alaska RTWG:* Manager, Alaska OCS Office, Attention: RTWG Coordinator, Minerals Management Service, 800 "A" Street, Anchorage, Alaska 99501, (907) 261-2307
- Pacific RTWG:* Manager, Pacific OCS Office, Attention: RTWG Coordinator, Minerals Management Service, 1340 W. 6th Street, Los Angeles, California 90017, (213) 688-2063

For additional information relating to the OCS Advisory Board, interested parties should contact Michele Tetley, Executive Secretary, OCS Advisory Board, Minerals Management Service, Department of the Interior, OIS/MS 640, Washington, D.C. 20240, telephone number (202) 343-9314.

Dated: March 22, 1984.

John B. Rigg,  
Associate Director for Offshore Minerals Management.

[FR Doc. 84-8232 Filed 3-27-84; 8:45 am]

BILLING CODE 4310-MR-M



## INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

### Agency for International Development

#### Current Schedule of Reviews of Government Versus Contract Operation of Commercial or Industrial Activities and Service Contracts

**AGENCY:** Agency for International Development, IDCA.

**ACTION:** Notification of current schedule of reviews.

**SUMMARY:** Pursuant to Office of Management and Budget (OMB) Circular A-76, notice is hereby given that the Agency for International Development (AID) intends to conduct reviews of the feasibility and/or cost of contract operation versus Government operation of commercial and industrial activities listed below under Supplemental Information. Specific invitation for bids or request for proposals will be announced in the *Commerce Business Daily*. A contract or contracts may or may not result from each feasibility or cost comparison study. Results of each study will be made available to responding bidders or offerors and other interested parties.

#### FOR FURTHER INFORMATION CONTACT:

Fred Allen, 632-3378  
John H. Elgin, 632-3378

**SUPPLEMENTARY INFORMATION:** Studies to be made are identified in the following tabulation:

| Name of activity       | Location of activity     | Review start date |
|------------------------|--------------------------|-------------------|
| Voucher Processing.    | Washington, D.C. ....    | March, 1985.      |
| Duplicating Services.  | Rosslyn, Virginia.....   | Review underway.  |
| Warehousing Operation. | Arlington, Virginia..... | Review underway.  |

Dated: March 21, 1984.

R.T. Rollis, Jr.,

Assistant to the Administrator for Management.

[FR Doc. 84-8295 Filed 3-27-84; 8:45 am]

BILLING CODE 6116-01-M

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-130 (Final)]

### Chloropicrin From the People's Republic of China

#### Determination

On the basis of the record<sup>1</sup> developed

in the subject investigation, the Commission unanimously determines, pursuant to section 735(b)(1) of the Tariff Act of 1930 (19 U.S.C. 1673(b)(1)), that an industry in the United States is materially injured by reason of imports from the People's Republic of China of chloropicrin, provided for in items 408.16, 408.29 and 425.52 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

#### Background

The Commission instituted this investigation effective September 19, 1983, following a preliminary determination by the Department of Commerce that imports of chloropicrin from China are being sold in the United States at LTFV.

Notice of the institution of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, D.C., and by publishing the notice in the *Federal Register* of October 5, 1983 (48 FR 45480).

On October 7, 1983, the Department of Commerce published a notice in the *Federal Register* (48 FR 45816) postponing its final antidumping determination. Accordingly, the Commission published a notice in the *Federal Register* of October 26, 1983 (48 FR 49558) revising its schedule for the conduct of the investigation. The public hearing was held in Washington, D.C., of February 9, 1984, and all persons who requested the opportunity were permitted to appear in person or by counsel. The staff briefing of the Commission and the Commission's vote on the investigation occurred on March 6, 1984 in a public "Government in the Sunshine" meeting of the Commission.

The Commission transmitted its report on the investigation to the Secretary of Commerce on March 19, 1984. A public version of the Commission's report, Chloropicrin from the Peoples Republic of China (Investigation No. 731-TA-130 (Final), USITC Publication 1505, 1984), contains the views of the Commission and information developed during the investigation.

By order of the Commission.  
Issued: March 19, 1984.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8301 Filed 3-27-84; 8:45 am]

BILLING CODE 7020-01-M

[Investigation No. 337-TA-166]

### Certain Computerized Jacquard Pattern Cutting Systems

Notice is hereby given that the prehearing conference in this matter will commence at 9:00 a.m. on April 30, 1984, at the Waterfront Center, Room 201, 1010 Wisconsin Avenue, NW., Washington, D.C. 20007, and the hearing will commence immediately thereafter.

The Secretary shall publish this notice in the *Federal Register*.

Issued: March 21, 1984.

Janet D. Saxon,

Administrative Law Judge.

[FR Doc. 84-8302 Filed 3-27-84; 8:45 am]

BILLING CODE 7020-02-M

[332-181]

### Conditions of Competition Between Certain Domestic and Imported Fabricated Structural Steel Products

**AGENCY:** International Trade Commission.

**ACTION:** Institution of an investigation under Section 332(b) of the Tariff Act of 1930 (19 U.S.C. 1332(b)) concerning the conditions of competition between certain domestic and imported fabricated structural steel products, and the scheduling of a hearing in connection therewith.

**EFFECTIVE DATE:** March 16, 1984.

#### FOR FURTHER INFORMATION CONTACT:

Peter Avery (202-523-0342) or Dennis Rapkins (202-523-0438), Minerals and Metals Division, U.S. International Trade Commission, Washington, D.C. 20436.

#### Background and Scope of Investigation

The Commission instituted the investigation, No. 332-181, on its own motion, following receipt on January 27 and March 1, 1984, of a request therefore from the Chairman of the Subcommittee on Trade, Committee on Ways and Means, U.S. House of Representatives.

In accordance with the Subcommittee's request, the study will include a review of the following points or questions with regard to the western U.S. market for fabricated steel products: (1) What are the recent trends in trade in steel and structural steel products into the western United States (as defined in previous Commission studies of the western U.S. steel industry)? What is the import penetration ratio and its trend line? What price differences have existed between domestic and imported

<sup>1</sup> The record is defined in § 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(i)).



products? Which countries play a major role in the western U.S. market? (2) What are the tariff classifications and rates on these imports (and are there any classification problems)? (3) To the extent it can be determined from available sources, are there differences in the pricing of raw steel products by foreign suppliers which favor Korean fabricators and adversely affect domestic fabricators? (4) What programs does the Government of the Republic of Korea maintain to assist its steel fabricators, both domestically and with respect to exports? (5) What is the nature of the steel fabrication industry in the Republic of Korea (i.e., how many firms are involved, what is this relation to steel producers, and what are their level of sales and net income)?

In addition, the same questions regarding trends in steel trade, import penetration, price competition, tariff classifications, and major importers will be addressed for the national steel market. Moreover, the nature of the steel fabrication industries in other major supplier countries, including Canada, and the type of government programs which exist will be examined. The Commission expects to complete its study by October 26, 1984.

#### Public Hearing

A public hearing in connection with this investigation will be held at the International Trade Commission in Washington, D.C. on August 28, 1984, at 10 A.M. All persons shall have the right to appear by counsel or in person, to present information and to be heard. Requests to appear at the public hearing should be filed with the Secretary, U.S. International Trade Commission, 701 E Street, NW, Washington, D.C. 20436, not later than noon, August 21, 1984.

#### Written Submissions

In lieu of or in addition to appearance at the public hearing, interested persons are invited to submit written statements concerning the investigation. Commercial or financial information which a submitting party desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submissions requesting confidential treatment must conform with the requirements of § 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). All written submissions, except for confidential business information, will be available for inspection by interested persons. To

be ensured of consideration by the Commission, written statements should be received at the earliest possible date, but no later than August 21, 1984. All submissions should be addressed to the Secretary at the Commission's Office in Washington, D.C.

By order of the Commission.

Issued: March 20, 1984.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8303 Filed 3-27-84; 8:45 am]

BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-188]

#### Certain Fluidized Supporting Apparatus and Components Thereof; Investigation

**AGENCY:** International Trade Commission.

**ACTION:** Institution of investigation pursuant to 19 U.S.C. 1337.

**SUMMARY:** Notice is hereby given that a complaint and a motion for temporary relief were filed with the U.S. International Trade Commission on February 23, 1984, pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), on behalf of UHI Corporation, 2464 Mariondale Avenue, Los Angeles, California 90017. The complaint alleges unfair methods of competition and unfair acts in the importation of certain fluidized supporting apparatus and components thereof into the United States, or in their rental and/or sale, by reason of alleged (1) defamation of complainant; (2) disparagement of complainant's fluidized supporting apparatus; (3) passing off; (4) false designation of origin; (5) interference with contractual relations; and (6) interference with prospective advantage. The Complaint further alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The complaint requests that the Commission institute an investigation, conduct temporary relief proceedings, and issue a temporary exclusion order prohibiting importation of the articles in question into the United States, except under bond, and temporary cease and desist orders. After a full investigation, the complaint requests that the Commission issue a permanent exclusion order and permanent cease and desist orders.

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930 and in § 210.12 of the Commission's Rules of Practice and procedure (19 CFR 210.12).

**Scope of investigation:** Having considered the complaint, the U.S. International Trade Commission, on March 20, 1984, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930 an investigation be instituted to determine whether there is a violation of subsection (a) of section 337 in the unlawful importation of certain fluidized supporting apparatus and components thereof into the United States, or in their sale, by reason of alleged (1) disparagement of complainant and complainant's fluidized supporting apparatus; (2) passing off; (3) false representation; and (4) interference with contractual relations, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States;

(2) Pursuant to § 210.24(e) of the Commission's rules, the motion for temporary relief under subsections (e) and (f) of section 337 of the Tariff Act of 1930, which was filed on February 23, 1984, shall be forwarded to the presiding officer for an initial determination pursuant to § 210.53(b) of the rules.

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon whom this notice of investigation shall be served:

(a) The complainant is: UHI Corporation, 2464 Mariondale Avenue, Los Angeles, California 90017.

(b) The respondents are the following companies, alleged to be in violation of section 337, and are the parties upon whom the complaint is to be served: Support Systems International, Inc., 4349 Corporate Road, Charleston, South Carolina 29401  
Support Systems International (S.A.), 111 Bis, Route De Toulouse, 3400 Montpellier, France

(c) Denise T. DiPersio, Esq., Unfair Import Investigations Division, U.S. International Trade Commission, 701 E Street, NW., Room 124, Washington, D.C. 20436, shall be the Commission investigative attorney, a party to this investigation; and

(4) For the investigation so instituted, Donald K. Duvall, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding officer. Pursuant to § 210.24(e) of the Commission's Rules of Practice



and Procedure, the presiding officer shall determine as expeditiously as possible whether or not temporary relief proceedings should be instituted.

Responses must be submitted by the named respondents in accordance with § 210.21 of the Commission's Rules of Practice and Procedures (19 CFR 210.21). Pursuant to §§ 201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Responses to the motion for temporary relief may be submitted by the named respondents in accordance with § 210.24(e)(3) of the Commission's rules. Any such responses must be filed within 20 days after service of the motion. Extensions of time for submitting responses to the complaint and/or the motion for temporary relief will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings.

The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Room 156, Washington, D.C. 20436, telephone 202/523-0471.

**FOR FURTHER INFORMATION CONTACT:** Denise T. DiPersio, Esq., Unfair Import Investigations Division, U.S. International Trade Commission, telephone 202/523-0113.

Issued: March 22, 1984.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8304 Filed 3-27-84; 8:45 am]  
BILLING CODE 7020-02-M

[Investigation No. 713-TA-183  
(Preliminary)]

### Large Diameter Carbon Steel Welded Pipes From Brazil

**AGENCY:** International Trade Commission.

**ACTION:** Institution of a preliminary antidumping investigation and scheduling of a conference to be held in connection with the investigation.

**EFFECTIVE DATE:** March 21, 1984.

**SUMMARY:** The United States International Trade Commission hereby gives notice of the institution of a preliminary antidumping investigation under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Brazil of carbon steel welded pipes, over 16 inches in outside diameter, provided for in item 610.32 of the Tariff Schedules of the United States, which are alleged to be sold in the United States at less than fair value.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Coombs, Office of Investigations, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C. 20436, telephone 202-523-1376.

#### SUPPLEMENTARY INFORMATION:

##### Background

This investigation is being instituted in response to a petition filed on March 21, 1984, by counsel on behalf of Berg Steel Pipe Corporation, Panama City, Florida. The Commission must make its determination in this investigation within 45 days after the date of the filing of the petition, or by May 7, 1984 (19 CFR 207.17).

##### Participation

Persons wishing to participate in this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided for in section 201.11 of the Commission's Rules of Practice and Procedure (19 CFR 201.11), not later than seven (7) days after the publication of this notice in the *Federal Register*. Any entry of appearance filed after this date will be referred to the Chairman, who shall determine whether to accept the late entry for good cause shown by the person desiring to file the notice.

##### Service of Documents

The Secretary will compile a service list from the entries of appearance filed in this investigation. Any party submitting a document in connection with the investigation shall, in addition to complying with § 201.8 of the Commission's rules (19 CFR 201.8), serve a copy of each such document on all

other parties to the investigation. Such service shall conform with the requirements set forth in § 201.16(b) of the rules (19 CFR 201.16(b)).

In addition to the foregoing, each document filed with the Commission in the course of this investigation must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

##### Written Submissions

Any person may submit to the Commission on or before April 18, 1984, a written statement of information pertinent to the subject matter of this investigation (19 CFR 207.15). A signed original and fourteen (14) copies of such statements must be submitted (19 CFR 201.8).

Any business information which a submitter desires the Commission to treat as confidential shall be submitted separately, and each sheet must be clearly marked at the top "Confidential Business Data." Confidential submissions must conform with the requirements of § 201.6 of the Commission's rules (19 CFR 201.6). All written submissions, except for confidential business data, will be available for public inspection.

##### Conference

The Director of Operations of the Commission has scheduled a conference in connection with this investigation for 9:30 a.m. on April 16, 1984, in the Hearing Room of the U.S. International Trade Commission Building, 701 E Street, NW., Washington, D.C. Parties wishing to participate in the conference should contact the staff investigator, Mr. David Coombs (202-523-1376) not later than April 11, 1984, to arrange for their appearance. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference.

##### Public Inspection

A copy of the petition and all written submissions, except for confidential business data, will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C.

For further information concerning the conduct of this investigation and rules of



general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and B (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201). Further information concerning the conduct of the conference will be provided by Mr. Coombs.

This notice is published pursuant to § 207.12 of the Commission's rules (19 CFR § 207.12).

Issued: March 22, 1984.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8300 Filed 3-27-84; 8:45 am]  
BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-164]

##### Certain Modular Structural Systems

Notice is hereby given that the prehearing conference and hearing in this matter scheduled to commence on April 4, 1984 (49 FR 7465) are cancelled.

The Secretary shall publish this Notice in the *Federal Register*.

Issued: March 22, 1984.

Janel D. Saxon,  
Administrative Law Judge.

[FR Doc. 84-8305 Filed 3-27-84; 8:45 am]  
BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-157]

##### Certain Office Desk Accessories and Related Products; Decision Not To Review Initial Determination Amending Notice of Investigation

**AGENCY:** International Trade Commission.

**ACTION:** The Commission has determined not to review an initial determination (ID) to amend the notice of investigation to add allegations of infringement of U.S. Design Patent No. 270,649 and to change the allegation of false designation of origin or source to failure to mark country of origin.

**SUPPLEMENTARY INFORMATION:** The Commission did not receive any petitions for review of the ID or any comments from other Government agencies.

Copies of the ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

**FOR FURTHER INFORMATION CONTACT:** Gracia M. Berg, Esq. Office of the

General Counsel, U.S. International Trade Commission, telephone 202-523-1627.

**Authority:** 19 U.S.C. 1337, 47 FR 25134, June 10, 1982, and 48 FR 20225, May 5, 1983 (to be codified at 19 CFR 210.53(c) and (h)).

By order of the Commission.  
Issued: March 20, 1984.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8306 Filed 3-27-84; 8:45 am]  
BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-147]

##### Certain Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof; Decision Not To Review Initial Determination

**AGENCY:** International Trade Commission.

**ACTION:** Notice is hereby given that the Commission has determined not to review the presiding officer's initial determination (ID) that there is no violation of section 337 of the Tariff Act of 1930 in the above-captioned investigation. The Commission has adopted that portion of the presiding officer's ID relating to the noninfringement of U.S. Letters Patent 3,726,758. The Commission has taken no position on the other issues discussed in the ID, since the findings and conclusions of the presiding officer regarding noninfringement are dispositive of the question of whether there is a violation of section 337.

**Authority:** The authority for the Commission's action is contained in section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and in §§ 210.53-210.56 of the Commission's Rules of Practice and Procedure (47 FR 25134 (June 10, 1982), as amended by 48 FR 20225 (May 5, 1983) and 48 FR 21115 (May 11, 1983)); to be codified at 19 CFR 210.53-210.56.

**SUPPLEMENTARY INFORMATION:** On February 14, 1984, the presiding officer issued an ID that there is no violation of section 337 of the Tariff Act of 1930 in the unauthorized importation and sale of certain papermaking machine forming sections for the continuous production of paper, and components thereof. Complainant and respondents filed petitions for review of various parts of the ID, pursuant to § 210.54(a) of the Commission's rules. Having examined the record in this investigation, including the ID, the petitions for review, and the responses thereto, the Commission on March 15, 1984, determined not to review the ID.

Notice of this investigation was published in the *Federal Register* of May 11, 1983 (48 FR 21213).

Copies of the public version of the ID and all other nonconfidential documents on the record of this investigation are available for public inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, Docket Section, U.S. International Trade Commission, 701 E Street NW., Room 156, Washington, D.C. 20436, telephone 202-523-0471.

**FOR FURTHER INFORMATION CONTACT:** P. N. Smithey, Esq., Office of the General Counsel, United States International Trade Commission, telephone 202-523-0350.

Issued: March 19, 1984.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8307 Filed 3-27-84; 8:45 am]  
BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-97]

##### Certain Steel Rod Treating Apparatus and Components Thereof; Reopening of Investigation

**AGENCY:** International Trade Commission.

**ACTION:** Lifting of suspension and reopening of the above-captioned investigation upon joint motion of complainant and respondents in order to entertain motion to terminate the investigation on the basis of a settlement agreement.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation or sale of certain steel rod treating apparatus and components thereof. Notice of the investigation was published in the *Federal Register* of January 28, 1981 (46 FR 9262).

On December 1, 1981, the Commission unanimously determined that there is a violation of section 337 in the unauthorized sale for importation of certain steel rod treating apparatus and components thereof which infringe U.S. Letters Patent 3,390,871. The Commission further determined that the appropriate remedy is an exclusive order pursuant to section 337(d) excluding from entry into the United States certain steel rod treating apparatus which are manufactured by or on behalf of Korf Industrie und Handel, GmbH, Korf Engineering, GmbH, Korf Industries, Inc., Ashlow, Ltd., Ashlow Corp., Mr. Willy Korf and/or Mr. Johann Heinrich Rohde, or any successor, assignee, parent company, affiliated



person, subsidiary, or related business entity of the above-named parties respondent, or which are sought to be imported by Georgetown Steel Corporation.

On December 30, 1981, the U.S. District Court for the District of South Carolina indicated that the court would hold U.S. Letters Patent 3,390,871 invalid and unenforceable. *Ashlow Ltd. et al v. Morgan Construction Co.* (D.S.C., Civ. No. 81-936-5).

On December 31, 1981, respondents Ashlow Ltd., Ashlow Corp., Korf Industries, Inc., Georgetown Steel Corp., Korf Industrie und Handel, Korf Engineering, Mr. Willy Korf and Mr. Johann Heinrich Rohde, moved the Commission to stay or suspend its exclusion order and for an expedited decision thereon (Motion No. 97-64). The Commission granted Motion No. 97-64, subject to certain measures designed to protect the *status quo* pending Morgan's exhaustion of its appeal rights. Specifically, the Commission issued an order permitting entry of the subject apparatus under bond pursuant to section 337(e), and suspended its investigation pending judicial proceedings. Notice of these actions was published in the *Federal Register* of January 20, 1982, 47 FR 2950.

Appeals were taken from the District Court decision and the Commission's action requiring posting of a bond.

The appeal from the Commission's action was stayed in the U.S. Court of Customs and Patent Appeals pending resolution by the U.S. Court of Appeals for the Fourth Circuit of the appeal by Morgan from the decision of the District Court. Following briefing and oral argument, the Fourth Circuit decided to delay resolution of that appeal until a decision had been issued by the U.S. Court of Appeals for the Federal Circuit (successor to the U.S. Court of Customs and Patent Appeals). The Court of Appeals for the Federal Circuit thereupon lifted its stay and briefing and oral argument followed. No decision has been issued by the Court of Appeals for the Federal Circuit.

Complainants and respondents have moved for and obtained a stay in the Court of Appeals for the Federal Circuit for a period of 70 days, during which time they have informed the court they will seek termination of the Commission's investigation on the basis of a settlement agreement, pursuant to section 210.51(c) of the Commission's Rules of Practice and Procedure, 19 CFR 210.51(c).

#### Written Comments

A copy of the motion for termination and the settlement agreement are

available for inspection by the public during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C. 20436, telephone 202-523-0161. Interested persons may submit written comments concerning termination of the investigation within ten (10) days of the date of publication of this notice in the *Federal Register*. The original and 14 copies of all such comments must be filed with the Secretary to the Commission, 701 E Street, NW., Washington, D.C. 20436. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

**FOR FURTHER INFORMATION CONTACT:** Frank J. Schuchat, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0421.

Issued: March 20, 1984.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8308 Filed 3-27-84; 8:45 am]

BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-133]

#### Certain Vertical Milling Machines, Parts, Attachments, and Accessories Thereto; Termination of Investigation

**AGENCY:** International Trade Commission.

**ACTION:** Termination of investigation upon a finding of no violation of section 337 of the Tariff Act of 1930.

**SUPPLEMENTARY INFORMATION:** On November 17, 1982, the Commission instituted an investigation in response to a petition filed on behalf of Textron, Inc., of Providence, R.I. Bridgeport Machines is a division of Textron which manufactures, distributes, and sells vertical milling machines and their attachments and accessories in the United States. The Commission published a notice of investigation in the *Federal Register* of November 17, 1982, 47 FR 51821, which instituted an investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 in the unauthorized importation or sale of certain vertical milling machines and parts,

attachments, and accessories thereto by reason of the alleged—

(a) Violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);

(b) Infringement of Federally registered trademarks in violation of section 32(1) of the Lanham Act, 15 U.S.C. 1114(1);

(c) Infringement of common law trademark rights;

(d) Trademark dilution;

(e) Misappropriation simulation or adoption of shape design and trade dress;

(f) Passing off;

(g) False advertising; and

(h) Unfair competition.

The effect or tendency of which is to destroy or substantially injure an industry which is efficiently and economically operated in the United States.

On March 1, 1984, the Commission unanimously determined that there was no violation of section 337 in investigation No. 337-TA-133 in the importation or sale of the vertical milling machines, parts, attachments, and accessories thereto in question.

Copies of the Commission's Action and Order, its Opinion, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

**FOR FURTHER INFORMATION CONTACT:** Catherine R. Field, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 523-0189.

Issued: March 22, 1984.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

[FR Doc. 84-8309 Filed 3-27-84; 8:45 am]

BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-180]

#### Certain X-Ray Image Intensifier Tubes and Instruments; Correction to Notice of Investigation

**AGENCY:** International Trade Commission.

**ACTION:** Correction of an error in notice of investigation published in the *Federal Register* of February 1, 1984.

**SUMMARY:** On January 26, 1984, the United States International Trade Commission issued a notice announcing the institution of the above-captioned



investigation. This notice, which was published in the **Federal Register** February 1, 1984 (49 FR 4046-4047), indicated that the investigation was being instituted to determine whether there is a violation of section 337 of the Tariff Act of 1930 in the unlawful importation of certain x-ray image intensifier tubes and instruments equipped with x-ray image intensifier tubes into the United States, or in their sale, by reason of (1) the alleged coverage of such tubes by claims 1 through 7 of U.S. Letters Patent 3,916,182 and (2) the alleged manufacture of such tubes by a process covered by claims 1 through 6 and 9 through 15 of U.S. Letters Patent 3,795,531. Notice is hereby given that the number of the first patent was listed incorrectly in the previously published notice. The correct number is 3,961,182. The prior notice accurately reflected the scope of the Commission's investigation in all other respects.

**SUPPLEMENTARY INFORMATION:** Copies of the patents, the complaint, the responses, and all other nonconfidential documents filed in connection with this investigation are available for public inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, Docket Section, U.S. International Trade Commission, 701 E Street NW., Room 156, Washington, D.C. 20436, telephone 202-523-0471.

**FOR FURTHER INFORMATION CONTACT:** P. N. Smithy, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0350.

Issued: March 22, 1984.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 84-8310 Filed 3-27-84; 8:45 am]

BILLING CODE 7020-02-M

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 84-27]

### NASA Advisory Council, Space Systems and Technology Advisory Committee; Meeting

**AGENCY:** National Aeronautics and Space Administration

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Space Systems and Technology Advisory Committee,

Informal Advisory Subcommittee on Chemical Propulsion Technology.

**DATE AND TIME:** April 17 and 18, 1984, 8:30 a.m. to 4:30 p.m., April 19, 1984, 8:30 a.m. to 12:00 noon.

**ADDRESS:** National Aeronautics and Space Administration, George C. Marshall Space Flight Center, Building 4610, Room 5025, Marshall Space Flight Center, Alabama 35812.

**FOR FURTHER INFORMATION CONTACT:** Mr. Vance Houston, National Aeronautics and Space Administration, Code RST, Washington, D.C. 20546 (202/453-2852).

**SUPPLEMENTARY INFORMATION:** The Informal Advisory Subcommittee on Chemical Propulsion Technology was established to provide guidance and direction to the Chemical Propulsion research and technology programs of NASA's Office of Aeronautics and Space Technology. The Subcommittee, chaired by Dr. Sanders Rosenberg, is comprised of five members. The meeting will be open to the public up to the seating capacity of the room (approximately 50 persons, including the Subcommittee members and participants).

Type of meeting: Open

#### Agenda

April 17, 1984

8:30 a.m.—Chairperson's Remarks.  
8:40 a.m.—Office of Aeronautics and Space Technology Propulsion Program Summary.  
9:30 a.m.—High Pressure Liquid Oxygen/Hydrogen Technology Program.  
1:30 p.m.—Advanced Orbital Transfer Vehicle Propulsion Technology Program.  
3:00 p.m.—Liquid Oxygen/Hydrocarbon Technology Program.  
4:30 p.m.—Adjourn.

April 18, 1984

8:30 a.m.—Lewis Research Center as Center of Excellence.  
9:00 a.m.—Marshall Space Flight Center as Center of Excellence.  
1:00 p.m.—MSFC Center of Excellence continued.  
3:30 p.m.—Subcommittee Discussion.  
4:30 p.m.—Adjourn.

April 19, 1984

8:30 a.m.—Subcommittee Business.  
10:00 a.m.—Subcommittee Discussion in Preparation of Final Report.  
12:00 noon—Adjourn.

**Richard L. Daniels,**  
Deputy Director, Logistics Management and Information Programs Division, Office of Management.

March 22, 1984.

[FR Doc. 84-8238 Filed 3-27-84; 8:45 am]

BILLING CODE 7510-01-M

## NATIONAL SCIENCE FOUNDATION

### Directorate for Engineering; Advisory Committee for Earthquake Hazard Mitigation; Meeting

In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Science Foundation announces the following meeting:

Name: Advisory Committee for Earthquake Hazard Mitigation (EHM).

Date and time: April 12, 1984—9:00 a.m. to 5:00 p.m. April 13, 1984—9:00 a.m. to 12 Noon. Place: AIA Board Room, 1735 New York Avenue, N.W., Washington, D.C.

Type of meeting: Open.

Contact person: Rowena Peacock, Administrative Officer (CEE) National Science Foundation, Room 1130, Washington, D.C. TELEPHONE: (202) 357-9545.

Summary minutes: Minutes may be obtained from the contact person.

#### Agenda

Thursday, April 12, 1984

9:00-10:00—Welcome and Discussion of Directorate Activities  
10:00-11:00—Report on EHM Activities  
11:00-12:00—General Issues for Long-Range Planning  
12:00-1:30—Lunch  
1:30-5:00—General Issues for Long-Range Planning

Friday, April 13, 1984

9:00-12:00—Discussion of General Issues for Long-Range Planning  
Adjournment

Dated: March 23, 1984.

**M. Rebecca Winkler,**  
Committee Management Coordinator.

[FR Doc. 84-8339 Filed 3-27-84; 8:45 am]

BILLING CODE 7555-01-M

## NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-250 and 50-251]

### Florida Power and Light Co.; Consideration of Issuance of Amendments to Facility Operating Licenses and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. DPR-31 and DPR-41, issued to Florida Power and Light Company (the licensee), for operation of the Turkey Point Plant Unit Nos. 3 and 4 located in Dade County, Florida.

The proposed license amendments were initially noticed December 21, 1983 (48 FR 56503). This notice includes requested changes provided in a



submittal dated October 26, 1983 which were not included in the initial notice of December 21, 1983. The proposed amendments request the deletion of non-radiological Environmental Technical Specifications (Appendix B) which address the groundwater monitoring program and environmental protection limits. The justification for the requested deletions are based on the results of eight years of studies, the revised agreement with the South Florida Water Management District and an effective National Pollutant Discharge Elimination System (NPDES) Permit from the Environmental Protection Agency in accordance with the licensee's application for amendments dated September 12, 1983, as modified October 26, 1983.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the request for amendments involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendments would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The amendments would delete the non-radiological monitoring programs related to the groundwater monitoring and environmental protection limits. The amendments would not change any current limitations related to the operation of the plants. Since no operational limitations are being changed, the staff proposes to determine that the amendments do not involve a significant increase in the probability or consequences of an accident from any accident previously evaluated, do not create the possibility of a new or different kind of accident from any accident previously evaluated and do not involve a significant reduction in a margin of safety. The staff, therefore, proposes to determine that the amendments do not involve a significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not

normally make a final determination unless it receives a request for a hearing.

Comments should be addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attn: Docketing and Service Branch.

By April 27, 1984, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be

litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendments under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendments request involve no significant hazards consideration, the Commission may issue the amendments and make them effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendments.

If the final determination is that the amendments involve a significant hazards consideration, any hearing held would take place before the issuance of any amendments.

Normally, the Commission will not issue the amendments until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result in derating or shutdown of the facility, the Commission may issue the license amendments before the expiration of the 30-day notice period, provided that its final determination is that the amendments involve no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attn: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C., by the above date. Where petitions are filed during the last ten (10) days of



the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union operator at (800) 325-6000 (in Missouri (800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Steven A. Varga, Branch Chief, Operating Reactors Branch No. 1, Division of Licensing: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of the **Federal Register** notice. A copy of the petition should also be sent to the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and to Harold F. Reis, Esquire, Lowenstein, Newman, Reis and Axelrad, 1025 Connecticut Avenue, NW., Suite 1214, Washington, D.C. 20036, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petitioner has made a substantial showing of good cause for the granting of a late petition and/or request. That determination will be based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for the amendments which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C., and at the Environmental and Urban Affairs Library, Florida International University, Miami, Florida 33199.

Dated at Bethesda, Maryland, this 20th day of March 1984.

For the Nuclear Regulatory Commission.

**Steven A. Varga,**

*Chief, Operating Reactors Branch No. 1,  
Division of Licensing.*

[FR Doc. 84-8332 Filed 3-27-84; 8:45 am]

**BILLING CODE 7590-01-M**

#### [Docket No. 70-27]

#### **Negative Declaration Regarding Renewal of Special Nuclear Material License No. SNM-42; Babcock & Wilcox Co., Naval Nuclear Fuel Division, Lynchburg, Virginia**

The U.S. Nuclear Regulatory Commission (the Commission) is considering the renewal of Special

Nuclear Material License SNM-42 for the continued operation of the Naval Nuclear Fuel Division at Lynchburg, Virginia.

The Commission's Division of Fuel Cycle and Material Safety has prepared an Environmental Impact Appraisal for the proposed renewal of Special Nuclear Material License SNM-42. On the basis of this appraisal, the Commission has concluded that the environmental impact created by the proposed license renewal action would not be significant and does not warrant the preparation of an Environmental Impact Statement. Accordingly, it has been determined that a Negative Declaration is appropriate. The Environmental Impact Appraisal (NUREG-1049) is available for public inspection at the Commission's Public Document Room at 1717 H Street, NW., Washington, D.C. Copies of NUREG-1049 may be purchased by calling (301) 492-9530 or by writing to the Publication Services Section, Division of Technical Information and Document Control, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, or purchased from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161.

Dated at Silver Spring, Maryland, this 22nd day of March 1984.

For the Nuclear Regulatory Commission.

**R. G. Page,**

*Chief, Uranium Fuel Licensing Branch,  
Division of Fuel Cycle and Material Safety,  
NMSS.*

[FR Doc. 84-8331 Filed 3-27-84; 8:45 am]

**BILLING CODE 7590-01-M**

#### **PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL**

#### **Fish Propagation Panel; Meeting**

**AGENCY:** Fish Propagation Panel of the Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

**ACTION:** Notice of meeting to be held pursuant to the Federal Advisory Committee Act, 5 U.S.C. Appendix I, 1-4. Activities will include:

- Role and future activities of panel
- Status report on subbasin planning proposal
- Other
- Public comment

Status: Open.

**SUMMARY:** The Northwest Power Planning Council hereby announces a forthcoming meeting of its Fish Propagation Panel.

**DATE:** April 2, 1984.

**ADDRESS:** The meeting will be held in the Peninsula East Room of the Seattle Airport Hilton, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mark Schneider, 503-222-5161.

**Edward Sheets,**

*Executive Director.*

[FR Doc. 84-8384 Filed 3-27-84; 8:45 am]

**BILLING CODE 0000-00-M**

#### **Options Evaluation Task Force; Regular Meeting**

**AGENCY:** Options Evaluation Task Force of the Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

**ACTION:** Notice of meeting to be held pursuant to the Federal Advisory Committee Act, 5 U.S.C. Appendix I, 1-4. Activities will include:

- Discussion of potential decision rules
  - Alternatives to model for evaluating options
  - Public Comment
- Status: Open.

**SUMMARY:** The Northwest Power Planning Council hereby announces a forthcoming meeting of its Options Evaluation Task Force.

**DATE:** Friday, March 30, 1984. 10:00 a.m.

**ADDRESS:** The meeting will be held at the Council Hearing Room at 700 S.W. Taylor; Suite 200, in Portland, Oregon.

**FOR FURTHER INFORMATION CONTACT:** Wally Gibson (503) 222-5161.

**Edward Sheets,**

*Executive Director.*

[FR Doc. 84-8385 Filed 3-27-84; 8:45 am]

**BILLING CODE 0000-00-M**

#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-20776]

#### **Securities Processing Roundtable**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Notice of the Division of Market Regulation's Securities Processing Roundtable.

**SUMMARY:** This is to give notice that the Division of Market Regulation will host a Securities Processing Roundtable on April 2 and 3, 1984 in Room 1C30 at the Securities and Exchange Commission's main offices, 450 5th Street, NW., Washington, D.C., beginning at 9:30 a.m. The public is invited to attend.

**FOR FURTHER INFORMATION CONTACT:** John Connolly, Division of Market Regulation, Securities and Exchange



Commission, Washington, D.C. 20549, (202) 272-2368.

**SUPPLEMENTARY INFORMATION:** The Division of Market Regulation hereby gives notice that it will host a Securities Processing Roundtable on April 2 and 3, 1984 in Room 1C30 at 450 5th Street, NW., Washington, D.C., beginning at 9:30 a.m. The Roundtable is intended to provide an opportunity for financial industry representatives to discuss ways to improve efficiency, reduce costs and increase safety in securities processing in the future. Issues scheduled for discussion at the Roundtable concern current and prospective clearing agency and transfer agent operations. The Roundtable is open to the public.

Dated: March 21, 1984.

George A. Fitzsimmons,  
Secretary.

[FR Doc. 84-8266 Filed 3-27-84; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 20775; File No. SR-SCCP-84-1]

#### Filing and Immediate Effectiveness of a Proposed Rule Change of Stock Clearing Corporation of Philadelphia

March 21, 1984.

Stock Clearing Corporation of Philadelphia ("SCCP") on March 1, 1984, submitted a proposed rule change to the Commission pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (the "Act"). 15 U.S.C. 78s(b)(1), that deletes a redundant rule, SCCP Rule 31, entitled "Audit Committee." Article IV, Section 8(i) of SCCP's By-laws already describes all standing committees of SCCP's Board of Directors, including its Audit Committee.

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Securities Exchange Act of 1934 and Rule 19b-4 thereunder. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate the proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

Interested persons are invited to submit written data, views and arguments concerning the submission within twenty-one days from the date of publication in the *Federal Register*. Persons desiring to make a written submission should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission,

450 Fifth Street, NW., Washington, D.C. 20549. Reference should be made to File No. SR-SCCP-84-1.

Copies of the submission, with accompanying exhibits, and of all written comments will be available for public inspection at the Securities and Exchange Commission's Public Reference Room, 450 Fifth Street, NW., Washington, D.C. Copies of the filing will also be available at the principal office of the above-mentioned self-regulatory organization.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

George A. Fitzsimmons,  
Secretary.

[FR Doc. 84-8263 Filed 3-27-84; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 20774; File No. SR-PHILADEP-84-1]

#### Filing and Immediate Effectiveness of a Proposed Rule Change by Philadelphia Depository Trust Co.

March 21, 1984.

Philadelphia Depository Trust Company ("Philadep") on March 1, 1984, submitted a proposed rule change to the Commission pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. 78s(b)(1), that deletes a redundant rule, Philadep Rule 18, entitled "Audit Committee." Philadep By-Law Article IV, Section 8(i) already contains an identical description of Philadep's Audit Committee. Current Philadep Rule 29, "Standard of Care," will become Philadep Rule 18.

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Securities Exchange Act of 1934 and Rule 19b-4 thereunder. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate the proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

Interested persons are invited to submit written data, views and arguments concerning the submission within twenty-one days from the date of publication in the *Federal Register*. Persons desiring to make a written submission should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. Reference should be made to File No. SR-PHILADEP-84-1.

Copies of the submission, with accompanying exhibits, and of all written comments will be available for public inspection at the Securities and Exchange Commission's Public Reference Room, 450 Fifth Street, NW., Washington, D.C. Copies of the filing will also be available at the principal office of the above-mentioned self-regulatory organization.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

George A. Fitzsimmons,  
Secretary.

[FR Doc. 84-8204 Filed 3-27-84; 8:45 am]  
BILLING CODE 8010-01-M

[File No.: 81-701]

#### PACCAR Financial Corp.; Application and Opportunity for Hearing

March 21, 1984.

Notice is hereby given that PACCAR Financial Corp. (The "Applicant"), a wholly owned subsidiary of PACCAR, Inc. ("PACCAR"), has filed an application pursuant to section 12(h) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), for exemption from certain requirements under sections 14(a) and 14(c) of the Act subject to certain conditions.

The application states in part:

Because Applicant's common stock is registered under section 12(g), of the Exchange Act, Applicant is required to comply with the proxy and information statement requirements of Regulations 14A and 14C under that Act.

Applicant believes that the exemptive order requested by it is appropriate in that as long as PACCAR continues to own all of Applicant's common stock, a proxy or information statement will be of no relevance to PACCAR.

Further, the information provided by a proxy or information statement will be either of little or no relevance to a holder of Applicant's debt securities, or will be otherwise publicly available in documents Applicant is required to file under section 13 of the Exchange Act.

For a more detailed statement of the information presented, all persons are referred to said application, which is on file in the Office of the Commission at the Public Reference Room, 450 Fifth Street, NW., Washington, D.C. 20549.

Notice is further given that any interested person not later than April 16, 1984 may submit to the Commission in writing his views or any substantial facts bearing on the application or the desirability of a hearing thereon. Any such communication or request should



be addressed to The Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549, and should state briefly the nature of the interest of the person submitting such information or requesting the hearing, the reason for such request, and the issues of fact and law raised by the application which he desires to controvert.

Persons who request a hearing or advice as to whether a hearing is ordered will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof. At any time after said date, an order granting the application may be issued upon request or upon the Commission's own motion.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority,

**George A. Fitzsimmons,**  
Secretary.

[FR Doc. 84-8265 Filed 3-27-84; 8:45 am]

BILLING CODE 8010-01-M

## SMALL BUSINESS ADMINISTRATION

[Designation of Disaster Loan Area  
#615100]

### Texas; Designation of Disaster Loan Area

Uvalde, Bosque, Bell, Jackson, Calhoun, Bowie, Travis, Williamson and Gonzales Counties in the State of Texas constitute a disaster area because of a freeze which occurred during December 1983. Eligible small businesses may file applications for economic injury assistance until the close of business on December 24, 1984, at the address listed below:

U.S. Small Business Administration, 727 East Durango—Room A-513, Federal Building, San Antonio, Texas 78206

U.S. Small Business Administration, 1100 Commerce Street, Dallas, Texas 75242

U.S. Small Business Administration, 2525 Murworth, Suite 112, Houston, Texas 77054

or other locally announced locations. The interest rate for eligible applicants is 8%.

[Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008]

Dated: March 22, 1984.

**James C. Sanders,**  
Administrator.

[FR Doc. 84-8358 Filed 3-27-84; 8:45 am]

BILLING CODE 8025-01-M

## Direct Business Loans; Interest Rates

The interest rate on section 7(a) Small Business Administration direct business

loans (as amended by Pub. L. 97-35) and the SBA share of immediate participation loans is twelve and five-eighths (12½) percent for the fiscal quarter beginning April 1, 1984.

On a quarterly basis, the Small Business Administration also publishes an interest rate called the optional "peg" rate (13 CFR 120.3(b)(2)(iii)). This rate is a weighted average cost of money to the government for maturities similar to the average SBA loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. For the April-June quarter of 1984, this rate will be eleven and five-eighths (11½) percent.

**Edward J. Myerson,**

*Acting Associate Administrator for Finance and Investment.*

[FR Doc. 84-8359 Filed 3-7-84; 8:45 am]

BILLING CODE 8025-01-M

## Maximum Annual Cost of Money to Small Business Concerns

13 CFR 107.301(c) sets forth the SBA Regulations governing the maximum annual cost of money to small business concerns for financing by small business investment companies.

Section 107.301(c)(2) requires that SBA publish from time to time in the **Federal Register** the current Federal Financing Bank (FFB) rate for use in computing the maximum annual cost of money pursuant to § 107.301(c)(1). It is anticipated that a rate notice will be published each month.

13 CFR 107.301(c) does not supersede or preempt any applicable law that imposes an interest ceiling lower than the ceiling imposed by that regulation. Attention is directed to new subsection 308(i) of the Small Business Investment Act, added by section 524 of Pub. L. 96-221, March 31, 1980 (94 Stat. 161), to that law's Federal override of State Usury ceilings, and to its forfeiture and penalty provisions.

Effective April 1, 1984, and until further notice, the FFB rate to be used for purposes of computing the maximum cost of money pursuant to 13 CFR Section 107.301(c) is 12.565% per annum.

Dated: March 20, 1984.

**Edward J. Myerson,**

*Deputy Associate Administrator for Finance and Investment.*

[FR Doc. 84-8360 Filed 3-27-84; 8:45 am]

BILLING CODE 8025-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Priority System for the Airport Improvement Program

**AGENCY:** Federal Aviation Administration, DOT.

**SUBJECT:** Availability of the Airport Improvement Program Priority System for Information of the Aviation Public.

**SUMMARY:** This notice provides information on availability of copies of the Airport Improvement Program Priority System.

Section 505 of the Airport and Airway Improvement Act of 1982 (AAIA) (49 U.S.C. 2204) authorizes the Secretary to make grants for eligible projects under the Airport Improvement Program. Because the demand for these funds exceeds the amount available, the FAA is unable to fund all of those projects for which airport sponsors wish to obtain grants. The FAA has developed a priority system to help make decisions on the relative national priority of projects proposed during the year. Under this system, projects are favored which best carry out the purpose of the Act, with emphasis on those which improve safety and assure the integrity of the system.

The FAA is making this document available for review by the aviation public. Interested parties may call, write, or visit the following office to obtain the document: Office of Airport Planning and Programming, Grants-in-Aid Division, APP-500 (Room 620), Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591, Telephone: (202) 426-3067.

Issued in Washington, D.C., on March 23, 1984.

**Paul L. Galis,**

*Director, Office of Airport Planning and Programming.*

[FR Doc. 84-8338 Filed 3-27-84; 8:45 am]

BILLING CODE 4910-13-M

## Maritime Administration

### Approval of Applicant as Trustee; NCNB New National Bank of Florida

Notice is hereby given that NCNB New National Bank (to be named NCNB National Bank of Florida), successor to NCNB National Bank of Florida, with offices at 600 N. Florida Avenue, Tampa, Florida, has been approved as Trustee pursuant to Pub. L. 89-346 and 46 CFR 221.21—221.30.

Dated: March 23, 1984.



By order of the Maritime Administrator.  
Georgia P. Stamas,  
Secretary.

[FR Doc. 84-8330 Filed 3-27-84; 8:45 am]  
BILLING CODE 4910-81-M

# **Removal, Without Disapproval, From Roster of Approved Trustees; Exchange Bank and Trust Co. of Florida**

Notice is hereby given, pursuant to 46 CFR 221.28, that Exchange Bank and Trust Company of Florida, with offices at 600 N. Florida Avenue, Tampa, Florida, has been removed from the Roster of Approved Trustees. In its request for removal, Exchange Bank and Trust Company of Florida stated that as of December 31, 1982, the shareholders of Exchange Bancorporation, Inc. (principal stockholder of the Bank) sold all of their stock in the Bank to NCNB Exchange Corporation.

Dated: March 23, 1984.

By Order of the Maritime Administrator.  
Georgia P. Stamas,  
Secretary.

[FR Doc. 84-8329 Filed 3-27-84; 8:45 am]  
BILLING CODE 4910-81-M

## **TENNESSEE VALLEY AUTHORITY**

### **Paperwork Reduction Act of 1980; Forms Under Review by the Office of Management and Budget**

**AGENCY:** Tennessee Valley Authority.  
**ACTION:** Forms under review by the Office of Management and Budget.

**SUMMARY:** The Tennessee Valley Authority (TVA) has sent to OMB the following proposals for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35).

Requests for information, including copies of the forms proposed and supporting documentation, should be directed to the Agency Clearance Officer whose name, address, and telephone number appear below. Questions or comments should be directed to the Agency Clearance Officer and also to the office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attention: Desk Officer for Tennessee Valley Authority, 395-7313.

Agency Clearance Officer: Mark R. Winter, Tennessee Valley Authority, 100 Lupton Building, Chattanooga, TN 37401; (615) 751-2524, FTS 858-2524.  
Type of Request: New, regular submission

Title of Information Collection: TVA Energy Awareness Pilot Program—Phase II Teacher Evaluation  
Frequency of Use: Annually  
Type of Affected Public: Non-Profit Institutions  
Small Businesses or Organizations Affected: No  
Federal Budget Functional Category Code: 271  
Estimated Number of Annual Responses: 500  
Estimated Total Annual Burden Hours: 100  
Estimated Annual Cost from Appropriated Funds: \$0

**Need for and Uses of Information:**  
During this proposed information collection, TVA will contract elementary and high school teachers regarding the success of the Energy Awareness Pilot Program. The information is needed by TVA to evaluate this program and to determine whether to continue or to terminate the program.

Dated: March 21, 1984.

John W. Thompson,  
Manager, Corporate Services, Senior Agency Official.

[FR Doc. 84-8241 Filed 3-27-84; 8:45 am]  
BILLING CODE 8120-06-M

## **DEPARTMENT OF THE TREASURY**

### **Office of the Secretary**

March 22, 1984.

[Supplement to Dept Circ.; Public Debt Series—No. 7-84.]

### **Interest Rate; Notes Designated Series S-1986**

The Secretary announced on March 21, 1984, that the interest rate on the notes designated Series S-1986, described in Department Circular—Public Debt Series—No. 7-84 dated March 15, 1984, will be 11½ percent. Interest on the notes will be payable at the rate of 11½ percent per annum.

Gerald Murphy,  
Acting Fiscal Assistant Secretary.

[FR Doc. 84-8251 Filed 3-27-84; 8:45 am]  
BILLING CODE 4810-40-M

## **VETERANS ADMINISTRATION**

### **Agency Information Collections Under OMB Review**

**AGENCY:** Veterans Administration.  
**ACTION:** Notice.

**SUMMARY:** The Veterans Administration has submitted to OMB for review the following proposals for the collection of

information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document contains forms and reporting requirements and lists the following information: (1) The Department or Staff Office issuing the requirement; (2) The title of the form or report; (3) The agency form number, if applicable; (4) How often the form or report must be filled out; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to fill out the form; and (8) An indication of whether section 3504(h) of Pub. L. 96-511 applies.

**ADDRESSES:** Copies of the forms, reports, and supporting document may be obtained from Patricia Viers, Agency Clearance Officer (004A2), Veterans Administration, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 389-2146. Comments and questions about the items on this list should be directed to the VA's OMB Desk Officer, Dick Eisinger, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395-6880.

**DATES:** Comments on the forms and questionnaires should be directed to the OMB Desk Officer within 60 days of this notice.

Dated: March 22, 1984.

By direction of the Administrator:  
Dominick Onorato,  
Associate Deputy Administrator for Information Resources Management.

### **New Reporting Requirement**

1. Department of Medicine and Surgery.
2. Epidemiologic Study of the Health of Vietnam Veterans.
3. None.
4. Reporting requirement.
5. Individuals or households.
6. 32,600 responses.
7. 32,600 hours.
8. Not applicable.

### **Reporting Requirement**

- (1) Department of Medicine and Surgery.
- (2) Former Prisoner of War Medical Follow-up.
- (3) Not applicable.
- (4) One-time.
- (5) Individuals or households.
- (6) 3300 responses.
- (7) 1650 hours.
- (8) Not applicable.

### **Extensions**

1. Department of Veterans Benefits.
2. Counseling Record—Personnel Information.
3. VA Form 28-1902.



4. On occasion.
5. Individuals or households.
6. 60,000 responses.
7. 30,000 hours.
8. Not applicable.

\* \* \* \* \*

1. Department of Veterans Benefits.
2. Transfer of (Scholastic) Credit (Schools).
3. VA Form 22-315.
4. On occasion.
5. Individuals or households, State or local governments, Businesses or other for-profit, Non-profit institutions, Small businesses or organizations.
6. 1,600 responses.
7. 267 hours.
8. Not applicable.

#### Extensions

1. Department of Veterans Benefits.
2. Request to Lender for Status Loan Account—LCS.
3. VA Form 26-8778.
4. On occasion.
5. Small businesses or organizations.
6. 126,000 responses.
7. 21,600 hours.
8. Not applicable.

\* \* \* \* \*

1. Department of Veterans Benefits.
2. Electrical Systems Inspection Report (Manufactured Home).
3. VA Form 26-8731b.
4. On occasion.

5. Individuals or households, Businesses or other for-profit, Small businesses or organizations.
6. 1,000 responses.
7. 2,000 hours.
8. Not applicable.

\* \* \* \* \*

1. Department of Veterans Benefits.
2. Statement of Dependency on Parent(s).
3. VA Form 21-509.
4. On occasion.
5. Individuals or households.
6. 55,000 responses.
7. 27,500 hours.
8. Not applicable.

[FR Doc. 84-6312 Filed 3-27-84; 8:45 am]

BILLING CODE 8320-01-M



# Sunshine Act Meetings

Federal Register

Vol. 49, No. 61

Wednesday, March 28, 1984

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

Dated: March 26, 1984.

**James McAfee,**  
*Associate Secretary of the Board.*

[FR Doc. 84-8448 Filed 3-28-84; 4:02 pm]

BILLING CODE 6210-01-M

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### 1

#### FEDERAL RESERVE SYSTEM

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** Notice forwarded to Federal Register on March 16, 1984.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** Approximately 11:00 a.m., Monday, March 26, 1984, following a recess at the conclusion of the open meeting.

**CHANGES IN THE MEETING:** Addition of the following closed item(s) to the meeting: Proposed statement to the Senate Committee on Banking, Housing, and Urban Affairs, regarding S. 2181, the Financial Services Competitive Equity Act, and S. 2134, the Depository Institutions Holding Company Act Amendments of 1983.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board, (202) 452-3204.

### 2

#### FEDERAL HOME LOAN MORTGAGE CORPORATION

**DATE AND TIME:** March 29, 1984, 1:30 p.m.

**PLACE:** 1776 G Street, NW., Washington, D.C., Conference Room 4-G.

**STATUS:** Closed.

#### CONTACT PERSON FOR MORE

**INFORMATION:** Alan B. Hausman, 1776 G Street, NW., P.O. Box 37248, Washington, D.C. 20013, (202) 789-4763.

#### MATTERS TO BE CONSIDERED:

Closed:  
Minutes of January 31, 1984 Board of Directors' Meeting  
Minute Entry

Closed:  
President's Report

Closed:  
Financial Report  
Minute Entry

Date sent to Federal Register: March 26, 1984.

**Maud Mater.**

*Corporate Secretary.*

[FR Doc. 84-8422 Filed 3-28-84; 1:49 pm]

BILLING CODE 6720-01-M

### 3

#### PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL (NORTHWEST POWER PLANNING COUNCIL)

**ACTION:** Notice of meeting to be held

pursuant to the Government in the Sunshine Act (5 U.S.C. 552b).

**STATUS:** Open. An executive session to discuss pending litigation and personnel matters will follow the meeting on April 12. This session will be closed to the public.

**TIME AND DATE:** April 11 and 12, 1984, 9:00 a.m.

**PLACE:** Red Lion Motor Inn/Riverside, 29th and Chinden Boulevard, Boise, Idaho.

#### MATTERS TO BE CONSIDERED:

- Preliminary Council Decisions on Draft Amendment of the Columbia River Basin Fish and Wildlife Program
- Public Comment on Second Set of Issue Papers on Amendment of the Columbia River Basin Fish and Wildlife Program
- Presentation of Third Set of Issue Papers on Amendment of the Columbia River Basin Fish and Wildlife Program
- Staff Presentation of Bureau of Reclamation, Federal Energy Regulatory Commission, and Corps of Engineers FY 1985 Budget Proposals
- Council Decision on Proposed Amendment to the Council's Study of Large Thermal Plant Planning and Construction Schedules (Action 23.1)
- Staff Presentation on Death Spiral Issue Paper
- Staff Presentation on Northwest Power Planning Council Power Planning Division Workplan

#### FOR FURTHER INFORMATION CONTACT:

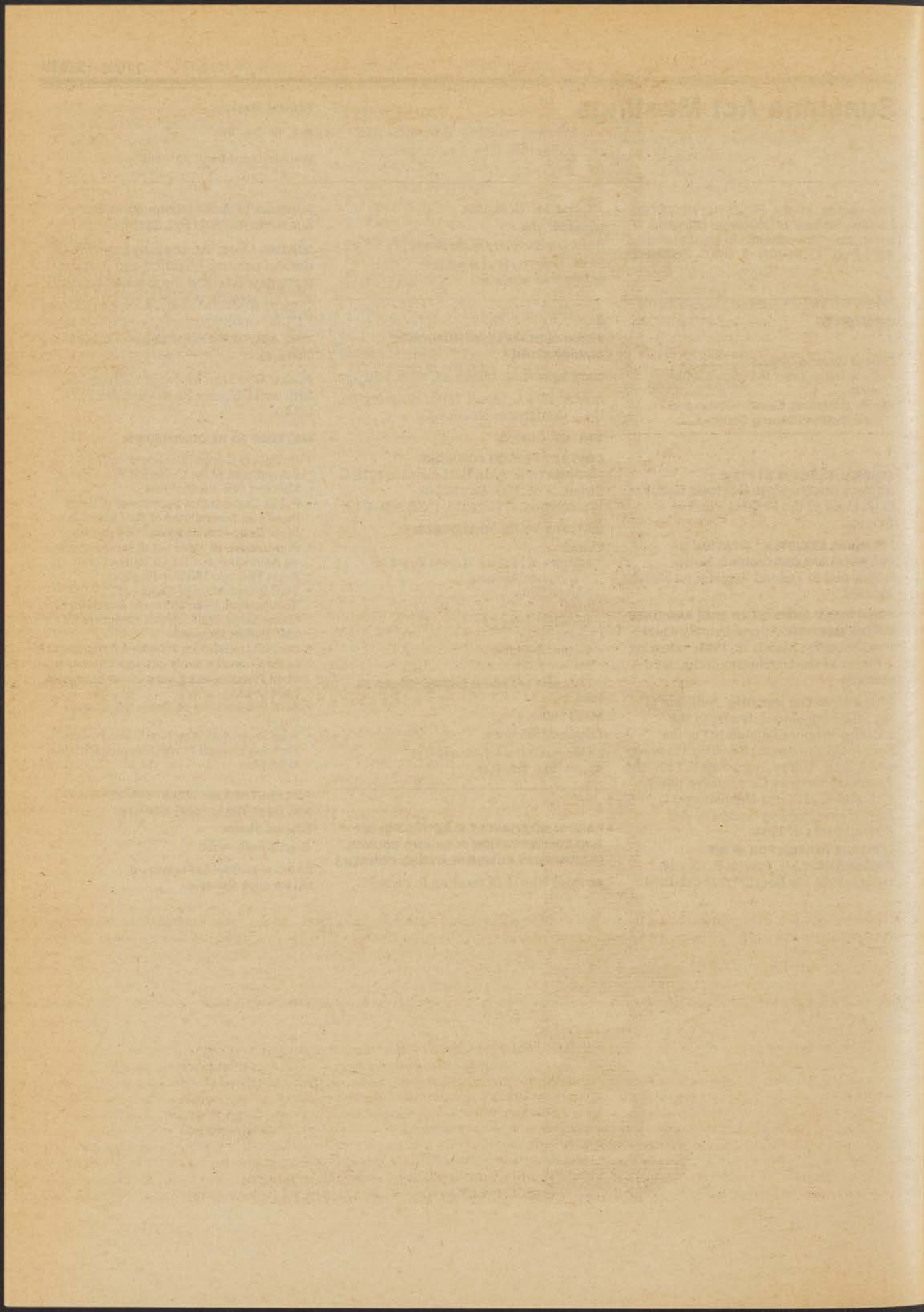
Ms. Bess Wong (503) 222-5161

Edward Sheets,  
*Executive Director.*

[FR Doc. 84-8383 Filed 3-28-84; 11:01 am]

BILLING CODE 0000-00-M







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**Wednesday**  
**March 28, 1984**

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**Part II**

**Department of  
Energy**

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**48 CFR Ch. 9**  
**Acquisition Regulations; Final Rule**



## DEPARTMENT OF ENERGY

## 48 CFR Ch. 9

## Acquisition Regulations

AGENCY: Department of Energy.

ACTION: Final rule.

**SUMMARY:** This final rule completes the effort begun by the notice of proposed rulemaking published in the *Federal Register* on September 26, 1983 at 48 FR 43772. The purpose of the rule is to establish the Department of Energy Acquisition Regulation (DEAR). This regulation will be codified as Chapter 9 of Title 48 of the Code of Federal Regulations. Its purpose is to implement and supplement the Federal Acquisition Regulation (FAR) which has been separately promulgated by the General Services Administration, Department of Defense, and National Aeronautics and Space Administration as Chapter I of Title 48 of the Code of Federal Regulations. The FAR was published in the September 19, 1983 issue of the *Federal Register*. The FAR is being promulgated as the uniform, simplified, acquisition regulation called for by Executive Order 12352, Federal Procurement Reforms.

The FAR will supersede the Defense Acquisition Regulation, the Federal Procurement Regulations, and the National Aeronautics and Space Administration Procurement Regulation. Civilian agency implementations of the Federal Procurement Regulations will generally become outdated as a result of the promulgation of the FAR. For this reason, the Department of Energy Procurement Regulations (DOE-PR), codified at Chapter 9 of Title 41 of the Code of Federal Regulations, will not be used, with one exception, for solicitations issued after the April 1, 1984 effective date of the FAR and DEAR. The exception to this however is that Part 9-9, "Patents, Data, and Copyrights," of the DOE-PR will remain in effect. However, the provisions of 41 CFR 9-9.107-1 through 9-9.107-6 and 9-9.109-6 shall apply only to contracts with other than small business firms and domestic nonprofit organizations which do not fall within the provisions of 35 U.S.C. 202(a)(i), (ii), or (iii). This will be an interim procedure pending finalization of FAR coverage in this area and a Departmental rulemaking. As a practical matter, both the Federal Procurement Regulations and the DOE-PR, 41 CFR Chapters 1 and 9, respectively, will continue to be applicable for the administration of contracts awarded prior to the effective date of the FAR and DEAR.

The intended effect of the FAR is to simplify the Federal procurement process by adopting a uniform regulation for all agencies. The uniform regulation will eliminate the confusion caused by differing policies among the various Federal agencies. The intended effect of the DEAR is to implement the FAR where required and to supplement the FAR in areas where there is no FAR coverage of policies unique to DOE.

**EFFECTIVE DATE:** This regulation will be effective April 1, 1984.

**FOR FURTHER INFORMATION CONTACT:**

Richard Langston, Procurement Policy Branch, MA-421.1, Procurement and Assistance Management Directorate, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 252-8188  
Robert Forst, Office of General Counsel, AGC for Procurement and Financial Incentives, GC-44, Department of Energy, Room 6B-158, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 252-1526

**SUPPLEMENTARY INFORMATION:****I. Background****II. Statutory & Regulatory Requirements***A. Executive Order 12291**B. Regulatory Flexibility Act**C. Paperwork Reduction Act***III. Public Comments****I. Background**

The policies and procedures of the Federal government regarding the procurement of supplies and services have been developed in a largely independent fashion by the various agencies. Many statutes bearing on Federal contracting have been directed toward specific agencies. Federal agencies have traditionally developed their own contracting procedures with limited attention to uniformity among agencies. The result of this is a system of procurement policies which vary from agency to agency and cause confusion within the contracting community. As long ago as 1972, the Commission on Government Procurement recommended that there be a standard Government-wide procurement regulatory system. The Office of Federal Procurement Policy, created in 1974, has worked with the agencies and the public to create a uniform procurement regulation to be known as the Federal Acquisition Regulation (FAR).

The FAR has been codified as Chapter 1 of Title 48 of the Code of Federal Regulations. The FAR was published in

the September 19, 1983 edition of the *Federal Register* with an effective date of April 1, 1984.

Because of differing statutory authorities among Federal agencies and because as a practical matter the FAR cannot contain all the procedural details of how to implement a particular policy, the FAR authorizes the agencies to issue implementing regulations. For this reason, DOE issued a notice of proposed rulemaking on September 26, 1983 at 48 FR 43772 inviting the public to comment on the draft of its regulation to implement and supplement the FAR. A correction notice was issued on October 25, 1983 at 48 CFR 49315. The only significant aspect of the correction notice involved the addition of 917.7108-3 which provides for managing Government property under special research contracts in accordance with FAR 45 and 945 when title is to remain with the Government.

**II. Statutory & Regulatory Requirements***A. Executive Order 12291*

This Executive Order, entitled "Federal Regulation", requires that certain rules be reviewed by the Office of Management and Budget prior to promulgation. In accordance with the memorandum from the Director, Office of Management and Budget to the Administrators of the Office of Federal Procurement Policy and the Office of Information and Regulatory Affairs, dated December 15, 1983, this final rule is exempt from the provisions of Executive Order 12291, pursuant to section 8(b) of the Order, because it deals with management of the agency's procurement function.

*B. Regulatory Flexibility Act*

This final rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96-354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

*C. Paperwork Reduction Act*

The information collection and recordkeeping requirements that are imposed on the public by this proposed rulemaking have been cleared by the Office of Management and Budget (OMB) under various control numbers, in accordance with section 3504(h) of the Paperwork Reduction Act of 1980, Pub. L. 98-511, and OMB's implementing



regulations at 5 CFR Part 1320. These requirements and their corresponding control numbers appear at 901.105. Pursuant to the request for public comments, DOE received two comments regarding paperwork reduction considerations. These comments are addressed at section III.

### III. Public Comments

The Department of Energy (DOE) published a notice of proposed rulemaking on September 26, 1983 to establish the Department of Energy Acquisition Regulation. The notice invited public comments for a 60 day period ending November 25, 1983. Comments were received from seven organizations. In addition to general comments, the DOE received two comments concerning items which involve approvals by the Office of Management and Budget (OMB) as part of the clearance process required by the Paperwork Reduction Act of 1980, Pub. L. 96-511 and OMB's implementing regulations of 5 CFR Part 1320. Actions taken with regard to the Paperwork Reduction Act of 1980 issues are the first issues discussed. Other public comments and suggestions pertinent to the notice of proposed rulemaking and actions taken in response thereto are summarized in the paragraphs that follow those comments.

#### *Comments Regarding Paperwork Reduction Act*

**Comment:** Two organizations objected to the Department's proposal, at 952.219-9, that requires a contractor to report the percent and dollar value of subcontracts awarded to women-owned small businesses. The proposal included language that this information be inserted at the "Remarks" section of Standard Forms 294 and 295. The commenter asked that 952.219-9 be removed from the final rule.

**Response:** The DOE's proposal was based on an interim "Phase I" copy of Part 19 of the FAR which contained a requirement for a women-owned small business subcontracting program clause. This clause was not contained in the final FAR. Based on the concerns of the respondent and the deletion of the earlier FAR requirement, the Department has removed the requirement for such subcontract reporting. Section 952.219-9 and references to it have not been deleted. Nonetheless as a result of additional internal review prompted by the comment, the Department did revise 952.219-9 and its general instructions for use at 919.708, as well as the internal reporting instructions at 904.601-70(b)(4). Subcontract reports are

required pursuant to FAR 19.704 for contracts which contain the Small Business and Small Disadvantaged Business Subcontracting Plan clause. These reports are furnished by means of semi-annual submissions of Standard Form 294 and quarterly submissions of Standard Form 295. The Department has reviewed these forms as well as its own need for such information. It was determined that the Department can fulfill its information requirements and at the same time reduce the paperwork burden imposed on its contractors. The SF 294 contains all the information needed except for the amount of labor surplus area subcontracting. The final rule has been revised to provide that DOE contractors need only submit their reports through use of an SF 294 on a quarterly basis with an annotation to indicate the amount of labor surplus area subcontracting if such reports are required by the terms of the contract. This action decreases from 6 to 4 the number of subcontract reports which must be submitted annually and simplifies the process by using a single form rather than two separate forms.

**Comment:** One organization objected to Article B-XXVII, "Sensitive Foreign Nations Controls" at 917.7113. They objected to the ambiguity caused by the reference to an "Attachment —" in the clause at 952.204-3 of the proposed rule which is incorporated in Article B-XXVII. The commenter expressed concern that the attachment would contain reporting and recordkeeping requirements.

**Response:** Upon review, the Department agrees the clause may not be clear regarding what is intended by the reference to "Attachment —". However, 904.404 describes the use of the clause and what is to be enclosed as an attachment.

The "—" is for a reference number of the particular contract attachment. National security requirements necessitate control when unclassified materials or information on nuclear technology may be made available to Sensitive Foreign Nations. Generally, special research contracts will not require the clause. However, some SRC's may deal with nuclear technologies, therefore the clause has been retained at 952.204-71 to be used under the appropriate circumstance. It has been rewritten to identify what is to be attached. Instructions for use of the clause are revised at 917.7113, Article B-XXVII to say that the clause is applicable when nuclear technology is involved. These requirements are included in the DOE paperwork clearance.

### *Other Comments*

**Comment:** Two commenters asked questions concerning 904.404 which specifies clauses to be used in contracts which involve or have the potential to involve classified information. One reviewer was confused by the numbering of the clauses and another asked the definition of the word "off-site" as used in the clause which appeared at 904.404(d)(4) in the proposed rule.

**Response:** The Department agrees there may be confusion in the series of clauses dealing with security. The several clauses in question were included in the proposed rule at 952.204-1; 952.204-2; 952.204-3; and 952.204-4. To clarify the differing security clauses that apply to DOE contracts, the clauses included in the final rule have been renumbered. This renumbering more clearly indicates that the clause entitled "Security" at 952.204-1 of the proposed rule, renumbered in the final rule as 952.204-2, is to be used in DOE contracts instead of the FAR clause of the same title. The other clauses are supplemental to the FAR and implement DOE requirements and have accordingly been numbered with "— 70" identifications. The purpose and intent of the clause at 952.204-72, of the final rule "Disclosure of Information" was clarified at this instruction for use as well as at 904.404(d)(4) by removing the words "off-site" and substituting a reference to the institutions own facilities.

**Comment:** Two respondents commended DOE for its efforts to reduce paperwork burden through use of the annual representations and certifications technique as proposed at 904.70. One of these commenters also suggested that the Department make these procedures mandatory rather than optional.

**Response:** The treatment of this subject is relocated to 915.406-5 in this final rule. Based on the comments received and further discussions within the Department, DOE has further expanded this topic. The coverage in the final rule being published today makes it possible to place a representations and certifications on record with a contracting activity for a period of 3 years. During that period, it will be possible to file a simplified certification attesting to the currency of the record copy and identifying any differences from the record copy that may exist for an individual bid or proposal. The DOE expects this simplified procedure to benefit organizations who submit frequent bids or proposals to the Department. It will contribute to the



Department's efforts to reduce such paperwork burdens. DOE expects all of its contracting activities to adopt these simplified procedures. Because the technique is new the Department has elected to provide for its use on an optional basis.

*Comment:* One commenter discussed 915.105, "Competition". The commenter suggested that there may be confusion as a result of recent legislation and regulation, both proposed and final. The commenter suggested that paragraph (b) of 915.105 be an unequivocal statement of the Department's policy. The commenter stated the belief that subparagraphs (b)(2) and (b)(6) of 915.105 of the proposed rule were correct and observed with regard to subparagraph (b)(2) that 41 U.S.C. 252(c)(5) authorizes the negotiation of any service to be rendered by any university and suggested that pending legislation, S. 338, will authorize noncompetitive procedures for "an essential research capability to be provided by an educational institution." Regarding subparagraph (b)(6) the commenter also stated that FPR Amendment 230 and FPR Temporary Regulation 75 encourage unsolicited proposals and stated that FPR 1-1003.2 provides that unique or innovative research proposals need not be synopsisized in the *Commerce Business Daily* if doing so would disclose the originality of thought or innovativeness of the proposed research.

*Response:* The recent legislation and regulation mentioned by the commenter is presumed to be Pub. L. 98-72 and FPR Temporary Regulation 75. Pub. L. 98-72 amended the Small Business Act to improve small business access to Federal procurement information by making it harder for agencies to award sole source contracts. The commenter appears to be equating the exceptions listed at paragraph (b) of 915.105 as being exceptions to the new synopsis requirements of Pub. L. 98-72. This is not the case and the Department disagrees with the apparent conclusion. The exceptions listed at 915.105(b) are exceptions to the general requirement for competition in its traditional sense. They are different and apart from the exceptions to the requirement to synopsisize acquisition solicitations in the *Commerce Business Daily* which were recently changed by FPR Temporary Regulation 75 as a result of Pub. L. 98-72. The DOE anticipates that a Federal Acquisition Circular will be issued prior to April 1 to assure that this recent legislation is reflected in the FAR. There is no need to change this section of the final rule at this time.

*Comment:* One commenter questioned the DOE's authority regarding the statement at 915.401 to the effect that subpart 15.4 of the FAR does not apply to special research contracts, program opportunity notices, or program research and development notices. The reviewer asked whether the DOE had obtained a FAR deviation in this area or had separate statutory authority in this matter.

*Response:* The intent of the DEAR is recognition that the DOE has developed over an extended period of years several highly specialized types of solicitation and award mechanisms. The DOE has statutory authority to negotiate the Special Research Contract and the Program Opportunity Notice. These authorities include section 31(c) of the Atomic Energy Act of 1954 and section 302(c) of the Federal Property and Administrative Services Act of 1949 for the Special Research Contract and the Federal Non-nuclear Energy Research and Development Act of 1974 for the Program Opportunity Notice. The Program Research and Development Announcement was developed as a result of experience gained from the Program Opportunity Notice and was first promulgated as part of the Energy Research and Development Administration Procurement Regulation in 1976. Later, it was promulgated, in the DOE-PR following public comment in June 1979. The DOE does not consider any of these special solicitation and contract types to represent a deviation from the FAR. They are supplemental to the FAR. For this reason, they were assigned "70" series numbers (917.71, 917.74, and 917.75 respectively) as described at 901.104-2.

*Comment:* One reviewer offered several observations concerning 909.5, "Organizational Conflicts of Interest." The reviewer suggested that DOE delete this topic and rely solely on the FAR coverage of this topic. The organization urged that organizational conflicts of interest (OCI) guidance in the FAR be utilized for DOE procurements in lieu of the guidance contained Subpart 909.5. In particular, the organization asserted that, upon completion of a DOE contract, all reports, technical data, etc., are essentially in the "public domain" thereby diminishing any unfair competitive advantage. The organization also noted that the Department's patent policy reduces the potential for OCI and that no fixed term/duration is indicated in the DOE OCI provision (thus imposing a serious and unmanageable restriction on DOE and its contractors).

*Response:* The OCI requirements contained at Subpart 909.5 reflect the Department's efforts to comply with statutory criteria contained in Pub. L. 95-39 and Pub. L. 95-70. Pursuant to these laws (made specifically applicable to DOE through Section 644 of Pub. L. 95-91), the Secretary of DOE was specifically required to promulgate regulations governing the avoidance of OCI in accordance with specific criteria contained within each of those statutes. Moreover, the OCI regulation that was finalized (44 FR 2556, January 11, 1979), in compliance with the statutory criteria of Pub. L. 95-39 and Pub. L. 95-70, reflected the opinions and recommendations expressed by interested parties commenting on the Department's proposed rule of March 27, 1978, (43 FR 12727).

The Department is not certain it fully understands the specific focus of the particular questions raised by the commenter. If the nature of the inquiries concerns OCI as it applies to research and development contracts, there is in general, little difference between the OCI coverage of the FAR and that of the proposed notice. Pursuant to 909.570-7, OCI disclosure or representation with respect to research and development contracts is specifically required only for research and development conducted pursuant to the Federal Energy Administration Act of 1974, as amended. A general OCI clause (DEAR 952.209-71) is included in contracts falling into that very limited category.

A degree of difference between the proposed rule and FAR OCI requirements does exist with respect to contracts for technical consulting and management support services. The Department has a special contract clause (DEAR 952.209-72) which is to be included in all contracts of that type. This clause does provide a fixed term/duration in its OCI restrictions with regard to information first provided to a particular contractor which will eventually be available to all. Although there are distinctions, as noted above, between the FAR and the DOE proposed OCI coverage depending on the type of contractual situation, in general, the OCI coverage in the FAR and the proposed rule are in agreement. The Department's OCI policy supplements and does not contradict the OCI policy set forth in the FAR. Both are based on the principle of avoiding bias and unfair competitive advantage (see DEAR 909.570-4 and FAR 9.505).

The FAR is not unlike the proposed rule in its recognition of the possible need to guard against OCI after contract completion. Again, the important thing



to remember is that the need for OCI coverage depends in large part on the particular type of contract. It may be that because of a particular contractual situation (e.g., technical consulting and management support services) more detailed OCI coverage will be necessary; and, depending on the particular factual situation, when OCI coverage is required, it may be necessary to impose OCI restraint (to avoid the circumstances of unfair competitive advantage or bias) that extends beyond contract completion. (With respect to technical consulting and management support contracts the fixed term/duration OCI restriction for access to and use of "Internal" data extends for six months after either completion of the contract or until such information is released or otherwise made available to the public (DEAR 952.209-72(b)(2)). Moreover, the FAR specifically implies that the period of restriction will vary (and could extend beyond contract completion) depending on the factual circumstances (see FAR 9.508-2).

In summary, while the circumstances that the commenter has mentioned (reports in the "public domain" reducing the potential for OCI, and patent ownership impacting on the issue of OCI) may affect OCI, the more important point is that need for OCI coverage must first be established; and this depends, in large part, on the type of contract involved. Once the need is established, the type of OCI coverage may very well be affected by factors such as reports being in the "public domain" and patent ownership rights, etc.

Finally, the commenter has also suggested that 909.570-3(a) be modified to remove proposed subcontractors and consultants from its definition in order that a prime not be held in default for an OCI at the subcontractor level. It should first be noted that Pub. L. 95-39 and Pub. L. 95-70 explicitly require that OCI coverage apply to subcontractors. It is for this reason that subcontractors and consultants have been included within the definition of OCI contained at 909.570-3(a). In carrying out these requirements, subcontractors and consultants are required to submit their own OCI disclosure or representation and this is evaluated by the contracting officer who is responsible for making an OCI assessment. The prime is not responsible for either evaluating OCI information or making an OCI assessment with respect to subcontractors or consultants.

The Department may, in certain situations (for example, with respect to

technical consulting and management support services), terminate a contract for default in a so-called "breach" situation. This could, for example, be based on a post-award finding that a subcontractor did have an OCI. However, 909.570-10 requires that in these types of situations "every reasonable action to avoid or mitigate the effects of the conflict" be taken before terminating.

*Comment:* One commenter suggested that 915.501 represented a departure from the FAR definition of "unsolicited proposal." The same reviewer had previously suggested the same thing during the rulemaking which resulted in "Change 7" of the DOE PR promulgated on April 15, 1983 at 48 FR 16450. The reviewer also made reference to Pub. L. 98-72 which contains a definition of "unsolicited proposal" and to FPR Temporary Regulation 75.

*Response:* The Department had never intended that the statement at 915.501 be taken as a literal interpretation that there is some separate definition of unsolicited proposal with respect to special research contracts which are separately covered at 917.71. The Department's intent had been to highlight the separate treatment afforded unsolicited proposals received from educational institutes under the Department's special research contract provisions at 917.71. To avoid misconception of the Department's intent, the final rule being published today deletes the paragraph entitled "Unsolicited proposals" from 915.501. Additionally, the definition of research proposal at 917.7101(c) is changed by referencing the definition of unsolicited proposal at FAR 15.501.

*Comment:* One comment suggested that 917.70 regarding cost participation varied from guidance contained in OMB Circulars A-88 and A-124 and requested that universities be exempt from the policy.

*Response:* The reviewer did not explain how the guidance of 917.70 departed from OMB Circulars A-88 and A-124. The cost participation policy of DOE is general policy with emphasis on cost sharing for demonstration projects. This portion of the policy is necessitated by the Federal Non-nuclear Energy Research and Development Act of 1974, which requires consideration of cost sharing for such projects. Section 917.7001(a) explains when cost sharing is required and 917.7002(c) describes situations in which cost sharing is unlikely. The DOE agrees that a contract with a university for the performance of basic research is not a situation in which cost participation is expected. On

the other hand, if a university were to propose a demonstration project then cost participation would be expected. The DOE finds no merit in the suggestion to exempt universities from 917.70. No change is made in the final rule published today.

*Comment:* One commenter stated that 917.7106-6 which concerns the selection of a field office for negotiation and award of special research contracts ignores the existence of DOE Order 4220.1 which sets forth policy and procedures concerning the cognizant office concept.

*Response:* DOE Order 4220.1 issued in 1979, concerned a cognizant office concept for contracting with educational institutions. The cognizant office for a particular educational institution is responsible for, among other things, negotiating basic agreements that would contain all the basic terms and conditions for subsequent contract awards by any DOE contracting activity. The order itself is undergoing internal review. If the review reveals a need to amend applicable acquisition regulations, that amendment will be handled through a future rulemaking.

*Comment:* One commenter observed that 917.71, Special Research Contracts, appears to be a reprint of 9-4.51 of the DOE-PR. The reviewer attached a copy of a letter previously submitted to the Department during the course of a rulemaking relating to Change 7 of the DOE-PR. The commenter suggested that the Department reconsider these earlier suggestions in the context of this rulemaking. The commenter went on to state that the provisions of paragraphs (b)(4), (d), and (e) of 917.7107-1 of the proposed rule, require an extraordinary amount of paperwork and administrative time.

*Response:* The commenter's observation is correct that 917.71 is merely a rearrangement of 9-4.51 of the DOE-PR. The Department previously considered the commenter's comments regarding Change 7 to the DOE-PR and published its response on April 15, 1983, at 48 FR 16450. The nature of the commenter's earlier comments would necessitate a fundamental reconsideration of the Special Research Contract. Such an action is beyond the scope of this rulemaking. The intent of this rulemaking is merely to implement and supplement the FAR not to establish new policy or make significant changes in previous policy. Due to a minor format change, to correctly include a section title inadvertently omitted in the proposed rule, 917.7107-1 has been renumbered and retitled as 917.7107-2 "Financial arrangements" in this final



rule. The requirements at 917.7107-2(b)(4), and (c) and (d) of this final rule all relate to situations in which the contractor shares in the cost of the project. They are instructional in nature and relate to completion of an Appendix A of the Special Research Contract format. To consider changes in this section would necessitate consideration of changes in other sections of the special research contract format. Such changes are beyond the scope of this rulemaking.

*Comment:* A commenter suggested that the requirements at 917.7108-1(c) for prior approval of the Contracting Officer to transfer title of equipment to a university contractor is contrary to FAR property provisions.

*Response:* The first sentence of paragraph (c)(4) of Alternate I of FAR 52.245-5 requires the prior approval of the Contracting Officer. Alternate I is for use when the contract is for the conduct of basic or applied research at nonprofit educational institutions or at nonprofit organizations whose primary purpose is the conduct of scientific research.

*Comment:* A commenter suggested that 917.7112-4 concerning prior approvals be compressed and simply make reference to portions of OMB Circular A-21 which contains guidance on prior approvals. The commenter also suggested that paragraphs (a) (5), (8), and (9) be deleted.

*Response:* The DOE prefers to provide the details included in the proposed rule. This prevents misunderstanding which might otherwise occur. For this same reason, the final rule retains paragraphs (a) (5), (8), and (9).

*Comment:* One commenter suggested that 917.7112-5 fails to recognize that OMB Circular A-88, which applies to Federal contracts as well as Federal grants, has established the concept of cognizant audit agencies. The commenter went on to state that OMB is considering extension to universities and nonprofit organizations of the single audit concept now prescribed by OMB Circular A-102 for awards to state and local governments.

*Response:* The Department agrees that OMB Circular A-88 involves the assignment of a single cognizant audit agency to individual educational institutions. The proposed rule does not conflict with this circular. If the DOE requires an audit of an educational institution for which another agency has cognizance, the Department will simply rely on the services of that cognizant agency. The Department is aware that OMB is considering such an extension of OMB Circular A-102. The Department will consider any future changes as may

be required by the conclusion of OMB's consideration.

*Comment:* One commenter suggested that Article A-II of 917.7113 contains a different definition of "equipment" in paragraph (a)(2) than that contained in OMB Circular A-21 at paragraph J.13. The same reviewer also provided a general statement that paragraph (a)(5) (regarding indirect cost rates) should be consistent with A-21.

*Response:* The Department agrees on the issue of definition. The definition is based on a dollar value. The change is made in the final rule to include the \$500 threshold currently cited in Circular A-21. The Department believes paragraph (a)(5) is consistent with A-21. However, for other reasons the term "predetermined" is being revised to "applicable" to reflect possible use with nonprofit organizations. No intent is changed. The applicable rates established by the cognizant negotiating agency will be used. They may be predetermined, fixed-carry forward, or other.

*Comment:* One commenter suggested that Article B-VIII at 917.7113 should be updated to include the more recent OMB Circular A-124 coverage of Patents.

*Response:* The Department agrees and the final rule includes appropriate updates.

*Comment:* One commenter suggested that Article B-XI, "Payments", at 917.7113 is inconsistent with the FAR.

*Response:* The Department's procedures are consistent with the FAR. The issue is clearer when reading 917.7112-3 and paragraph (c)(1) of Article B-XI. The FAR coverage is located at 32.406.

*Comment:* One commenter suggested that Article B-XIX, "Buy America Act", of 917.7113 is not appropriate to a special research contract providing for research services rather than the acquisition of supplies.

*Response:* The DOE agrees. Article B-XIX has been removed.

*Comment:* A commenter suggested that Article B-XXII, "Foreign Travel", of 917.7113 is redundant to paragraph (f) of Article B-XXX "Additional Approvals."

*Response:* The article is not considered by the Department to be redundant. Article B-XXII is a special provision alerting the contractor to this requirement which might otherwise be missed at Article B-XXX, a lengthy article.

*Comment:* One commenter suggested that the clause entitled "Preference for Privately Owned U.S. Flag Commercial Vessels" is not applicable to university contracts. The clause questioned is Article V-XXXVII of 917.7113.

*Response:* DOE agrees that ocean transportation of supplies is unlikely under a special research contract and has removed the clause.

*Comment:* One commenter suggested that 924.705 be revised to be consistent with OMB Circular A-124.

*Response:* The cited reference has been renumbered as 927.705 in the final rule. These provisions are not inconsistent with OMB Circular A-124. Pub. L. 96-517, provides small businesses and domestic nonprofit organizations the right to elect to retain title to subject inventions. DOE has separate statutory authority to grant patent waivers. The notice has been expanded to point this out and to explain that small businesses and domestic nonprofit organizations normally need not request a waiver since they have the right, pursuant to Pub. L. 96-517 and OMB Circular A-124, to elect to retain title to subject inventions.

*Comment:* One commenter suggested that Part 927, "Patents, Data and Copyrights" be reserved pending publication of such coverage in the FAR.

*Response:* The DOE has elected not to reserve Part 927. Pending FAR publication on this subject, DOE has chosen to provide that OMB Circular A-124 coverage be extended to small businesses and domestic nonprofit organizations. Patent coverage for other organizations will continue to be that found at 41 CFR Part 9-9. The final rule published today explains at 927.3 the Department's treatment of this topic. The DOE's statutory patent policy necessitates that the Department maintain this coverage in the final rule. When FAR coverage is available, the Department will make such adjustments as may be required.

*Comment:* One commenter pointed out that 931.205-18 restricts the allowability of independent research and development costs by requiring that the relevance of these costs to DOE be demonstrated. The commenter suggested that this section be deleted on the basis that the test of allowability should be uniform regardless of agency involved.

*Response:* DOE does not agree and follows a policy that funds authorized for payment of cost allocation for IR&D programs must be expended only for efforts relevant to the mission for which the appropriation was made.

*Comment:* One commenter stated that paragraph (a)(1) of 932.7104, "Payment Procedures," should be made inapplicable to research contracts with educational institutions. The commenter discussed OMB Circular A-125 (which



does not mandate inspection period) and suggested that delivery of a technical report did not equate to delivery of an end item susceptible to an inspection period. The commenter asked that the section be modified.

**Response:** It is assumed the commenter is addressing the procedures in 932.7104 requiring inclusion of inspection periods in research contracts. The Department does not agree that technical reports under research contracts are not receivables subject to oversight and review. Such reports are necessary before final payments and closeout of a contract can be accomplished. In the Department's view, the payment procedures presented at 932.7104 are applicable to all contracts except the exemptions at 932.7103. No change is made in the final rule.

**Comment:** One commenter suggested that 932.7107-1 did not take cognizance of the fact that university contracts are usually funded on an advance payment basis either through a letter of credit or by advance Treasury Check. The commenter went on to suggest that 932.7107-1(b) be revised to exclude university contracts and to add an additional sentence to provide that the "Advance Payment" clause at FAR 52.232-12 be included in university contracts.

**Response:** The Department cannot exclude university contracts from use of the "Allowable Cost and Payment" clause at FAR 52.216-7 as it is required by the FAR for cost reimbursement contracts. When advance payments are to be furnished, the FAR itself explains that the clause, "Advance Payments," at FAR 52.232-12 with its Alternate IV is to be used. It is not proper for the DEAR to restate FAR guidance.

**Comment:** One commenter suggested that the intent of the guidance at 936.603-72(b) "Evaluation of qualifications and performance data," would be enhanced by adding the phrase "unless no satisfactory response is received from any other compatible highly qualified firm" between the word "considered" and the words "and where size and simplicity."

**Response:** DOE agrees and has adopted the suggestion. Subsection 936.603-72(b) is found at 936.602-3(c)(1) of the final rule.

**Comment:** A commenter stated that the definition of "capital equipment" at 945.101 differed from that in OMB Circular A-21. The proposed rule spoke of an acquisition cost of \$1000 or greater and a service life of 1 year or more while the OMB definition speaks of an acquisition cost of \$500 or greater and a useful life of greater than 2 years.

**Response:** The DOE could not find a definition of "capital equipment" in Circular A-21. That circular speaks to definitions of "Equipment" and "Capital Expenditures" which have different meanings. "Capital equipment" is equipment for which the "capital expenditure" was \$1000 or more. This definition was established for accounting, reporting and control purposes. Circular A-21 deals with the allowability of certain cost reimbursements by the Government. Prior to the publication of this rule, DOE used a threshold of \$500. The explanation for this is that DOE's previous, and earlier, definition was based on a definition at Subpart 12.5, "Property," of the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies. That manual used the \$500 threshold. More recently the General Accounting Office issued an opinion, B114365(2), April 4, 1980, that revised the threshold upward in light of inflation and in the interest of reducing administrative costs of managing low cost property items. The DOE definition reflects this more recent decision dealing with reporting and control. A-21 shall continue to apply for reimbursements of cost under a contract with an educational institution.

**Comment:** One commenter stated that no 945.608-2 could be found even though 945.608-5 refers to it.

**Response:** This was the result of an error in the Federal Register. The title line for this section was inadvertently omitted on page 43880, although the text was included and the section was listed in the Table of Contents at page 43874. The title line should have appeared below the third sentence of 945.607-2 and above the paragraph designated (b)(1).

**Comment:** A commenter noted that 952.215-18, "Order of Precedence," makes reference to a provision 952.215-1 which could not be found.

**Response:** The Department agrees and the reference in 952.215-18 has been removed as there is no provision at 952.215-1.

**Comment:** One commenter was critical of the Department's policy at 972 and implementing clauses at 952.272 concerning "Foreign Ownership, Control or Influence" (FOCI) as related to universities. The commenter considered the provisions to be unduly burdensome for universities which have numerous foreign involvements such as foreign students, exchange programs and cooperative research programs. The commenter asked that universities be exempt from these policies. Also, the commenter thought that including

unclassified, sensitive information in the FOCI provisions was inappropriate.

**Response:** The Department has relocated the FOCI provisions to 904.70 in order to consolidate provisions of an administrative nature. The solicitation provision and contract clause have been moved to 952.204-73 and 952.204-74 respectively. In response to this commenter's and others' concern about including unclassified sensitive information in the FOCI provision, DOE has eliminated this information from the scope of this provision. Now, only contractors requiring access to classified information and special nuclear material must comply with the FOCI provision. In response to the commenter's more general concern, the Department points out there are few instances in which this subpart would be applicable to universities. Very few universities have contracts that require access to classified information or special nuclear material. DOE's primary concern is that the classified information or special nuclear material be protected from coming under FOCI. The DOE believes that universities, when seeking a DOE contract which requires access to classified information or special nuclear material, can answer the questions as completely as possible listing any qualifications. DOE cannot exempt universities from complying with the provisions of this subpart just as DOE has not, and will not, exempt universities from receiving, when necessary, facility security clearances or security clearances for individuals.

**Comment:** One commenter offered several comments regarding specific sections of Part 970 including a general observation that the proposed rule appears to mix together differing management concepts. The commenter also suggested the possibility of forming a task group to review this portion of the new regulation with the intent of clarifying it.

**Response:** The content of Part 970 has evolved over an extended period of years and can generally be traced to procurement regulations of the Atomic Energy Commission, the Energy Research and Development Administration, and the Department of Energy. The same provisions are, in general merely being promulgated as Part 970 of the Department of Energy Acquisition Regulations that implement the new Federal Acquisition Regulation. Establishment of a task group to review Part 970 is beyond the scope of this effort. The rulemaking, being finalized today (as was explained in the Preamble of the notice of the proposed rule) does not establish new policy. It is, in



general, a reformatting of the existing DOE-PR, with deletion of old portions which would duplicate new FAR coverage, and the insertion of necessary Departmental procedures at those places the FAR requires agency implementation. No action is being taken, at this time, on the commenter's specific comments relating to 970.22, "Application of Labor Policy;" 970.31, "Contract Cost Principles and Procedures, 970.44, "Contractor Procurement;" or 970.52, "Contract Clauses for Management and Operating Contracts." The Department is, however, making changes based on the two other comments made by this commenter. Concern was expressed that the proposed rule did not contain the provision previously found at DOE-PR 9-50.601-2(b) which authorized a contractor with an approved purchasing system to make determinations of nonavailability from domestic sources for individual acquisitions not exceeding \$25,000. The commenter anticipated delays in obtaining approval to acquire items clearly not available from domestic sources. To alleviate this concern, a section 970.2501 has been added which references the list of excepted items found at FAR 25.108(d). The commenter also stated that 970.1508-408(a) did not discuss the exemptions normally available regarding submission and certification of cost or pricing data. Section 970.1508-408 has been corrected in the final rule to read 970.1508-1, "Cost or Pricing Data." A new paragraph (b)(3) has been added to this subsection to note that the exemptions at FAR 15.804-3 apply to subcontractors under management and operating contracts.

*Comment:* One commenter noted that 970.2270-4(e), "Conduct of employees and consultants of DOE Management and Operating certain other contractors," and contained an extraneous and misleading statement: "Therefore, there is no general prohibition against employees as other citizens." The commenter suggested it be deleted.

*Response:* The statement was the result of a typographical error. It has been deleted. The corrected section has been renumbered and relocated to 970.2272.

In addition to the changes resulting from public comments received pursuant to this rulemaking, the Department wishes to highlight four areas in this final rule. They involve Subpart 909.4, "Debarment, Suspension, and Ineligibility;" Part 950, "Extraordinary Contractual Actions;" Part 972, "Foreign

Ownership, Control or Influence Over Contractor;" and Part 953, "Forms."

As was mentioned in the notice of proposed rulemaking, DOE has been conducting a separate rulemaking concerning its procedures regarding the debarment or suspension of contractors and assistance recipients. The purpose of the separate rulemaking was to establish uniform procedural coverage of this topic for financial assistance recipients as well as contractors. These procedures have been placed at 10 CFR Part 1035. Completion of this separate rulemaking, published in the *Federal Register* on February 3, 1984, at 49 FR 4314 necessitated minor revision of 909.4. The coverage being included in the final rule published today directs readers to 10 CFR Part 1035 for guidance concerning debarment and suspension and advises that the FAR is the source for guidance concerning ineligibility. In addition to 909.4, 944.202-1, 944.202-2, 944.303, 944.305-2, 970.4403(f), and 970.5204-22 have also been amended.

At Part 950, "Extraordinary Contractual Action" of the final rule published today the Department has made the requirements of FAR Part 50 applicable to the processing of claims under Pub. L. 85-804. As such, the Department applies the requirements of FAR Part 50 to DOE without further implementation. Any future changes to Departmental policy and procedure in this area will be undertaken through a separate rulemaking.

The proposed rule contained Part 972, Foreign Ownership, Control or Influence Over Contractor. The FOCI provision in the rule being published today is being relocated from Part 972 to 904.70 because this provision is more appropriately placed in Part 904 which discusses administrative matters.

This subpart is intended to help DOE identify and prevent situations in which FOCI over contractors with access to classified information and special nuclear material may pose an undue risk to the common defense and security. The DOE has been developing this provision through a separate rulemaking as an amendment to the DOE Procurement Regulations (See notice of proposed rulemaking, 48 FR 34396, July 28, 1983). The final rule amending the DOE procurement regulation (See 49 FR 7374, February 29, 1984) addressed the public comments received and the specific changes made resulting from the comments. That discussion is not repeated here.

The final rule published today substantively contains the same language as the final rule on FOCI which was incorporated into the DOE

procurement regulation. The following summarizes the significant changes that have been made to the FOCI provisions and that were discussed in the February 29 *Federal Register* rule mentioned above. Unclassified sensitive information which was previously included in the scope of the subpart is now excluded. In addition to focusing on the DOE's evaluation efforts, on potential threats to classified information and special nuclear material, this change allows for a simplified process that will enable DOE to monitor FOCI on a corporation-by-corporation basis, utilizing the existing security facility process, rather than on a contract-by-contract basis. The revised language also includes examples of types of plans that can be utilized to mitigate the foreign influence, if deemed necessary. Finally, a new subsection has been added describing when contract termination will be considered.

The Department has deleted Part 953, "Forms," in the final rule being published today. Part 53 of the FAR contains contract related forms for use by Government employees and those seeking or having Government contracts. The DOE has elected to utilize the FAR forms without introducing new forms of its own. Forms for use by DOE employees for internal administrative purposes will be developed and utilized in accordance with the DOE Directive related to forms. Such internal forms are not considered to be of interest to the general public and the DOE does not propose to publish such forms in the DEAR. If the Department does develop forms for use by the public, it will publish these through rulemaking and obtain such approvals as necessary.

In addition to the actions discussed above, numerous revisions, additions, edits, deletions and sequential repositionings are being made in the text published in the final rule today to correctly identify and align certain parts, subparts, sections, or subsections into a more logical or required location. Corrections to erroneous citations and cross references and paragraph number changes are being made to properly tract the numbering system of the FAR. Many of these revisions were suggested by the *Federal Register*. Syntax changes are also being made to some text that appeared in the proposed rule to more clearly and succinctly express its intent and meaning. In some cases, relatively minor substantive changes have been made. The revisions are summarized as follows:

(1) Subsection 901.104-70 of the proposed rule described a procedure by which the Department's regulation



would show certain parts or subparts as "Reserved" if there was no need to implement the FAR at such parts or subparts. Further discussion with the staff responsible for publication of the Code of Federal Regulations has indicated there is no need for such a practice. If the DEAR does not implement or supplement a particular FAR part or subpart, there will be nothing indicated and the reader will rely on the FAR only. This subsection of the proposed rule is deleted in the final rule.

(2) Subsection 901.603-72(b) was revised to delete the paragraph as unnecessary. As a result, paragraph (c) becomes paragraph (b).

(3) Section 902.1, "Definitions," was changed to delete the authority to ratify unauthorized contract and/or contract modification awards from the listing of authorities of the "Head of the Contracting Activity." This results from an earlier change in the DOE-PR at 47 FR 21539, May 19, 1982, which had not been noted in the proposed rule.

(4) Subsection 903.101-3 regarding "Standards of Conduct," was amended to add a requirement that contracting activities maintain a "Standards of Conduct Notebook for Acquisition and Assistance personnel" and that DOE acquisition and assistance personnel review it on an annual basis and certify their understanding of its contents.

(5) Section 904.403 was amended to delete the specific dates noted for each DOE Order cited therein. The most current order is always applicable.

(6) Subsection 904.601-70 was amended to delete the reference to Standard Form 295 from paragraph (b)(4) for reasons explained in the discussion of public comments of this preamble. The reference to Part 953 as the place where forms illustrations are found was also deleted by the omission of subparagraph (b)(5) of this section since there is no Part 953.

(7) Subsection 904.601-70 was revised at paragraph (b)(2) and (b)(3) to refer to "small purchase limit" rather than the proposed specific dollar limitation of \$10,000.

(8) Subpart 904.70 in the proposed rule covered representations and certifications. This section was rewritten and moved to 915.406-5. Coverage on "Foreign Ownership, Control, or Influence over Contractors" was added as a new section under 904.70. This had been located at Part 972 in the proposed rule. Changes were made as was explained in the public comments section of this preamble.

(9) Section 905.403 was edited to add a new paragraph (b)(3) to provide that contracting officers advise the Office of

Congressional Relations 48 hours prior to the time of contract execution for Special Research Contracts of \$50,000 or greater.

(10) Section 907.102 was amended to delete reference to specific DOE Orders involving acquisition planning and in lieu thereof referenced the complete series of 5700 series of DOE Orders.

(11) Section 908.7119, regarding the acquisition of "gas masks and canisters" and was deleted as these items are no longer stockpiled by DOE.

(12) Section 908.7120, regarding acquisition "masking devices" was deleted as they are no longer stockpiled by DOE.

(13) Section 908.7121(c) was amended to add text, inadvertently omitted in the proposed rule, that lithium is available at no cost through the DOE, Oak Ridge Operations Office.

(14) Subsection 909.104-70 was amended to delete the "-70" reference and to reidentify the subsection as 909.104-1, "General Standards," to be the same as FAR. Paragraphs (a) and (c) were reidentified as paragraphs (b) and (g) respectively (the appropriate FAR paragraphs which the DOE text implements).

(15) Subsections 909.570-14 and -15 were created to include, as a separate section, the examples and format language included the proposed rule as Appendix A and B to 909.570. The *Federal Register* suggested the change.

(16) Section 910.004 was revised to identify the language in the proposed rule as paragraph (f) and give it a title, "Specifications for concrete using fly ash." It is now consistent with FAR. A new paragraph (g) was added to contain the language included in the proposed rule at 917.7200. The paragraph more directly deals with specification requirements.

(17) Section 915.105, "Competition" was revised at (a)(1) to raise the threshold for documenting noncompetitive small purchases from \$500 to \$1,000 in order to conform to FAR.

(18) Section 915.105(c)(2). Regarding the format for a "Justification for Noncompetitive Acquisition" has been removed. This is internal guidance adequately covered in the DOE Directive System.

(19) Subsection 915.106-1 was deleted as unnecessary. FAR coverage will suffice.

(20) Section 915.200 was amended to redesignate paragraph (1) as paragraph (b) and move paragraph (2) to new 915.201 as paragraph (a).

(21) Section 915.201 was added as a new section titled "National Emergency." The text at paragraph (2) of

915.200 was relocated as paragraph (a). The language in the proposed rule at 915.201(b) supports the FAR text at 915.201(a).

(22) Section 915.404 was deleted. The language in FAR 15.404 "Presolicitation Notices and Conferences," at paragraph (c), was deemed sufficient upon re-evaluation.

(23) Subpart 915.5 was revised to more closely follow the sections and subsections of the FAR. Separate "-70" DOE designations were not considered necessary on re-evaluation. Most of the revised language is additional implementation of FAR text. Only editorial changes were made in the text. Location was the major revision and is recapped as follows:

915.503: Added as a new section titled "General." Relocated paragraph (a) from 915.504-72 as complementary language to FAR paragraph (c)(5) of FAR 15.503. Added new language as a paragraph (f) to better explain that unsolicited proposals for the performance of support services are not acceptable.

915.504: Added as a new section. See 915.504-70.

915.504-70: Re-identified as 915.504 Advance Guidance except paragraph (e) which moved to a new subsection 915.506-2 "Evaluation." 915.504-70 deleted and last sentence of paragraph (b)(7) was deleted as being unclear.

915.504-71: Relocated as paragraph (g) of new subsection 915.506-2 since it deals with evaluating a contractor per Subpart 909.1 and FAR. No text change. 915.504-71 deleted.

915.504-72: Relocated paragraph (a) as paragraph (c)(5) of new 915.503 General. Paragraph (b) was reidentified as 915.505, Content of Unsolicited Proposals. Paragraph (b)(5) of FAR 15.505 deals with the thrust of this paragraph. A correct reference to subpart on Cost Participation was added. Paragraph (c) was relocated under the new subpart 915.506-2 Evaluation. 915.504-72 deleted.

915.505: A new section, "Content of unsolicited proposals" was added. See 915.504-72 Comment.

915.506: Re-positioned paragraph (a) to a new 915.509 Limited use of data, which was deemed a more appropriate location.

915.506-70: Paragraph (a) was relocated as paragraph (b) of a new 915.506-1, "Receipt and Initial Review." This language supported the text of FAR 15.506-(b) thus the new section believed more appropriate than a -70 DOE supplement. The remaining paragraphs of this section were



identified as more appropriate to FAR 15.506-2, thus repositioned a new 15.506-2.

915.506-1: Added as a new section titled "Receipt and Initial Review" in order to clearly implement FAR. Paragraph (a) of 915.506-70 relocated to this section as paragraph (b) which implements FAR 915.601-1(b).

915.506-2: Added as new section, "Evaluation". Paragraph (c) of 915.504-72 of the proposed rule repositioned to this section to support text of FAR 15.506-2.1.

915.507-70: Deleted "-70" Reference and re-identified as paragraph (d) under a new 915.507 Contracting Method. No need for a supplemental DOE paragraph.

915.509: Added as new section titled "Limited Use of Data." Paragraph (a) of 915.506 relocated to this section. Text was appropriate to use of data.

915.570: Deleted as the text was placed at 943.170.

(24) 915.611(d) Moved, without change, to 915.612(g).

(25) Subsection 915.805-70 was edited to add a paragraph (e) which was inadvertently omitted from Federal Register issuance. The paragraph permits contracting officers to waive the requirement for audit.

(26) Subsection 915.971-2 was edited to delete the last sentence included in the proposed rule. Internal coordination of this language indicated it was being misunderstood and was not clear. The idea was added back as a new paragraph (h) of 915.971-4.

(27) Subsection 915.971-4 was revised to add (in addition to paragraph (h) referenced above) a new paragraph (g) to reflect increases to fee schedules that may be necessary if a fixed price contract is negotiated. The curves are based on a cost reimbursement type contract.

(28) Subsection 915.971-5 was revised. Paragraph (a) was rewritten and subdivided into additional paragraphs to provide a better understanding of what was intended and the applicability of the additional paragraphs in the subsection. Language was added to include specific adjustment factors if fixed price contracts are negotiated or the contractor furnishes its own financing. These were overlooked in the proposed rule.

(29) Section 915.971-6 was amended at (a)(10) to add language to identify the term "equipment" to be that which becomes Government-owned. Paragraph (a)(10) was amended to state equipment addressed at this section does not include "special equipment."

(30) Section 917.7007 was added to provide guidance on in-kind

contributions. This guidance was omitted from the proposed rule due to an administrative oversight. The provision was in the DOE-PR 9-4.5907 as a result of rulemaking completed on July 22, 1983, at 48 FR 33642.

(31) Subsection 917.7106-2 was amended at paragraph (g) to add a new subparagraph (1) to indicate that field offices are responsible for the cost/price analysis of a SRC proposal.

(32) Section 917.7107; and Subsection 917.7107-1 were amended to correct format errors. Section 917.7107 was retitled "Contract Content," Section 917.7107, "General," in the proposed rule was reidentified as subsection 917.7107-1 "General," in the final rule. Subsection 917.7107-1 of the proposed rule was reidentified as 917.7107-2, "Financial requirements," in the final rule. Minor text edits made and the paragraphs were subdivided for easier reading.

(33) Section 917.7113 was amended by adding "or other nonprofit institutions" to the title line so that it now reads "Format for Special Research Contracts with educational institutions or other nonprofit institutions." This corrects an error as Special Research Contracts have previously been available to both educational institutions and other nonprofit institutions.

(34) Subpart 917.72 was relocated in paragraph (g) of 910.004 with minor edits to fit a single paragraph format.

(35) Subpart 917.73 was relocated as a paragraph at 945.303-1 with minor edits to fit a single paragraph format.

(36) Subpart 917.74 was amended to reidentify this subpart as 917.72 and to renumber all sections and subsections accordingly. Additionally, the text of 917.7401 (proposed rule) was added to subpart 917.7400 (proposed rule) "Scope of part," and 917.7401 (proposed rule) was deleted.

(37) Subpart 917.75 was amended to renumber the subpart as 917.73.

(38) Subpart 917.76 was amended to renumber the subpart as 917.74.

(39) Subpart 917.77 was amended to renumber the subpart as 917.75.

(40) Subsection 917.7502-2(b)(2) was reidentified as 917.7301-2(b)(2) and was amended to add a requirement that concurrence be obtained from the Procurement Director of the office assigned to issue a Program Research and Development Announcement before that solicitation technique is chosen.

(41) Section 919.102 of the proposed rule has been deleted because the final FAR includes this information.

(42) Subsection 919.502-2 was added to emphasize that architect-engineer acquisition procedures must conform to the Brooks Act, (Pub. L. 92-582) as implemented at FAR Part 36.

(43) Subsection 919.705-5 was added and titled "Awards involving subcontracting plans." A paragraph (b) was added to implement the FAR.

(44) Subsection 919.705-6 was added and titled "Postaward responsibilities of the contracting officer." A requirement was added to require the contracting officer to submit a copy of the information given to SBA, as a result of FAR 19.705-6, to the Office of Small and Disadvantaged Business Utilization, DOE HQ.

(45) Section 920.302 was deleted. This section limited the usage of certain clauses in DOE Construction contracts.

(46) Subsection 922.403-70, "General," was changed to become 922.470 "Applicability." The unnumbered paragraphs of the proposed rule were numbered (a) and (b) respectively. Subpart 922.4 of the FAR was reserved. Subpart 922.4 had anticipated a FAR subpart. Since FAR 22.4 was in essence, reserved, subpart 922.4 (proposed rule number) has been renumbered with minor reformatting to more properly reflect the content to be that of the DOE.

(47) Subsection 922.403-71, "Noncoverage (Davis-Bacon and Copeland Acts)," was amended to move the paragraph cited therein to other sections. Paragraphs (a) (1), (2), (3), (4), (5), (6), (7), and (8) were repositioned as subparagraphs of paragraph (c) of the new section 922.470 "Applicability," discussed in note (46). Paragraphs (b) and (c) were moved to be paragraphs (d) and (e) of the new 922.470.

(48) Subsection 922.403-72, "Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities," was relocated to Part 970 as 970.2273 since the subject matter dealt with operating contracts it was considered more appropriate to Part 970, "DOE Management and Operating Contracts."

(49) Subsection 922.403-7301 contained unnecessary language and was deleted.

(50) Subsection 922.403-7302, "Specific examples," Was renumbered as 922.471 and titled, "Decisions and other guides in difficult areas." The text of this renumbered section was unchanged except for paragraph (h) "Experimental Installations," which was moved to become paragraph (c) of the 970.2273 established in part 970. The text of this paragraph dealt with work in DOE owned facilities by operating contractors.

(51) Section 922.404, "Wage Determinations," included no text in the proposed rule. This section was renumbered as 922.472 and the paragraphs at 922.404-2 and 922.404-70



were added to it and renumbered accordingly.

(52) Section 922.405, "Administration and enforcement," was renumbered as 922.473. Paragraphs (a) and (b) of 922.405-70, "Responsibilities," were relocated to this section.

(53) Subsection 922.405-70, "Responsibilities," was deleted. Paragraphs (a) and (b) were relocated to 922.473 as (a) and (b).

(54) Section 922.470, "Applicability," was added. See Note (46).

(55) Section 922.471, "Decisions and other guides in difficult areas," was added. See note (49).

(56) Section 922.472 "Wage determinations," was added. See note (51).

(57) Section 922.473, "Administration and enforcement," was added. See Note (52).

(58) Subpart 922.70 was added as a new subpart as a result of repositioning the text previously contained in the proposed rule at 970.2270-1.

(59) Section 922.803 was amended to delete paragraph (c) regarding "referral lists." Such referral lists are not maintained for the purposes cited in (c).

(60) Section 923.7001 was amended to delete the second paragraph as it involved management and operating contracts which are separately covered at Part 970.

(61) Section 932.7103 was amended to add a paragraph (e) to clarify that the interest penalties do not apply to contracts awarded prior to October 1, 1982, unless provided for by a contract clause.

(62) Subpart 924.70 was relocated to 927.70 in the final rule. Narrative material in this subpart that duplicated material appearing at 927.402-4 of the proposed rule has been deleted from the final rule as relocated at 927.70.

Solicitation and contract provisions that duplicated provisions contained in 952.227 of the proposed rule have been deleted from the material relocated at 927.70.

(63) Subsection 924.702 was amended to delete the text at paragraph (c). It duplicated language at 952.227-76 and was unnecessary.

(64) Section 924.703 of the proposed rule has been deleted with an instruction added at 927.7003 to use the notice at FAR 15.413-2(e) for solicited proposals and FAR 15.509(d) for unsolicited proposals in its stead.

(65) Subsection 925.902-70 was deleted in the final rule.

(66) Section 925.903 was added to require submission of determinations and reports required therein to the Procurement Review Office Hqs.

(67) Subsection 927.402-4 dealing with the treatment of data under management and operating contracts was moved to 970.2702 so that Part 970 will be a single repository, to the extent possible, of regulations governing such contracts.

(68) Subpart 927.70. See item (62) above.

(69) Section 927.7000(c) which appeared in the proposed rule at 924.7000(c) and 952.227-74.4, has been restyled as a representation by the external evaluator to require their signature.

(70) Section 927.7002, in the final rule which appeared at 927.702 in the proposed rule was amended to direct the use by proposers of the proprietary data marking legend at FAR 52.215-12 for solicited proposals and FAR 15.509 for unsolicited proposals. This is in lieu of the single DOE Notice that appeared in the proposed rule at 927.702(c). Conforming changes have been made elsewhere.

(71) Subsection 928.101-70; 928.102-70; and 928.103-70 were added as new subsections covering review requirements for the different types of bonds. These subsections resulted from clarifying the intent of 928.106-70 of the proposed rule which was then deleted. The intent of the change was to align the DOE review requirements with the applicable bond type.

(72) Subsection 928.106-70 was deleted. See Note (71).

(73) Part 930 was deleted in its entirety. The FAR is adding the same language in its first revision. The DOE language appears unnecessary and would be a duplication.

(74) Subsection 934.005-2 was moved in its entirety to become a section in 970 as its content on mission-oriented solicitations addressed contractors subject to 970 of this regulation. It has been designated 970.70.

(75) Section 935.014 was added and titled, "Government property," to implement the FAR provision that agencies can establish different thresholds for vesting title of property in the contractor. FAR stated \$5,000; DOE prefers \$1,000. This involves property under research contracts with educational and nonprofit institutions.

(76) Section 935.070 entitled, "Contract Clauses," was added to include a requirement for a "Key Personnel" clause. The clause was added at 952.235-70. The clause, previously found at FPR 1-7.404-6, appears to have been inadvertently omitted from FAR. The clause is needed for research contracts.

(77) Section 936.202 was added and titled "Specifications" by deleting the "-70," "-71," and "-72" designations from 936.202-70, -72 respectively. No text

changes; only minor edits to accommodate new structure.

(78) Subsection 936.202-72 of the proposed rule was revised to increase dollar limits. The suffix "-72" was also removed as per previous comment. Paragraph (a) includes a provision that allows DOE to charge the full cost of specification and drawing packages for construction solicitations up to a maximum of \$100. The actual cost of reproducing packages has sometimes exceeded \$100 per set. The limit has been increased to \$500 per set.

(79) Subsection 936.602-2, "Evaluation Boards," was added to reidentify text in the proposed rule as an implementation of the FAR text rather than supplemental text. This section includes the information in the proposed rule at 936.603-71(a).

(80) Subsection 936.602-3, "Evaluation board functions," was added to better implement the FAR. It includes the information in the proposed rule at 936.603-72 (a) and (c); 936.603-73; 936.603-74, and 936.603-77.

(81) Subsection 936.602-4, "Selection authority," was added. The text was taken from 936.603.75 and was designated (b) in the new location.

(82) Subsection 936.603-70 was renumbered in the final rule as 936.602-70.

(83) Subsection 936.603-71 was corrected. The identification should have properly read 936.602-3, "Evaluation board functions." The Department has repositioned the first half of paragraph (a) into a new 936.602-2, "Evaluation boards," and renumbered paragraphs accordingly in both the "-2" and "-3" subsections.

(84) Subsection 936.603-72 was deleted. The text was relocated under a new 936.602-3, "Evaluation Board Functions." Paragraph (a) became (a)(2), (b) became (c)(1) and (c) became (c)(2).

(85) Subsection 936.603-73 was deleted. The language was relocated as paragraph (c)(3) of 936.602-3 to correspond with FAR.

(86) Subsection 936.603-74 was deleted. The text of paragraph (a) became (a)(1) of 936.602-3. Paragraphs (b) and (c) became (c)(4) of 936.602-3.

(87) Subsection 936.603-75 was relocated to 936.602-4, "Selection authority" and the text designated as paragraph (b) to correspond to FAR 36.602-4.

(88) Subsection 936.603-76 was deleted and the text was moved to become part of the existing text at 936.601 "Policy" as it addresses policy and procedure issues.

(89) Subsection 936.603-77, was amended to move text to become



paragraph (c)(5) of 936.602-3 to correspond with the FAR.

(90) Subsections 936.606-70, -71, -72, -73 were renumbered to delete the dash references. Their text becomes part of 936.606, "Negotiations," which addresses price proposals, contract prices and fees.

(91) Subsection 936.606-74 was deleted as unnecessary.

(92) Section 936.670 was deleted as unnecessary.

(93) Subsection 936.609-3, "Work oversight in architect-engineer contracts," was added to provide instruction on and requirements for an inspection clause in architect-engineer contracts. The clause was relocated at 952.236-71.

(94) Section 936.702, "Forms for use in contracting for architect services" was added to furnish instructions for use of the clause at 952.236-70.

(95) Section 936.7200 was deemed to be inappropriate as a separate part on negotiation. Paragraph (a) text was deleted as duplicating 936.605. The text of (a)(1) through b(1)(vii) was properly numbered and moved to be part of 936.605. The remainder of 936.7200 text was retitled as "Acquisition of special equipment," and arranged into appropriate paragraphs 936.7200, "Scope of Part"; 936.7201 "Definitions;" and 936.7202, "Description of Services."

(96) Section 936.7302 "Outline of agreement for rental of third party owned construction equipment" was added to move into Part 936, the third party agreement format published in the proposed rule at 970.3604.

(97) Section 942.000 was rewritten to better define the policy, responsibilities and structure of contract administration in the DOE as compared to the Department of Defense. Sections 942.001, 942.002 were added to establish and describe this relationship and contract administration policies of the DOE.

(98) Section 942.803 was revised at paragraph (c) to more clearly identify the actions of the contracting officer in dealing with questioned cost in auditor reports.

(99) Section 943.170 was added as a result of revisions to 917.7111. The issue deals with modifying a contract to extend it. It was proposed at 917 because the text addresses contracts resulting from unsolicited proposals. Since the issue deals with modifying a contract to extend the performance period, it was relocated to Part 943.170 as a unique DOE modification requirement. It has been titled "Extension of contracts resulting from unsolicited proposals."

(100) Section 944.101 was amended to delete the first two sentences as being confusing and misleading.

(101) Subsection 944.202-1, "Responsibilities," was added to be more specific in the responsibilities of the contracting officer in consenting to subcontract awards.

(102) Subsection 944.202-2, "Considerations," was added to include a requirement to refer to the DOE Consolidated List of Debarred, Suspended, Ineligible or Voluntarily Excluded Awardees.

(103) Section 944.302-70 was amended to delete the "-70" suffix. Paragraph (a) was edited to clarify the intent of the language in the proposed rule. FAR paragraph (a) allows agencies to establish lower thresholds than the \$10,000,000 in FAR if such are considered appropriate for contractor procurement system reviews. The proposed rule imposed a DOE requirement of \$5,000,000 in Government sales for DOE cognizant contractors. The final rule amends this to \$5,000,000 of sales to the DOE and only in those instances where there is sufficient subcontracting to support a review. Due to the changes in paragraph (a) some of the text in (b) was included in (a) to conform with FAR 44.302(a). Paragraph (c) of the proposed rule was reidentified as paragraph (b) and (c) to be compatible with FAR paragraphs. The last sentence of 944.305-71 was relocated as paragraph (d) of this section.

(104) Section 944.305 was determined to be a duplication of FAR language and was deleted.

(105) Subsection 944.305-1.70 was considered to apply to contracts covered by Part 970. Appropriate language was included in 970.44 and 944.305-70 was deleted.

(106) Subsection 944.305-1.71 was deleted as not applicable as a separate DOE subsection. The text of (a) and (b) was located as paragraph (b) of 944.302 and paragraph (c) was added to 944.302-70 as a separate paragraph (d).

(107) Subsection 944.305-1.72 was reidentified as 944.305-1, "Responsibilities," since FAR 44.305-1 addresses review requirements.

(108) Subsection 944.305-2 was deleted as being duplicative language of paragraph (c) at FAR 305-2 Notification.

(109) Subsection 944.305-3 was deleted. Paragraph (b) was considered to be duplicative of FAR. Paragraph (c) was relocated to 944.307, "Reports."

(110) Section 944.307 "reports," was added to include a portion of the language of old 944.305-3 since it amplifies the current language of FAR 44.307 Reports.

(111) Section 945.000 "Scope of part," was created to clarify the applicability of the DOE rules cited in the Part 45 and FAR 45 to DOE management and operating contractors and restated in a different way, the applicability of special test equipment and special tooling requirements of the FAR previously stated at 945.102-72 of the proposed rule.

(112) Section 945.101 was revised to delete the inclusion of special test equipment and special tooling, which was incorrectly stated.

(113) Subsection 945.102-72 was deleted since the subject was addressed in a new 945.000.

(114) Subsection 945.303-1 was added to state DOE policies concerning furnishing of special nuclear materials to contractors. This represented a repositioning of material in the proposed rule at 971.73.

(115) Subsection 945.502-71, was amended at paragraph (b) to provide for physical inventories once each year. The paragraph discusses the inventory and control of sensitive items.

(116) Subsection 945.505-14 was revised to indicate new dates for submission of the semiannual reports required by this section.

(117) Subsection 945.570-5 was revised at paragraph (d) to add a reference which establishes mileage standards for specific types of vehicles. A statement was also added concerning the standard against which vehicle use must be measured.

(118) Subsection 945.570-8 was revised to delete the last sentence on contracting officer guidance in preparation and submission of the motor vehicle reports.

(119) Subsection 945.603-71, "Disposal procedures for radioactively contaminated personal property," was added to reference 41 CFR 109-45.50 regarding procedures for disposal of radioactively contaminated property.

(120) Subsection 945.607-2 was amended to move paragraph (b) into a new 945.608-2, "Standard Screening." Paragraph (b) and (e) were rewritten into a single paragraph (b). There was no change in content.

(121) Subsection 945.608-70 was deleted as it duplicated 945.607-2.

(122) Subsection 945.608-2 was added and titled, "Standard screening." The text of paragraph (b) of 945.607-2 was relocated to a paragraph b(1). The text covered standard screening which was the subject of FAR 45.607.

(123) Section 947.506 was added at the request of Maritime Administration. The title is "Procedures," and covers ocean transportation by U.S. Flag Vessels. The



added text requires copies of contract awards involving foreign suppliers, which will require ocean transportation, be forwarded to the Maritime Administration.

(124) Section 952.100 was amended to use the term "contract clauses" in lieu of the term "general provisions." The FAR uniform contract format references inclusion of "clauses" and not "provisions." The term "provisions" is assigned for use in solicitations.

(125) Subsection 952.212-72, "Uniform Reporting System Clause," of the proposed rule was deleted from the final rule.

(126) Subsection 952.215-18, "Order of Precedence," of the proposed rule was revised to follow the correct section topics of the uniform contract format and to reflect post award situations. The final sentence of this subsection, which referred to 952.215-1, was deleted as this was an erroneous reference mistakenly left in from a preliminary draft of the notice of proposed rulemaking.

(127) Subsection 952.215-70 was added as a new solicitation provision entitled "Required Subcontractor Representations and Certifications." The purpose of the provision is to alert contractors to the need to obtain certain certifications from their subcontractors if their own contracts include certain clauses listed therein.

(128) Subsections 952.222-70 and 952.222-71, both dealing with clauses for determinations, were deleted. The clauses were considered superfluous and DOE will rely only on the FAR coverage in this area.

(129) Subsection 952.227-74.2 "Rights to Proposal Data" of the proposed rule has been relocated to 952.227-82.

(130) Subsection 952.227-80 was added to include a new solicitation provision entitled "Technical Data Certification." Its purpose is to assure that DOE does not pay monies to acquire technical data which it or another Government agency may have already acquired or has the right to acquire. The provision also requires the offeror or proposer to identify any proprietary data it intends to withhold pursuant to the "Rights in Technical Data" clause at 952.227-75. It has been included because many DOE contracting activities have as a practical matter been using such a certification in their solicitations. The second portion of this certification implements the requirements of the solicitation provision at 952.227-83.

(131) Subsection 952.227-81 was added to include a new solicitation provision entitled "Royalty Payments Certifications." The purpose of the clause is to assure that the DOE does

not include royalty payments in a contract price if it or another Government agency has previously paid for such rights. Several DOE contracting activities had been using this provision in their solicitations. This certification implements the requirements of 41 CFR 9-9.111, as incorporated by 927.300 of this regulation.

(132) Subsection 952.227-82, "Rights to proposal data" was added. See comment (129).

(133) Subsection 952.227-83, "Rights in Technical Data Solicitation Instruction" was added to relocate the language which appeared in the proposed rule at 924.704-2 and 952.227-74.5 dealing with identification of proprietary data.

(134) Subsection 952.227-84, which appeared in the proposed rule at 924.705 and 952.227-74.6, describing the right to of proposers to request patent waivers has been revised to point out that small businesses and domestic nonprofit organizations may retain title to subject inventions; pursuant to OMB Circular A-124 and Pub. L. 96-517.

(135) Subsection 952.231-70 was added to include a clause entitled "Date of Incurrence of Costs." The clause was previously used by DOE, when appropriate, and its original source is FPR 1-7.204-3. Its use is appropriate, in cost-reimbursement type contracts when the parties wish to record in the contract their advance agreement on certain items of cost. The nature of DOE's mission is such that it has a high proportion of cost-reimbursement type contracts and it has chosen to continue use of this clause by placing it in the Department's implementing regulation.

(136) Subsection 952.232-70 was amended to clarify its intent. The language in the proposed rule at paragraph (c) required the contracting officer to insert the number of calendar days after receipt or completion of work to establish when "constructive acceptance" would be deemed to occur. The intent was to establish that constructive acceptance would occur on the last day of the stated inspection period. To preclude potential misinterpretations, the second sentence of paragraph (c) was appropriately revised.

(137) Subsection 952.232-71 was amended to add a new provision at paragraph (d) establishing that a payment will be considered to have been made on the date the Government check was dated or an electronic transfer of funds transfer payment. This change pursuant to guidance contained in Federal Procurement Regulations—Temporary Regulation 66, Supplement 1. Proposed paragraph (d) renumbered as (e).

(138) Subsection 952.232-73 amended to add new provision (d) requiring for contractors to identify the contractor's authorized official for providing the required payment data. This change based on guidance contained in the Federal Procurement Regulations—Temporary Regulation 66, Supplement 1. Proposed paragraph (d) renumbered as (e).

(139) Subsection 952.235-70: See Note (76) above.

(140) Subsection 952.236-71 was added to include the text of a clause prescribed for inclusion in architect-engineer contracts as 609-3. The text is relocated from 936.

(141) Subsection 952.250-1, "Nuclear Hazards Indemnity" was edited to change the term "article" as stated in the clause at this section to read "clause." The term "article" is no longer used in the FAR system. The term "clause" is preferred. The "-1" reference was also changed to a "-70" reference to indicate it is a DOE supplemental clause.

(142) Subsection 952.250-2, "Nuclear Hazards Indemnity—Product Liability" was edited. See comment for 952.250-1 for description of change. The "-2" reference also changed to "-71" to indicate it is a DOE clause.

(143) Subsection 952.250-70 was added by renumbering 952.250-1.

(144) Subsection 952.250-71 was added by renumbering 952.250-2.

(145) Section 970.0404, "Safeguarding Classified Information," was established in the final rule to remind a contracting activity awarding a management and operating contract that there may be security requirements that must be included therein. Appropriate locations of the required clauses were cited. Four subsections were established. They basically are a restatement of the same language in the proposed rule at 904.4. Edits were made to be consistent with the part 970 format. No new language was added.

(146) Subpart 970.08, "Required Sources of Supplies and Services" was added by moving text which had been at Subpart 970.51 of the proposed rule.

(147) Subpart 970.10, "Specifications, Standards, and other Statement of Work Descriptions" was established in order to relocate the text in the proposed rule at 970.5204-37 from the clauses section. The text states that clause language should be created. (It is not actual clause language as are the other subsections of subpart 970.52.) The text is more properly placed in the subpart that contains the direction that a statement of work is necessary under management and operating contracts.



970-5204-37 was amended to refer to 970.10.

(148) Section 970.1509-1 was amended at paragraph (e) to add language to clarify that approval of the Procurement Executive is necessary if maximum fee amounts are exceeded.

(149) Section 970.1509-4 was amended to paragraph (d) to clarify when the approval of Procurement Executive is necessary.

(150) Section 970.1509-6 was amended to identify situations when the fee schedules may not reflect adequate compensation.

(151) Section 970.1901 was amended at paragraph (a) adding a reference to "52.219-9 as modified by 952.219-9." This addition is intended to clarify that management and operating contracts and their subcontracts will contain the FAR clause on "Small and Disadvantaged Business Subcontracting Plan."

(152) Section 970.1901(d), regarding use of small business concerns, was changed such that all acquisitions of construction by Management and Operating contractors are set aside for small business concerns rather than just those between \$10,000 and \$3,000,000. As a practical matter, Management and Operating contractors have been setting aside small purchases for small business concerns.

(153) Section 970.2205 was deleted. The language not applicable to management and operating contracts.

(154) Section 970.2207 was deleted. See note for comment (153).

(155) Section 970.2208 was amended to simplify the language. Much of the text included in the proposed rule did not directly address management and operating contractors. The title was also changed to the same as FAR 22.8, "Equal Employment Opportunity."

(156) Subsection 970.2270-1 was moved, as written to Section 922.7001, "Responsibilities." The text is more applicable to prime construction contracts.

(157) Subsection 970.2273 was added and titled "Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities." This subsection was created by repositioning the text located in the proposed rule at 922.403-72 under the same title.

(158) Subpart 970.23 was established to identify, in appropriate text sections of the final rule, DOE requirements for "Environmental Conservation and Occupational Safety Programs." The language is basically a repeat of what was in the proposed rule at 923.7001 and 923.7002 but edited to appropriate language for Part 970. Paragraphs (b), (c)

and (d) of Part 970.2303-2, "Clauses," was included in the final rule to provide the instruction language for applicable clauses. The same as that which preceded the clauses at 970.5204-2(b); 970.5204-26 and 952.233-75 of the proposed rule. To be consistent it was deemed appropriate to move the instruction language into the subpart establishing the need for the respective clause.

(159) Section 970.2701 was amended to add a new paragraph (a) to affirm that in patent related matters, the provisions of 41 CFR 9-9.1 apply to management and operating contracts.

(160) Subpart 970.28 was amended to add a new 970.2870 to include language discussing the applicability of indemnification to operating and management contracts and identifying the contract clause required for management and operating contracts. No new language was developed. It was a restatement of subpart 950.70 of the proposed rule.

(161) Subsection 970.3100-1 was revised to delete references to contract types which were already defined elsewhere and actually had no direct applicability to Management and Operating contracts. Additional examples were added to the definition of direct on-site costs.

(162) Subsection 970.3100-2(a) and (b) were edited to delete an unnecessary and confusing sentence on allocating cost dealing with the same purpose, in like circumstances, and being both direct and indirect. The term final cost objective was also deleted as being misleading under a Management and Operating contract. Unnecessary language relating to overhead expense and its allocation basis was also deleted from paragraph (b). This language was not considered to be directly associated with Management and Operating contractors. The last sentence (b)(4) was deleted as non-applicable since the DOE establishes the accounting period for Management and Operating contracts.

(163) Section 970.3201 was edited to add language to identify the Controller as having involvement in the financing of management and operating contracts.

(164) Section 970.3202(c) was edited to add necessary language to clarify that changes in the specified requirements for special bank account agreements shall not be considered a deviation to the DEAR. Text was added to provide that any additional requirements required by the Treasury Department should be included.

(165) Section 970.3271 was created to reposition the "Special Bank Account Agreement" in the proposed rule at 970.5204-17 to the main text of the Part.

This text is an agreement which is a contract itself. It is not a clause. It has been moved to stress its importance to the Financing of Management and Operating contracts. The location is now consistent with other outlines and suggested formats included in the final rule.

(166) Section 970.3604 dealing with a format for rental of construction equipment was moved and repositioned in 936.7302.

(167) Section 970.3607 "Architect-Engineer/Construction Services," was rewritten for clarity at paragraph (a).

(168) Subpart 970.51 was edited to move certain sections into Subpart 970.8 whose title was corrected to read: Required Sources of Supplies and Services by adding "and services." Without text changes 970.5102 became 970.0801; 970.5104 became 970.0811; 970.5105 became 970.0870; 970.5106 became 970.0871; 970.5107 became 970.0872; 970.5103 renumbered 970.5102.

(169) Subsection 970.5204-19 regarding printing was rewritten for clarity.

(170) Subsection 970.5204-48 was deleted as it is judged duplicative of a provision at 970.1901(a).

(171) Part 971 was modified to rearrange the contents into a more logical sequence and to improve the language on review requirements. Additions were added to identify the data required to be furnished by DOE field offices to be furnished to Headquarters for review and approvals.

(172) Other edits or title changes being made in the final rule published today are as follows:

901: Part title change to same as FAR: "Federal Acquisition Regulation System."

902.100: Revised definition to delete reference to delegation from Procurement Executive.

903.302-70: Deleted the "-70" which should have been excluded in the proposed rule.

904.601-70: Retitled to read: "Procurement and Assistance Data Systems" (PADS).

904.702: The title in paragraph (b) deleted as unnecessary.

905.403-70: Deleted the "-70" which should have been excluded in the proposed rule.

909.404: The reference in proposed rule, 10 CFR 1035.13(j) changed to read 10 CFR 1035.15.

905.404-1: The term "application" added in paragraph (a) to be consistent with FAR.

905.502: The term "Newspaper" was added to paragraph (a) to be consistent with FAR.



- 908.800-70: Retitled as 908.82 "Policy." The same as FAR. The "-70" designation not necessary.
- 913: Part title changed to same as FAR: "Small Purchase and Other Simplified Purchase Procedures."
- 914.407-8: Revised the stated protest receipt times to be consistent with GAO Manual requirements.
- 914.502-70: Deleted the "-70" and identified the text as paragraph (a).
- 915.307-70: Deleted the "-70" and retitled to be consistent with FAR. No separate DOE designation was considered necessary.
- 915.305-70: Paragraphs (a) and (b) were switched to give a better introduction. The remainder of the subsection was divided into paragraphs to provide better reading.
- 915.405-1: Renumbered as 915.405 and retitled "General."
- 915.612: Edited to delete references to "SEB Handbook" as "Regulations Handbook No. 1."
- 915.970.3: Correction to the proper form identification.
- 915.1002-70: Deleted the "-70" which should have been excluded in the proposed rule.
- 916.603-70: This subsection was determined to be part of 916.603-2 "Application." Its contents amplified 916.603-2(f).
- 917.604-71 & 917-605-70: "-70" titles deleted as the language is not DOE unique but implements and clarifies the FAR.
- 917.74, 75, 76, 77: All sections and subsections were renumbered and edited to be identified as 917.72; 917.74; 917.75; respectively. Minor syntax edits made and 917.7404 (as reidentified) corrected to read solicitations as its subject matter and not competition.
- 922.202(2): Correctly identified as 922.202 "Policy."
- 922.608-3: Correctly identified as "Protest against Eligibility."
- 949.111-70: Correctly identified as 949.111 "Review of Proposed Settlements."
- 949.111-71: Subsection title was deleted and the two paragraphs assigned to 949.111 as paragraphs (c) and (d).
- 949.505-70: Deleted the -70 reference and identified subsection as 949.505. Other termination clauses. This is consistent with FAR format. The text of the clause was repositioned to clause section at 952.249-70.
- 951.102-70 and -71: Deleted the "-70/71" reference and identified the text paragraphs under 951.102. This move consistent with FAR format.
- 970: All titles in the table of contents and text were edited to be same as or closer to the titles of the FAR. Several

- had to be different of necessity. Changes made in: 970.8; 970.803; 970.1508; 970.1901; 970.2001; 970.2213; 970.27; 970.2701; 970.46; 470.4601; 970.49; 970.51.
- 970: The term "Management and Operating" was added in front of the term Contractor in several locations in Part 970—since 970 applies to Management and Operating contracts.
- 970-0803-7: Title deleted. Text became applicable to 970.0803 which was retitled "Acquisition of Utility Services" as paragraph (c).
- 970.0803-70: "-70" title deleted. Text became applicable as paragraph (d) of 970.0830.
- 970.1508-3: Reidentified as 970.1508 Price Negotiation.
- 970.1508-408: Reidentified as 970.1508-5.
- 970.1508-4: Deleted title only. Text positioned as—1508.
- 970.1509: Properly identified as "Fees for management and operating contracts."
- 970.2201: Unnecessary language in opening sentence deleted.
- 970.2204: Language not necessary deleted and a single paragraph added. Subsection 970.2270-2 was renumbered as 970.2270.
- Subsection 970.2270-3 was renumbered as 970.2271.
- Subsection 970.2270-4 was renumbered as 970.2272.
- 970.2903: Titles deleted from paragraphs.
- 970.3100: Minor edits made to clarify intent.
- 970.3103-3: Language of (a)(2) simplified.

The Department of Energy appreciates the comments and suggestions received from the public as well as its own employees, and has made the corresponding changes discussed above. Because of the need to have a regulation in place as of the effective date of the FAR, the rule being published today is effective April 1, 1984. However, in view of the size of the Department's Acquisition Regulation and the overall number of changes made, additional comments will be taken for a period of sixty days after the April 1st effective date. The Department will consider all comments received as part of an ongoing process to amend its Acquisition Regulation as discussed at 901.301-72.

#### List of Subjects in 48 CFR Chapter 9

Government procurement, DOE acquisition regulation.

Authority: Section 161 of the Atomic Energy Act of 1954, 42 U.S.C. 2201 and Section 644 of the Department of Energy Organization Act, 42 U.S.C. 7254. For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is amended as set forth below.

Issued in Washington, D.C. March 15, 1984.

Berton J. Roth,

Director, Procurement and Assistance Management Directorate.

Title 48 of the CFR is amended by establishing chapter 9 to read as follows:

#### CHAPTER 9—DEPARTMENT OF ENERGY

##### Part and Title

##### SUBCHAPTER A—GENERAL

- 901—Federal Acquisition Regulations System
- 902—Definitions of words and terms
- 903—Improper business practices and personal conflicts of interest
- 904—Administrative matters
- 905—Publicizing contract actions

##### SUBCHAPTER B—ACQUISITION PLANNING

- 907—Acquisition planning
- 908—Required sources of supplies and services
- 909—Contracting qualifications
- 910—Specifications, standards, and other purchase descriptions
- 912—Contract delivery or performance

##### SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

- 913—Small purchase and other simplified purchase procedures
- 914—Formal advertising
- 915—Contracting by negotiation
- 916—Types of contracts
- 917—Special contracting methods

##### SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

- 919—Small business and small disadvantaged business concerns
- 920—Labor surplus area concerns
- 922—Application of labor laws to Government acquisitions
- 923—Environment, conservation, and occupational safety
- 924—Protection of privacy and freedom of information
- 925—Foreign acquisition

##### SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

- 927—Patents, data, and copyrights
- 928—Bonds and insurance
- 931—Contract cost principles and procedures
- 932—Contract financing
- 933—Disputes and appeals

##### SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

- 935—Research and development contracting
- 936—Construction and architect-engineer contracts
- 937—Service contracting



**SUBCHAPTER G—CONTRACT MANAGEMENT**

- 942—Contract administration
- 943—Contract modifications
- 944—Subcontracting policies and procedures
- 945—Government property
- 947—Transportation
- 949—Termination of contract
- 950—Extraordinary contractual actions
- 951—Use of government sources by contractors

**SUBCHAPTER H—CLAUSES AND FORMS**

- 952—Solicitation provisions and contract clauses

**SUBCHAPTER I—AGENCY SUPPLEMENTARY REGULATIONS**

- 970—DOE management and operating contracts
- 971—Headquarter's review and approval of contract actions

**PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM****Subpart 901.1—Purpose, Authority, Issuance**

Sec.

- 901.101 Purpose.
- 901.102 Authority.
- 901.103 Applicability.
- 901.103-70 Exclusions.
- 901.104 Issuance.
- 901.104-1 Publication and code arrangement.
- 901.104-2 Arrangement of regulations.
- 901.104-3 Copies.
- 901.105 OMB control numbers.

**Subpart 901.2—Administration**

- 901.201-1 The two councils.

**Subpart 901.3—Agency Acquisition Regulations**

- 901.301 Policy.
- 901.301-70 Acquisition letters.
- 901.301-71 Amendment of regulation.
- 901.301-72 Other issuances related to acquisition.
- 901.303 Codification and public participation.

**Subpart 901.4—Deviations From the FAR**

- 901.402 Policy.
- 901.403 Individual deviations.
- 901.404 Class deviations.

**Subpart 901.5—Agency and Public Participation**

- 901.570 Rulemaking.

**Subpart 901.6—Contracting Authority and Responsibilities**

- 901.601 General.
- 901.601-70 Responsibility of the Head of the Contracting Activity.
- 901.603 Selection, appointment and termination of appointment.
- 901.603-1 General.
- 901.603-70 Modification of appointment.
- 901.603-71 Ratification of unauthorized contract awards.
- 901.603-72 Responsibility of other government personnel.

901.603-73 Contracting officer's representatives.

**Authority:** Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy of 1954, as amended (42 U.S.C. 2168).

**Subpart 901.1—Purpose, Authority, Issuance****901.101 Purpose.**

(a) This subpart establishes Chapter 9, the Department of Energy Acquisition Regulation, within Title 48, the Federal Acquisition Regulation System, of the Code of Federal Regulations. The short title of this regulation shall be DEAR.

(b) The purpose of the DEAR is to implement the Federal Acquisition Regulations (FAR) where further implementation is needed, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR. The DEAR is not, by itself, a complete document as it must be used in conjunction with the FAR. When a FAR Part or Subpart is adequate for use without further DOE implementation, no mention is cited in the DEAR. Therefore the order of use is (1) FAR; (2) DEAR.

**901.102 Authority.**

The DEAR and amendments thereto are issued by the Procurement Executive pursuant to a delegation from the Secretary in accordance with the authority of section 644 of the Department of Energy Organization Act of 1977 (Pub. L. 95-91), the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252), as amended, and other applicable law.

**901.103 Applicability.**

The FAR and DEAR apply to all DOE acquisitions of supplies and services which obligate appropriated funds unless otherwise specified in this regulation. These regulations shall be used as guides to the extent practicable for acquisitions using non-appropriated funds.

**901.103-70 Exclusions.**

Certain DOE policies and procedures which might otherwise come within the scope of this regulation may be excluded from the DEAR where there is appropriate justification, such as:

- (a) Subject matter which bears a security classification (See FAR 4.402).
- (b) Subject matter which deals with assistance programs where the award instruments are other than acquisition contracts and purchase orders. The DOE financial assistance policies are codified separately at Part 600 of Title 10 of the Code of Federal Regulations.

(c) Subject matter which deals with the Department's sales programs. These

matters are codified separately at various parts of Title 10 of the Code of Federal Regulations.

(d) Subject matter which is procedural in nature and which is internal to the operation of the Department. These matters are contained in the DOE Directives System.

(e) Instructional or training material that more fully explains matters covered in the FAR and DEAR.

**901.104 Issuance.****901.104-1 Publication and code arrangement.**

(a) The DEAR and its subsequent changes are published in (1) daily issues of the *Federal Register*, (2) cumulative form of the Code of Federal Regulations, and (3) a separate loose-leaf edition.

(b) The DEAR is issued as Chapter 9 of Title 48 of the Code of Federal Regulations.

**901.104-2 Arrangement of regulations.**

(a) *General.* The DEAR is divided into the same parts, subparts, sections, subsections and paragraphs as is the FAR. However, when the FAR coverage is adequate by itself, there will be no corresponding DEAR part, subpart, etc.

(b) *Numbering.* Where the DEAR implements the FAR, the implementing part, subpart, section or subsection of the DEAR will be numbered and captioned, to the extent feasible, the same as the FAR part, subpart, section or subsection being implemented except that the implementation will be preceded with a 9 or a 90 such that there will always be three numbers to the left of the decimal. For example, the DEAR implementation of FAR 1.104-1 is shown as 901.104-1 and the DEAR implementation of FAR 24.1 is shown as 924.1. Material which supplements the FAR will be assigned the numbers 70 and up. For example, by statute, DOE requires a more comprehensive organizational conflicts of interest review than is contemplated by FAR 9.5. This supplementary material is identified as 909.570.

(c) *References and citations.* (2) This regulation may be referred to as the Department of Energy Acquisition Regulation or the DEAR.

(3) References to FAR materials within this regulation will include FAR and the identifying number, for example, FAR 1.104-2(c)(3). References to DEAR materials within this regulation will simply cite the identifying number, for example, 901.104-2(c)(3).

**901.104-3 Copies.**

(a) Copies of the DEAR published in the *Federal Register* or Code of Federal



Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Requests should reference the DEAR as Chapter 9 of Title 48. The Code of Federal Regulations is printed in paperback edition and updated annually. Requests for the CFR version of the DEAR should reference Chapter 9 of Title 48.

(b) Loose-leaf copies of the DEAR are distributed within DOE in accordance with a distribution list maintained by the Policy Office in the Procurement and Assistance Management Directorate, Headquarters.

#### 901.105 OMB control numbers.

The Paperwork Reduction Act of 1980, Pub. L. 96-511, and the Office of Management and Budget's implementing regulations at 5 CFR Part 1320, require that reporting and recordkeeping requirements affecting 10 or more members of the public be cleared by that Office. Shown below are DEAR citations containing such requirements and their control numbers.

| DEAR             | Title                                                                      | Control No. |
|------------------|----------------------------------------------------------------------------|-------------|
| 913.505-2        | Agency order form in lieu of Optional Forms 347 and 348.                   | 1910-3000   |
| 915.406-5        | Offeror representations and certifications.                                | 1910-3100   |
| 917.72           | Program opportunity notice for commercial demonstrations.                  | 1910-3200   |
| 917.73           | Program research and development (R&D) announcement.                       | 1910-3200   |
| 919.708          | Small business report.                                                     | 1910-3300   |
| 922-804-2(b)(2). | Affirmative action compliance requirements for construction.               | 1910-3400   |
| 927.402-3        | Technical data certification.                                              | 1910-3500   |
| 928-103-3        | Payment bond.                                                              | 1910-3600   |
| 928.170          | Fidelity bond.                                                             | 1910-3600   |
| 936.7301         | Outline of agreement for rental of contractor-owned equipment.             | 1910-3700   |
| 945.508          | Physical inventory.                                                        | 1910-3800   |
| 945.607-2        | Recovering precious metals.                                                | 1910-3800   |
| 945.608-2        | Agency screening.                                                          | 1910-3800   |
| 949.505          | Other termination clauses.                                                 | 1910-3900   |
| 952.204-2        | Security requirements.                                                     | 1910-1800   |
| 952.204-70       | Classification.                                                            | 1910-1800   |
| 952.204-71       | Sensitive Foreign nations controls.                                        | 1910-1800   |
| 952.204-72       | Disclosure of information.                                                 | 1910-1800   |
| 952.204-73       | Foreign ownership, control, or influence over contractor (Representation). | 1910-1800   |
| 952.204-74       | Foreign ownership, control, or influence over contractor.                  | 1910-1800   |
| 952.209-70       | Organizational conflicts of interest—disclosure or representation.         | 1910-0800   |
| 952.209-71       | Organizational conflicts of interest—general.                              | 1910-0800   |
| 952.209-72       | Organizational conflicts of interest—special clause.                       | 1910-0800   |
| 952.212-71       | Priorities, allocations and allotments for DOE atomic energy programs.     | 1910-4000   |
| 952.212-73       | Cost and schedule control systems criteria.                                | 1910-1400   |
| 952.215-70       | Required subcontractor representations and certifications.                 | 1910-4000   |
| 952.217-70       | Acquisition of real property.                                              | 1910-4000   |
| 952.219-9        | Small business and small disadvantaged business subcontracting plan.       | 1910-4000   |
| 952.223-71       | Safety and health (Government-owned or leased facility).                   | 1910-0300   |

| DEAR           | Title                                                                                   | Control No. |
|----------------|-----------------------------------------------------------------------------------------|-------------|
| 952.223-72     | Radiation protection and nuclear criticality.                                           | 1910-0300   |
| 952.223-74     | Nuclear facility safety applicability.                                                  | 1910-0300   |
| 952.223-75     | Preservation of individual occupational radiation exposure records.                     | 1910-0300   |
| 952.227-71     | Patent rights—small business firms or nonprofit organizations.                          | 1910-4000   |
| 952.227-71(h). | Utilization of subcontractor inventions report.                                         | 1910-4000   |
| 952.227-80     | Technical data certification.                                                           | 1910-4000   |
| 952.227-81     | Royalty payments certification.                                                         | 1910-4000   |
| 952.227-83     | Identification of proprietary data.                                                     | 1910-4000   |
| 952.227-84     | Notice of right to request patent waiver.                                               | 1910-0800   |
| 952.235-70     | Key personnel.                                                                          | 1910-4000   |
| 952.245-2      | Government property (fixed-price contracts).                                            | 1910-4000   |
| 952.245-5      | Government property (cost-reimbursement, time and material, or labor hour contracts).   | 1910-4000   |
| 952.247-70     | Foreign travel.                                                                         | 1910-2100   |
| 952.249-70     | Termination clause for cost reimbursement architect-engineer contracts.                 | 1910-4000   |
| 970.5203-2     | Examination of records by comptroller general.                                          | 1910-4100   |
| 970.5204-1     | Security.                                                                               | 1910-1800   |
| 970.5204-2     | Safety and health (Government-owned or leased).                                         | 1910-0300   |
| 970.5204-9     | Accounts, records, and inspection.                                                      | 1910-1700   |
| 970.5204-10    | Foreign ownership, control, or influence over contractors.                              | 1910-1800   |
| 970.5204-11    | Changes.                                                                                | 1910-4100   |
| 970.5204-12    | Contractor's organization.                                                              | 1910-4100   |
| 970.5204-13    | Allowable costs and fixed-fees (CPFF management and operating contracts).               | 1910-4100   |
| 970.5204-14    | Allowable costs and fixed-fees (support contracts).                                     | 1910-4100   |
| 970.5204-19    | Printing.                                                                               | 1910-1300   |
| 970.5204-21    | Property.                                                                               | 1910-4100   |
| 970.5204-22    | Contractor procurement.                                                                 | 1910-4100   |
| 970.5204-23    | State and local taxes.                                                                  | 1910-4100   |
| 970.5204-24    | Subcontractor's certificate of current cost or pricing data.                            | 1910-4100   |
| 970.5204-26    | Nuclear safety.                                                                         | 1910-0300   |
| 970.5204-27    | Consultant or other comparable employment services of contractor employees.             | 1910-4100   |
| 970.5204-29    | Permits and licenses.                                                                   | 1910-4100   |
| 970.5204-30    | Notice of labor disputes.                                                               | 1910-4100   |
| 970.5204-31    | Litigation and claims.                                                                  | 1910-4100   |
| 970.5204-32    | Requirement bonds and insurance—exclusive of Government property (cost-type contracts). | 1910-4100   |
| 970.5204-33    | Priorities, allocations and allotments.                                                 | 1910-4100   |
| 970.5204-34    | Sensitive foreign nations control.                                                      | 1910-1800   |
| 970.5204-38    | Special clause for procurement of construction.                                         | 1910-4100   |
| 970.5204-41    | Preservation of individual occupational radiation exposure records.                     | 1910-0300   |
| 970.5204-42    | Key personnel.                                                                          | 1910-4100   |
| 970.5204-45    | Termination.                                                                            | 1910-4100   |
| 970.5204-50    | Cost and schedule control systems.                                                      | 1910-1400   |

#### Subpart 901.2—Administration

##### 901.201-1 The two councils.

(b) The DOE representative to the Civilian Agency Acquisition Council will be a staff member of the Policy Office, Procurement and Assistance Management Directorate, Headquarters, appointed for that purpose by the Procurement Executive.

(d) The Policy Office will be responsible for coordination with all interested Departmental elements

regarding proposed FAR revisions and advocating revisions sought by DOE.

#### Subpart 901.3—Agency Acquisition Regulations

##### 901.301 Policy.

(a) Acquisition policies and procedures will be issued in the DEAR by the Procurement Executive after appropriate coordination with other officials.

(b) Implementing procedures, instructions, and guides which are necessary to clarify or to implement the DEAR within DOE may be issued by the Heads of the Contracting Activities. Contracting activities have the authority to establish the review and approval levels for various acquisition actions, within their respective organizations, up to the dollar authority level delegated to that organization by the Procurement Executive provided the implementing procedures, instructions and guides:

- (1) Are consistent with the policies and procedures contained in this regulation as implemented and supplemented from time to time;
- (2) Follow the format, arrangement, and numbering system of this regulation; to the extent practicable, and
- (3) Contain no material which duplicates, paraphrases, or is inconsistent with the contents of this regulation.

##### 901.301-70 Acquisition letters.

From time to time the Procurement Executive may, after coordination with the General Counsel, issue advisory Acquisition Letters to furnish interim guidance to contracting activities.

##### 901.301-71 Amendment of regulation.

This regulation may be amended from time to time by the Procurement Executive with appropriate concurrences from other officials (e.g., Counsel, and any other appropriate Headquarters offices) in accordance with 901.570.

##### 901.301-72 Other issuances related to acquisition.

In addition to the FAR and DEAR, there are other issuances which deal with acquisition. Among these are the Federal Property Management Regulations, the DOE Property Management Regulations, and DOE Directives.

(a) The Federal Property Management Regulations, FPMR, are published by the General Services Administration to guide and govern the Federal agencies in matters pertaining to the management of property and records and other programs and activities of the type



administered by GSA. The FPMRs are codified as Chapter 101 of Title 41 of the Code of Federal Regulations.

(b) The DOE Property Management Regulations, DOE-PMR, implement and supplement the FPMR regarding the utilization, management and disposition of personal property. The DOE-PMRs are codified as Chapter 109 of Title 41 of the Code of Federal Regulations.

(c) The DOE Directives System contains the policies and procedures governing the internal operation of the Department. Because of the need to involve the public through the rulemaking process of the Administrative Procedure Act, as explained at 901.5, such policies and procedures as may directly affect contractors or the general public will be published in the DEAR following the rulemaking procedures established by the Administrative Procedure Act and the DOE Organization Act, Pub. L. 95-91. Policies and procedures which are generally of interest to or used only by DOE personnel will be published in the DOE Directives System.

#### 901.303 Codification and public participation.

(a) The DEAR is codified as Chapter 9 of Title 48 of the Code of Federal Regulations.

(b) Procedures for public participation are described at 901.5.

#### Subpart 901.4—Deviations From the FAR

##### 901.402 Policy.

(a) Requests for authority to deviate from the provisions of the FAR or the DEAR shall be submitted in writing as far in advance as the exigencies of the situation will permit. Each request for deviation shall contain the following:

(1) A statement of the deviation desired, including identification of the specific paragraph number(s) of the FAR or DEAR;

(2) The reason why the deviation is considered necessary or would be in the best interest of the Government;

(3) If applicable, the name of the contractor and identification of the contract affected;

(4) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(5) A description of the intended effect of the deviation;

(6) A statement of the period of time for which the deviation is needed; and

(7) Any pertinent background information which will contribute to a full understanding of the desired deviation.

##### 901.403 Individual deviations.

In individual cases, deviations from either the FAR or the DEAR will be authorized only when essential to effect a necessary acquisition or where special circumstances make such deviations clearly in the best interest of the Government. Heads of Contracting Activities (HCAs) or designees are authorized to approve deviations from the DEAR, except for cost principles, in individual cases within their delegated dollar authority, after coordination with Counsel and such other DOE personnel as required. No deviations from the FAR may be authorized at the local level. A copy of each deviation and its supporting documentation shall be provided to the Procurement Executive. Deviations, either in excess of an HCA's delegated dollar authority or involving the cost principles contained in Part 931, or any FAR deviation, shall not be made unless such action is authorized by the Procurement Executive after consultation with General Counsel and any other appropriate Headquarters office, on the basis of a written justification stating clearly the special circumstances involved. For deviations from policies and procedures or clauses involving patents, data and copyrights, the concurrence of the Assistant General Counsel for Patents shall be obtained as provided in Part 927.

##### 901.404 Class deviations.

Where deviations from the FAR, or DEAR in classes of contracts, are considered necessary, requests for authority to deviate shall be submitted in writing to the Procurement Executive who will, after appropriate coordination with other officials (e.g., Counsel, and such other DOE personnel as required), consider the submission, and in the case of FAR deviations, consider the submission jointly with the Chairperson of the Civilian Agency Acquisition Council as appropriate. Class deviations to the FAR or the DEAR involving patents, data, and copyrights shall be forwarded to the Procurement Executive, Headquarters, via the Assistant General Counsel for Patents. Where circumstances preclude obtaining prior concurrence of the Chairperson of the Civilian Agency Acquisition Council, the Procurement Executive may authorize the deviation and subsequently inform the Chairperson of the Civilian Agency Acquisition Council of the deviation including the circumstances under which it was required.

#### Subpart 901.5—Agency and Public Participation

##### 901.570 Rulemaking.

(a) Section 553(a)(2) of the Administrative Procedure Act (5 U.S.C. 553), provides an exception from the standard public rulemaking procedures to the extent that the rule involves a matter related to agency management or personnel or to public property, loans, grants, benefits or contracts. OFPP Policy Letter 83-2 requires rulemaking for substantive acquisition rules but allows significant discretion in the matter. However, notwithstanding either of these, section 501(b)(3) of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7191(b)(3)), provides that the exception shall not be available with respect to public property, loans, grants, or contracts within DOE. Accordingly, DEAR has been promulgated and may be revised from time to time in accordance with the rulemaking procedures of the Administrative Procedure Act and the DOE Organization Act. This procedure generally involves issuing a notice of proposed rulemaking inviting public comment, review and analysis of comments received, and publication of a final rule. The final rule includes a discussion of the public comments received and describes actions taken as a result of the comments.

(b) All acquisition rulemakings will be done either by or with the concurrence of the Policy Office, Procurement and Assistance Management Directorate, Headquarters and authorized for issuance by the Procurement Executive or his or her Deputy.

#### Subpart 901.6—Contracting Authority and Responsibilities

##### 901.601 General.

Contracting authority vests in the Secretary of Energy. The Secretary has delegated this authority to the Procurement Executive. The Procurement Executive has redelegated this authority to the Heads of the Contracting Activities. These delegations are formal written delegations containing dollar limitations and conditions. Each HCA in turn makes formal contracting officer appointments within the contracting activity.

##### 901.601-70 Responsibility of the Head of the Contracting Activity.

The Head of the Contracting Activity, as defined at FAR 2.1 as supplemented by 902.100 of this regulation, is responsible for the conduct of an effective and efficient acquisition



program. Adequate controls shall be established to assure compliance with applicable laws, regulations, procedures, and the dictates of good management practices. Periodic reviews shall be conducted by qualified personnel, preferably assigned to positions other than in the particular acquisition office or portion thereof being reviewed, to determine the extent of adherence to prescribed policies, regulations, and good management practices, and to identify any needs for improvement, guidance and/or training.

**901.603 Selection, appointment and termination of appointment.**

**901.603-1 General.**

The DOE system for the selection, appointment, and termination of appointment of contracting officers is established in DOE Order 4200.4, Selection, Appointment, and Termination of Contracting Officers.

**901.603-70 Modification of appointment.**

To modify a contracting officer's authority, the present appointment shall be revoked and a new certificate issued.

**901.603-71 Ratification of unauthorized contract awards.**

(a) The Government is not generally bound by agreements or contractual commitments made to contractors or prospective contractors by persons to whom acquisition authority has not been delegated. Such unauthorized acts may be in violation of the Federal Property and Administrative Services Act, other Federal laws, the FAR, the DEAR, and good acquisition practice; e.g., certain requirements of law and regulation necessary for the proper establishment of a contractual obligation may not be met, such as certification of the availability of funds, determinations and findings, competition of sources, determination of contractor responsibility, price/cost analysis, administrative approvals, negotiation of appropriate contract clauses, etc.

(b) Unauthorized commitments shall not be ratified unless it would have been otherwise proper to enter into a contract prior to the commitment. As used herein, the phrase "otherwise proper" means that a ratification of an unauthorized commitment can be made only if there occurred no violation of any substantive legal requirements; (e.g., there can be no ratification unless a sole source can be justified; a determination made that the contractor is not debarred or otherwise ineligible for award; the organizational conflicts of interest reviews and determinations, if required, are completed; and where all other

substantive legal requirements have been met.) Whenever it is discovered that any person is performing work as a result of an unauthorized commitment, that person shall be advised that such work is being performed at their own risk pending establishment of valid contractual coverage. The HCA shall then be notified of the circumstances. If the HCA agrees that the work appears to be without valid authorization, the HCA will take appropriate steps to resolve the matter if within his or her area of cognizance. If outside the HCA's normal area of cognizance, the Procurement Executive and Senior Program Official will be notified by the HCA. If they determine that an unauthorized commitment exists, they will arrange for valid contractual coverage if appropriate. The contracting officer shall direct the disposition of all products and deliverables received by the Government as a result of an unauthorized commitment.

(c) Requests received by contracting officers for ratification of commitments made by personnel lacking contracting authority shall be processed as follows:

(1) The individual who made the unauthorized contractual commitment shall be required to furnish the contracting officer all records and documents concerning the commitment and a complete, written statement of facts, including, but not limited to, a statement as to why the acquisition office was not used, why the proposed contractor was selected and a list of other sources considered, description of work to be performed or products to be furnished, estimated or agreed upon contract price, citation of appropriation available, and a statement as to whether the contractor has commenced performance. Under exceptional circumstances, such as when the person who made the unauthorized commitment is no longer available to attest to the circumstances of the unauthorized commitment, the Procurement Executive may waive the requirement that the responsible employee initiate and document the request; provided, the cognizant Assistant Secretary or the Head of the Contracting Activity determines in writing that the commitment was in fact made by an employee who shall be identified in the determination.

(2) The request for ratification, an approved justification for non-competitive acquisition, and the information required by (c)(1) above must be forwarded to the cognizant program Assistant Secretary, or HCA, based on the source of funds for the proposed contract, for that person's concurrence, together with

recommended corrective actions to preclude recurrence.

(3) If the Assistant Secretary, or HCA concurs with the request for ratification, the request and concurrence shall be forwarded to the Procurement Executive. The Procurement Executive will review the request, the justification for Non-Competitive Acquisition, any comments or information submitted by the contracting officer which should be considered in evaluation of the request, and the information submitted in accordance with (c)(2) above. Based upon this review and advice from the Office of General Counsel, the Procurement Executive, will proceed as follows:

(i) If the request submitted does not appear to be justified, it will be returned to the concurring Assistant Secretary or equivalent official without approval with an explanation of the decision not to ratify.

(ii) If the request and the recommended corrective actions appear justified and adequate, the Procurement Executive may ratify the action, return the file to the contracting officer for action, and monitor the implementation of the corrective action plan.

(iii) A detailed record of the review shall be maintained for audit purposes.

**901.603-72 Responsibility of other Government personnel.**

(a) Responsibility for the decision of what to buy and when to buy rests with program and certain staff offices and the head of the agency or designee. Responsibility for determining how to buy, the conduct of the buying process, and execution of the contract rests with the contracting activity, the contracting officer in particular.

(b) Personnel not delegated contracting authority may not commit the Government, formally or informally, to any type of contractual obligation. However, program personnel who must use the contracting process to accomplish their programs, must support the contracting officer in ensuring that:

(1) Requirements are clearly defined and specified;

(2) Competitive sources are solicited, evaluated, and selected;

(3) Quality standards are prescribed and met;

(4) Performance or delivery is timely;

(5) Prices, estimated costs, and fees are reasonable; and

(6) Files are documented to substantiate the judgments, decisions, and actions taken.



**901.603-73 Contracting officer's representatives.**

(a) A contracting officer may designate other Government personnel to act as authorized representatives for such functions as technical monitoring, inspection, approval of shop drawings, testing, approval of samples, and other functions of a technical nature not involving a change in the scope, price, terms or conditions of the contract or order. Such designation shall be in writing and shall contain specific instructions as to extent to which the representative may take action for the contracting officer, but will not contain authority to sign contract documents. The responsibilities and limitations of the contracting officer's representatives may be set forth in the contract or in a separate letter, a copy of which shall be furnished to the contractor.

(b) A person assigned to and performing primary duty within a contracting office, and who is under the supervision of a contracting officer, does not require designation as a representative to perform assigned duties. The contracting officer cannot authorize subordinates to sign any contract document or letter where the signature of a contracting officer is required.

**PART 902—DEFINITIONS OF WORDS AND TERMS****Subpart 902.1—Definitions**

Sec.

902.100 Definitions.

**Subpart 902.2—Definitions Clause**

902.200 Definitions clause.

Authority: Section 644 of the Department of Energy (Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**Subpart 902.1—Definitions**

902.100 Definitions.

The following definitions are in addition to those stated in FAR 2.1.

"Acquisition Executive," as that term is defined in OMB Circular A-109, means the Assistant Secretary, Management and Administration. The Acquisition Executive, as contrasted to the Procurement Executive, is involved in monitoring the development of major systems and the review of their progress as they evolve through the major systems acquisition process. Details regarding internal major system acquisition procedures may be found in the DOE Directives.

"Contracting Activity" means a DOE organizational element which has authority to award contracts.

"Head of the Agency" means the Secretary, Deputy Secretary, or Under Secretary.

"Head of the Contracting Activity (HCA)" means, in addition to the element specified in the FAR, a DOE Official who has met the following requirements: first, has been delegated authority to award contracts and appoint contracting officers by the Procurement Executive; and second, has been designated as an HCA. A partial listing of the duties specifically reserved to the HCA or designee includes:

(a) Authority to establish review and approval levels for contract actions within the organization, up to the dollar level delegated.

(b) Authority to approve deviations from the DEAR in accordance with 901.403.

(c) Authority to appoint contracting officers.

(d) Authority to make administrative determinations regarding withdrawals of bids before award in mistake-in-bid cases.

"Procurement Executive" means the individual appointed as such by the Head of the Agency pursuant to Executive Order 12352. The Director, Procurement and Assistance Management Directorate, has been appointed as the DOE Procurement Executive. Duties of the Procurement Executive include:

(a) Prescribe and publish agency acquisition policies, regulations and procedures;

(b) Enter into, make determinations and decisions and take other actions, consistent with appropriate policies, regulations and procedures with respect to purchases, contracts, leases, sales agreements and other transactions, except those required by law or regulation to be made by other authority;

(c) Designate contracting officers and representatives thereof;

(d) Establish clear lines of contracting authority;

(e) Exercise priorities authority on behalf of the agency, in accordance with the provisions of the Defense Production Act of 1950 (50 U.S.C. App. 2071, et seq.), Department of Defense Delegation of Priorities Authority, dated October 21, 1958, and applicable policies and regulations; and the Energy Conservation and Policy Act, Pub. L. 94-164;

(f) Evaluate and monitor the agency's acquisition system performance;

(g) Manage and enhance career development of the acquisition work force;

(h) Examine, in coordination with the OFPP, the acquisition system to determine specific areas where Government-wide performance standards should be established and applied and participate in the development of Government-wide acquisition policies, regulations and standards;

(i) Determine areas for agency unique standards and develop unique agency-wide standards;

(j) Be the advocate for competition; and

(k) Certify to the agency head that the acquisition system meets approved standards.

"Senior Program Official" means the Assistant Secretaries; Administrators of Administrations; Chairman, Federal Energy Regulatory Commission; Director, Office of Energy Research; and heads of DOE Headquarters staff offices.

**Subpart 902.2—Definitions Clause**

902.200 Definitions clause.

As prescribed by FAR 2.2, insert the clause at FAR 52.202-1, Definitions, but modify it to limit the definition, at paragraph (a) of the clause, to encompass only the Secretary, Deputy Secretary, and Under Secretary of the Department of Energy. The contracting officer shall also add a paragraph (d) (or (c) in case Alternate 1 is used), which defines "DOE" as meaning the United States Department of Energy.

**PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST****Subpart 903.1—Safeguards**

Sec.

903.101 Standards of conduct.

903.101-3 Agency regulations.

**Subpart 903.2—Contractor Gratuities to Government Personnel**

903.203 Reporting suspected violations of the Gratuities clause.

903.204 Treatment of violations.

**Subpart 903.3—Reports of Identical Bids and Suspected Antitrust Violations**

903.302-2 Reporting requirements.

**Subpart 903.4—Contingent Fees**

903.408-1 Responsibilities.

**Subpart 903.5—Other Improper Business Practices**

903.502 Subcontractor kickbacks.

**Subpart 903.6—Contracts With Government Employees or Organizations Owned or Controlled by Them**

903.603 Responsibilities of the contracting officer.



Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 903.1—Safeguards

#### 903.101 Standards of conduct.

##### 903.101-3 Agency regulations.

Detailed rules applicable to the conduct of DOE employees are set forth in 10 CFR Part 1010. To ensure that contracting personnel are informed of the high standards to be met and that they maintain current knowledge of the standards of conduct, all contracting activities shall maintain a "Standards of Conduct Notebook for Acquisition and Assistance Personnel." The notebook will contain a copy of 10 CFR Part 1010 and any other DOE or local directives on standards of conduct. All contracting personnel and their supporting personnel shall certify they have read and understand the contents of the notebook by signing a certificate to that effect. This shall be done at least annually.

### Subpart 903.2—Contractor Gratuities to Government Personnel

#### 903.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause shall be reported to the Head of the Contracting Activity (HCA) in writing detailing the circumstances. The HCA will evaluate the report and if the allegations appear to support a violation the matter will be referred to the Procurement Executive for disposition.

#### 903.204 Treatment of violations.

Apparent violations will be processed in accordance with the debarment and suspension rules set forth at Title 10, Part 1035, of the Code of Federal Regulations.

### Subpart 903.3—Reports of Identical Bids and Suspected Antitrust Violations

#### 903.302-2 Reporting requirements.

(a) Executive Order 12430 of July 6, 1983, revoked the requirement of Executive Order 10936 of April 24, 1961, to submit a report to the Attorney General on identical bids.

(b) Potential anti-competitive practices, such as described in FAR 3.301, and antitrust law violations as described in FAR 3.303, evidenced in bids or proposals shall be reported to the Office of General Counsel through the Head of the Contracting Activity with a copy to the Procurement

Executive. The Office of General Counsel will provide reports to the Attorney General as appropriate.

### Subpart 903.4—Contingent Fees

#### 903.408-1 Responsibilities.

(b) Each Standard Form 119 completed in connection with a DOE contract, together with other relevant information, shall be reviewed by Counsel prior to the initiation of appropriate action.

### Subpart 903.5—Other Improper Business Practices

#### 903.502 Subcontractor kickbacks.

(b) Contracting officers shall report suspected violations of the Anti-Kickback Act through the Head of the Contracting Activity, or designee, to the Office of General Counsel.

### Subpart 903.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

#### 903.603 Responsibilities of the contracting officer.

(a) When the needs of the Government cannot be reasonably supplied by sources other than employees of the Government or sources which are substantially owned or controlled by Government employees, the contracting officer shall submit, through the HCA, a request to the Procurement Executive, with appropriate justification, for approval of an exception to the prohibitions contained in FAR 3.601.

## PART 904—ADMINISTRATIVE MATTERS

### Subpart 904.4—Safeguarding Classified Information Within Industry

#### Sec.

904.401 Definitions.

904.402 General.

904.403 Responsibilities of contracting officers.

904.404 Contract clauses.

### Subpart 904.6—Contract Reporting

904.601 Federal procurement data system.

904.601-70 Procurement and Assistance Data System (PADS).

### Subpart 904.7—Contractor Records Retention

904.702 Applicability.

### Subpart 904.8—Contract Files

904.803 Contents of contract files.

904.804-1 Close out by the office administering the contract.

904.805 Disposal of contract files.

### Subpart 904.70—Foreign Ownership, Control, or Influence Over Contractors

904.7000 Purpose.

904.7001 Applicability.

904.7002 Definitions.

904.7003 Disclosure of foreign ownership, control, or influence.

904.7004 Findings, determination, and contract award or termination.

904.7005 Solicitation provision and contract clause.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 904.4—Safeguarding Classified Information Within Industry

#### 904.401 Definitions.

"Classified Information" means any information or material that is owned by, produced by or for, or is under the control of the United States Government, and determined pursuant to provisions of Executive Order 12356, April 2, 1982 (47 FR 14874, April 6, 1982), or prior orders, or as authorized under the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure, and is so designated.

"Restricted Data" means data which is defined in section II, of the Atomic Energy Act of 1954, as amended, as "all data concerning: (1) Design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142."

#### 904.402 General.

(a) The basis of DOE's security requirements is the Atomic Energy Act of 1954, as amended.

(b) DOE security regulations. DOE regulations concerning national security information are codified at 10 CFR Part 1045. Supplemental material is found in the DOE Directives. Foreign ownership, control, or influence over contractors as it relates to security is discussed at 904.70.

(c) Special requirements regarding foreign release. Statutory requirements to be observed in connection with the release of Restricted Data to foreign governments are contained in the Atomic Energy Act of 1954, Sections 141 and 144.

(d) Prohibition against the dissemination of certain unclassified information. Section 148 of the Atomic Energy Act (42 U.S.C. 2168) prohibits the



unauthorized dissemination of unclassified nuclear information with respect to the atomic energy defense programs pertaining to:

(1) The design of production facilities or utilization facilities;

(2) Security measures (including security plans, procedures, and equipment) for the physical protection of: (i) Production or utilization facilities, (ii) nuclear material contained in such facilities, or (iii) nuclear material in transit; or

(3) The design, manufacture, or utilization of any atomic weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act.

(k) Further information on this subject may be found at 10 CFR Part 710.

#### 904.403 Responsibilities of contracting officers.

(a) *Presolicitation Phase.* If access to Restricted Data may be required, security clearances shall be obtained as noted in DOE Order 5631.2.

(c) *Award Phase.* Contracts which may require the processing or storage of Restricted Data or Special Nuclear Material require application of the provisions of DOE Orders 5634.1; 5635.1; and 5632.2. DOE regulations relating to the protection of Restricted Data may also be found under 10 CFR Part 1016.

#### 904.404 Contract clause.

(d) The security clauses to be used in DOE contracts are found at 952.204. They are:

(1) *Security, 952.204-2.* This clause is required in contracts under section 31 (research assistance) or 41 (ownership and operation of production facilities) of the Atomic Energy Act of 1954, as amended, and in other contracts and subcontracts, the performance of which involves or is likely to involve classified information. The DOE system is separate from that of the Department of Defense and the DEAR clause shall be used instead of that at FAR 52.204-2.

(2) *Classification, 952.204-70.* This clause is to be used in all contracts which involve classified information.

(3) *Sensitive foreign nation controls, 952.204-71.* This clause is required in unclassified research contracts which may involve making unclassified information about nuclear technology available to certain sensitive foreign nations. The contract specialist shall consult the local security office for a listing of nations involved. (The attachment referred to in the clause should set forth the applicable

requirements of the DOE regulations on dissemination of unclassified published and unpublished technical information to foreign nations.)

(4) *Disclosure of information, 952.204-72.* This clause should be used in place of the clauses entitled "Security" and "Classification" in contracts with educational institutions for research work performed in their own institute facilities that are not likely to produce classified information.

#### Subpart 904.6—Contract Reporting

##### 904.601 Federal procurement data system.

(c) DOE's data collection point is the Office of Procurement Support, Headquarters.

##### 904.601-70 Procurement and Assistance Data System (PADS).

(a) The Procurement and Assistance Data System (PADS) is the Department of Energy's system for collection of Federal Procurement Data System (FPDS) data.

(b) DOE Order 1331.1A, entitled "Requirements and Procedures for the Procurement and Assistance Data System," requires that all data be entered into PADS within five (5) working days after the award in the following manner:

(1) Contracting activities shall report the information required by this subpart for new awards and modifications.

(2) For each prime contract action over the small purchase limit, contracting officers shall complete an Individual Procurement Action Report (IPAR), DOE F 4200.40, and submit it to their data entry point for input to the PADS system. Detailed information on completing IPAR forms is contained in the publication entitled "Handbook for Preparation of Individual Procurement Action Reports." A copy of each completed IPAR form shall be inserted in the pertinent contract file.

(3) Prime contract awards below the small purchase limit shall be reported either:

(i) Individually, by completion and submission of an IPAR; or

(ii) On a summary basis, by completion and submission of a DOE F 4200.31, Award Action Quarterly Report. Summary reports shall be submitted within 15 calendar days after the end of each Federal fiscal quarter.

(4) Contracting officers shall assure that contractors whose contracts include the Small and Small Disadvantaged Business Subcontracting Plan clause, FAR 52.219-9, submit the required reports on Standard Forms 294.

#### Subpart 904.7—Contractor Records Retention

##### 904.702 Applicability.

(b) Contracts containing the Safety and Health clause at 952.223-71, the Radiation Protection and Nuclear Criticality clause at 952.223-72, or the Nuclear Safety clause at 952.223-74 must also include the Preservation of Individual Occupational Radiation Exposure Records clause at 952.223-75 which will necessitate retention of records in accordance with schedules contained in Chapter V of DOE Order 1324.2, and any pertinent superseding provisions, rather than those found at FAR 4.7. These schedules are required by DOE, pursuant to an agreement with the General Accounting Office, in situations where prudence dictates longer retention periods for records involving employee health matters.

#### Subpart 904.8—Contract Files

##### 904.803 Contents of contract files.

(a) (29) The record copy of the Individual Procurement Action Report shall be included in the file section containing procurement management reports.

##### 904.804-1 Closeout by the office administering the contract.

(a) The Head of the Contracting Activity shall ensure that necessary procedures and milestone schedules are established to meet the requirements of FAR 4.804-1, and that resources are applied to effect the earliest practicable deobligation of excess funds and the timely closeout of all contract files which are physically completed or otherwise eligible for closeout action.

(b) Quick closeout procedures for cost reimbursable and other than firm fixed price type contracts are covered under 942.708.

##### 904.805 Disposal of contract files.

Contract files shall be disposed of in accordance with applicable DOE Order 1324.2.

#### Subpart 904.70—Foreign Ownership, Control, or Influence Over Contractors

##### 904.7000 Purpose.

This subpart sets forth the Department of Energy policies and procedures regarding foreign ownership, control, or influence (FOCI) over contractors. The procedures are designed to protect against an undue risk to the common defense and security which may result if classified information or special nuclear material is made available to DOE contractors or



subcontractors who are owned, controlled, or influenced by foreign governments, individuals, or organizations. The procedures require certain offerors/bidders and contractors/subcontractors to submit information which will help DOE to determine whether award of a contract to a firm, or continued performance of a contract by a firm, may pose an undue risk to the common defense and security because of FOCI over the offeror/bidder or contractor/subcontractor.

#### 904.7001 Applicability.

The provisions of this subpart shall apply to all offerors/bidders, contractors, and subcontractors who will or do have access to classified information or a significant quantity of special nuclear material as defined in 10 CFR Part 710. In this subpart, the term "contractor" shall also mean subcontractor at any tier, the term "contract" shall also mean subcontract at any tier, and the term "special nuclear material" shall also mean significant quantity of special nuclear material as defined in 10 CFR Part 710.

#### 904.7002 Definitions.

"Foreign interest" means any of the following:

- (1) Foreign government or foreign government agency or instrumentality thereof;
- (2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;
- (3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S. which is owned, controlled, or influenced by a foreign government, agency, firm, corporation, or person, or
- (4) Any person who is not a U.S. citizen.

"Foreign ownership, control, or influence" means the situation where the degree of ownership, control, or influence over an offeror/bidder or a contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

"Contracting Officer" means the DOE contracting officer.

#### 904.7003 Disclosure of foreign ownership, control, or influence.

(a) If a contract requires a contractor to have access to classified information or a significant quantity of special nuclear material, the DOE must determine whether access to the information or material by a contractor

who is or may be subject to FOCI may pose an undue risk to the common defense and security before a contract can be awarded.

(b) If during the performance of a contract, the contractor comes under FOCI, then the DOE must determine whether any further access to the classified information or special nuclear material may pose an undue risk to the common defense and security through the possible compromise of that information or material. If the DOE determines that such a threat or potential threat exists, the contracting officer shall consider the alternatives of negotiating an acceptable method of isolating the foreign interest which owns, controls, or influences the contractor or terminating the contract.

(c) It is essential for the DOE to obtain information about FOCI which is sufficient to help the Department determine whether award of a contract to a person or firm, or the continued performance of a contract by a person or firm, may pose undue risk to the common defense and security. Therefore, the provision specified at 952.204-73 shall be included in solicitations that involve offerors/bidders or contractors that are subject to 904.7001.

(d) The contracting officer shall not award or extend any contract subject to this subpart, exercise any options under a contract, modify any contracts subject to this subpart, or approve or consent to a subcontract subject to this subpart unless: (1) The contractor provides the information required by the solicitation provision at 952.204-73, or (2) the contractor certifies that it has previously submitted the information requested in 952.204-73 as part of a facility security clearance and that this information is accurate, complete, and current, and (3) the contracting officer has made a positive determination in accordance with 904.7004.

#### 904.7004 Findings, determination, and contract award or termination.

(a) Based on the information disclosed by the offeror/bidder or contractor, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror/bidder or continued performance of a contract by a contractor will not pose an undue risk to the common defense and security. The contracting officer need not prepare a separate finding and determination addressing FOCI; however, the memorandum of negotiation shall include a discussion of the applicability of this subpart and the resulting determination.

(b) In those cases where FOCI does exist, and the DOE determines that an undue risk to the common defense and security may exist, the offeror/bidder or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

(c) The types of plans that a contractor can propose are: measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; assignment of specific security duties and responsibilities to board members or special executive level committees; or any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis. If the offeror/bidder or contractor and the DOE cannot negotiate a plan of action that isolates the offeror/bidder or contractor from FOCI satisfactory to the DOE, then the offeror/bidder shall not be considered for contract award and affected existing contracts with a contractor shall be terminated.

#### 904.7005 Solicitation provision and contract clause.

(a) The contracting officer shall insert the representation at 952.204-73, Foreign Ownership, Control, or Influence Over Contractor, in all solicitations for contracts subject to 904.7001.

(b) The contracting officer shall insert the clause at 952.204-74, Foreign Ownership, Control, or Influence Over Contractor, in new contracts and contract modifications to existing contracts subject to 904.7001.

### PART 905—PUBLICIZING CONTRACT ACTIONS

#### Subpart 905.2—Synopsis of Proposed Contracts

Sec.

905.205 Special situations.

#### Subpart 905.4—Release of Information

905.403 Requests from Members of Congress.

905.404-1 Release procedures.

#### Subpart 905.5—Paid Advertisements

905.502 Authority.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic



Energy Act of 1954, as amended (42 U.S.C. 2168).

## Subpart 905.2—Synopsis of Proposed Contracts

### 905.205 Special situations.

(a) *Research and development (R&D) advance notices.* If, a result of an R&D Sources-Sought Synopsis, a subsequent synopsis is issued, the latter synopsis shall contain information regarding the earlier synopsis, and identify the special qualifications, expertise, experience, or facilities deemed necessary to perform the work satisfactorily. The purpose of this added notice is to alert potential sources that their proposal preparation effort as well as the Government evaluation effort will be unnecessarily expended if they do not possess these special qualifications.

## Subpart 905.4—Release of Information

### 905.403 Requests from Members of Congress.

(a) *Individual requests.* In addition to having access to the information available to the general public, Members of Congress shall, upon their request, be given full and detailed information regarding any particular Departmental acquisition. The information provided shall be fully responsive to the member's request unless such a response would disclose classified matter, information not to be released pursuant to law, business confidential information or information which would be prejudicial to the competitive process. The contracting officer shall promptly consult with appropriate specialists such as security analysts or legal counsel and the Office of Congressional Affairs to determine whether circumstances exist which will allow the release of additional information. In such instances, the Congressional requestor shall be provided an interim reply furnishing the information which is readily releasable. The interim reply shall set forth the reasons which preclude release of any requested material and describe generally what steps, if any, are being taken to make such information available.

(b) *Required notices of award.* The Office of Congressional Affairs, Headquarters, is responsible for advising Members of Congress regarding Departmental activities likely to have an impact on their constituents. To facilitate this advice, contracting officers shall notify the Office of Congressional Affairs regarding pending awards for significant new starts or modifications significantly expanding the previous scope of a contract. The

transmittal of such notices to the Office of Congressional Affairs shall be as follows:

(1) Notice of awards of \$500,000 or greater, but less than \$1,000,000 shall be forwarded 48 hours prior to the time of contract execution.

(2) Notice of source selection for a contemplated award of \$1,000,000 or greater shall be forwarded 48 hours prior to the public announcement of the source selection. Such notices need not be duplicated at time of award.

(3) Notice of awards of \$50,000 or greater, under Special Research Contracts as described at 917.71, shall be forwarded 48 hours prior to the time of contract execution.

### 905.404-1 Release procedures.

(a) *Application.* Offices contemplating the release of long range acquisition planning estimates shall coordinate with the Office of Procurement Support, Procurement and Assistance Management Directorate, Headquarters, in advance of the release of such planning estimates.

## Subpart 905.5—Paid Advertisements

### 905.502 Authority.

(a) *Newspapers.* When it is deemed necessary to use paid advertisements in newspapers and trade journals, written authority for such publication shall be obtained from the Head of the Contracting Activity or designee.

## PART 907—ACQUISITION PLANNING

### Subpart 907.1—Acquisition Plans

Sec.  
907.102 Policy.

### Subpart 907.3—Contractor Versus Government Performance

907.307 Appeals.

### Subpart 907.4—Equipment Lease or Purchase

907.401 Acquisition considerations.  
907.402-70 Purchase versus lease comparison.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 907.1—Acquisition Plans

#### 907.102 Policy.

Acquisition plans are required as an element of project management plans which are required for major system acquisitions and major projects. The 5700 Series of DOE Directives establish the project management system which controls the planning and administration of major projects. This project

management system calls for the preparation of project management plans which have as an annex the advance acquisition plan. Acquisition plans will be developed for other acquisitions when the potential benefit justifies their development.

## Subpart 907.3—Contractor Versus Government Performance

### 907.307 Appeals.

An appeal of a decision to convert to contract or to continue in-house performance may be made by an affected party. Appeals shall be made in writing, be based only on specific alleged material deviation (or deviations), from OMB Circular A-76, and be supported by appropriate documentation. Appeals must be delivered within 15 working days of the announced decision, to the contracting officer. The contracting officer shall process any such appeal in accordance with internal Departmental procedures.

## Subpart 907.4—Equipment Lease or Purchase

### 907.401 Acquisition considerations.

(c) The factors in FAR 7.401 (a) and (b), the guidelines prescribed in FPMR 101-25.5 and 907.402-70 of this chapter for making purchase or lease determinations shall be applied to the acquisition of all types of equipment. These factors and guidelines shall be used in making purchase versus lease determinations at time of original acquisition, when lease renewals are being considered, or at other times as circumstances warrant.

(d) Contracting officers shall assure the use of applicable purchase versus lease factors and guidelines in all acquisition and supply operations under their jurisdiction.

(e) Excess lists shall be consulted prior to leasing equipment in both original and renewal leasing actions. Also, leased equipment shall be offered for utilization by other DOE offices and DOE contractors prior to release whenever an accumulated credit toward purchase of the equipment will be lost.

(f) Unavailability of funds is not adequate justification for a decision to lease when purchase is indicated by a purchase versus lease comparison to be the more economical course of action. In such circumstances, it is essential that every effort be made to follow the purchase course of action. This is true both with respect to those studies made at the time leases are renewed or when other circumstances warrant.



**907.402-70 Purchase versus lease comparison.**

(a) A comparative cost analysis of the alternative methods of acquisition (i.e., purchase, lease, or lease with option to purchase or any other legally acceptable method) shall be performed to determine which method shall provide the Government with the lowest overall cost (price and other factors considered), over the life of the equipment. The method chosen shall be that which offers the greatest advantage to the Government under the circumstances which pertain to each situation.

(b) Responsibilities of acquisition officials, head of program offices, and controller and finance divisions are as follows:

(1) *Acquisition officials:*

(i) Contracting officers shall assure the use of applicable purchase versus lease guidelines in all acquisition and supply operations under their jurisdiction.

(ii) Maintain all purchase versus lease analyses and studies, and other pertinent data used to support administrative actions taken.

(2) *Heads of Program Offices:* Prepare comparative cost analyses for alternative methods of equipment acquisition and submit to the contracting officer.

(3) *Controller and Finance Divisions:* Provide financial policy guidance and assistance to the program offices in preparing comparative cost analyses.

(c) A purchase or lease determination supported by a comparative cost analysis is essential to the equipment acquisition process. To develop a comparative cost analysis properly, it is necessary to bring together "overall costs" of the equipment over the stated life of the equipment. Overall costs shall include, but not be limited to, cost elements as purchase cost, rental cost, lease cost, maintenance cost for purchased equipment, site preparation cost and installation cost. In performing a comparative cost analysis of the alternative methods of acquisition, it is necessary to give consideration to equipment life and residual value.

(1) The cost of equipment for the stated equipment life should be calculated for each acquisition method offered. Examples of plans are:

(i) *Purchase*—Outright purchase after installation and acceptance of equipment.

(ii) *Lease with Purchase Option*—Lease with option to purchase at predetermined intervals of time. The purchase price is usually reduced by subtracting rental credits as set forth in the offeror's proposal.

(iii) *Long Term Lease*—Such plans may provide multi-year leasing at determinable prices where the agency exercises a renewal option at the end of each fiscal year.

(iv) *Lease-to-Ownership Plan or Lease with Title Transfer Plan*—A plan whereby title transfers after payment of  $n$  months of rental, but usually with no obligation, or less obligation, to continue to lease than in the installment purchase plan described below.

(v) *Installment Purchase Plan*—A plan whereby the Government exercises an option to purchase the equipment upon payment of  $n$  months of payments. It is frequently offered as a fixed term installment plan usually for 36 or 60 months in which the Government either is granted title immediately, or title is passed at the end of the contract.

(2) Equipment life, which is a forecast or projection of the period of time which begins with the installation of the equipment and ends when the requirement for the equipment is terminated, is based upon requirements which should be stipulated in the solicitation document. Equipment life is not synonymous with the actual life of the equipment.

(3) Usually, at the end of the stated equipment life, the equipment still has some residual value to the Government. This value may reflect the fact that the initial using activity may well keep the equipment longer than planned or some other Government activity may reutilize the equipment. The future lease payments saved, as well as the resale value of the equipment at the end of the stated equipment life, affect residual value. The residual value varies with each component (item) of equipment and its activity. However, it is generally expected that after a five-year equipment life the equipment should still be worth approximately 20-30% of the purchase price and after eight years, about 10%. The "purchase price" is the lowest evaluated purchase price offered by a responsible and responsive offeror. Instead of the straight purchase price, the sum of all invoice payments to be made to the Contractor may be used as the basis for this calculation. Any procurement option (e.g., Purchase, Lease-to-Ownership, etc.) that results in the Government owning the system(s) will have the residual value deducted from the systems life cost for evaluation purposes.

(4) Care should be taken during negotiations to ensure that the Government retains accrued credits and/or equity under any lease or installment purchase plan should the agency requirement cease or funds no longer be available. It is desirable to

negotiate for the transfer of accrued credits to GSA should this case arise, so that GSA can find another user and retain the equity and any purchase option credits. At least a 90 day transfer plan should be available. The negotiator also has to be careful that equipment discontinuance is not hampered by restrictions on when the equipment can be dropped from the plan, or restrictions on the adding of new equipment. Ideally, the contract should contain no penalties for cancellation at the end of each fiscal year. It is imperative, however, that statutory "anti-deficiency" restraints be considered before entering into any multi-year lease or installment plan contracts.

(5) Particular caution should be exercised in entering into a lease-to-ownership or installment purchase plan because often the problems of ownership such as risk of loss or damage, taxes and insurance immediately fall on the Government and hence are avoided by the contractor. These plans offer real profit advantages to a contractor when they can pass the costs and risks on to the Government. Accordingly, since the offeror does not have to include such contingencies in his pricing, commensurate price reductions must be a part of the negotiation objectives under these conditions.

## **PART 908—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

### **Subpart 908.8—Acquisition of Printing and Related Supplies**

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- 908.7113 Calibration services.
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- 908.7115 Forms.
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- 908.7118 Rental of post office boxes.
- 908.7119 [Reserved]
- 908.7120 [Reserved]
- 908.7121 Special materials.

**Subpart 908.72—Use of Acquisition and Supply Management Support Services at the Nevada Test Site**

- 908.7200 Scope of subpart.
- 908.7201 Policy.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**Subpart 908.8—Acquisition of Printing and Related Supplies**

**908.802 Policy.**

(b) The Joint Committee on Printing, Congress of the United States periodically publishes "Government Printing and Binding Regulations" These regulations and DOE Order 1340.1A, Chapter VI, "Printing and Related Activities," govern the acquisition, use, and disposal of printing. Inclusion of printing requirements (limited exceptions are set forth in paragraphs 35-2 through 35-4 of the Government Printing and Binding Regulations) in contracts for supplies and services is prohibited unless specifically approved by the Director, Office of Administrative Services, Headquarters. Contracting officers shall insert the clause at 952.208-70.

**Subpart 908.11—Leasing of Motor Vehicles**

**908.1100 Scope of subpart.**

This subpart prescribes procedures for the leasing, from commercial concerns, by DOE offices and its authorized contractors, of motor vehicles that comply with Federal Motor Vehicle Safety Standards and applicable State motor vehicle safety regulations. It does not apply to motor vehicles leased outside the United States. Motor vehicle acquisition policies are at 908.7101.

**908.1102 Presolicitation requirements.**

(a)(4) Commercial vehicle lease sources may be used only when the General Services Administration (GSA) has advised that it cannot furnish the vehicle(s) through the Interagency Motor Pool System and it has been determined that the vehicle(s) are not available through the GSA Consolidated Leasing Program.

**908.1104 Contract clauses.**

(e) The clause at 952.208-7, Tagging of Leased Vehicles, shall be inserted whenever a vehicle(s) is to be leased over 60 days, except for those vehicles exempted by FPMR 41 CFR 101-38.6.

**908.1170 Leasing of fuel-efficient vehicles.**

(a) All sedans and station wagons and certain types of light trucks, as specified by GSA, that are acquired by lease for 60 continuous days or more for official use by DOE or its authorized contractors, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), Pub. L. 94-163 and of Executive Order 12003 and subsequent implementing regulations. Accordingly, the Director of Administration and Heads of Contracting Activities shall submit annually to the Director, Property and Equipment Management Division, Office of Policy, Procurement and Assistance Management Directorate, Headquarters, for approval, a forecast of plans for the lease of such vehicles during the fiscal year. Such forecast shall be submitted so as to arrive at Headquarters on or before November 1 of each year.

(b) Two copies of each proposal/request to commercially lease such vehicles shall also be forwarded to the Director, Property and Equipment Management Division, Office of Policy, Procurement and Assistance Management Directorate, Headquarters, for review and certification/approval prior to submission to GSA under the Consolidated Lease Program or execution of commercial lease agreements. All such documentation will be reviewed by this official and a determination made as to conformance with applicable annual forecasts and pertinent public laws and their implementations. (See DOE-PMR 41 CFR 109-38.13.)

(c) Leased vehicles will meet the miles-per-gallon criteria of, and be incorporated in, the approved plan of the fiscal year in which leases are initiated, reviewed, extended, or increased in scope. Vehicle leases will specify the vehicle model type to be provided.

**Subpart 908.70—Use of Excess Materials From GSA Inventories**

**908.7001 Use of excess materials from General Services Administration inventories.**

(a) It is the policy of DOE to comply with the provisions of the Federal Property Management Regulations 41 CFR Part 101-14, National Defense Stockpile, as supplemented from time to time by FPMR Bulletins.

(b) Section 328.2 of Defense Mobilization Order II provides that "Under such policies and procedures as the Administrator of General Services may prescribe, Government agencies which directly or indirectly use strategic and critical materials shall fulfill their requirements through the use of materials in Government inventories that are excess to the needs thereof."

(c) DOE offices shall fulfill their requirements for strategic and critical materials through use of the excess strategic and critical materials in the GSA inventories.

(d) General Services Administration (DS), Washington, D.C. 20406, should be contacted directly for any detailed information concerning specifications, prices, and methods of placing the order.

**Subpart 908.71—Acquisition of Special Items**

**908.7100 Scope of subpart.**

This subpart sets forth requirements and procedures for the acquisition of special items by DOE and contractors authorized to use special sources of supply to the extent indicated herein.

**908.7101 Motor vehicles.**

**908.7101-1 Scope of section.**

Acquisitions by purchase of motor vehicles shall be in accordance with this section.

**908.7101-2 Consolidated acquisition of new vehicles by General Services Administration.**

(a) New vehicles shall be procured in accordance with FPMR 41 CFR 101-25.304, 101-26.501, and 101-38.13, and DOE-PMR 41 CFR 109-25.304, 109-38.13, and 109-39.51.

(b) Orders for all motor vehicles shall be submitted on GSA Form 1781, Motor Vehicle Requisition—Delivery Order—Invoice, in accordance with FPMR 41 CFR 101-26.501. Requisitions for sedans, station wagons, and certain light trucks as specified by GSA, should contain a certification that the acquisition is in conformance with Pub. L. 94-163, and Executive Order 12003 and 12375 and subsequent implementations.



(c) The schedule of dates for submission of orders is contained in FPMR 41 CFR 101-26.501-4. Heads of Contracting Activities shall consolidate and submit their requirements for passenger automobiles early in the fiscal year. Requisitions for sedans, station wagons and certain types of light trucks shall be submitted through Headquarters as outlined in 908.7101-6. Requisitions for all other types of vehicles shall be submitted directly to GSA.

#### 908.7101-3 Direct acquisition.

Vehicles may be acquired by DOE activities directly rather than through GSA when a waiver has been granted by GSA. A copy of the activity's request to GSA for a waiver shall be forwarded to the Director, Property and Equipment Management Division, Office of Policy, Procurement and Assistance Management Directorate, Headquarters. In those cases involving general purpose vehicles where GSA refuses to grant a waiver and where it is believed that acquisition through GSA would adversely affect or otherwise impair the program, authority for direct acquisition shall be obtained from the above-mentioned Headquarters official, prior to acquisition. In the acquisition of special purpose vehicles for use by DOE and its authorized contractors, the Head of the Contracting Activity may authorize direct purchases. The purchase price for sedans and station wagons, shall not exceed any statutory limitation in effect at the time the acquisition is made. (See DOE-PMR 41 CFR 109-38.5101-4).

#### 908.7101-4 Replacement of motor vehicles.

(a) The replacement of motor vehicles shall be in accordance with the replacement standards prescribed in FPMR 41 CFR 101-38.9 and DOE-PMR 41 CFR 109-38.9.

(b) Heads of Contracting Activities may arrange to sell, as exchange sales, used motor vehicles being replaced and to apply the proceeds to the purchase of similar new vehicles. However, in the event personnel are not available to make such sales, or it is in the best interest of the DOE office, GSA may be requested to sell the used vehicles.

#### 908.7101-5 Used vehicles.

Normally, DOE does not purchase or authorize contractors to purchase used vehicles. However, Heads of Contracting Activities may authorize the purchase of used vehicles where justified by special circumstances; e.g., when new vehicles are in short supply, the vehicles are to be used for

experimental or test purposes, or the vehicles are acquired from exchange sale. In accordance with DOE-PMR 41 CFR 109-38.5101-5, the statutory passenger vehicle allocation requirements for DOE shall apply to any purchase of used vehicles except in the case of vehicles to be used exclusively for experimental or test purposes.

#### 908.7101-6 Acquisition of fuel-efficient vehicles.

(a) All purchases of sedans and station wagons, and certain types of light trucks as specified by GSA, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), Pub. L. 94-163, and of Executive Orders 12003 and 12375 and subsequent implementing regulations. Accordingly, the Director of Administration and Heads of Contracting Activities will submit annually to the Director, Property and Equipment Management Division, Office of Policy, Procurement and Assistance Management Directorate, Headquarters for approval, a forecast of plans for the purchase of such vehicles during the fiscal year. Such forecast shall be submitted so as to arrive at Headquarters on or before November 1 of each year. Additionally, the original and 2 copies of requisitions (GSA form 1781) for purchase of such vehicles shall also be forwarded to the above official for review and certification/approval prior to submission to GSA. All such documentation will be reviewed by this official and a determination made as to conformance with applicable annual forecasts and pertinent public laws and their implementations. (See DOE-PMR 41 CFR 109-38.13.)

(b) Sedans, station wagons, and light trucks requisitioned according to an approved forecast, but not contracted for by GSA until the subsequent fiscal year, will be included in the acquisition plan for the miles-per-gallon criteria of the year in which GSA signs the purchase contract along with the new vehicles planned for acquisition that year.

#### 908.7101-7 Government license tags.

(a) Government license tags shall be procured and assignments recorded by DOE offices in accordance with FPMR 41 CFR 101-38.303.

(b) The letter "E" has been designated as the prefix symbol for all DOE official license tags. Assignments of specific "blocks" of tag numbers and the maintenance of tag assignment records, is performed by the Director, Property and Equipment Management Division, Office of Policy, Procurement and Assistance Management Directorate,

Headquarters. Assignments of additional "blocks" of tag number will be made upon receipt of written requests from field offices.

(c) Special license tags for security purposes shall be purchased in accordance with state and local laws, regulations, and procedures.

(d) In the District of Columbia, official Government tags shall be obtained from the Department of Transportation, Motor Vehicles Services Branch, District of Columbia, for all motor vehicles (except vehicles exempt for security purposes) based or housed in the District.

(e) See DOE-PMR 41 CFR 109-38.3 and 109-38.6 for additional guidance.

#### 908.7102 Aircraft.

Acquisition of aircraft shall be in accordance with DOE-PMR 41 CFR 109-38.5205.

#### 908.7103 Office machines.

Acquisitions of office machines by DOE offices and its authorized contractors shall be in accordance with FPMR 41 CFR 101-25.104, 101-25.302, 101-25.302-3, 101-25.302-4, and 101-25.302-6, and 101-25.403, and DOE-PMR 41 CFR 109-25.302, 109-25.302-3, and 109-25.4.

#### 908.7104 Office furniture and furnishings.

Acquisitions of office furniture and furnishings by DOE offices shall be in accordance with FPMR 41 CFR 101-25.104, 101-25.302, 101-25.302-1, 101-25.302-5, 101-25.302-7, and 101-25.302-8, 101-25.404 and 101-26.505, and DOE-PMR 41 CFR 109-25.302, 109-25.302-1, and 109-25.350.

#### 908.7105 Filing cabinets.

Acquisitions of filing cabinets shall be in accordance with FPMR 41 CFR 101-26.308 and 101-25.302-2 and DOE-PMR 41 CFR 109-25.302-2.50.

#### 908.7106 Security cabinets.

(a) Acquisitions of security cabinets shall be in accordance with FPMR 41 CFR 101-26.507 and the "prerequisites to ordering" criteria contained in FPMR 41 CFR 101-25.302-2 and DOE-PMR 41 CFR 109-25.302-2.50.

(b) Fixed-price prime contractors and lower tier subcontractors may use GSA acquisition sources for security cabinets in accordance with FPMR 41 CFR 101-26.407 and FAR 51.

#### 908.7107 Alcohol.

(a) This section covers (1) Bureau of Alcohol, Tobacco and Firearms, (ATF), Treasury Department, alcohol regulations applicable to DOE, (2) delegations of authority to submit



applications to purchase tax-free alcohol or specially denatured alcohol, and (3) purchases of alcohol by DOE or authorized contractors. To the fullest extent practicable, alcohol for use by DOE or its cost-type contractors shall be procured on a tax-free basis.

(b) ATF regulations relating to the acquisition and use of alcohol free of tax, by Government agencies, are set forth in 26 CFR 213.141-213.146. Copies of excerpts from these regulations may be secured from the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, Washington, D.C. 20226. These regulations shall be followed in the acquisition of alcohol.

(c) ATF Form 1444/1486, "Tax Free Spirits or Specially Denatured Spirits for Use of United States," shall be used for acquisitions of specially denatured alcohol and ethyl alcohol. Section I of the form is the application for permission to acquire and Section II is the permit. If acquisition from more than one warehouse is desirable, separate applications must be made for withdrawal from each warehouse. When permits are no longer required, they should be forwarded to the Bureau of Alcohol, Tobacco and Firearms for cancellation. Alcohol procured by use of the ATF form referred to in this subsection shall be used exclusively on DOE work.

(d) The Procurement Executive has been authorized to sign and delegate to others authority to sign applications under Bureau of Alcohol, Tobacco and Firearms regulations relating to the acquisition and use of alcohol free of tax. Specific DOE personnel have been delegated authority to execute Part I of Form 1444/1486 by letters to the Director, Bureau of Alcohol, Tobacco and Firearms without power of redelegation. Copies of such letters have been furnished to field offices. Only the individuals so authorized shall execute Section I of these forms. Requests by field offices for new authorizations or changes to existing authorizations shall be submitted by letter to the Procurement Executive.

(e) Applications on the ATF Form 1444/1486 shall be executed in duplicate by an authorized DOE official and mailed directly to the address on the application. Only one permit will be provided to each field organization. Due to the numerous locations managed by field operations offices, the exact shipping address need not be shown in block 3 of the form. Shipments, however, must be addressed to the "Department of Energy at various locations within the United States". The ATF will assign the application a permit number and return it to the requestor. Distribution of

certified copies shall be controlled and each holder of a certified copy recorded.

(f) Annually, the Bureau of Alcohol, Tobacco and Firearms publishes printed lists of Distilled Spirits Plants, Bonded Warehouses and Denaturing Plants Authorized to Operate. Copies of these lists and supplies of Form 1444/1486 may be secured by written request to the Director, Bureau of Alcohol, Tobacco and Firearms, Special Operations Branch, Washington, DC 20226.

(g) A signed copy of the permit shall accompany the original purchase order issued to the plant or warehouse, where it shall be retained or returned with the shipment. Subsequent orders shall refer to the permit on file in the plant or warehouse if it was retained.

(h) When alcohol is shipped, the shipper prepares the required form as specified by Bureau of Alcohol, Tobacco and Firearms regulations and forwards them to the consignee. Upon receipt of the receiving report covering the shipment, the officer who signed the purchase order shall execute the certificate of receipt and forward it to the appropriate Regional Director, Bureau of Alcohol, Tobacco and Firearms. The carrier transporting the alcohol shall also be given a receipt as specified by Bureau of Alcohol, Tobacco and Firearms regulations.

(i) Abandoned and forfeited alcohol which has come into the custody or control of a Federal agency may be obtained by following the procedure set forth in FPMR 41 CFR 101-43.4.

#### 908.7108 Helium.

(a) Acquisitions of helium by DOE and its authorized contractors shall be in accordance with this section.

(b) The helium act (Pub. L. 86-777, as amended (50 U.S.C. 167(d))) provides that, to the extent that supplies are readily available, whether in gaseous or liquid form, DOE shall purchase all major requirements of helium from the Secretary of Interior, Bureau of Mines, or from the Bureau of Mines distribution contractors eligible to sell Bureau of Mines helium to Federal agencies and their users in accordance with 30 CFR Part 602.

(c)(1) Purchases may be made directly from the Bureau of Mines by forwarding a purchase order in duplicate to: Bureau of Mines, Division of Helium Operations, 1100 South Fillmore Street, Amarillo, Texas 79101.

(2) Purchases may be made from those commercial firms listed in the Bureau of Mines as eligible to sell helium to Federal users.

(i) The purchase document shall contain the following statement:

"Helium furnished under this contract shall be Bureau of Mines Helium."

(ii) A copy of each acquisition document shall be furnished to the address in paragraph (c)(1) of this section.

#### 908.7109 Fuels and packaged petroleum products.

Acquisitions of fuel and packaged petroleum products by DOE offices shall be in accordance with FPMR 41 CFR 101-26.602. When contractors are authorized, consistent with 951, to acquire such products from Defense sources, they shall do so in accordance with FPMR 41 CFR 101-26.602.

#### 908.7110 Coal.

DOE offices and authorized contractors may participate in the Defense Fuel Supply Center (DFSC) coal contracting program for carload or larger lots. If participation is desired, estimates shall be submitted to DFSC in accordance with FPMR 41 CFR 101-26.602.

#### 908.7111 Arms and ammunition.

Pursuant to 10 U.S.C. 4655, the Secretary of the Army is authorized to furnish arms, suitable accouterments for use therewith, and ammunition for the protection of public money and property.

#### 908.7112 Materials handling equipment replacement standards.

Materials handling equipment shall be purchased for replacement purposes in accordance with the standards in FPMR 41 CFR 101-25.405 and DOE-PMR 41 CFR 109-25.4. Heads of Contracting Activities are authorized to replace an item earlier than the date specified in such standards under unusual circumstances. A written justification shall be placed in the purchase file.

#### 908.7113 Calibration services.

Orders for calibration services may be placed with the National Bureau of Standards, Washington, D.C. 20234, by either DOE acquisition offices or its authorized contractors. Copies of the letters authorizing contractors to order calibration services on behalf of DOE shall be sent to the Bureau of Standards. Attention: "Administrative Services Division."

#### 908.7114 Wiretapping and eavesdropping equipment.

Acquisition by DOE offices and contractors of devices primarily designed to be used surreptitiously to overhear or record conversations is prohibited.



**908.7115 Forms.**

(a) DOE forms shall be obtained by DOE offices in accordance with DOE Order 1322.2A, "Forms Management." Cost-type contractors shall obtain DOE forms through the DOE contracting officer.

(b) Standard, optional, and certain other agency forms as listed in the GSA Supply Catalog will be obtained by DOE offices in accordance with FPMR 41 CFR 101-26.302.

(c) Marginally punched continuous forms shall be obtained in accordance with FPMR 41 CFR 101-26.703.

**908.7116 Electronic data processing tape.**

(a) Acquisitions of electronic data processing tape by DOE offices shall be in accordance with FPMR 41 CFR 101-26.508.

(b) Acquisitions of electronic data processing tape by authorized contractors shall be in accordance with FPMR 41 CFR 101-26.508-1. However, if adequate justification exists, Heads of Contracting Activities may authorize contractors to obtain their tape from other sources. When such an authorization is granted, a copy of the authorization and justification shall be retained in the contract file.

**908.7117 Tabulating machine cards.**

DOE offices shall acquire tabulating machine cards in accordance with FPMR 41 CFR 101-26.509.

**908.7118 Rental of post office boxes.**

DOE offices and authorized contractors may rent post office boxes on an annual basis, or for shorter periods by quarters, where necessary. Payments for annual rentals are to be made in advance at the beginning of the fiscal year, and for periods of less than a year, either in advance for the whole period or at the beginning of each quarter in which the box is to be used.

**908.7119 [Reserved]****908.7120 [Reserved]****908.7121 Special materials.**

This section covers the purchase of materials peculiar to the DOE program. While purchases of these materials are unclassified, quantities, destination or use may be classified. See appropriate sections of the Classification Guide. Contracting activities shall require authorized contractors to obtain the special materials identified in the following subsections in accordance with the procedures stated therein.

(a) *Heavy water.* The Senior Program Official or designee controls the acquisition and production of heavy water for a given program. Orders shall

be placed directly with the cognizant Senior Program Official or designee.

(b) *Precious metals.* The Oak Ridge Operations Office is responsible for maintaining the DOE supply of precious metals. These metals are platinum, palladium, iridium, osmium, rhodium, ruthenium, gold and silver. Oak Ridge Operations Office has assigned management of these metals to NLO, Inc., P.O. Box 39158, Cincinnati, Ohio 45239. DOE offices and authorized contractors shall coordinate with NLO, Inc., regarding the availability of the above metals prior to the purchase of these metals on the open market.

(c) *Lithium.* Lithium is available at no cost other than normal packing, handling, and shipping charges. The excess quantities at Oak Ridge are to be considered as the first source of supply, prior to procurement of lithium or lithium compounds from any other source.

**Subpart 908.72—Use of Acquisition and Supply Management Support Services at the Nevada Test Site****908.7200 Scope of subpart.**

This subpart sets forth DOE policy for the use of the acquisition and supply management support services at the Nevada Test Site (NTS). The provisions of this subpart shall be applied to contractors carrying out authorized projects at the NTS.

**908.7201 Policy.**

As an integral part of its responsibility for furnishing project-related materials, equipment, and technical services, the Nevada Operations Office shall, except in special cases, provide to the fullest practicable extent, the necessary acquisition and supply management support services required to support the technical efforts of all organizations sponsoring experiments or participating in the scientific aspects of experiments conducted at the NTS. Furthermore, all organizations that are carrying out projects or performing work at the NTS will make the fullest practicable use of these facilities and services to prevent unnecessary duplication and to assure maximum efficiency and economy.

**PART 909—CONTRACTOR QUALIFICATIONS****Subpart 909.1—Responsible Prospective Contractors**

Sec.

909.104-1 General standards.

**Subpart 909.4—Debarment, Suspension, and Ineligibility**

909.402 Policy.

909.404 Consolidated lists of debarred, suspended, and ineligible contractors.

909.406 Debarment.

909.406-3 Procedures.

909.407 Suspension.

909.407-3 Procedures.

**Subpart 909.5—Organizational Conflicts of Interest**

909.500 Scope of subpart.

909.570 DOE organizational conflicts of interest.

909.570-1 Scope of section.

909.570-2 Policy.

909.570-3 Definitions.

909.570-4 Criteria for recognizing organizational conflicts of interest.

909.570-5 Disclosure of organizational conflicts of interest.

909.570-6 Notices and representations: Action required of contracting officers.

909.570-7 Disclosure or representation.

909.570-8 Contract clauses.

909.570-9 Evaluation, findings, and contract award.

909.570-10 Action in lieu of termination.

909.570-11 Architect-engineering and construction contracts.

909.570-12 Subcontractors and consultants.

909.570-13 Remedies.

909.570-14 Examples.

909.570-15 Disclosure format.

**Authority:** Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**Subpart 909.1—Responsible Prospective Contractors****909.104-1 General standards.**

A prospective contractor, in order to be determined as responsible, in the opinion of the contracting officer, must meet the following standards as they relate to the particular acquisition under consideration:

(b) Have an established system of accounting and financial controls which the contracting officer determines will permit the effective administration of the type of contract proposed, particularly if under its terms, the costs incurred are a factor in determining the amount payable under the contract, or if advance or progress payments are requested.

(g) If a bid or proposal for a construction contract qualifies any major equal opportunity requirement included or referenced in a solicitation, the qualification shall constitute grounds for a determination that the offeror is not eligible for award. In the case of construction acquisition actions by DOE prime contractors, this determination shall be made only with the approval of the DOE contracting officer.



**Subpart 909.4—Debarment, Suspension, and Ineligibility****909.402 Policy.**

DOE debarment and suspension regulations are contained in 10 CFR Part 1035. Ineligibility regulations are contained in the FAR.

**909.404 Consolidated lists of debarred, suspended, and ineligible contractors.**

The GSA Consolidated List of Debarred, Suspended, and Ineligible Contractors (GSA List) and the DOE Consolidated List of Debarred, Suspended, Ineligible and Voluntarily Excluded Awardees (DOE List) shall be reviewed in accordance with 10 CFR 1035.15.

**909.406 Debarment.****909.406-3 Procedures.**

(a) Information of possible fraud, waste, abuse, or other forms of wrongdoing which may constitute or contribute to grounds for debarment or suspension shall be reported in accordance with 10 CFR 1035.5(c).

**909.407 Suspension.****909.407-3 Procedures.**

(a) See 909.406-3.

**Subpart 909.5—Organizational Conflicts of Interest****909.500 Scope of subpart.**

DOE acquisitions will be processed in accordance with 909.570 below rather than as provided at FAR subpart 9.5 with respect to organizational conflicts of interest.

**909.570 DOE organizational conflicts of interest.****909.570-1 Scope of section.**

This section sets forth Department of Energy policies and procedures regarding organizational conflicts of interest (OCI) and is issued pursuant to section 644 of the Department of Energy Organization Act (Pub. L. 95-91) to implement the requirements of the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub. L. 93-577), as amended, and the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended.

**909.570-2 Policy.**

It is the policy of the DOE to identify and avoid or mitigate organizational conflicts of interest before entering into contracts, agreements, and other arrangements.

**909.570-3 Definitions.**

"Affiliates" means business concerns which are affiliates of each other when

either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both.

"Architect-engineering services" means the work or effort of a professional nature associated with the study, test, design, supervision, and construction, alteration, or repair of real property including utilities and appurtenances thereto. Such services embrace conceptual design and Title I, Title II, and Title III work, as defined in 936.605(c).

"Contract" for purposes of implementing policy on organizational conflicts of interest, means any contract, agreement or other arrangement with the Department.

"Contractor" means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, which is a party to a contract with the Department.

"Evaluation services or activities" means any work or effort, the principal purpose of which involves the independent study of technology, process, product, or policy.

"Offeror" means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, submitting a bid or proposal, solicited or unsolicited, to the Department to obtain a contract or modification thereof.

"Organizational conflicts of interest" means that a relationship or situation exists whereby an offeror or a contractor (including chief executives and directors, to the extent that they will or do become involved in the performance of the contract, and proposed consultants or subcontractors where they may be performing services similar to the services provided by the prime) has past, present, or currently planned interests that either directly or indirectly, through a client relationship relate to the work to be performed under a Department contract and which (1) may diminish its capacity to give impartial, technically sound, objective assistance and advice, or (2) may result in it being given an unfair competitive advantage. It does not include the normal flow of benefits from the performance of the contract.

"Research and development" means any work or effort, the principal purpose of which involves (1) theoretical analysis, exploration, or experimentation; or (2) extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing

of models, devices, equipment, materials, and processes.

"Subcontractor" means any subcontractor of any tier which performs work under a contract.

"Technical consulting and management support services" means any work or effort, the principal purpose of which is to provide internal assistance to any program element or other organizational component of the Department in the formulation or administration of its programs, projects, or policies, which requires the contractor to be given access to internal or proprietary data. Such services typically include assistance in the preparation of program plans; evaluation, monitoring or review of contractors' activities or proposals submitted by prospective contractors; preparation of preliminary designs, specifications, or statements of work.

**909.570-4 Criteria for recognizing organizational conflicts of interest.**

(a) *General.* Two questions should generally be asked in determining whether organizational conflicts of interest exist: (1) Are there conflicting roles which might bias a contractor's judgment in relation to its work for the Department? (2) Is the contractor being given an unfair competitive advantage based on the performance of the contract? The ultimate determination as to whether organizational conflicts of interest exist should be made in the light of common sense and good business judgment based upon the relevant facts and the work to be performed. While it is difficult to identify, and to prescribe in advance, a specific method for avoiding all the various situations or relationships which might involve potential organizational conflicts of interests, Department personnel must pay particular attention to proposed contractual requirements which call for the rendering of advice, or consultation or evaluation services, or similar activities that lay direct groundwork for the Department's decisions on future acquisitions, research and development programs, production and regulatory activities.

(b) *Situations or relationships involving organizational conflicts of interest.* The following general examples (which are not all-inclusive) illustrate situations or relationships where potential organizational conflicts of interest frequently arise. Specific examples are set forth at 909.570-14.

(1) Contract performance involving the preparation and furnishing of complete or essentially complete specifications which are to be used in



competitive acquisition for the furnishing of products or services.

(2) Contract performance involving the preparation and furnishing of a detailed plan for specific approaches or methodologies that are to be incorporated in a competitive acquisition.

(3) Contract performance involving access to internal information not available to the public concerning Departmental plans or programs and related opinions, clarifications, interpretations, and positions.

(4) Contract performance involving access to proprietary information which cannot lawfully be used for purposes other than those authorized by the owners.

(5) Contract performance involving evaluation of the contractor's products or services, or the products or services of another party, where the contractor is or has been substantially involved in their development or marketing.

(6) Contract performance involving the preparation and furnishing of advice to the Department in a technical area where the contractor is also providing consulting assistance in the same area to any other organization.

(7) Contract performance involving the preparation and furnishing of advice to the Department on a regulatory matter where the contractor is also providing assistance on the same or similar matter to any organization regulated by the Department.

(c) *Other considerations.* An organizational conflict of interest may exist or arise:

(1) Even though no follow-on acquisition is anticipated;

(2) Even though a hardware exclusion clause may not be appropriate; and

(3) When a contract is awarded on a noncompetitive or a sole source basis.

(d) An organizational conflict of interest is more likely to be disclosed if a contract is competitive. Accordingly, greater care shall be exercised in the absence of competition.

#### 909.570-5 Disclosure of organizational conflicts of interest.

(a) When submitting solicitations and unsolicited proposals for (1) evaluation services or activities; (2) technical consulting and management support services and professional services; (3) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (4) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the resulting contract, offerors shall be required to disclose

relevant information bearing on the possible existence of any organizational conflicts of interest or complete the representation required by 909.570-7. This requirement shall also apply to all modifications of contracts of the types noted above except those issued under the Changes clause. Where, however, a disclosure statement of the type required by the Organizational Conflicts of Interest Disclosure or Representation provision has previously been submitted with regard to the contract being modified, only an updating of such statement shall be required. Information submitted by offerors pursuant to the disclosure requirement shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes.

(b) When the Government finds that an organizational conflict of interest exists or may exist with respect to an offeror or contractor, no contract or contract modification award covered by 909.570-7 shall be made until the organizational conflict of interest has been adequately avoided or mitigated, except as provided in 909.570-9.

#### 909.570-6 Notices and representations: Action required of contracting officers.

The disclosure or representation required by 909.570-7 is designed to alert the contracting officer to situations or relationships which may constitute either present or anticipated organizational conflicts of interest with respect to a particular offeror or contractor. However, this disclosure or representation may not identify a potential organizational conflict of interest involving a successful offeror that could affect the offeror's participation in subsequent acquisitions arising out of or related to work performed under a contract that results from the solicitation currently under consideration. Accordingly, whenever such potential conflicts are foreseeable by the Government, a special notice also shall be included in the solicitation informing offerors of the fact that such a potential conflict is foreseen and that a special contract clause designed to avoid or mitigate such conflict will be included in any resultant contract as required by 909.570-7. Such notice shall specify the proposed extent and duration of restrictions to be imposed with respect to participation in subsequent acquisitions. A fixed term of reasonable duration is measured by the time required to eliminate what would otherwise constitute an unfair competitive advantage. This is a variable; and in no event shall an exclusion be stated which is not related

to specific expiration date or an event certain. In the event a contractor, having performed on one contract, later seeks work that stems or may be deemed to stem directly from prior performance, such contractor shall not be precluded from proposing on follow-on work unless the prior contract contained an appropriate follow-on restriction.

#### 909.570-7 Disclosure or representation.

The disclosure or representation provision at 952.209-70 shall be included in all solicitations, scope modifications, and unsolicited proposals for (a) evaluation services or activities; (b) technical consulting and management support services and professional services; (c) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (d) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the resulting contract. 909.570-15 contains a suggested outline for the disclosure submission.

#### 909.570-8 Contract clauses.

(a) *General contract clause.* Except where a special clause has been determined to be appropriate, all contracts subject to the disclosure or representation requirement of 909.570-7 shall include the clause set forth at 952.209-71.

(b) *Special contract clauses.* (1) If it is determined from the nature of the proposed contract that a potential organizational conflict of interest may exist, the Contracting Officer may determine that such conflict can be avoided through the use of an appropriate special contract clause. Examples of the types of clauses which may be employed include, but are not limited to, the following:

(i) Hardware exclusion clauses which prohibit the acceptance of production contracts following a related nonproduction contract previously performed by the contractor;

(ii) Software exclusion clauses;

(iii) Clauses which require the contractor (and/or certain of its key personnel) to avoid certain organizational conflicts of interest;

(iv) Clauses which provide for the protection of the confidentiality of data and guard against its unauthorized use; and

(v) Clauses that prohibit other segments or divisions of the contractor from becoming involved in the performance of the contract work or



being in a position to influence such work.

If deemed appropriate, the prospective contractor may be given the opportunity to negotiate the terms and conditions of the clause and its application including the extent and time period of any restrictions.

(2) Contracts for technical consulting and management support services, as defined in 909.570-3, are particularly susceptible to organizational conflicts of interest. Therefore, the clause set forth at 952.209-72 shall be included in all contracts for technical consulting and management support services. This clause, after any appropriate modification, may also be included in any contract for professional services and evaluation services and activities.

**909.570-9 Evaluation, findings, and contract award.**

(a) The contracting officer or selection official, as appropriate, shall evaluate all relevant facts submitted by an offeror pursuant to the requirements of 909.570-6 and such other relevant information as may be available concerning possible organizational conflicts of interest. After evaluation all such information in accordance with the criteria of 909.570-4 and prior to any award, a finding shall be made by the contracting officer whether possible organizational conflict of interest exist with respect to a particular offeror or whether there is little or no likelihood that such conflicts exist. When formal Source Evaluation Board procedures are applicable, the finding shall be made by the Source Selection Official. If the finding indicates that such conflicts exist, then the contracting officer shall:

(1) Disqualify the offeror from award; or

(2) Avoid such conflicts by the inclusion of appropriate conditions in the resulting contract; or

(3) If such conflicts cannot be avoided by an appropriate contract clause, and the Secretary or the Secretary's designee has nevertheless determined that award of the contract to the offeror is in the best interest of the United States, the contract may be awarded. Where such a public interest determination is made, an appropriate written finding and determination shall be published in the Federal Register and an appropriate clause included in the contract to mitigate the conflict, to the extent feasible, prior to any award.

(b) Examples of circumstances justifying the determination permitted by 909.570-9(a)(3) include, but are not limited to:

(1) Situations where the public exigency will not otherwise permit; and

(2) Situations where the work or services cannot otherwise be obtained.

**909.570-10 Action in lieu of termination.**

If, after award, a possible organizational conflict of interest is identified by the contractor or other sources and the contracting officer determines that such a conflict does in fact exist and that it would not be in the best interest of the Government to terminate the contract as provided in the clauses required by 909.570-8, the contracting officer shall take every reasonable action to avoid or mitigate the effects of the conflict.

**909.570-11 Architect-engineering and construction contracts.**

(a) The award of related architect-engineering services and construction contracts or subcontracts to the same contractor can result in self-inspection of construction work and permit the contractor to render biased decisions. Such contract awards shall not be permitted unless a waiver is obtained prior to award from the Department's Procurement Executive.

(b) The award of architect-engineering services contracts, the principal purpose of which is to provide evaluation services and activities or technical consulting and management support services, shall be subject to the requirements of 909.570-7 and 909.570-8(b)(2).

**909.570-12 Subcontractors and consultants.**

The contracting officer shall require offerors and contractors to obtain for the Department a disclosure or representation in accordance with 909.570-7 from subcontractors and consultants who may be performing services similar to the services provided by the prime, except that subcontractors shall not normally be required to submit the disclosure or representation if such subcontract is for supplies. Such disclosure or representation may be submitted by the subcontractors and consultants directly to the contracting officer and they shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes. The contracting officer shall assure that contract clauses in accordance with 909.570-8 are included in subcontracts or consultant agreements involving performance of work under a prime contract covered by this subpart.

**909.570-13 Remedies.**

In addition to such other remedies as may be permitted by law or contract, for a breach of any of the restrictions in this subpart or for nondisclosure or

misrepresentation of any relevant facts required to be disclosed by this subpart, the Department may disqualify the contractor for subsequent Department contracts. Contractors and offerors may also be subject to the criminal penalties expressed in 18 U.S.C. 1001 for such violations.

**909.570-14 Examples.**

(a) In development work it is normal to select firms which have done the most advanced work in the field. It is to be expected that these firms will design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than can firms which did not participate in the development, and this affects the time and quality of production, both of which are important to the Government. In many instances, the Government may have financed such development. Thus, the development contractor may have an unavoidable competitive advantage which is not considered unfair and no prohibition should be imposed.

(b) The following examples illustrate types of situations and relationships where organizational conflict of interest questions frequently arise, but they are not all-inclusive.

(1) Contractor A, in connection with the performance of a study contract, is given information by the Department regarding Department plans for future acquisitions. This information is not available to interested industrial firms. *Guidance.* Normally this would constitute an OCI and the contractor should not be permitted to compete with such firms for work relating to such plans.

(2) Company A, in response to a requests for proposals (RFP), proposes to undertake certain analyses of an energy savings device as called for in the RFP. The company is one of several companies considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it is currently performing similar analyses for the manufacturer of the device. *Guidance.* Normally this would constitute an OCI and a contract for that particular work would not be awarded to Company A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department. Since there are other well qualified companies available, there would be no reason for granting a waiver of the policy.

(3) Accounting Firm A, in response to a requests for proposals (RFP), proposes to undertake an analysis of the profitability of one segment of the



energy industry. The firm is one of several firms considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it derives a substantial portion of its income from the industry to be studied. *Guidance.* Normally this would constitute an OCI and a contract would not be awarded to Firm A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department.

(4) Company A prepares updated Government specifications for a standard refrigerator to be procured competitively. *Guidance.* Normally this would constitute an OCI and Company A shall not be allowed for a reasonable period of time to compete for supply of the refrigerator.

(5) Company A designs or develops new electronics equipment and, as a result of the design or development, prepares specifications. *Guidance.* Normally this would not constitute an OCI and the company may supply the electronics equipment.

(6) A tool company and/or a machinery company representing the American Tool Institute works under the supervision and control of Government representatives to refine specifications or to clarify the requirements of a specific acquisition. *Guidance.* Normally this would constitute an OCI and these companies may supply the item.

(7) Prior to acquisition of Automatic Data Processing (ADP) Equipment, Company A is awarded a contract to develop software to automate a DOE function. Since the software can be written to favor a particular vendor's commercial ADP hardware, a potential conflict of interest exists. *Guidance.* Normally this would constitute an OCI and Company A should be barred from at least the initial follow-on ADP hardware acquisition using the software developed under its development contract.

(8) Company A receives a contract to define the detailed performance characteristics a Government agency will require for the purchase of rocket fuels. A has not developed the particular fuels. At the time the contract is awarded, it is clear to both parties that the performance characteristics arrived at will be used by the Government agency to choose competitively a contractor to develop or produce the fuels. *Guidance.* Normally this would constitute an OCI and Company A shall not be permitted to bid on this acquisition.

(9) Company A receives a contract to prepare a detailed plan for the acquisition of services aimed at the

advanced scientific and engineering training of the Department's personnel. It suggests a curriculum which the agency endorses and incorporates in requests for proposals to various institutions to establish and conduct such training. *Guidance.* Normally this would constitute an OCI and Company A shall not be permitted to bid on this acquisition.

(10) Consulting Firm A, in response to an RFP, proposes to undertake an evaluation of the environmental impacts of coal-fired powered plants as called for in the RFP. The company is one of several companies considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it derives a substantial portion of its income from companies which manufacture nuclear power plants. *Guidance.* Normally this would constitute an OCI and a contract for that particular work would not be awarded to Firm A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department.

(11) Consulting Firm A derives a substantial portion of its income from Company B in connection with the study of natural gas production. Company B is also heavily involved with motor gasoline marketing. A discloses these facts in response to an RFP for a study of motor gasoline marketing. *Guidance.* Normally this would constitute an OCI and a contract for the study of motor gasoline marketing plants would not be awarded to Firm A because it would be placed in a position in which its judgment could be biased in relation to its work for the Department.

(12) Firm A, because of its unique technical expertise, has been requested to assist the Department in the evaluation of proposals which will result from a competitive solicitation. Firm A also plans to submit a proposal in response to this same solicitation. *Guidance.* Normally this would constitute a conflict and Firm A should be precluded from participating in the solicitation. In a particular case, it may be desirable (e.g., when the competitive field is narrow) to allow a separate division or affiliate of Firm A to submit a proposal; but in such a case, of course, Firm A would not itself participate in the evaluation of this proposal, which would be undertaken by DOE personnel or another firm.

#### 909.570-15 Disclosure format.

(a) With respect to past, present, and currently planned interests (financial, contractual, organizational, or otherwise), the offeror should furnish a list of past, present, and currently

planned activities (including contracts) which relate to the work to be performed under the solicitation.

(b) The list may be in columnar format showing:

(1) The company (or agency) for which the work is being, has been, or will be performed;

(2) Nature of the work (a brief description);

(3) Period of performance for the work;

(4) Dollar value of the work; and

(5) Sales and marketing activity.

(c) Similar information to (b) above should be provided by the covered subcontractors and consultants relating to the work to be performed by them under the solicitation.

#### PART 910—SPECIFICATIONS, STANDARDS, AND OTHER PURCHASE DESCRIPTIONS

##### 910.004 Selecting specifications or descriptions for use.

(f) *Specification for concrete using fly ash.* Pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6962, the Environmental Protection Agency has promulgated rules at Part 249 of Title 40 of the Code of Federal Regulations regarding the use of certain waste byproducts as generally acceptable substitutes for energy intensive raw materials. When cement or concrete is being acquired, specifications should include provisions to allow for the use of (as an optional or alternate material) cement or concrete which contains fly ash. However, specifications should not be revised to allow the use of fly ash if it can be determined that for a particular project or application reasonable performance requirements for the cement or concrete will not be met, or that the use of fly ash would be inappropriate for technical reasons. Architect-engineer contracts should include provisions assuring that the provisions of 40 CFR Part 249 are considered in developing specifications.

(g) *Measurement principles for sources and special nuclear material transfers.*

(1) Certain principles regarding the resolution of measurement differences have been developed which should be used as guides in the preparation of contracts or other agreements by DOE in which monetary payments or credits depend on quantity and quality of source and special nuclear material. The provisions providing for the resolution of measurement differences must be such that resolution is always accomplished while at the same time



minimizing any advantage one party might have over the other.

(2) Each contract, lease or agreement should contain a:

- (i) Clause describing material to be transferred;
- (ii) Clause specifying the method by which the quantity and quality are to be measured and reported;
- (iii) Clause specifying the procedures to be used in resolving any differences arising as a result of such measurements;
- (iv) Clause providing for the use of an umpire to settle unresolved differences in the analytical samples; and
- (v) Clause specifying in detail which party shall bear the costs of revolving a difference and what constitutes such costs.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

## PART 912—CONTRACT DELIVERY OR PERFORMANCE

### Subpart 912.3—Priorities, Allocations, and Allotments

Sec.

- 912.300 Scope of subpart.
- 912.302 General.
- 912.304 Solicitation provision and contract clause.

### Subpart 912.5—Suspension of Work, Stop-Work Orders, and Government Delay of Work

#### 912.503 Stop-work orders.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 912.3—Priorities, Allocations, and Allotments

#### 912.300 Scope of subpart.

This subpart implements and supplements FAR Subpart 12.3—Priorities, Allocations, and Allotments, and implements the regulations and procedures of the Defense Materials System (DMS) and the Defense Priorities System (DPS) in solicitations and contracts in support of authorized national defense and those energy programs which maximize domestic energy supplies. (See 15 CFR Parts 330-354).

#### 912.302 General.

(d) Programs which maximize domestic energy supplies are eligible for priorities and allocations support depending on an executive decision

made on a case-by-case basis. Eligibility is pursuant to section 104(a) of the Energy Conservation and Policy Act, Pub. L. 94-163, which added a new section 101(c) to the Defense Production Act. Guidance is provided by 10 CFR Part 216 and Department of Energy publication DOE/PR-0042, "Priorities and Allocations Support for Energy: Keeping Energy Orders on Schedule," dated August 1980. Rated orders and ACM orders placed in support of authorized energy programs are equivalent to orders placed in support of authorized defense programs under DMS/DPS and receive the same preferential treatment throughout the industrial supply chain.

(e) Heads of Contracting Activities shall ensure that members of their staff and contractors under their jurisdiction are advised of the provisions of the DMS and DPS regulations and that the related procedures are followed to ensure training and adherence to the regulations and procedures throughout the industrial supply chain. Under DMS and DPS, it is mandatory that the priority rating be extended through the industrial chain from supplier to supplier.

#### 912.304 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 952.212-70, Rated or Authorized Controlled Material Orders (Atomic Energy) in solicitations that will result in the placement of rated orders or ACM orders for authorized DOE atomic energy programs.

(b) The contracting officer shall insert the clause at 952.212-71, Priorities, Allocations, and Allotments for DOE Atomic Energy Programs, in contracts that are placed in support of authorized DOE atomic energy programs.

(c) The use of the provisions at 952.212-70 and the clause at 952.212-71 is optional for industrial delivery orders of \$2,500 or less.

(d) The contracting officer shall insert the provision at 952.212-70 (Alternate I) Rated or Authorized Controlled Material Orders (Domestic Energy Supplies), in solicitations that may result in the placement of rated orders or ACM orders for authorized energy programs.

(e) The contracting officer shall insert the clause at 952.212-71 (Alternate I) Priorities, Allocations, and Allotments-Special E.P.C.A. clause if it is believed the contract involves a program the purpose of which is to maximize domestic energy supplies.

### Subpart 912.5—Suspension of Work, Stop-Work Orders, and Government Delay of Work

#### 912.503 Stop-work orders.

(b) Approval before issuance of a stop-work order shall be obtained at one organizational level above the contracting officer or at such higher level as the Head of the Contracting Activity may require.

## PART 913—SMALL PURCHASES AND OTHER SIMPLIFIED PURCHASE PROCEDURES

### Subpart 913.3—Fast Payment Procedure

Sec.

- 913.301 General.

### Subpart 913.4—Imprest Fund

- 913.403 Agency responsibilities.

### Subpart 913.5—Purchase Orders

- 913.505-2 Agency order forms in lieu of Optional Forms 347 and 348.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 913.3—Fast Payment Procedure

#### 913.301 General.

The fast payment procedure delineated in FAR Subpart 13.3 is not to be utilized by DOE.

### Subpart 913.4—Imprest Funds

#### 913.403 Agency responsibilities.

(d) If imprest funds are to be used, the HCA shall issue detailed procedures for the control of such funds.

### Subpart 913.5—Purchase Orders

- 913.505-2 Agency order forms in lieu of Optional Forms 347 and 348.

The combination purchase request/order/receipt form may be used in lieu of the Optional Form 347 for small purchases.

## PART 914—FORMAL ADVERTISING

### Subpart 914.2—Solicitation of Bids

Sec.

- 914.201-5 Part IV Representations and instructions.
- 914.201-7 Contract clauses.
- 914.201-70 Preparation of invitations for bids.

### Subpart 914.4—Opening of Bids and Award of Contract

- 914.401 Receipt and safeguarding of bids.
- 914.402-1 Unclassified bids.
- 914.406 Mistakes in bids.



914.406-3 Other mistakes disclosed before award.

914.406-4 Mistakes after award.

914.407-8 Protests against award.

914.407-70 Protest authorities.

914.408-2 Award of classified contracts.

#### Subpart 914.5—Two-Step Formal Advertising

914.502 Conditions for use.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### Subpart 914.2—Solicitation of Bids

##### 914.201-5 Part IV—Representations and Instructions.

(a) Section K, Representations, certifications, and other statements of bidders.

(1) DOE contracting activities may elect to adopt the simplified representations and certifications technique, described at 915.406-5, in their formally advertised acquisitions.

(b) Include the solicitation provision at 952.215-70 if the resulting contract will contain any of the clauses referenced therein.

##### 914.201-7 Contract clauses.

(b)(1) When contracting by formal advertising, the contracting officer shall insert the clause at FAR 52.214-27, Price Reduction for Defective Cost or Pricing Data—Modifications-Formal Advertising, in all solicitations and contracts.

##### 914.201-70 Preparation of invitations for bids.

When an option is to be employed, the option quantity should be for an amount which bears a reasonable relationship to the initial firm quantity amount. For procedures to be used in setting the option quantity, see FAR 17.2.

#### Subpart 914.4—Opening of Bids and Award of Contract

##### 914.401 Receipt and safeguarding of bids.

(c) Envelopes, or other outer covering, containing identified bids shall be time-stamped (indicating the place, date, and time of receipt) upon receipt, either in a mail room or other receiving point at the address specified in the invitation.

##### 914.402-1 Unclassified bids.

(d) At the bid opening, the relative merits of any bid shall not be discussed by the person opening the bids or the contracting officer, with the bidders, their representatives, or with casual observers. No statements shall be issued by the bid opener or the contracting officer at a bid opening bearing on the

award, the possibility of a readvertisement, mistakes in bids, etc.

##### 914.406 Mistakes in bids.

##### 914.406-3 Other mistakes disclosed before award.

(e) Pursuant to FAR 14.406-3(e), the Procurement Executive, has been delegated authority by the Secretary to make the determinations under FAR 14.406-3. In the case of mistakes in bids alleged after opening of bids and before award, the Procurement Executive has redelegated this authority to Heads of Contracting Activities without power of redelegation and to make administrative determinations regarding withdrawal of bids as provided for in paragraphs (a) and (c) of FAR 14.406-3, providing that each such determination shall be approved by Legal Counsel.

##### 914.406-4 Mistakes after award.

The Procurement Executive has been delegated authority to make the determinations under FAR 14.406-4. Mistakes in bids after award, together with the data set forth in FAR 14.406-4(e), shall be submitted to the Procurement Executive for decision.

##### 914.407-8 Protests against award.

(a) General. Protests must be received within ten working days after the basis for protest is known or should have been known *except* that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals.

(b) Protests before award.

(3) The Head of the Contracting Activity or designee shall obtain, through the Office of Procurement Review, Headquarters, approval of the Procurement Executive to make an award where a protest has been submitted to either the DOE or to the Comptroller General.

##### 914.407-70 Protest authorities.

(a) The Procurement Executive has the authority and responsibility for processing, reviewing, and providing to the General Accounting Office (GAO) all information relevant to a protest filed with GAO and otherwise representing DOE in all matters relating to such protests. In the case of protests filed with DOE Headquarters, the Procurement Executive shall decide such protests. The authorities and responsibilities concerning GAO protests have been delegated to the Director, Business Clearance Division, Office of Procurement Review, Headquarters.

(b) The Head of the Contracting Activity (HCA) shall decide all agency protests made to the contracting activity, with the following exceptions:

(1) The HCA is the signatory contracting officer; or

(2) Prior to making final disposition of the protest, the action is protested to GAO or DOE Headquarters; or

(3) The HCA finds that the issues raised have the potential for significant impact on DOE acquisition policy or the accomplishment of programmatic requirements.

(c) If a protest is filed with the Contracting Activity, and a decision is made by the Head of Contracting Activity, the agency will not entertain a protest to the Procurement Executive.

##### 914.408-2 Award of classified contracts.

DOE regulations regarding the safeguarding of restricted data and procedures for its destruction are contained at 10 CFR Part 795.

#### Subpart 914.5—Two-Step Formal Advertising

##### 914.502 Conditions for use.

(c) Use of the two-step formal advertising method shall be approved by the Head of Contracting Activity. The contracting officer shall submit a written request for approval justifying its use in accordance with FAR 14.502.

### PART 915—CONTRACTING BY NEGOTIATION

#### Subpart 915.1—General Requirements for Negotiation

Sec.

915.105 Competition.

#### Subpart 915.2—Negotiation Authorities

915.200 Scope of subpart.

915.201 National emergency.

915.204 Personal or professional services.

915.213 Technical equipment requiring standardization and interchangeability of parts.

915.215 Otherwise authorized by law.

#### Subpart 915.3—Determinations and Findings to Justify Negotiation

915.307 Signatory authority.

#### Subpart 915.4—Solicitation and Receipt of Proposals and Quotations

915.401 Applicability.

915.405-1 General.

915.406-5 Part IV Representations and instructions.

915.413 Disclosure and use of information before award.

915.413-2 Alternate II.

#### Subpart 915.5—Unsolicited Proposals

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- 915.1002 Debriefing of unsuccessful offerors.
- Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### Subpart 915.1—General Requirements for Negotiation

##### 915.105 Competition.

(a)(1) Negotiated acquisition shall be on a competitive basis to the maximum practical extent (FAR 15.105) and reasonable competition shall be

obtained in making small purchases in excess of \$1,000 (FAR 13.106). There are, however, circumstances where one source (or group of sources) has exclusive capability to perform the work within the time required and at reasonable prices; e.g., by reason of experience, specialized facilities, or technical competence. In such circumstances, the initiating program office may conclude that only one source (or group of sources) is qualified to perform the work and, therefore, may recommend that a contract be negotiated only with that source or group. (In the case of a "group sole source" situation, a justification is required for limiting competition to that group and for the allocation of work among members of the group.) The recommendation, in writing, shall be contained in a separate document entitled, "Justification for Noncompetitive Acquisition," and shall examine the reasons for the acquisition being noncompetitive in accordance with paragraph (c) below.

(2) For a noncompetitive acquisition, a recommended justification shall be attached to the acquisition request when the request is sent to a contracting officer for action.

(3) A justification for noncompetitive acquisition is also required where "new" acquisitions (i.e., outside the contractual scope of work) are initiated through modifications to existing contracts.

(4) If a noncompetitive acquisition has been justified and approved, in accordance with this section, as part of an annual acquisition plan and such plan has been reviewed and approved, it will not be necessary to resubmit the justification for approval at the time each individual acquisition action is processed. Such justifications shall be made a part of the permanent contract file (see subpart 904.8 and FAR subpart 4.8).

(b) The provisions of this regulation do not apply to:

(1) Acquisitions of electric power or energy, gas (natural or manufactured), water or other utility services;

(2) Acquisitions of educational services from nonprofit institutions;

(3) Acquisitions resulting from program opportunity notices, or program research and development announcements (which are forms of competitive solicitations);

(4) Acquisitions from or through other Government agencies;

(5) Contracts which are subject to separate justification for recompensation or extension;

(6) Contracts resulting from unsolicited proposals (because they are

subject to the approval procedures for justifications for unsolicited proposals);

(7) Special Research Contracts with educational institutions and extensions thereof (because they are subject to the separate process for SRCs); and

(8) Subscriptions to periodicals (within the small purchase limitations).

(c)(1) The justification for noncompetitive acquisition shall examine the reasons for the acquisition being noncompetitive and shall contain, in the first sentence of the document, an appropriate recommendation (e.g., "I recommend that negotiations be conducted only with (name of entity) for the supplies and services described herein.") For small purchases the justification for noncompetitive acquisitions should be in accordance with small purchase procedures.

(2) Each justification shall set forth enough facts and circumstances to clearly and convincingly establish that competition would not have been feasible or practicable. Procedural guidance is provided in DOE Order 4200.1.

#### Subpart 915.2—Negotiation Authorities

##### 915.200 Scope of subpart.

(b) Section 302(c) of the Federal Property and Administrative Services Act of 1949, as amended, authorizes the negotiation of contracts, and is applicable to AEC (now DOE) acquisitions. Section 302(c)(15) of the Federal Property and Administrative Services Act of 1949, as amended, permits negotiation when otherwise authorized by law, provided, that in such event the requirements of that Act shall apply. Accordingly, when the Federal Property and Administrative Services Act of 1949, as amended, or the Atomic Energy Act of 1954, as amended, or other law is used as the basis for negotiation, the requirements of section 304 of the Federal Property and Administration Services Act of 1949, as amended, are applicable, except as provided in these regulations.

##### 915.201 National emergency.

(a) Contracts to support industrial mobilization plans may be negotiated under section 302(c)(1) of the Federal Property and Administrative Services Act of 1949, as amended, or section 302(c)(15) of that Act and the Atomic Energy Act of 1954, as amended, if the requisite circumstances exist and the required findings and determinations can be made.



**915.204 Personal or professional services.**

(d) Formal advertising procedures shall not be used for contracts for architect-engineer or other professional engineering services. Such contracts may be negotiated under section 302(c)(4) of the Federal Property and Administrative Services Act of 1949, as amended, or section 302(c)(15) of that Act and the Atomic Energy Act of 1954, as amended. However, the exemption provided for in 915.903(d)(1)(ii) does not apply to contracts negotiated under section 302(c)(4) of the Federal Property and Administrative Services Act of 1949, as amended. Professional architect-engineer services shall be negotiated in accordance with Subpart 936.6 and FAR Subpart 36.6.

(e) Surveying, mapping, and field or laboratory tests of construction workmanship and materials and equipment should be classified as professional services when they clearly require planning, direction, supervision, and interpretation by professional engineers as a condition of performance, or when the contractor will be required to assume responsibility for the professional adequacy and accuracy of results. Depending upon the nature and requirements of a particular contract professional engineering services may involve activities such as the following:

- (1) Overall direction of the technical work;
- (2) Supervision of work performed by technicians, sub-professionals, or nonprofessional employees;
- (3) Determination of the methods or procedures for accomplishing the requirements of the contract;
- (4) Interpretation of the methods or procedures for accomplishing the requirements of the contract; and
- (5) Direct performance of required professional services.

(f) When the services are such that the planning and execution can be performed by personnel having only a practical knowledge of the use of instruments and techniques, such as routine aerial photography and testing, and do not require any professional engineering competence or judgment, the "personal or professional services" exception to the formal advertising requirement is not applicable.

(g) In 1959, the American Society of Civil Engineers (ASCE) adopted a policy statement that land surveying, engineering surveying, geodetic surveying, and cartographic surveying, commonly designated as surveying and mapping, are a part of the civil engineering profession. The report of the ASCE Task Committee on Status of Surveying and Mapping may be used for guidance in determining which positions

should be considered as professional and which should be considered subprofessional.

**915.213 Technical equipment requiring standardization and interchangeability of parts.**

If section 302(c)(13) of the Federal Property and Administrative Services Act of 1949, as amended, and the Atomic Energy Act of 1954, as amended, are used as the basis of negotiation, determinations and findings shall state the authority for negotiations.

**915.215 Otherwise authorized by law.**

(a)(3) The Atomic Energy Act of 1954, as amended, and the Atomic Energy Community Act of 1955, as amended, contain various exemptions from section 3709 of the Revised Statutes, as amended. Pursuant to section 310 of the Federal Property and Administrative Services Act of 1949, as amended, these references to section 3709 shall be construed to authorize acquisition pursuant to section 302(c)(15) of the Federal Property and Administrative Service Act of 1949, as amended, without regard to the advertising requirements of section 302(c) and 303 of the Act. The situations enumerated in FAR 15.201 through 15.215 are illustrative of situations which could support a determination and finding under the Atomic Energy Act of 1954, as amended, that advertising is not reasonably practicable or, as appropriate, that negotiation is necessary in the interest of common defense and security.

(4) The Atomic Energy Act of 1954, as amended, also provides in section 162 that the President may, in advance, exempt any specific action of the Department of Energy in a particular matter carried out under the authority of the Atomic Energy Act of 1954, as amended, from the provisions of law relating to contracts whenever he determines that such action is essential in the interest of common defense and security.

(5) Every contract negotiated under the authority of section 302(c)(15) of the Federal Property and Administrative Services Act of 1949, as amended, and the Atomic Energy Act of 1954, as amended, shall be supported by a determination and finding justifying use of such authority.

**Subpart 915.3—Determinations and Findings to Justify Negotiation****915.307 Signatory Authority.**

Determinations and findings supporting negotiation under the authority of the Federal Property and Administrative Services Act of 1949,

section 302(c)(11) (FAR 15.211), with respect to contracts which will not require the expenditure of more than \$25,000 may be executed by the Procurement Executive. Determinations and findings for contracts in excess of \$25,000 negotiated pursuant to section 302(c)(11), and in support of all contracts negotiated pursuant to sections 302(c)(12) and 302(c)(13) of the Federal Property and Administrative Services Act of 1949, as amended (FAR 15.211, 15.212 and 15.213) shall be executed by the Head of the Agency.

**Subpart 915.4—Solicitation and Receipt of Proposals and Quotations****915.401 Applicability.**

In addition to the exclusions included at FAR 15.401, FAR 15.4 is not applicable to Special Research Contracts (See 917.71), Program Opportunity Notices (See 917.72), or Program Research and Development Announcements (See 917.73).

**915.405-1 General.**

Approval for the use of solicitation for information or planning purposes shall be obtained from the Head of the Contracting Activity.

**915.406-5 Part IV Representations and Instructions.**

(a) *Section K, Representations, certifications and other statements of offerors or quoters.* (1) To minimize the paperwork burden imposed by the repetitious submission of contract representations and certifications with each bid or proposal submitted, DOE contracting activities may permit a repetitious bidder or offeror the optional use of simplified representations and certifications, provided acceptable comprehensive representations and certifications have been submitted to the DOE contracting activity within three years of the anticipated contract award date and are currently on file with the awarding activity. Bidders and offerors shall, through use of the simplified representations and certifications only be asked to furnish with each bid or proposal a certification that the previously filed record copy remains current, or indicate any change relative to the individual submission, along with certain minimal information such as type of organization and whether the bidder or offeror is a small, small/disadvantaged, or women-owned small business concern and whether the work will be performed in a labor surplus area. Select additional representations and certifications may also be required depending on the nature of the individual acquisition. These additional



representations and certifications, such as "Organizational Conflicts of Interest Disclosure or Representation" and "Cost Accounting Standards Notices and Certification" shall be separately identified in Section K of the uniform contract format when they are required. (also see (a)(5) below)

(2) Use of the optional simplified representations and certifications is predicated upon the single submission of an acceptable comprehensive representations and certifications rather than the repetitive submission of these items with each bid or proposal. It is required, therefore, that any comprehensive representations and certifications submitted by a potential contractor in anticipation of using the simplified approach be evaluated by the contracting activity based upon the statutory and/or regulatory requirements which mandate the various representations and certifications. The submitter also should be advised of the submissions acceptability, thus permitting use of the simplified representations and certifications. When utilizing the optional simplified representations and certifications, bidders or offerors shall be advised of the need to identify any individual items that may differ from their comprehensive representations and certifications which are on record. Obvious, unintentional errors should be treated as minor informalities whenever possible. Each contracting activity permitting use of the simplified approach shall establish internal procedures to maintain control of comprehensive submittals submitted by an offeror or bidder in support of the simplified approach and to assure notification to the submitter or their acceptance or rejection.

(3) The following format illustrates a simplified representations and certifications approach which may be used if the contracting activity permits use of simplified representations and certifications.

#### Representations and Certifications

(1) The bidder/offeror certifies:  
(a) It is ( ) a Corporation, incorporated in the state of \_\_\_\_\_; ( ) an individual; ( ) a partnership; ( ) a nonprofit or educational institution; ( ) a state or local government; and,

(b) It is ( ), is not ( ), a small business ( ), a small and disadvantaged business ( ), a women-owned small business ( ), a labor surplus area concern ( ).

(c) Its Data Universal Numbering System (DUNS) establishment number is:

(2) The offeror/bidder represents that the following persons are authorized to communicate on its behalf with the Government in connection with this

solicitation: list names and telephone numbers of appropriate personnel.

Phone \_\_\_\_\_  
Name \_\_\_\_\_

(3) The offer/bidder (check (i) or (iii)):  
(i) ( ) Certifies that the comprehensive representations and certifications submitted to the DOE (insert appropriate DOD contracting activity) on (insert date) remain current and accurate with respect to this bid or proposal submitted in response to solicitation (insert number) dated (insert date) except as amended hereby.

(ii) ( ) certifies the following specific representations and certifications differ from the disclosures previously filed: (list any differences); and revised representation and certification are therefore submitted.

(iii) ( ) acknowledges a comprehensive representations and certifications has not previously been placed on record with the contracting activity and such a comprehensive representations and certifications data package is completed and being submitted with respect to this bid or proposal in response to solicitation no. \_\_\_\_\_ dated \_\_\_\_\_.

(4) By signing below, the bidder/offeror certifies that the representations and certifications are accurate, current and complete. The bidder/offeror further certifies that it will notify the contracting activity of any changes affecting a comprehensive representations and certifications if one has been placed on records.

Solicitation Number \_\_\_\_\_  
Signature \_\_\_\_\_  
Date \_\_\_\_\_  
Type Name \_\_\_\_\_  
Title and \_\_\_\_\_  
Address \_\_\_\_\_

(4) The following is a comprehensive listing by topic with source citation of the representations and certifications which are required to be submitted with individual bids or proposals and which must be filed with an accepted by the DOE contracting activity to allow use of the simplified representations and certifications described at 915.406-5(a)(3).

#### Comprehensive Representations and Certifications

(i) Certificate of Independent Price Determination FAR 52.203-2

(ii) Contingent Fee Representation and Agreement FAR 52.203-4

(iii) Type of Business Organization-Formal Advertising (Negotiation) FAR 52.214-2 (FAR 52.215-6)

(iv) Parent Company and Identifying Data FAR 52.214-8

(v) Place of Performance-Formal Advertising (Negotiation) FAR 52.214-14 (FAR 52.215-20)

(vi) Small Business Concern Representation FAR 52.219-1

(vii) Small Disadvantaged Business Concern Representation FAR 52.219-2

(viii) Women-Owned Small Business Concern Representation FAR 52.219-3

(ix) Walsh-Healey Public Contracts Act Representation FAR 52.222-19 (need be completed only for contracts for the manufacture or furnishing of supplies to be performed in the United States and which exceed \$10,000).

(x) Certification of Nonsegregated Facilities FAR 52.222-21

(xi) Previous Contracts and Compliance Reports FAR 52.222-22.

(xii) Affirmative Action Compliance FAR 52.222-25 (not applicable to construction contracts)

(xiii) Clean Air and Water Certification FAR 52.223-1

(xiv) Buy American Certificate FAR 52.225-1

(5) Additional representations and certifications which may be required, depending on the nature of the acquisition, are listed by topic and source below. Although they may be included in the single comprehensive submission, they may also be required for the simplified submission since they are unique to an instant solicitation.

(i) Foreign Ownership, Control, or Influence-Representation.

(ii) Jewel Bearings and Related Items Certificate FAR 52.208-2.

(iii) Organizational Conflicts of Interest Disclosure Representation 952.209-70

(iv) Preference for Labor Surplus Area Concerns FAR 52.220-1

(v) Recovered Material Certification FAR 52.223-4

(vi) Balance of Payments Program Certificate FAR 52.225-6

(vii) Cost Accounting Standards Notices and Certification FAR 52.230-1, or FAR 52.230-2

(viii) Permits, Authorities and Franchises FAR 52.247-2

(ix) Technical Data Certification 952.227-80

(x) Royalty Payments Certification 952.227-81

(b) Section L Instructions, Conditions and Notices to offerors and quoters. A proposal may include technical data and other data, including trade secrets and privileged or confidential commercial or financial information, which the proposer does not want disclosed to the public or used by the Government for any purposes other than proposal evaluation. Procedures for handling and protecting such data and information are discussed at 927.402-3(d)(2).

(d) Insert the notice at 952.215-70 in solicitations if the resulting contract will contain any of the clauses referenced therein.



**915.413 Disclosure and use of information before award.****915.413-2 Alternate II.**

The procedures discussed at FAR 15.413-2 may be used if approved at a level above the contracting officer. See also 927.70.

**Subpart 915.5—Unsolicited Proposals****915.501 Definitions.**

"Notice of program interest" means a method by which broad general technical problem areas needing investigation are published in order to stimulate the flow of unsolicited proposals. The notice describes problems, not desired solutions.

"Project officer" means the individual designated by the responsible official, or designee, having responsibility for the unsolicited proposal.

"Receiving office" means the office designated as the central control point for the receipt, distribution, accountability, and status reporting of unsolicited proposal.

"Responsible official" means the Senior Program Official or the head of the staff office within whose area of responsibility the work contemplated by the unsolicited proposal falls.

**915.502 Policy.**

(a) Present and future needs demand the involvement of all resources in exploring alternative energy sources and technologies. To achieve this objective, it is DOE policy to encourage external sources of unique innovative methods, approaches, and ideas by stressing submission of unsolicited proposals for government support. In furtherance of this policy and to ensure the integrity of the acquisition process through application of reasonable controls, the DOE:

(i) Disseminates information on areas of broad technical concern whose solutions are considered relevant to the accomplishment of DOE's assigned mission areas;

(ii) Encourages potential proposers to consult with program personnel before expending resources in the development of written unsolicited proposals;

(iii) Endeavors to distribute unsolicited proposals to all interested organizations within DOE;

(iv) Processes unsolicited proposals in an expeditious manner and, where practicable, keep proposers advised as discrete decisions are made;

(v) Assures that each proposal is evaluated in a fair and objective manner; and,

(vi) Assures that each proposal will be used only for its intended purpose and the information contained therein will

not be divulged without prior permission of the proposer.

(b) Extensions of contract work resulting from unsolicited proposals shall be processed in accordance with the procedures at 943.107.

**915.503 General.**

(c)(5) When the DOE receives a document for a commercial demonstration which might otherwise qualify as an unsolicited proposal, but its substance is generally known and may be obtained without restriction by formal competitive solicitation or program opportunity notice, or its substance closely resembles that of a pending formal competitive solicitation or program opportunity notice, the DOE's policy of obtaining competition applies.

(f) Unsolicited proposals for the performance of support services are, except as discussed in this paragraph, unacceptable as the performance of such services is unlikely to necessitate innovative or unique concepts. There may be rare instances in which an unsolicited proposal offers an innovative or unique approach to the accomplishment of a support service. If such a proposal offers a previously unknown or an alternative approach to generally recognized techniques for the accomplishment of a specific service(s) and such approach will provide significantly greater economy or enhanced quality, it may be considered for acceptance. Such acceptance shall, however, require approval of the acquisition of support services in accordance with applicable DOE Directives and be processed as a deviation to the prohibition herein in accordance with Subpart 901.4.

**915.504 Advance guidance.**

(b)(6) A notice of program interest can be used to provide notification of areas of DOE interest and to stimulate the flow of unsolicited proposals. Each program office should publish periodically a listing of broad, general, technical problems and areas needing investigation using the following guidelines.

(i) The notice shall be coordinated in advance with the head of the contracting office that will be expected to award any contracts which may result from the notice, so that advance preparations can be made for processing proposals in accordance 915.506 and to assure that some form of competitive solicitation, e.g. a program research and development or request for proposal, is not possible.

(ii) Concurrence shall be obtained from the appropriate procurement

Advisor in the Office of Procurement Support, Headquarters when it is not possible to identify which contracting office(s) will make possible award(s).

(iii) The notice should contain, but need not be limited to, the following information:

(A) A number assigned by the program office for control and reference purposes;

(B) A brief description of the board, general, technical program or areas needing investigation (generally 50 words or less).

(C) Restrictions, if any, as to who may submit proposals.

(D) A contact (name and telephone number) within the program office or divisions, where additional information may be obtained.

(E) An expiration date, as needed. An expiration date for a Notice of Program Interest is not to be considered a formal due date or common cut-off date for the submission or receipt of unsolicited proposals as is associated with formal solicitations. Rather the expiration date is an approximation of the time after which program interests or directions may be expected to change less the necessary administrative time that will be needed for the evaluation and possible award of contracts resulting from the notice.

(F) A statement that DOE reserves the right to support or not to support any or all proposals in whole or in part.

(G) A statement that DOE assumes no responsibility for any costs associated with specific proposal preparation.

(H) The number of proposal copies required and address of the receiving office to which proposals should be mailed.

(I) A reference that detailed information concerning contracting policy and procedures is contained in the DEAR, copies of which are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(iv) The notice content should be consolidated at the responsible office level and should be in the format that best reflects the needs of that specific office; e.g., letter, booklet, bulletin, or related documents and coordinated in advance with the Unsolicited Proposal Management Officer identified at 915.506(b).

(v) The notice should be given wide distribution including mailings to industry associations, including small business associations, schools, colleges and universities, appropriate professional and scientific journals, other DOE offices, as well as individual's



and organizations that request copies on a one-time basis.

(vi) Copies of the notice shall be given to the Unsolicited Proposal Management Officer identified at 915.506(b).

#### 915.505 Content of unsolicited proposals.

(b)(5) Unsolicited proposals for nonnuclear energy demonstration activities not covered by existing formal competitive solicitations or program opportunity notices should contain information along the lines of the information requirements at 917.7201-5. They may include a request for federal assistance or participation, and shall be subject to the cost sharing provisions of 917.70.

#### 915.506 Agency procedures.

(b) Unless otherwise specified in a notice of program interest, all unsolicited proposals should be submitted to the Procurement and Assistance Management Directorate, U.S. DOE, Attn: Unsolicited Proposals Management Officer, MA432, Washington, D.C. 20585. If the proposer has ascertained the cognizant program office through preliminary contacts with program staff, the proposal may be submitted directly to that office. In such instances, the proposer should separately send a copy of the proposal cover letter to the Unsolicited Proposal Management Officer to assure that the proposal is logged in the Department's automated tracking system for unsolicited proposals.

#### 915.506-1 Receipt and initial review.

(b) The DOE receiving office shall acknowledge receipt of an unsolicited proposal, complete a preliminary review, and establish accountability. It will send copies of the unsolicited proposal to the responsible official(s). Each unsolicited proposal that is circulated for a comprehensive evaluation shall have an agency control number and legend attached or imprinted on it by the receiving office identifying it as an unsolicited proposal and stating that it shall be used only for purposes of evaluation.

#### 915.506-2 Evaluation.

(a) The responsible official is responsible for assignment of a project officer and such personnel as may be necessary to evaluate the proposal fairly and objectively. In some instances the responsible official may find it advantageous to subject the proposal to external rather than internal evaluation. In such cases, the prior written permission of the proposer shall be obtained. Proposals for demonstration projects will be evaluated in accordance

with the Federal support criteria set forth in 917.7203.3 (a) through (h) and the evaluation criteria set forth in 917.7204(c).

(1) The submission of innovative methods, approaches, or ideas is not restricted to those problems or technical areas published in a DOE notice of program interest.

(c) If, after evaluation, it is decided that a proposal will not be supported, it is the responsibility of:

(1) The project officer to prepare a written statement setting forth the basis for rejection of the unsolicited proposal, submit one copy to the responsible official and retain one copy in the permanent file.

(2) The responsible official to prepare a letter to the proposer with copies to the receiving office and the project officer.

(d) If the decision is to support a proposal, a written justification is required which shall address each of the evaluation factors contained in FAR 15.506-2. The justification shall be appended to the procurement request.

(e) Unsolicited proposal justifications shall contain a recommendation, concurrence (when needed), and approval as follows: (In the case of cost shared contracts, review levels shall be based on the sum of the contractor and Government shares.)

(1) The recommendation shall be prepared and reviewed within the initiating office at such levels as are deemed appropriate by the Senior Program Official for acquisitions initiated by the Headquarters or by the Head of the Contracting Activity for field initiated acquisitions. In establishing levels for the review of such recommendations, the Senior Program Official or Head of the Contracting Activity shall assure that the recommendation is reviewed at a senior organizational level in order to assure that competition is sought when appropriate. See FAR 15.507 and 15.508.

(2) The more complex and costly transactions will benefit from early coordination with counsel. Justifications exceeding \$1,000,000, or such lower level as counsel may determine, shall be submitted by the initiator to counsel, at the Headquarters or field location of the initiator, for concurrence prior to forwarding to the contracting officer.

(3) The justification, following review of the recommendation and concurrence of counsel (if required or considered appropriate), shall be forwarded to the cognizant contracting officer for approval. If the justification is acceptable to the cognizant contracting officer, final approval shall be sought at such level as the Head of the

Contracting Activity may require. In specifying the level for final approval, the Head of the Contracting Activity shall require final approval at a level above contracting officer as required by FAR 15.105(c). The Head of the Contracting Activity shall further assure that the official designated as the reviewing official is a contracting officer.

(g) Notwithstanding the decision to accept an unsolicited proposal, organizations and individuals are subject to the policies concerning the responsibility of prospective contractors set forth in 909.1 and FAR 9.1.

#### 915.507 Contracting methods.

(d) Subpart 917.70, which outlines DOE's cost participation policy, shall be followed in determining the extent to which the DOE will participate in the cost for the proposed effort.

#### 915.509 Limited use of data.

(a) An unsolicited proposal may include technical data and other data, including trade secrets and privileged or confidential commercial or financial information, which the proposer does not want disclosed to the public or used by the Government for any purpose other than proposal evaluation. Procedures for handling and protecting such data and information are set forth at 927.402-3(d)(3).

#### Subpart 915.6—Source Selection

#### 915.610 Written or oral discussions.

(c) The contracting officer shall point out to each offeror within the competitive range any ambiguities or uncertainties in its proposal. For research, development, and demonstration contracts, the discussions are intended to assist the Source Evaluation Board (SEB) in understanding fully the proposals and their strengths and weaknesses based upon the individual efforts of each proposer, in assuring that the meanings and points of emphasis of solicitation provisions have been adequately conveyed to the offerors so that all offerors are competing equally on the basis intended by the Government, and in evaluating the qualifications of the personnel proposed by each firm. Where the proposed award is not for research, development, or demonstration, (e.g., supplies and services) the contracting officer should point out instances in which aspects of a proposal contain a weakness in relation to the Government's requirements.



**915.612 Formal source selection.**

(a) Negotiated competitive acquisitions of \$5 million or less are not subject to the SEB Handbook unless specifically required by the Procurement Executive. For acquisitions under \$5 million, less formal procedures are used. For acquisitions under \$5 million, but more than \$1 million, source evaluation panels may be established. These panels may follow the policies and procedures set forth in the SEB Handbook as a guide. For acquisitions under \$1 million, less formal source evaluation and selection procedures shall be used.

(b) The contracting officer may form teams to evaluate the technical, business and management, and cost aspects of proposals. When teams are used, each will function independently of the other and report its findings to the contracting officer. The contracting officer will discuss those findings with the teams (or representatives thereof) separately or together, as may be more helpful. The contracting officer will negotiate and execute the contractual instrument, using, in many cases, some of the same specialists who participated in earlier evaluations and discussions. Part 971 sets forth administrative requirements for the review and approval of certain contract actions.

(c) In selections other than where price is the determining factor, the evaluation procedures set forth in (c) (1), (2), and (3) below should be considered.

(1) *Technical evaluation.* Generally, the contracting officer must rely on scientific and engineering personnel for assistance in reviewing proposals from a technical point of view. It is imperative, therefore, that technical evaluations and findings be fully documented and reviewed by responsible personnel. The report shall reflect the scoring and ranking of the proposals. The report shall also include a narrative evaluation specifying the strengths and weaknesses of each proposal, and any reservations or qualifications that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal shall be included. After evaluation and preparation of written and signed evaluation findings by the technical evaluators, such evaluations and proposals shall be returned to the contracting officer or authorized representative, and maintained as a permanent record in the contract file.

(2) *Business and management evaluation.* Management capabilities of the offeror to perform the required work in a timely manner must be appraised. In making this appraisal, the following

factors, as appropriate, and as stated in the solicitation must be considered: the company's management organization; past performance; reputation for reliability; availability of required facilities; cost controls; ability to control, maintain, and account for any property provided by the Government; the offeror's willingness to devote its resources to the proposed work with appropriate diligence; and other pertinent administrative and business information that may have been requested in the solicitation, such as certifications and representations.

(3) *Price/cost determinations.* Each proposal requires some form of price/cost analysis. The evaluation should consider items such as categories and amounts of labor, indirect costs, materials, travel, computer time, as well as information with regard to the contractor's past cost performance, including contracts or subcontracts for like services or supplies. The contracting officer must exercise judgment in determining the extent of analysis in each case and any desire to obtain assistance from personnel trained in this discipline.

(d) Personnel from the DOE, other Government agencies, consultants, and contractors including those who operate or manage Government-owned facilities may be used in the evaluation process as advisors when their services are necessary and available. When personnel outside the Government, including those of contractors who operate or manage Government-owned facilities, are used as advisors, approval and disclosure procedures as required by 927.7003 shall be followed. In all instances, such personnel will be required to comply with DOE conflict of interest regulations and nondisclosure of information requirements.

(e) The SEB procedures are intended to provide the Source Selection Official with sufficient information to select an offeror for negotiation on the basis of its proposal. However, it is within the discretion of the Source Selection Official to select multiple offerors from those within the competitive range for negotiation and to direct that discussions be reopened with those offerors and that best and final offers be obtained on the basis of fully definitized contract documents executed by the offerors. The contracting officer should seek correction of each offeror's correctable weaknesses using only technical and other information which the Government is entitled to use for this purpose. At the conclusion of discussions, a final common cut-off date which allows a reasonable opportunity for submission of best and final offers

shall be established and all participants notified.

(g) Except as provided in 915.612(e), revised proposals are evaluated, selection is made, and negotiations may be conducted with the selected offeror but only to definitize a final agreement on price, terms, and conditions, etc. (No factor which could have had any effect on the selection process may be changed after the common cut-off date for discussions).

**915.613 Alternative source selection procedures.**

Source Evaluation Board (SEB) procedures shall be used for all negotiated competitive prime acquisitions expected to exceed \$5 million, excepting acquisitions for architect-engineer services, and acquisitions specifically waived by the Procurement Executive. Guidance regarding the designation and operation of the SEB are set forth in the SEB Handbook.

**Subpart 915.8—Price Negotiation****915.801 Definitions.**

"Field Pricing Support" is synonymous with "pricing support" and within the Department of Energy means the advice provided the contracting officer by auditors, price or cost analysts, quality assurance personnel, engineers, program office personnel, small business, legal, financial or other specialists based on their review and analysis of a contractor's proposal notwithstanding their organizational location.

**915.804-2 Requiring certified cost or pricing data.**

(a) The certification requirements of FAR 15.804-2 need not be applied to cost-reimbursement contracts placed with educational institutions subject to the cost principles at FAR Subpart 31.3, or State, local or Federally recognized Indian Tribal governments subject to the cost principles at FAR Subpart 31.6.

**915.804-3 Exemptions from or waiver of submission of certified cost or pricing data.**

(b)(2)(iii) Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may approve the finding required by FAR 15.804-3(b)(2)(iii) that the lowest price received is unreasonable.

(c)(8) Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may approve the finding required by FAR 15.804-3(c)(8) that the price is unreasonable even though it is a catalog or market price.



(g) Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, authorize individual or class exemptions for exceptional cases in accordance with FAR 15.804-3(g).

(i) Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, waive the requirements for cost or pricing data under the circumstances set forth in FAR 15.804-3(i) provided that any such waivers are promptly reported to the Procurement Executive.

#### 915.804-6 Procedural requirements.

(e) Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, waive the requirements for cost or pricing data under the circumstances set forth in FAR 15.804-6(e) provided that any such waivers are promptly reported to the Procurement Executive.

(i) Heads of Contracting Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, waive the requirements for subcontractor cost or pricing data under the circumstances set forth in FAR 15.804-6(i), provided that any such waivers are promptly reported to the Procurement Executive.

#### 915.804-8 Contract clauses.

(a) The clause prescribed at FAR 52.215-22, Price Reduction For Defective Cost or Pricing Data, shall only be included in negotiated contracts where a Certificate of Current Cost or Pricing Data was obtained.

(b) The contracting officer shall, insert the clause at FAR 52.215-23, Price Reduction for Defective Cost or Pricing Data—Modifications, in solicitations and contracts when the clause prescribed in paragraph (a) above has not been included, unless the contractor will otherwise not be required to submit certified data pursuant to 915.804-2(a).

#### 915.804-70 Uncertified cost or pricing data.

Anytime an offeror or contractor is not required to submit certified cost or pricing data (proposals of \$500,000 or less) the contracting officer may require the offeror or contractor to submit uncertified cost or pricing data. The amount of data required to be submitted should be limited to that data necessary to allow the contracting officer to determine the reasonableness of the price.

#### 915.805-5 Field pricing support.

(a)(1) Field pricing reports as prescribed in FAR 15.805-5(a)(1) are not required for the negotiation of DOE contract prices or modifications thereof. The term "field pricing report" refers to the Department of Defense (DOD) system for obtaining a price and/or cost analysis report from a cognizant DOD field level contract management office wherein requests for the review of a proposal submitted by an offeror are initiated and the recommendations made by the various specialists of the management office are consolidated into a single report that is forwarded to the office making the contract award for use in conducting negotiations. In the DOE, such review activities, except for reviews performed by professional auditors, are expected to be accomplished by pricing support personnel located in DOE Contracting Activities. The DOE contracting officer shall formally request the assistance of appropriate pricing support personnel, other than auditors, for the review of any proposal that exceeds \$500,000, unless the contracting officer has sufficient data to determine the reasonableness of the proposed cost or price. Such pricing support may be requested for proposals below \$500,000, if considered necessary for the establishment of a reasonable pricing arrangement. Contracting officers, however, are not precluded by this section from requesting pricing assistance from a cognizant DOD contract management office, provided an appropriate cross-servicing arrangement for pricing support services exists between the DOE and the servicing agency.

(c)(1) When an audit is required pursuant to 915.805-70, "Audit as an aid in proposal analysis", the request for audit shall be sent directly to the Federal audit office assigned cognizance of the offeror or prospective contractor. A copy of each such request for audit, without enclosures, shall be forwarded to the Director, Audit Management Division, Office of Inspector General, Washington, D.C. When the cognizant agency is other than the Defense Contract Audit Agency or the Department of Health and Human Services, and an appropriate cross-servicing agreement has not been established, the need for audit assistance shall be coordinated with the Directorate of Procurement and Assistance Management, Office of Policy, Policy and Procedures Division.

(2) The request for audit shall establish the due date for receipt of the auditor's report and in so doing shall

allow as much time as possible for the auditor's review.

(e)(6) Copies of technical analysis reports prepared by DOE technical or other pricing support personnel shall not normally be provided to the auditor. The contracting officer or the supporting price, cost, or financial analyst at the contracting activity shall determine the monetary impact of the technical findings.

#### 915.805-70 Audit as an aid in proposal analysis.

(a) Auditors are professional accountants who, although organizationally independent, are the principal advisors to contracting officers on contractor accounting and cost matters.

(b) Audit as an aid in the negotiation of price or cost arrangements in DOE contract awards shall be utilized as provided by this subsection.

(c) Preaward audit services include:

(1) The submission of an auditor's report which sets forth the results of the review and analysis of cost data submitted by offerors as part of their pricing proposals, reviews of contractor's accounting systems, recorded contract costs, and financial condition other related matters; and

(2) Personal consultation and advice regarding the use of the auditor's report in the negotiation and award of a contractual instrument.

(d) When a contract price will be based on cost or pricing data (FAR 15.804) submitted by the offerors, the DOE contracting officer or authorized representative shall request a review by the cognizant Federal audit activity prior to the negotiation of any contract or modification including modifications under advertised contracts in excess of:

(1) \$500,000 for a firm fixed-price contract or a fixed-price contract with economic price adjustment provisions; or

(2) \$1,000,000 for all other contract types, including initial prices, estimated costs of cost-reimbursement contracts, interim and final price redeterminations, and target and settlement of incentive contracts.

(e) The requirement for auditor reviews of proposals which exceed the thresholds specified in paragraph (d) above may be waived at a level above the contracting officer when the reasonableness of the negotiated contract price can be determined from information already available. The contract file shall be documented to reflect the reason for any such waiver, provided, however, that independent Government estimates of cost or price



shall not be used as the sole justification for any such waiver.

(f) Ordinarily, preaward reviews by an auditor should not be requested for actions below the thresholds specified in paragraph (d) of this section. Before requesting such audits, the contracting officer should consider using recent audit reports, price negotiation memorandums, or other pertinent information regarding the offeror to establish the reasonableness of proposed price. However, auditor reviews should be considered for proposals below the specified thresholds when the contracting officer determines that:

- (1) The available data is inadequate for determining the reasonableness of the contractor's cost proposal;
- (2) The contractor's estimating, accounting, or purchasing methods are not reliable; or
- (3) The best interest of the Government will be served by an audit review, after giving consideration to the cost of the audit, type of audit and value of the proposed contract amount.

#### 915.903 Price negotiation memorandum.

(b) Whenever an audit review was requested and a report was obtained, the contracting officer shall inform the cognizant audit activity of the disposition of each audit finding and recommendation by either forwarding a copy of the price negotiation memorandum to the auditor; or by advising the auditor, in writing, if an award was cancelled or not made to the audited entity; whichever is applicable.

### Subpart 915.9—Profit

#### 915.903 Contracting officer responsibilities.

(d)(1)(ii) The statutory limitations on profit and fees as set forth in FAR 15.903(d)(1) (i), (ii) and (iii) shall be followed, except as exempted for DOE architect-engineer contracts covering Atomic Energy Commission (AEC) and Bonneville Power Administration (BPA) functions. Pursuant to section 602(d) (13) and (20) of the Federal Property and Administration Services Act of 1949, as amended, those former AEC functions, as well as those of the BPA, now being performed by DOE are exempt from the 10 and 6 per centum cost and fee restrictions on contracts for architect-engineer services.

(d)(2) Waivers to apply the maximum cost-plus-award-fee percentage in 915.972(a)(3) in those situations that shall result in potential fees exceeding the limitations cited in FAR 15.903(d)(1) (i), (ii), and (iii) shall be forwarded to the Procurement Executive.

(f) In cases where a change or modification calls for substantially different work than the basic contract, the contractor's effort may be radically changed and a detailed analysis of the profit factors would be a necessity. Also, if the dollar amount of the change or contract modification is very significant in comparison to the contract dollar amount, a detailed analysis should be made.

(g) The estimated costs on which the maximum fee is computed pursuant to the statutory limitations set forth in FAR 15.903(d)(1) shall include facilities capital cost of money when this cost is included in cost estimates.

#### 915.905 Profit-analysis factors.

A profit/fee analysis technique designed for a systematic application of the profit factors in FAR 15.905-1 provides contracting officers with an approach that will ensure consistent consideration of the relative value of the various factors in the establishment of a profit objective and the conduct of negotiations for a contract award. It also provides a basis for documentation of this objective, including an explanation of any significant departure from it in reaching a final agreement. The contracting officer's analysis of these prescribed factors is based on information available prior to negotiations. Such information is furnished in proposals, audit data, performance reports, preaward surveys and the like.

#### 915.970 DOE structured profit and fee system.

This section implements FAR 15.902 and 15.905.

##### 915.970-1 General.

(a) *Objective.* It is the intent of DOE to remunerate contractors for financial and other risks which they may assume, resources they use, and organization, performance and management capabilities they employ. Profit or fee shall be negotiated for this purpose; however, when profit or fee is determined as a separate element of the contract price, the aim of negotiation should be to fit it to the acquisition, giving due weight to effort, risk, facilities investment, and special factors as set forth in this subpart.

(b) *Commercial (profit) organization.* Profit or fee prenegotiation objectives for contracts with commercial (profit) organizations shall be determined as provided in this subpart.

(c) *Nonprofit organizations.* It is DOE's general policy to pay fees in contracts with nonprofit organizations other than educational institutions and

governmental bodies; however, it is a matter of negotiation whether a fee will be paid in a given case. In making this decision, the DOE negotiating official should consider whether the contractor is ordinarily paid fees for the type of work involved. The profit objective should be reasonable in relation to the task to be performed and the requirements placed on the contractor.

(d) *Educational institutions.* It is DOE policy not to pay fees under contracts with educational institutions.

(e) *State, local and Indian tribal governments.* Profit or fee shall not be paid under contracts with State, local, and Indian tribal Governments.

##### 915.970-2 Weighted guidelines system.

(a) To properly reflect differences among contracts and the circumstances relating thereto and to select an appropriate relative profit/fee in consideration of these differences and circumstances, weightings have been developed for application by the contracting officer to standard measurement bases representative of the prescribed profit factors cited in FAR 15.905 and paragraph (d) of this section. This is a structured system, referred to as weighted guidelines. Each profit factor or subfactor, or component thereof, has been assigned weights relative to their value to the contract's overall effort. The range of weights to be applied to each profit factor is also set forth in paragraph (d) of this section. Guidance on how to apply the weighted guidelines is set forth in 915.970-8.

(b) Except as set forth in 915.970-4, the weighted guidelines shall be used in establishing the profit objective for negotiation of contracts where cost analysis is performed.

(c) The negotiation process does not contemplate or require agreement on either estimated cost elements or profit elements. Accordingly, although the details of analysis and evaluation may be discussed in the fact-finding phase of the negotiation process in order to develop a mutual understanding of the logic of the respective positions, specific agreement on the exact weights of values of the individual profit factors is not required and need not be attempted.

(d) The factors set forth below are to be used in determining DOE profit objectives. The factors and weight ranges for each factor shall be used in all instances where the weighted guidelines are applied.



| Profit factors                                                                                | Weight ranges (percent) |
|-----------------------------------------------------------------------------------------------|-------------------------|
| I. Contractor Effort (Weights applied to cost):                                               |                         |
| A. Material acquisitions:                                                                     |                         |
| 1. Purchased parts.....                                                                       | 1 to 3.                 |
| 2. Subcontracted items.....                                                                   | 1 to 4.                 |
| 3. Other materials.....                                                                       | 1 to 3.                 |
| B. Labor skills:                                                                              |                         |
| 1. Technical and managerial:                                                                  |                         |
| a. Scientific.....                                                                            | 10 to 20.               |
| b. Project management/administration.....                                                     | 8 to 20.                |
| c. Engineering.....                                                                           | 8 to 14.                |
| 2. Manufacturing.....                                                                         | 4 to 8.                 |
| 3. Support services.....                                                                      | 4 to 14.                |
| C. Overhead:                                                                                  |                         |
| 1. Technical and managerial.....                                                              | 5 to 8.                 |
| 2. Manufacturing.....                                                                         | 3 to 6.                 |
| 3. Support services.....                                                                      | 3 to 7.                 |
| D. Other direct costs.....                                                                    | 3 to 8.                 |
| E. G&A (General Management) expenses.....                                                     | 5 to 7.                 |
| II. Contract Risk (type of contract—weights applied to total cost of items IA thru E).        | 0 to 8.                 |
| III. Capital Investment (Weights applied to the net book value of allocable facilities).      | 5 to 20.                |
| IV. Independent Research and Development:                                                     |                         |
| A. Investment in IR&D program (Weights applied to allocable IR&D costs).                      | 5 to 7.                 |
| B. Developed items employed (Weights applied to total of profit \$ for items IA thru E).      | 0 to 20.                |
| V. Special Program Participation (Weights applied to total of Profit \$ for items IA thru E). | -5 to +5.               |
| VI. Other Considerations (Weights applied to total of Profit \$ for items IA thru E).         | -5 to +5.               |
| VII. Productivity/Performance (special computation).                                          | (N/A)                   |

#### 915.970-3 Documentation.

Determination of the profit or fee objective, in accordance with this subpart shall be fully documented. A worksheet, DOE Form F 4220.23 has been developed to assist the contracting officer in this effort. Since the profit objective is the contracting officer's pre-negotiation evaluation of a total profit allowance for the proposed contract, the amounts developed for each category of cost will probably change in the course of negotiation. Furthermore, the negotiated amounts will probably vary from the objective and from the pre-negotiation detailed application of the weighted guidelines technique to each element of the contractor's input to total performance. Since the profit objective is viewed as a whole rather than as its component parts, insignificant variations from the pre-negotiation profit objective, as a result of changes to the contractor's input to total performance, need not be documented in detail. Conversely, significant deviations from the profit objective necessary to reach a final agreement on profit or fee shall be explained in the price negotiation memorandum prepared in accordance with FAR 15.808.

#### 915.970-4 Exceptions.

(a) For contracts not expected to exceed \$500,000, the weighted guidelines need not be used; however, the contracting officer may use the weighted guidelines for contracts below this amount if he or she elects to do so.

(b) For the following classes of contracts, the weighted guidelines shall not be used:

- (1) Commercialization and demonstration type contracts;
- (2) Management and operating contracts;
- (3) Construction contracts;
- (4) Construction management contracts;
- (5) Contracts primarily requiring delivery of material supplied by subcontractors;
- (6) Termination settlements; and
- (7) Contracts with educational institutions.

(c) In addition to paragraphs (a) and (b) above, the contracting officer need not use the weighted guidelines in unusual pricing situations where the weighted guidelines method has been determined by the DOE negotiating official to be unsuitable. Such exceptions shall be justified in writing and shall be authorized by the Head of the Contracting Activity. The contract file shall include this documentation and any other information that may support the exception.

(d) If the contracting officer makes a written determination that the pricing situation meets any of the circumstances set forth above, other methods for establishing the profit objective may be used. For contracts other than those subject to Subpart 917.6, the selected method shall be supported in a manner similar to that used in the weighted guidelines (profit factor breakdown and documentation of profit objectives); however, investment or other factors that would not be applicable to the contract shall be excluded from the profit objective determination. It is intended that the methods will result in profit objectives for noncapital intensive contracts that are below those generally developed for capital intensive contracts.

#### 915.970-5 Special considerations—contracts with nonprofit organizations (other than educational institutions).

(a) For purposes of identification, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from Federal income taxation under section 501 of the Internal Revenue Code.

(b) In computing the amount of profit or fee to be paid, the DOE negotiating official shall take into account the tax benefits received by a nonprofit organization. While it is difficult to establish the degree to which a remuneration under any given contract contributes to an organization's overall net profit, the DOE negotiating official should assume that there is an element of profit in any amount to be paid.

(c) In order to assure consideration of the tax posture of nonprofit organizations during a profit or fee negotiation, the DOE negotiating official shall calculate the fee as for a contract with a commercial concern and then reduce it at least 25 percent. However, depending on the circumstances, the contracting officer may pay profit or fees somewhere between this amount and the appropriate profit or fee as if it were a commercial concern. When this is the case, the contract file shall be documented to specifically state the reason or reasons.

(d) Where a contract with a nonprofit organization is for the operation of Government-owned facilities, the fee should be calculated using the procedures and schedules applicable to operating contracts as set forth in Part 970.

#### 915.970-6 Contracts with educational institutions.

In certain situations the DOE may contract with a university to manage or operate Government-owned laboratories. These efforts are generally apart from, and not in conjunction with, their other activities, and the complexity and magnitude of the work are not normally found in standard university research or study contracts. Such operating contracts are subject to the applicable provisions set forth in Part 970.

#### 915.970-7 Alternative techniques.

(a) Profit or fees to be paid on construction contracts and construction management contracts shall be determined in accordance with the applicable profit/fee technique for such contracts set forth in 915.971.

(b) Profit and fee to be paid on contracts under \$500,000, not using the weighted guidelines, shall be judgmentally developed by the contracting officer by assigning individual dollar amounts to the factors appropriate to DOE profit considerations discussed in 915.970-2(d).

(c) Contracts which require only delivery or furnishing of goods or services supplied by subcontractors shall include a fee or profit which, in the



best judgment of the contracting officer, is appropriate. It would be expected that there would be a declining relationship of profit/fee dollars in relation to total costs. The higher the cost of subcontracts, for example, the lower the profit/fee ratio to these costs.

(d) Profit/Fee considerations in termination settlements are often a question of equity. They are a matter of negotiation. They should not, however, exceed what would have otherwise been payable under weighted guidelines had the termination not occurred.

#### 915.970-8 Weighted guidelines application considerations.

(a) *General.* (1) 915.970-2(d) lists those DOE factors which are given consideration for profit/fee determination in all cases in which profit is to be specifically negotiated. This section discusses these factors and provides guidance on how they should be evaluated.

(2) The profit/fee elements (factors or subfactors) relating to Contractor Effort, as shown 915.970-2(d), item I, are similar to those cost elements contained in most contract pricing proposals. Often, individual proposals will be in a different format, but, since these factors and subfactors are broad and basic, they provide sufficient guidance to evaluate all items of cost generally found in proposals.

(3) In making a judgment of the value of each factor, the contracting officer should recognize the definition, description, and purpose of the factors, together with consideration for evaluating them as set forth herein.

(4) The effect of the Facilities Capital Cost of Money cost principle (FAR 31.205-10) has been recognized in the weights assigned for arriving at profit and fee objectives; consequently, no offset is necessary or will be made to the prenegotiation profit objectives for cost of money recognized as a cost.

(b) *Contractor effort.* (1) This factor is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirements in an efficient manner. This factor, which is apart from the contractor's basic responsibility for contract performance, takes into account what resources are necessary, and what the contractor must do, to accomplish a in the contract. This factor recognizes that, within a given performance output or within a given sales dollar figure, necessary efforts on the part of individual contractors can vary widely in both value and quantity, and, that the profit objective should reflect the extent and nature of the contractor's contribution to total

performance. The evaluation of this factor requires an analysis of the cost content of the proposed contract, as discussed in paragraphs (b) (2) through (4) of this section. *Not to be included as part of the cost base (for purposes of computing profit) is any amount calculated for the cost of money for facilities capital computed in accordance with Cost Accounting Standard 414.*

(2) The following comprise the base elements for measuring contractor effort:

(i) *Material acquisition.* Analysis of material acquisition cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required purchased parts, subcontracted items or services, and other materials, including consideration of the number of orders and supplies and whether established sources are available or new sources must be developed. In reviewing this element:

(A) The contracting officer shall determine whether the contractor will obtain the material and tooling by routine orders from readily available suppliers (particularly orders of substantial value in relation to the total contract cost) or by subcontracts, and shall consider the extent to which the prime contractor will be required to develop complex specifications involving creative design or close tolerance manufacturing requirements.

(B) Consideration shall be given to the managerial and technical efforts necessary for the prime contractor to administer subcontracts and select subcontractors, including efforts to break out sole source subcontractors through the introduction of competition. These determinations and considerations shall be made for purchases of raw materials or basic commodities, purchases of processed material, including all types of components of standard or near standard characteristics, and purchases of pieces, assemblies, subassemblies, special tooling, and other products special to the end item. In the application of this criterion, it should be recognized that the contribution of the prime contractor to his purchasing program may be substantial. This may apply in the management of subcontracting programs involving many sources, new complex components and instrumentation, incomplete specifications, and close surveillance by the prime contractor's representative.

(C) Recognized costs proposed as direct material costs, or proposed as material overhead costs, such as scrap charges, shall be treated and evaluated as material costs for profit evaluation.

(D) Intracompany transfers which are accepted at price, in accordance with FAR 31.205-2(e), shall be evaluated as material. Other intracompany transfers shall be evaluated by individual components of cost, i.e., material, labor, and overhead.

(ii) *Labor (technical and managerial, manufacturing, and support services).* Analyses of the labor cost content of the contract shall include evaluation of the comparative quality and level of the talents, skills, and experience of those personnel to be employed for contract performance. In reviewing this element:

(A) Technical and managerial labor shall be evaluated, for the purpose of assigning profit dollars, by giving consideration to the amount of notable scientific, unusual or scarce engineering, and top management talent needed in contrast to journeyman engineering effort, professional staff, or closely related supporting personnel. The diversity, or lack thereof, of scientific, engineering and managerial specialties required for contract performance and the corresponding need for related supervision and coordination shall be evaluated. By way of definition, project management and administration labor falling within this category includes senior project management personnel who oversee and direct the work, and usually consist of the project managers, project engineers, and comparable management personnel who form the project management team that plans, directs, and takes responsibility for the execution of the program or project assignment. The cost element for project management and administration labor usually applies to architect-engineer (A-E) contracts. The weight assigned will take into consideration the dollar amount of the project supervised.

(B) Manufacturing labor shall be evaluated by giving consideration to the variety and range of required manufacturing labor skills (i.e., department heads, supervisors, skilled and unskilled labor) and the contractor's manpower resources for meeting these requirements.

(C) Support services labor shall be evaluated in a manner similar to the above by assigning higher weights to professional-type skills and lower weights to semi-professional or other type skills required for contract performance. Support services labor represents those classifications of direct labor whose efforts are not identifiable with the descriptions of labor in paragraph (b)(2)(ii)(A) and (b)(2)(ii)(B) of this subsection and may include labor classifications assigned exclusively for contract performance, such as on-site



A-E firm employees performing project activities related to accounting, contract administration (including reporting), cost engineering, secretarial, clerical and the like. Care should be taken that direct charges of this nature are appropriately classified as direct rather than indirect, and that like activities are not allocated indirectly either to this contract or to the contractor's other work assignments. A weighting in excess of 9 percent for support service contract labor normally will be justified only when the quality, skill, and experience of the support labor warrants a weighting corresponding to category (A), above.

(iii) *General management (overhead and general and administrative (G&A) but exclusive of IR&D costs).* In reviewing this element:

(A) Analysis of overhead and G&A expenses includes evaluation of the makeup of these expenses and how much they contribute to contract performance. This analysis shall include a determination of the amount of labor within the expense pools and how this labor would be treated if it were considered as direct labor under the contract. The allocable labor elements shall be given the same profit consideration that they would receive if they were treated as direct labor. The other elements of these expense pools shall be evaluated to determine whether they are routine expenses (such as utilities, supplies, and maintenance) and hence given lesser profit consideration, or whether they contribute significantly to contract performance. Depreciation expenses on facilities capital will be excluded from consideration since the profit reward for facilities capital investment is separately weighted as discussed in 915.970-8(d). The composite of the individual determinations in relation to the elements of the expense pools will be the profit consideration given the pools as a whole. The procedure for assigning relative values to such expenses differs from the method used in assigning values for the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(B) It is not necessary that the contractor's accounting system break down the overhead expenses within the classification of technical and managerial (or engineering) overhead, manufacturing overhead, and general and administrative expenses, unless dictated otherwise by Cost Accounting

Standards (CAS). The contractor whose accounting system only reflects one overhead rate on all direct labor need not make changes to reflect more detail data (if CAS exempt) to correspond with the above classifications. In evaluating such a contractor's overhead rate, the negotiating official can break out the applicable sections of the composite rate which can be classified as technical, managerial, or engineering overhead, manufacturing overhead, and general and administrative expenses and follow the appropriate evaluation technique.

(C) There is a critical factor to consider in the determination of profit in this area. Management problems surface in various degrees and the management expertise exercised to solve them shall be considered as an element of profit. For example, a new program for an item that is on the cutting edge of the state of the art will cause more problems and require more managerial time and abilities of a higher order than a follow-on contract. If new contracts create more problems and require a higher profit consideration, follow-ons shall be adjusted downward as many of the problems may have been solved. In any event, an evaluation shall be made of the underlying managerial effort involved on a case-by-case basis.

(D) It may not be necessary for the negotiating official to make a separate profit evaluation of overhead expenses with each acquisition of substantially the same circumstance or service with the same contractor. Where an analysis of the profit weight to be assigned to the overhead pool has been made, the weight to be assigned may be used for future contracts with the same contractor until there is a change in the cost composition of the overhead pool or the contract circumstances, or until the factors discussed in paragraph (C) above are relevant.

(iv) *Other direct costs (exclusive of CAS 414, Facilities Capital Cost of Money).* In evaluating this element, it should be remembered:

(A) Proposals, particularly for research and development, often list as direct costs the kinds of expenses usually treated as indirect for other contracts. Examples are travel and subsistence, consultants, telephone, computer costs and reports reproduction. The accounting treatment of a cost category does not change the weight appropriate to the cost being evaluated.

(B) The weight ranges in the format cover the broad categories of direct material, labor, and G&A expenses. Although cost submissions may vary

from the way shown in the format, all cost categories contained in submissions will fall under one of the broad groupings shown in the format. Because other direct costs are not direct material or direct labor, it follows that they will be considered as indirect costs for weighting purposes.

(C) *Contract risk.* (1) This factor reflects the policy of the Department of Energy that contractors bear an equitable share of cost risk, and to compensate them for the assumption of that risk. A contractor's risk associated with costs to perform under a Government contract is usually minimal under cost-reimbursement-type contracts. In developing a prenegotiation profit or fee objective, the negotiating official will need to consider the type of contract to be negotiated and the anticipated contractor cost risk. This consideration is one of the most important factors in arriving at a prenegotiation profit or fee objective.

(2) Profit/Fee allowances for contractor assumption of cost risk require a determination of the degree of cost responsibility the contractor assumes, and the reliability of the cost estimates in relation to the task assumed. This factor is specifically limited to the risk of costs of contract performance, including unallowable cost elements. Thus, such risks on the part of the contractor as reputation, losing a commercial market, losing potential profits in other fields, or any risk on the part of the contracting activity, such as the risk of not acquiring an effective product or service, are not within the scope of this factor.

(3) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of performance cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-fixed-fee contract, requiring only that the contractor use his best efforts to perform a task, and a firm-fixed-price contract. A cost-plus-fixed-fee contract reflects a minimum assumption of cost responsibility, whereas a firm-fixed-price contract reflects a complete assumption of cost responsibility.

(4) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates which, among other things, take the difficulty of the task into consideration. Prior production experience assists the contractor in preparing reliable cost estimates on new contracts for similar items.



(5) Contractors are likely to assume greater cost risk when confident that contracting officers analyze the risk incident to proposed contracts and show they are willing to compensate contractors for it. Generally, a cost-plus-fixed-fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm-fixed-price contract justify a reward of less than the minimum on the following weighted guidelines. Where proper contract-type selection has been made, the reward for risk, by contract type, will usually fall into the following percentage ranges which are applied to total recognized contract costs, exclusive of facilities capital cost of money:

(i) Type of contract and percentage ranges for profit objectives developed for equipment and supply contracts:

Cost-Plus-Fixed-Fee—0 to 0.5%

Cost-Plus-Incentive-Fee:

With Cost Incentives Only—1 to 2%

With Multiple Incentives—1.5 to 3%

Fixed-Price-Incentive:

With Cost Incentives Only—3 to 5%

With Multiple Incentives—4 to 6%

Prospective-Price-Redeterminable—4 to 6%

Firm-Fixed-Price—6 to 8%

(ii) Type of contract and percentage ranges for profit objectives developed for research and development contracts:

Cost-Plus-Fixed-Fee—0 to 0.5%

Cost-Plus-Incentive-Fee:

With Cost Incentives Only—1 to 2%

With Multiple Incentives—1.5 to 3%

Fixed-Price-Incentive:

With Cost Incentives Only—2 to 4%

With Multiple Incentives—3 to 5%

Prospective-Price-Redeterminable—3 to 5%

Firm-Fixed-Price—5 to 7%

(iii) Type of contract and percentage ranges for profit objectives developed for contracts for services:

Cost-Plus-Fixed-Fee—0 to 0.5%

Cost-Plus-Incentive-Fee—1 to 2%

Fixed-Price-Incentive—2 to 3%

Firm-Fixed-Price—3 to 4%

(6) In assessing the selection and application of a weighting factor, the DOE negotiating official should remember:

(i) These ranges may not be appropriate for all acquisitions. For instance, a fixed-price-incentive contract that is closely priced with a low ceiling price and high incentive share may be tantamount to a firm fixed price contract. In this situation, the contracting officer may determine that a basis exists for high confidence in the reasonableness of the estimate and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula can be considered to contain cost-plus-

incentive-fee contract features. In this situation, the contracting officer may determine that the Government is retaining much of the contract responsibility and that the risk assumed by the contractor is minimal. Similarly, if a cost-plus-incentive-fee contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive-contract. In such a pricing environment, the negotiating official may determine that the Government has transferred a greater amount of cost responsibility to the contractor than is typical under a normal cost-plus-incentive-fee contract.

(ii) The acquisition may not obviously fit a specific category shown. For example, effort under a particular A-E contract may better fall into the category of R&D, rather than services. Judgment is required, therefore, in establishing the category and weights to be applied in each case.

(iii) The contractor's subcontracting program may have a significant impact on the contractor's acceptance of risk under a contract form. It can cause risk to increase or decrease in terms of both cost and performance. This consideration shall be a part of the contracting officer's overall evaluation in selecting a factor to apply for cost risk. It may be determined, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost risk evaluation, as a result, may be below the range that would otherwise apply for the contract type being proposed. This situation will be found to exist only in a few extraordinary situations under circumstances of (A) a follow-on production contract, in which a substantial portion of the total contract costs represents a single subcontract or a few subcontracts, and (B) the fullest incentive reward and penalty feature on cost performance having been passed by the prime contractor to the subcontractor. In an acquisition in which all of these circumstances are found to exist, a lower than usual profit weight may be applied to the aggregate of all recognized costs, including the subcontract portion. The contract risk evaluation should not be lowered, however, merely on the basis that a substantial portion of the contract costs represents subcontract costs (when there is no substantial transfer of the contractor's risk) since such action eventually can result in an undue or undesirable lessening of the amount of work let on subcontracts.

(iv) In making a contract cost risk evaluation in an acquisition that involves executing a definitive contract

for a letter contract, unpriced change orders, and unpriced orders under basic ordering agreements, the effect on total contract cost risk as a result of having partial performance before a definitive contract is executed should be considered. Under some circumstances it may be concluded that the amount of cost risk has been effectively reduced. Under other circumstances it may be apparent that the contractor's cost risk remained substantially unchanged. To be equitable, the determination of a profit weight for application to the total of all recognized costs, both those incurred and those yet to be expended, must be made with consideration of all attendant circumstances and not be just the portion of costs incurred, or percentage of work completed, prior to the execution of a definitive contract.

(v) Time and material, labor hour, and overhaul contracts priced on a time and material basis shall be considered to be cost-plus-fixed-fee contracts for the purpose of establishing a profit weight in the evaluation of the contractor's assumption of contract cost risk.

(d) *Capital investment (facilities).* (1) This element relates to the consideration to be given in the profit objective in recognition of the investment risk associated with the facilities employed by the contractor. Measurement of the amount of facilities capital employed is discussed in 930.7001-4 and 930.7001-8. Five to twenty percent of the net book value of facilities capital allocated to the contract is the normal range of weight for this profit factor. The key factors that the negotiating official shall consider in evaluating this factor are:

(i) The overall cost effectiveness of the facilities employed;

(ii) Whether the facilities are general purpose or special purpose items;

(iii) The age of the facilities;

(iv) The relationship of the remaining writeoff life of the investment and the length of the program(s) or contract(s) on which the facilities are employed; and

(v) Special contract provisions that reduce the contractor's risk of recovery of facilities capital investment (termination-protection clauses, multiyear cancellation ceilings, etc.).

(2) To assist in evaluating new investment, the contracting officer should request the contractor to submit reasonable evidence that the new facilities are part of an approved investment plan and that achievable benefits to the Government will result from the investment. New industrial facilities and equipment shall receive maximum weight when they—



(i) Are to be acquired by the contractor primarily for Government and energy related business and effort;

(ii) Have a long service life;

(iii) Have a limited economic life due to limited alternative uses; and

(iv) Reduce the total life cycle cost of the products produced for, or services to, the Department of Energy.

To the extent that the new investment represents routine replacement of existing assets, a lesser weight shall be assigned.

(e) *Independent research and development.* This factor rewards contractors in two ways:

(1) As a reward for the contractor's investment in a viable independent research and development program; considering, among other things, the program's quality, scope, and resources employed. The normal weight range for this factor is from 5 to 7 percent of allowable IR&D costs allocable to the prospective contract.

(2) As a reward for contractors who assume the extra risk of developing items with energy program applications on their own initiative with no direct Government assistance and little or no indirect Government assistance. Profit weights in the range of 0 to 20 percent of the basic profit dollars (total of profit dollars for items I.A. through I.E., 915.970-2(d)) are normal for this factor. The weight selection is to be based on the amount of assistance provided by the Government through independent research and/or development expense allowance under previous Government contracts and the extent the contractor already has been compensated for independent development through prior sales of the identical item to the Government.

(f) *Participation in special programs.*

(1) A composite percentage weight within the range of -5 percent to +5 percent of the basic profit objective (total of profit dollars for items I.A. through I.E., 915.970-2(d)) may be assigned for this profit objective. This profit factor, which may apply to special circumstances as well as a particular acquisition, relates to rewards of outstanding achievement in contractor participation in the Government's small business, small disadvantaged business, women-owned small business concerns, labor surplus, energy conservation and other special programs. Participation that is rated as merely satisfactory shall be assigned a weight of zero, generally. Evidence of effective support may justify a plus weight and poor support a negative weight.

(2) In assessing this factor, the negotiating official shall:

(i) Give favorable consideration to the contractor's policies and procedures that effectively support Government small business and small disadvantaged business subcontracting programs. Any unusual effort that the contractor displays in subcontracting with these concerns, particularly for development-type work likely to result in later production opportunities, and the overall effectiveness of the contractor in subcontracting with, and furnishing assistance to, such concerns shall be considered. Conversely, failure or unwillingness on the part of the contractor to support these Government policies shall be viewed as evidence of poor performance for the purpose of establishing a profit objective.

(ii) Make a similar review and evaluation of the contractor's policies and procedures supporting the Government's labor surplus area program. In particular, favorable consideration shall be given to a contractor who (A) makes a significant effort to help find jobs and provide training for the hardcore unemployed, or (B) promotes maximum subcontractor utilization of certified eligible concerns.

(iii) Give favorable consideration to the contractor's initiatives and accomplishments in the conservation of energy and in carrying out any other special Government programs.

(g) *Other considerations.* (1) Particular situations may justify consideration of a profit allowance in addition to those specifically identified elsewhere in the guidelines. These situations shall be identified and the reason(s) for their use documented in the price negotiation memorandum. An assigned weight of -5 to +5 percent of the basic profit objective is the normal range for this profit factor depending on the circumstances of the particular acquisition. A zero weight designates a satisfactory or average effort.

(2) Examples of "other considerations" are described in the following subparagraphs.

(i) *Cost-control and other past accomplishments.* This factor allows additional profit opportunities to a prospective contractor that has previously demonstrated its ability to perform similar tasks effectively and economically. In addition, consideration should be given to (A) measures taken by the prospective contractor that result in productivity improvements and (B) other cost-reduction accomplishments that will benefit Government contracts. Among other things, consideration should be given to the contractor's efforts to explore additional production opportunities or to improve or develop new product, manufacturing or

performance technologies to reduce production cost.

(ii) *Complexity of R&D or services assignment.* A weighting for the complexity of the R&D or services assignment will be considered when a contract, such as an A-E contract, relates to a DOE project facility. The following complexity categories are to be used for the purpose of establishing the appropriate fee weight:

(A) *Class A*—Manufacturing plants involving continuous closed processes or other complicated operations requiring a high degree of design particle accelerators; complex laboratories or industrial units especially designed for processing, testing or handling highly radioactive materials; facilities to be used for research, development, experimental or demonstration purposes which involve advance or unique design considerations that are peculiar to the purposes for which the facility is built.

(B) *Class B*—Normal manufacturing processes and assembly operations such as ore dressing, metal working plants and simple processing plants; power plants and accessory switching and transformer stations; water treatment plants; sewage disposal plants; hospitals and ordinary laboratories.

(C) *Class C*—Permanent administrative and general service buildings, permanent housing, roads, railroads, grading, sewers, storm drains and water and power distribution systems.

(D) *Class D*—Construction camps and facilities and other construction of a temporary nature.

(iii) *Operating capital.* This factor includes consideration of the level of the contractor's operating or working capital investment required for effective contract performance. This level will vary, depending on such circumstances as (A) the nature of the work and duration of the contract, (B) contract type and dollar magnitude, (C) the reimbursement or progress payment rate, (D) the contractor's financial management practices, and (E) the frequency of and time lag between billings and Government payments. Such circumstances should be taken into account in determining what profit adjustment, if any, is appropriate under this subfactor. When the contractor will invest relatively few dollars for operating capital purposes (because of cost reimbursement and progress payment rates, or when an advance payment method (such as a letter of credit) is used to finance the contractor), a negative adjustment may be appropriate.



(h) *Productivity/Performance adjustment for follow-on contracts.* (1) One of the objectives of the DOE profit policy is to reduce costs needed to achieve national energy goals by encouraging contractor investment in modern cost-reducing facilities and other improvements in efficiency and performance. To the extent that costs serve as the basis for pricing (both cost and profit), success in reducing costs can serve in turn to reduce the magnitude of prospective profit dollars on follow-on contracts. For example, a cost-plus-award-fee contract may be awarded as the first of two or more contracts required for a major energy program. The incentive to increase productivity or performance and reduce cost under the first contract works against the contractor on any follow-on contracts because the reduced level of costs becomes a part of the basis for pricing subsequent contracts. In order to mitigate the relative loss of prospective profit dollars on a follow-on contract that occurs when costs are reduced under the predecessor contract or contracts due to productivity or performance gains, a special "Productivity/Performance Reward" may be included in the prenegotiation profit objective of a pending follow-on acquisition under certain circumstances.

(2) The "Productivity/Performance Reward" may be applied when all of the following criteria are met:

- (i) The pending acquisition is for a follow-on contract.
- (ii) Reliable actual cost data relating to the predecessor contract or contracts is available to establish a fair and reasonable cost baseline.
- (iii) Changes made in the configuration of the item being acquired or in the technical aspects of the services being performed are not likely to invalidate price comparability.
- (3) The amount of productivity or performance reward for a given follow-on contract is based on the estimated cost reduction on the predecessor contract or contracts that can be attributed to productivity or performance gains. Set forth below are principles and procedures that apply to estimating cost reductions and calculating the productivity or performance reward:

- (i) The contractor shall prepare and support the cost reduction estimate.
- (ii) The overall contract cost decrease shall be based on estimated decreases measured at the unit cost level, or equivalent.
- (iii) The lowest average unit cost or its equivalent (exclusive of profit) for a preceding performance period or

production run shall serve as the unit cost baseline.

(iv) A technique shall be employed to determine that portion of the cost decrease attributable to productivity or performance gains as opposed to other factors such as the effects of quality differences between the base contract and the pending acquisition.

(v) When the parties agree that the estimated overall contract cost decrease is materially affected by price level differences between the base period and the current point in time, an economic price adjustment may be applied to the estimate.

(vi) The reward shall be calculated by multiplying the contract cost decrease due to productivity/performance gains by the base profit objective rate.

(vii) The degree of review and validation of the data supporting the reward calculation shall be commensurate with the materiality of this profit element in relation to the overall price objective.

(4) There may be several methods advanced, by both contracting officers and contractors, to quantify productivity/performance gains. Any technique may be acceptable, provided it equitably takes into account the principles and procedures listed above.

#### 915.971 Profit and fee-system for construction and construction management contracts.

##### 915.971-1 General.

(a) Business concerns awarded a DOE construction or construction management contract shall be paid a profit or fee if requested or solicited. The profit or fee objective for a construction or construction management contract shall be an amount appropriate for the type of effort contained therein. It is the intent of DOE to (1) reward contractors based on the complexity of work, (2) reward contractors who demonstrate and establish excellent records of performance and (3) reward contractors who contribute their own resources, including facilities and investment of capital.

(b) Standard fees or across-the-board agreements will not be used or made. Profit or fee objectives are to be determined for each contract according to the effort or task contracted for thereunder.

(c) Profit or fee payable on fixed-price and cost-reimbursable construction or construction management contracts shall be established in accordance with the appropriate procedures and schedules set forth in this subpart.

##### 915.971-2 Limitations.

Amounts payable under construction and construction management contracts shall not exceed amounts derived from the schedules established for this purpose. Requests to pay fees in excess of these levels shall be forwarded to the Procurement Executive for review and approval.

##### 915.971-3 Factors for determining fees.

(a) The profit policy stated in 915.971-1(a) reflects, in a broad sense, recognition that profit is compensation to contractors for the entrepreneurial function of organizing and managing resources (including capital resources), and the assumption of risk that all costs of performance (operating and capital) may not be reimbursable.

(b) The best approach calls for a structure that allows judgmental evaluation and determination of fee dollars for prescribed factors which impact the need for, and the rewards associated with, fee or profit, as follows.

(i) Management risk relating to performance, including the (A) quality and diversity of principal work tasks required to do the job, (B) labor intensity of the job, (C) special control problems, and (D) advance planning, forecasting and other such requirements;

(ii) The presence or absence of financial risk, including the type and terms of the contract;

(iii) The relative difficulty of work, including consideration of technical and administrative knowledge, skill, experience and clarity of technical specifications;

(iv) Degree and amount of contract work required to be performed by and with the contractor's own resources, including the extent to which the contractor contributes plant, equipment, computers, or working capital (labor, etc.);

(v) Duration of project;

(vi) Size of operation;

(vii) Benefits which may accrue to the contractor from gaining experience and know-how, from establishing or enhancing a reputation, or from being enabled to hold or expand a staff whose loyalties are primarily to the contractor; and

(viii) Other special considerations, including support of Government programs such as those relating to small and small disadvantaged business in subcontracting, energy conservation, etc.

(c) The total fee objective and amount for a particular negotiation is established by judgmental considerations of the above factors, assigning fee values as deemed



appropriate for each factor and totaling the resulting amounts.

(d) In recognition of the complexities of this process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, fee schedules have been developed which set forth maximum fee amounts that contracting activities are allowed to negotiate for a particular transaction without obtaining prior approval of the Procurement Executive. In addition, the fee negotiation objective established in accordance with 915.971-3(a), (b), and (c) shall not exceed the applicable fee schedule amounts without prior approval of the Procurement Executive. To facilitate application to a contract, the fee amounts are related to the total cost base which is defined as total operating and capital costs.

#### 915.971-4 Considerations affecting fee amounts.

(a) In selecting final fee amounts for the various factors in 915.971-3 of this section, the DOE negotiating official will have to make several judgments as discussed in this subsection.

(b) Complexity of a construction project shall be considered by analysis of its major parts. For a project which includes items of work of different degrees of complexity, a single average classification should be considered, or the work should be divided into separate classifications. The following class identifications are appropriate for proper fee determinations.

(1) *Class A*—Manufacturing plants involving continuous closed processes or other complicated operations requiring a high degree of design layout or process control; nuclear reactors; atomic particle accelerators; complex laboratories or industrial units especially designed for handling radioactive materials.

(2) *Class B*—Normal manufacturing processes and assembly operations such as ore dressing, metal working plant and simple processing plants; power plants and accessory switching and transformer stations; water treatment plants; sewage disposal plants; hospitals; and ordinary laboratories.

(3) *Class C*—Permanent administrative and general service buildings, permanent housing, roads, railroads, grading, sewers, storm drains, and water and power distribution systems.

(4) *Class D*—Construction camps and facilities and other construction of a temporary nature.

(c) Normal management elements of principal tasks relating to a construction contract cover several categories of

tasks with differing rates of application throughout the construction period. The principal elements of management effort are outlined in this paragraph. Although each project has a total management value equal to 100% for all elements, the distribution of effort among the various elements will be different for each project due to differences in project character or size. The basic management elements and the normal range of efforts expected to apply for a normal sized project are as follows. When the normally expected effort will not be performed by a contractor, this fact should be considered in arriving at appropriate fee amounts.

| Management elements                                                                                                                                                                                                                                                                                                    | Effort range |         |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|---------|
|                                                                                                                                                                                                                                                                                                                        | Minimum      | Maximum |
| I. <i>Broad project planning</i> .—Overall project planning and scheduling, establishment of key project organization and consultation with the A-E and DOE. Performed by highest level of contractor's officers, technical personnel and project manager.....                                                         | 15           | 25      |
| II. <i>Field planning</i> .—Mobilization and demobilization of top field organization from the contractor's existing organization and from other sources as necessary. Detailed project planning and scheduling for construction of facilities. Performed by the project manager and top field professional staff..... | 18           | 28      |
| III. <i>Labor supervision</i> .—Direct supervision of manual employees. Performed by contractor's subprofessional staff, such as superintendents and foremen (some salaried and some hourly rate). This includes the contractor's personnel to coordinate and expedite the work of subcontractors....                  | 12           | 16      |
| IV. <i>Acquisition and subcontracting</i> .—Acquisition of other than special equipment. Selection of subcontractors and execution and administration of subcontracts. Performed by contractor's staff under supervision and direction of elements I and II.....                                                       | 12           | 16      |
| V. <i>Labor relations and recruitment</i> (manual).—Performed by the contractor's staff under supervision and direction of elements I, II and III. This includes demobilization of work forces.....                                                                                                                    | 7            | 11      |
| VI. <i>Recruitment of supervisory staff</i> .—Staffing required to supplement the organization under elements I and II, and demobilization during completion of the project. Performed by contractor's permanent staff and recruitment personnel under supervision and direction of management elements I and II.....  | 4            | 6       |
| VII. <i>Expediting</i> .—Expediting contracting performed by contractor's staff and by subcontractors. Performed by contractor's staff under supervision and direction of elements I and II.....                                                                                                                       | 4            | 6       |
| VIII. <i>Construction equipment operations</i> .—This includes mobilization and demobilization. Performed by contractor's staff under supervision, direction and coordination of elements I, II, and IV.....                                                                                                           | 4            | 6       |
| IX. <i>Other services</i> .—Timekeeping, cost accounting, estimating, reporting, security, etc., by the contractor's staff under supervision and direction of elements I and II.....                                                                                                                                   | 4            | 6       |

(d) Fee considerations dealing with the duration of a project are usually provided by the consideration given to the degree of complexity and magnitude of the work. In only very unusual circumstances should it be necessary to separately weight, positively or

negatively, for the period of services or length of time involved in the project when determining fee levels.

(e) The size of the operation is to a considerable degree a continuation of the complexity factor, and the degree and amount of work required to be performed by and with the contractor's own resources. Generally, no separate weighting, positively or negatively, is required for consideration of those factors.

(f) The degree and amount of work required to be performed by and with the contractor's own resources affect the level of fees. Reasonable fees should be based on expectations of complete construction services normally associated with a construction or construction management contract. In the case of a construction contract, reduced services can be in the form of excessive subcontracting or supporting acquisition actions and labor relation interfaces being made by the government. If an unusual amount of such work is performed by other than the contractor, it will be necessary to make downward adjustments in the fee levels to provide for the reduction in services required.

(g) The type of contract to be negotiated and the anticipated contractor cost risk shall be considered in establishing the appropriate fee objective for the contract.

(h) When a contract calls for the contractor to use its own resources, including facilities and equipment, and to make its own cost investment (i.e., when there is no letter-of-credit financing), a positive impact on the fee amount shall be reflected.

#### 915.971-5 Fee schedules.

(a) The schedules included in this paragraph, adjusted in accordance with provisions stated herein and 915.971-6, provide maximum fee levels for construction and construction management contracts. The fees are related to the estimated cost (fee base) for the construction work and services to be performed. The schedule in paragraph (d) sets forth the basic fee schedule for construction contracts. The schedule in paragraph (f) sets forth the basic fee schedule for construction management contracts. A separate schedule in paragraph (h) has been developed (i) for determining the fee applicable to special equipment purchases and (ii) to reflect a differing level of fee consideration associated with the subcontractor effort under construction management contracts. (See 915.971-6(c) and 915.971-6(d)).



(b) The schedules cited in paragraph (a) above provides the maximum fee amount for a CPFF contract arrangement. If a fixed-price type contract is to be awarded, the fee amount set forth in the fee schedules shall be increased by an amount not to exceed 4 percent of the fee base.

(c) The fee schedule shown in paragraphs (d) and (f) assumes a letter of credit financing arrangement. If a contract provides for or requires the contractor to make their own cost investment for contract performance (i.e., when there is no letter-of-credit financing), the fee amounts set forth in the fee schedules shall be increased by an amount equal to 5 percent of the fee amount as determined from the schedules.

(d) The following schedules sets forth the base for construction contracts.

#### CONSTRUCTION CONTRACTS SCHEDULE

| Fee base           | Fee       | Fee, per-cent | Increment, per-cent |
|--------------------|-----------|---------------|---------------------|
| \$100,000          | \$5,400   | 5.40          | 5.25                |
| \$300,000          | 15,900    | 5.30          | 5.00                |
| \$500,000          | 25,900    | 5.18          | 4.72                |
| \$1,000,000        | 49,500    | 4.95          | 3.33                |
| \$3,000,000        | 116,100   | 3.87          | 2.82                |
| \$5,000,000        | 172,500   | 3.45          | 2.53                |
| \$10,000,000       | 299,000   | 2.99          | 2.18                |
| \$15,000,000       | 408,000   | 2.72          | 1.90                |
| \$25,000,000       | 598,000   | 2.39          | 1.68                |
| \$40,000,000       | 850,000   | 2.13          | 1.46                |
| \$60,000,000       | 1,142,000 | 1.90          | 1.28                |
| \$80,000,000       | 1,398,000 | 1.75          | 1.24                |
| \$100,000,000      | 1,646,000 | 1.65          | 1.03                |
| \$150,000,000      | 2,161,000 | 1.44          | .80                 |
| \$200,000,000      | 2,581,000 | 1.28          | .65                 |
| \$300,000,000      | 3,211,000 | 1.07          | .50                 |
| \$400,000,000      | 3,711,000 | .93           | .35                 |
| \$500,000,000      | 4,061,000 | .81           |                     |
| Over \$500 million | 4,061,000 |               | 1.35                |

0.35 percent excess over \$500 million.

(e) When using the Construction Contracts Schedule for establishing maximum payable basic fees, the following adjustments shall be made to the Schedule fee amounts for (1) complexity levels, (2) excessive subcontracting, (3) normal contractor services performed by the government or another contractor:

(i) The target fee amounts, set forth in the fee schedule, shall not be adjusted for a Class A project, which is maximum complexity. A Class B project requires a 10 percent reduction in amounts. Class C and D projects require a 20 percent and 30 percent reduction, respectively. The various classes are defined in 915.971-4(b).

(ii) The target fee schedule provides for 45 percent of the contract work to be subcontracted for such things as electrical and other specialties. Excessive subcontracting results when such efforts exceed 45 percent of the total contract work. To establish

appropriate fee reductions for excessive subcontracting, the negotiating official should first determine the amount of subcontracting as a percentage of the total contract work. Next, the negotiating official should determine a percentage by which the prime contractor's normal requirement (based on a requirement for doing work with its own forces) is reduced due to the excessive subcontracting and, finally, multiply the two percentages to determine a fee reduction factor.

(iii) If acquisition or other services normally expected of the contractor (see 915.971-4(c)) are performed by the government, or another DOE prime or operating contractor, a fee reduction may also be required. The negotiating official should first determine what percentage of the total procurement or other required services is performed by others. Then the negotiating official should apply this percentage reduction to the normally assigned weightings for the management services or effort as discussed in 915.971-4(c) to arrive at the appropriate reduction factor.

(f) The following schedule sets forth the base fee for construction management contracts:

#### CONSTRUCTION MANAGEMENT CONTRACTS SCHEDULE

| Fee base           | Fee       | Fee, per-cent | Increment, per-cent |
|--------------------|-----------|---------------|---------------------|
| \$100,000          | \$5,400   | 5.40          | 5.25                |
| \$300,000          | 15,900    | 5.30          | 5.00                |
| \$500,000          | 25,900    | 5.18          | 4.72                |
| \$1,000,000        | 49,500    | 4.95          | 3.33                |
| \$3,000,000        | 116,100   | 3.87          | 2.82                |
| \$5,000,000        | 172,500   | 3.45          | 2.53                |
| \$10,000,000       | 299,000   | 2.99          | 2.18                |
| \$15,000,000       | 408,000   | 2.72          | 1.90                |
| \$25,000,000       | 598,000   | 2.39          | 1.68                |
| \$40,000,000       | 850,000   | 2.13          | 1.46                |
| \$60,000,000       | 1,142,000 | 1.90          | 1.28                |
| \$80,000,000       | 1,398,000 | 1.75          | 1.24                |
| \$100,000,000      | 1,646,000 | 1.65          | 1.03                |
| Over \$100 million | 1,646,000 |               | 1.03                |

1.03 percent over \$100 million.

(g) When applying the basic Construction Management Contracts Schedule for determining maximum payable fees, no adjustments are necessary to such payable fees for contractor Force account labor used for work which should otherwise be subcontracted until such Force account work exceeds, in the aggregate, 20 percent of the base. Excessive use of Force account work results when such effort exceeds 20 percent of the fee base; and, when this occurs, appropriate fee reductions for such excessive Force account labor shall be computed as follows:

(1) Determine the percentage amount of Force account work to total contractor effort.

(2) Determine the percentage amount of subcontract work reduced due to the use of Force account work.

(3) Multiply the two percentages to determine the fee reduction factor. It is not expected that reductions in the Construction Management Contracts Schedule fee amounts will be made for complexity, reduced requirements and similar adjustments as made for construction contracts.

(h) The schedule of fees for consideration of special equipment purchases and for considerations of the subcontract program under a construction management contract is as follows:

#### SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE

| Fee base           | Fee     | Fee, per-cent | Increment, per-cent |
|--------------------|---------|---------------|---------------------|
| \$100,000          | \$1,500 | 1.50          | 1.50                |
| \$200,000          | 3,000   | 1.50          | 1.47                |
| \$400,000          | 5,940   | 1.48          | 1.39                |
| \$600,000          | 8,720   | 1.45          | 1.29                |
| \$800,000          | 11,300  | 1.41          | 1.15                |
| \$1,000,000        | 13,800  | 1.38          | 1.00                |
| \$2,000,000        | 23,600  | 1.18          | .80                 |
| \$4,000,000        | 39,800  | .99           | .62                 |
| \$6,000,000        | 52,000  | .87           | .62                 |
| \$8,000,000        | 64,400  | .81           | .57                 |
| \$10,000,000       | 75,800  | .76           | .53                 |
| \$15,000,000       | 102,300 | .68           | .45                 |
| \$25,000,000       | 147,300 | .59           | .42                 |
| \$40,000,000       | 210,300 | .53           | .36                 |
| \$60,000,000       | 262,300 | .47           | .33                 |
| \$80,000,000       | 348,300 | .44           | .28                 |
| \$100,000,000      | 404,800 | .41           | .22                 |
| \$150,000,000      | 514,300 | .34           | .15                 |
| \$200,000,000      | 589,300 | .29           | .09                 |
| \$300,000,000      | 679,300 | .23           |                     |
| Over \$300 million | 679,300 |               | 1.09                |

0.09 percent excess over \$300 million.

#### 915.971-6 Fee base.

(a) The fee base shown in the Construction Contracts Schedule and Construction Management Contracts Schedule represents that estimate of cost to which a percentage factor is applied to determine maximum fee allowances. The fee base is the estimated necessary allowable cost of the construction work or other services which are to be performed. It shall include the estimated cost for, but is not limited to, the following as they may apply in the case of a construction or construction management contract:

- (1) Site preparation and utilities.
- (2) Construction (labor-materials-supplies) of buildings and auxiliary facilities.
- (3) Construction (labor-materials-supplies) to complete/construct temporary buildings.
- (4) Design services to support the foregoing.
- (5) General management and job planning cost.



- (6) Labor supervision.
- (7) Procurement and acquisition administration.
- (8) Construction performed by subcontractors.
- (9) Installation of government furnished or contractor acquired special equipment and other equipment.
- (10) Equipment (other than special equipment) which is to become Government property (including a component of Government property).
- (b) The fee base for the basic fee determination for a construction contract and construction management contract shall include all necessary and allowable costs cited in paragraph (f)(2) as appropriate to the type of contract; except, any home office G&A expense paid as a contract cost per cost principle guidance and procedures shall be excluded from the fee base. The fee base shall exclude:
  - (1) Cost of land.
  - (2) Cost of engineering (A&E work).
  - (3) Contingency estimate.
  - (4) Equipment rentals or use charges. (See 936.70.)
  - (5) Cost of government furnished equipment or materials.
  - (6) Special equipment as defined in 936.7200(b)(4).
- (c) A separate fee base shall be established for special equipment for use in applying the Special Equipment Purchases or Subcontract Work Schedule (see 915.971-5(f)). The fee base for determination of applicable fees on special equipment shall be based on the estimated purchase price of the equipment.
- (d) The fee base under the Construction Management Contracts Schedule for a maximum basic fee determination for a construction management contract shall be comprised of only the costs of the construction manager's own efforts. However, it is recognized that in the case of construction management contracts, the actual construction work will be performed by subcontractors. In most cases the subcontract awards for the construction work will be made by the construction management contractor. Occasionally the contract may involve management of construction performed under a contract awarded by the Department or by one of the Department's operating contractors. In these cases, the actual cost of the subcontracted construction work shall be excluded from the fee base used to determine the maximum basic fee (under the Construction Management Contracts Schedule) applicable to a construction management contract. A separate fee base for additional allowances (using the Special

Equipment Purchases or Subcontract Work Schedule) shall be established, which shall be comprised of those subcontract construction costs, special equipment purchases, and other items' costs that are contracted for or purchased by the construction manager.

#### 915.972 Special considerations for cost-plus-award-fee contracts.

(a) When a contract is to be awarded on cost-plus-award-fee basis in accordance with 916.404-2, several special considerations are appropriate.

(1) The base fee portion of the fee objective of an award fee contract may range from 0% up to the 50% level of the fee amount for a Cost-Plus-Fixed-Fee (CPFF) contract, arrived at by using the weighted guidelines or other techniques (such as those provided in 915.971 for construction and construction management contracts). However, the base amount should not normally exceed 50% of the otherwise applicable fixed fee. In the event this 50% limit is exceeded, appropriate documentation shall be entered into the contract file. In no event shall the base fee exceed 60% of the fixed fee amount.

(2) The base fee plus the amount included in the award fee pool should normally not exceed the fixed fee (as subjectively determined or as developed from the fee schedule) by more than 50%. However, in the event the base fee is to be less than 50% of the fixed fee, the maximum potential award fee may be increased proportionately with the decreases in base fee amounts.

(3) The following maximum potential award fees shall apply in award fee contracts: (percent is stated as percent of fee schedule amounts).

| Base fee percent | Award fee percent | Maximum total percent |
|------------------|-------------------|-----------------------|
| 50.....          | 100               | 150                   |
| 40.....          | 120               | 160                   |
| 30.....          | 140               | 170                   |
| 20.....          | 160               | 180                   |
| 10.....          | 180               | 190                   |
| 0.....           | 200               | 200                   |

(b) Prior approval of the Procurement Executive, is required for total fee (base plus award fee pool) exceeding the guidelines in 915.972(a)(3). Additionally, in the event use of the award fee guidelines exceeds the statutory limitations discussed in FAR 15.903(d)(1) (i), (ii) and (iii), prior approval of the Procurement Executive shall also be required.

#### Subpart 915.10—Preaward and Postaward Notifications, Protests, and Mistakes

##### 915.1002 Debriefings of unsuccessful offerors.

(a) Debriefings must be requested within 10 working days of receipt of notification of elimination from consideration or announcement of selection. Contracting officers shall advise unsuccessful offerors of this limitation in such notification letter(s). Debriefings will be provided at the earliest feasible time, which normally shall be after announcement of the selection decision and prior to award of the contract. However, when the exigency of the situation will not permit delaying the award in order to debrief unsuccessful offerors, such debriefing may be conducted after award of the contract. The contracting officer, may if it is decided the facts justifies such action, receive and act upon request received at a later date. Also see 924.202(b).

#### PART 916—TYPES OF CONTRACTS

##### Subpart 916.2—Fixed-Price Contracts

- Sec.
- 916.203 Fixed-price contracts with economic price adjustment.
- 916.203-4 Contract clauses.
- 916.206 Fixed-ceiling-price contracts with retroactive price redetermination.
- 916.206-3 Limitations.
- 916.207 Firm-fixed-price, level-of-effort term contracts.
- 916.207-3 Limitations.

##### Subpart 916.3—Cost-Reimbursement Contracts

- 916.301-3 Limitations.
- 916.303 Cost-sharing contracts.
- 916.306 Cost-plus-fixed-fee contracts.
- 916.307 Contract clauses.

##### Subpart 916.4—Incentive Contracts

- 916.404-2 Cost-plus-award-fee contracts.
- 916.405 Contract clauses.

##### Subpart 916.6—Time-And-Materials, Labor-Hour, and Letter Contracts

- 916.603 Letter contracts.
- 916.603-2 Application.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy of 1954, as amended (42 U.S.C. 2168).

##### Subpart 916.2—Fixed-Price Contracts

- 916.203 Fixed-price contracts with economic price adjustments.
- 916.203-4 Contract clauses.

(d)(2) The Head of the Contracting Activity, or designee, for contracts estimated to be within the limits of their delegated authority, may approve the



use of an economic price adjustment clause when appropriate in accordance with FAR 16.203-4(d)(1).

**916.206 Fixed-ceiling-price contracts with retroactive price redetermination.**

**916.206-3 Limitations.**

(d) The Head of the Contracting Activity, or designee, for contracts estimated to be within the limits of delegated authority, may approve the use of a fixed-ceiling-price contract with retroactive price redetermination.

**916.207 Firm-fixed-price, level-of-effort term contracts.**

**916.207-3 Limitations.**

(d) The Head of the Contracting Activity, or designee, for contracts estimated to be within the limits of their delegated authority, may approve the use of a firm-fixed-price, level-of-effort term contract in excess of \$100,000.

**Subpart 916.3—Cost-Reimbursement Contracts**

**916.301-3 Limitations.**

(c) The determination and findings required by FAR 16.301-3(c) may be approved at a level above the contracting officer. Such determination and findings shall be prepared using the following format:

**Department of Energy**

**Determination and Findings**

**Authority To Use Cost-Reimbursement Type Contract**

I hereby find that:

(1) The Department of Energy proposes to contract with (name of proposed contractor) for (describe work, service, or product) (identify program or project). The estimated cost is (\$—) (if contract is CPFF type, insert, "plus a fixed fee of (\$—) which is — percent of the estimated cost exclusive of fee").

(2) (Set forth facts and circumstances that show why it is impracticable to secure property or services of the kind or quantity required without the use of the proposed type of contract or why the proposed method of contracting is likely to be less costly than other methods.)

I hereby determine that:

On the basis of the above findings it is impracticable to secure the property or services of the kind or quality required without the use of a (insert contract type—) type of contract, or the (insert contract type—) method of contracting is likely to be less costly than any other method.

Date \_\_\_\_\_  
(Signature) \_\_\_\_\_

**916.303 Cost-sharing contracts.**

(b) DOE cost participation policies and application are at Subpart 917.70, Cost Participation.

**916.306 Cost-plus-fixed-fee contracts.**

(c)(2) The head of the Contracting Activity, or designee, for contracts estimated to be within their delegated authority, may approve (sign) the determination and findings establishing the basis for application of the statutory price or fee limitations.

**916.307 Contract clauses.**

(j) The contracting officer shall insert the clause at FAR 52.216-15, Predetermined Indirect Cost Rates, modified as specified in 952.216-15 in solicitations and contracts when a cost-reimbursement research and development contract with a State or local government is contemplated and predetermined indirect cost rates are to be used.

**Subpart 916.4—Incentive Contracts**

**916.404-2 Cost-plus-award-fee contracts.**

(d) *Fee Determination Plans.*—Award fee arrangements limited to technical performance considerations are prohibited because they may increase cost disproportionately to any benefits gained. Instead, the award fee arrangement shall include both technical performance (including scheduling as appropriate) and business management considerations tailored to the needs of the particular situation. In addition, in a situation where cost estimating reliability and other factors are such that the negotiation of a separate predetermined incentive sharing arrangement applicable to cost performance is determined both feasible and advantageous, cost incentives may be added. The resulting contract would then be identified as a cost-plus-incentive-fee/award-fee combination type. The goals and evaluation criteria should be results-oriented. The award fee should be concentrated on the end product of the contract, that is, output, be it hardware, research and development, demonstration or services, together with business management considerations. However, input criteria such as equal employment opportunity, small business programs, functional management areas, such as safety, security, etc., should not be disregarded and may be appropriate criteria upon which to base some part of the award fee. Specific goals or objectives shall be established in relation to each performance evaluation criterion against which contractor performance is measured.

**916.405 Contract clauses.**

(e) Award fee contracts should include in the contract schedule the ARTICLES shown below. The Articles

may be modified to meet individual situations and any ARTICLE or specified requirement therein should be deleted when it is not applicable to a given contract. If substantial changes are believed appropriate, consultation with the Director, Office of Policy, Headquarters, is advisable.

**ARTICLE (Insert Article Number)—ESTIMATED COST, BASE FEE, AND AWARD FEE**

The estimated cost of this contract is \$ (Insert Amount). A base fee of \$ (Insert Amount) is payable in accordance with the ARTICLE entitled "Payment of Base and Award Fee." In addition, a maximum Award Fee of \$ (Insert Amount) is available for payment in accordance with the ARTICLE entitled "Payment of Base and Award Fee."

**ARTICLE (Insert Article Number)—PAYMENT OF BASE AND AWARD FEE**

*Base Fee.* The government will make payment of the base fee in (Insert Number) increments. The amount payable shall be based on the progress as determined by the Contracting Officer and shall be subject to any withholdings as may be provided for elsewhere in this contract.

*Award Fee.* The government will promptly make payment of any Award Fee upon the submission, by the contractor to the Contracting Officer or his authorized representative, of a public voucher or invoice in the amount of the total fee earned for the period evaluated. Payment shall be made without the need for a contract modification.

**ARTICLE (Insert Article Number)—DETERMINATION OF AWARD FEE EARNED**

A. The government shall at the conclusion of each specified evaluation period(s) evaluate the contractor's performance for a determination of award fee earned. The contractor agrees that the determination as to the amount of award fee earned will be made by the government Fee Determination Official (FDO) and such determination concerning the amount of award fee earned is binding on both parties and shall not be subject to appeal under the "Disputes" clause or to any other appeal clause.

B. It is agreed that the evaluation of contractor performance shall be in accordance with the Performance Evaluation Plan referenced in the ARTICLE entitled "Performance Evaluation Plan" and that the contractor shall be promptly advised in writing of the determination, and the reasons why it was or was not earned. It is further agreed that the contractor may submit a self-evaluation of performance for each period under consideration. While it is recognized that the basis for determination of the fee shall be the evaluation by the government, any self-evaluation which is received within (Insert Number) days after the end of the period being evaluated, may be given such consideration, if any, as the FDO shall find appropriate.

C. The FDO may, in his sole discretion, specify in any fee determination that fee not earned during the period evaluated may be



accumulated and be available for allocation and/or "Distribution of Award Fee" shall be adjusted to reflect such allocations.

#### ARTICLE (Insert Article Number)— PERFORMANCE EVALUATION PLAN

A. A contractor Performance Evaluation Plan upon which the determination of award fee shall be based, including the criteria to be considered under each area evaluated and the percentage of award fee, if any, available for each area, will be unilaterally established by the government. A copy of the plan shall be provided to the contractor (Insert Number) calendar days prior to the start of the first evaluation period.

B. The Performance Evaluation Plan shall set forth the criteria upon which the contractor will be evaluated for performance relating to any (1) Technical including Schedule requirements if appropriate, (2) Management, and (3) Cost Functions selected for evaluation.

C. The Performance Evaluation Plan may, consistent with the contract, be revised unilaterally by the government at any time during the period of performance. Notification of such changes shall be provided to the contractor (Insert Number) calendar days prior to the start of the evaluation period to which the change will apply.

#### ARTICLE (Insert Article Number)— DISTRIBUTION OF AWARD FEE

A. The total amount of award fee available under this contract is assigned to the following evaluation periods in the following amounts:

Evaluation Period \_\_\_\_\_  
Available Award Fee \_\_\_\_\_

B. In the event of contract termination, either in whole or in part, the amount of award fee available shall represent a pro-rata distribution associated with evaluation period activities or events as determined by the Fee Determination Official.

The contract clauses required for cost reimbursement contracts should be modified for use under award fee contracts as cited below:

(i) The words "base fee and award fee" should be substituted for the term "fixed-fee" where it appears in the clause at FAR 52.243-2, Changes.

(ii) The words "base fee" should be substituted for the word "fee" where it appears in the clauses at FAR 52.232-20, Limitation of Costs, and FAR 52.232-22, Limitation of Funds.

(iii) The words "base fee, if any, and such additional fee as may be awarded as" provided for in the schedule" should be substituted for the term "fee" wherever it appears in the clause at FAR 52.216-7, Allowable Cost and Payment.

#### Subpart 916.6—Time-And-Materials, Labor-Hour, and Letter Contracts

##### 916.603 Letter contracts.

##### 916.603-2 Application.

(c) In accordance with FAR 16.603-2(c), a letter contract shall provide for definitization of the contract not more

than 180 days after the date of award or after completion of 40 percent of the work to be performed, whichever occurs first, unless approved in advance by the Procurement Executive.

(d) In accordance with FAR 16.603-2(d), the amount of funds obligated under a letter contract shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the Procurement Executive.

(f) Letter contract awards should be reported in the Procurement and Assistance Data System as soon after award as possible. Should it be necessary to modify a letter contract prior to its definitization, such actions shall be handled and reported as formal modifications as they occur. The actual definitization of the letter contract in turn, shall be accomplished by formal modification and be reported as such.

#### PART 917—SPECIAL CONTRACTING METHODS

##### Subpart 917.5—Interagency Acquisition Under the Economy Act

Sec.

917.502 General.

917.504 Ordering procedures.

917.505-70 Methods of financing employed by DOE.

917.505-71 Cost-reimbursement standards.

##### Subpart 917.6—Management and Operating Contracts

917.600 Scope of subpart.

917.604 Identifying management and operating contracts.

917.605 Award, renewal, and extension.

##### Subpart 917.70—Cost Participation

917.7000 Scope of subpart.

917.7001 Policy.

917.7002 Application.

917.7003 Amount of cost participation.

917.7004 Disposition of property and equipment furnished or acquired.

917.7005 Records.

917.7006 Payments under contracts with third party cost contributions.

917.7007 In-kind contributions.

##### Subpart 917.71—Special Research Contracts With Educational Institutions

917.7100 Scope of subpart.

917.7101 Definitions.

917.7102 General.

917.7103 Research program objectives.

917.7104 Other objectives.

917.7105 Unsolicited research proposals.

917.7106 Selection, preparation, and award.

917.7106-1 General.

917.7106-2 Responsibilities.

917.7106-3 Review of research proposals.

917.7106-4 Compensation for personal services of professional staff.

917.7106-5 Notice of selection or rejection.

917.7106-6 Selection of field office.

917.7106-7 Information to be furnished to field office.

917.7106-8 Changes in scope and level.

917.7106-9 Notification of contract execution.

917.7107 Contract content.

917.7107-1 General.

917.7107-2 Financial requirements.

917.7108 Personal property.

917.7108-1 Transfer of title to equipment to nonprofit educational or research institutions.

917.7108-2 Acquisition of excess Government personal property.

917.7108-3 Management of Government-owned equipment.

917.7108-4 Reports.

917.7109 Reporting requirements.

917.7109-1 Purpose of reports.

917.7109-2 Notice of Energy R&D Project.

917.7109-3 Progress reports.

917.7109-4 Technical reports.

917.7109-5 Special reports.

917.7109-6 Final report.

917.7109-7 Summary and distribution of reports.

917.7110 Dissemination of results.

917.7110-1 Prompt dissemination.

917.7110-2 Publication.

917.7111 Extension of contracts.

917.7111-1 Renewal proposals.

917.7111-2 Evaluation of requests for renewals.

917.7111-3 Authorization to renew.

917.7112 Administration.

917.7112-1 Responsibilities of program offices.

917.7112-2 Responsibilities of field offices.

917.7112-3 Payments under special research contracts.

917.7112-4 Approval of deviations in performance and other specified actions.

917.7112-5 Auditing.

917.7112-6 Security.

917.7113 Format for Special Research Contracts (SRC) with educational institutions or other nonprofit institutions.

##### Subpart 917.72—Program Opportunity Notices for Commercial Demonstrations

917.7200 Scope of subpart.

917.7201 Policy.

917.7201-1 General.

917.7201-2 Determination to use and approval of content.

917.7201-3 Federal support criteria.

917.7201-4 Information to be included in program opportunity notices.

917.7201-5 Information to be provided in proposals offered pursuant to program opportunity notices.

917.7202-1 Forms of assistance and participation.

917.7202-2 Cost participation.

917.7203 Method and criteria for evaluation and selection.

917.7204 Award or support.

917.7205 Unsolicited proposals for commercial demonstrations.

917.7206 Optional two-step method.

##### Subpart 917.73—Program Research and Development Announcements

917.7300 Scope of subpart.

917.7301 Policy and prerequisites.

917.7301-1 General.

917.7301-2 Determination to use and approval of content.



- 917.7301-3 Information to be included.  
 917.7301-4 Information to be provided in proposals.  
 917.7302 Cost participation.  
 917.7303 Method and criteria for evaluation and selection.  
 917.7304 Award or support.

#### Subpart 917.74—Acquisition, Use, and Disposal of Real Estate

- 917.7400 Scope of subpart.  
 917.7401 General.  
 917.7402 Policy.  
 917.7403 Application.  
 917.7404 Competition.

#### Subpart 917.75—Multiple Awards—Phased Acquisitions

- 917.7500 Scope of subpart.  
 917.7501 RFP provisions.  
 917.7502 Evaluation.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### Subpart 917.5—Interagency Acquisition Under the Economy Act

##### 917.502 General.

The Head of the Contracting Activity shall make the determination prescribed in FAR 17.502.

##### 917.504 Ordering procedures.

(b) In addition to the items noted at FAR 17.504(b), agreements shall include:

- (1) The parties to the interagency agreement.
- (2) Agreement number, or modification number, if any as appropriate.
- (3) Period covered by interagency agreement and/or duration of the work.
- (4) Cost estimate of the project and the amount of funds to be provided by the DOE including (i) the total estimated cost of the work for the period of time specified in the agreement; (ii) the capital equipment, if any, approved for acquisition under the agreement; and (iii) limitations, if any, on the reimbursement of costs by DOE which are not set forth in the agreement. If DOE participates with another agency or agencies in sponsoring a work project, the amount of contribution to be made by each agency and the basis for distributing the costs incurred shall be specified.

- (5) Method of financing to be used.
- (6) Standard clauses, and reporting requirements as appropriate.

##### 917.505-70 Methods of financing employed by DOE.

(a) Except as specified in (b) and (c) below DOE prefers to finance work done by servicing agencies by reimbursement on the basis of current billings for progress payments.

(b) A consolidated working fund advance shall be used to finance small or medium construction projects buy or the acquisition of goods or services of lesser value from the servicing agency within the same fiscal year in which the advance is made, only after a determination has been made that the reimbursement basis is not to be used.

(c) An appropriation transfer shall be used to finance larger construction projects buy or the acquisition of more costly goods or services from the servicing agency where the work will extend beyond the fiscal year in which the transfer is made, only after a determination has been made that the reimbursement basis is not to be used.

##### 917.505-71 Cost-reimbursement standards.

(a) Incurred cost necessary or incident to the performance of the work of servicing agencies are to be considered allowable for cost-reimbursement purposes. Such costs include direct and, where applicable, indirect costs:

(b) Direct costs are the costs that can be directly identified with work under the agreement. Examples of such costs are salaries and wages, technical services, materials, travel and transportation, communications, and any facilities and equipment expressly approved for purchase under the interagency agreement.

(c) Indirect costs shall be limited to the properly allocable portion of costs that are not charged directly to the work but which can be shown as mutually benefiting the work covered by the interagency agreement as well as other work of the servicing agency. Justification for any such charges shall be required, and the basis of allocation must be reasonable. Where agreements are entered into under authority of section 601 of the Economy Act of 1932, the servicing agency's charge for any indirect costs may include appropriately allocable charges for "general administration" or "central agency overhead," as provided in Comptroller General Decision, 56 Comp. Gen. 275 (1977) as modified by 57 Comp. Gen. 674 (1978). However, general administrative or central agency overhead is chargeable only to the extent specified in the interagency agreement.

#### Subpart 917.6—Management and Operating Contracts

##### 917.600 Scope of subpart.

This subpart implements FAR Subpart 17.6, Management and Operating Contracts. DOE implementing procedures and requirements to be followed in the selection, award, and

administration of Management and Operating Contracts are at Part 970.

##### 917.604 Identifying management and operating contracts.

(a) Single purpose contracts for the operation of process development units, pilot plants, and demonstration plants where the purpose is to demonstrate the viability of processes toward the goal of commercialization are not considered to be included, unless designated operating contracts in accordance with FAR 17.602.

##### 917.605 Award, renewal, and extension.

(b) The decision to extend or compete management and operating contracts requires advance Headquarters' approval. The Head of the Contracting Activity will submit a memorandum that recommends either extending or not extending a management and operating contract. This memorandum of recommended action, together with attachments supporting it, will be submitted at least 18 months prior to expiration of the contract. The attachments shall include the following information:

(1) A full and complete justification of the recommendation that is made; i.e., either to obtain competition or to extend the contract without obtaining competition. This justification must address the policy stated in FAR 17.605.

(2) A statement of the present contractor's overall performance since award of the contract, or if previously extended, since Headquarters' last authorized extension of the contract. This should be supported by a detailed summary of the most recent appraisal of the contractor's performance.

(i) The technical appraisal shall include data which indicates the contractor's success or failure in meeting established program goals and objectives during the appraisal period. It is recognized that in some cases, the contracting office will not have the technical staffing necessary to perform an appraisal of the scientific and technical work under the contracts they are administering, as in the case with the contracts for the operation of DOE's national laboratories. When this is the situation, the contracting office shall obtain the necessary technical appraisal information from the appropriate Headquarters' program division(s) for incorporation into the overall management appraisal.

(ii) The cost appraisal shall include data that indicates the contractor's success or failure in controlling both direct and indirect costs.



(iii) Where the contract is a cost-plus-award-fee (CPAF) or similar arrangement, include a discussion of award fee experience since the date that the contract was last extended, showing the base fee, award fee pool, award fee appraisals, and award fee earned.

(iv) A separate appraisal shall be made of the contractor's performance in assuring consideration of environmental, safety, health, energy conservation and security in operating the facility and development of products.

(3) The justification for use of the contract type contemplated, including discussion of consideration given to use of the CPAF type contract.

(4) Summary description of scope of work and brief listing of some of the important projects which have been performed under this contract. A list of any important projects planned for assignment in the future should be included as well as the current institutional planning documents if applicable or other documents that indicate the area of work to be performed during the contract period.

(5) The actual cost expenditures and fee or management allowance over the past contract period and expected costs in the future.

(6) While a copy of the proposed contract document should not be submitted with the recommendation, Headquarters should be advised of the following:

(i) Any special or unique features (with brief supporting rationale) in the existing contract expected to be continued in either the extension of the existing contract or in the replacement contract. This shall include any provisions which deviate from standard clauses.

(ii) An outline of the principal issues to be negotiated if the contract is extended, with arguments pro and con, and with a recommended position. This should include the identification of any anticipated problem areas for which Headquarters guidance is needed and should also include a justification for any clauses which deviate from standard clauses and continued use of deviations granted in the past.

(d) If Headquarters makes the decision to extend the existing contract without obtaining competition, the contracting officer will be authorized by the Head of the Agency to negotiate an extension to the contract. The contracting officer shall submit the negotiated contract to Headquarters for the approval of the Procurement Executive prior to execution. The proposed contract document shall be accompanied by the following:

(1) A complete justification as required above;

(2) A summary of the major clauses of the proposed contract with particular attention to indemnity, patents, and conduct of work (including clauses concerning control over work and termination). Any deviations from current FAR and DEAR policies or standard contract clauses should be identified with the reasons therefore;

(3) A listing of any significant changes from the existing contract.

#### Subpart 917.70—Cost Participation

##### 917.7000 Scope of subpart.

(a) This subpart sets forth the DOE policy on cost participation by organizations performing research, development, and demonstration projects under DOE prime contracts. This subpart does not cover efforts and projects performed for DOE by other Federal agencies.

(b) Cost participation is a generic term denoting any situation where the Government does not fully reimburse the performer for all allowable costs necessary to accomplish the project or effort under the contract. The term encompasses cost sharing, cost matching, cost limitation (direct or indirect), participation in kind, and similar concepts.

##### 917.7001 Policy.

(a) When DOE supports performer research, development, and demonstration efforts, where the principal purpose is ultimate commercialization and utilization of the technologies by the private sector, and when there are reasonable expectations that the performer will receive present or future economic benefits beyond the instant contract as a result of performance of the effort, it is DOE policy to obtain cost participation. Full funding may be provided for early phases of development programs when the technological problems are still great.

(b) In making the determination to obtain cost participation, and evaluating present and future economic benefits to the performer, DOE will consider the technical feasibility, projected economic viability, societal and political acceptability of commercial application, as well as possible effects of other DOE-supported projects in competing technologies.

(c) The propriety, manner, and amount of cost participation must be decided case-by-case.

(d) Cost participation is required for demonstration projects unless exempted by the Under Secretary. Demonstration

projects, pursuant to this subpart, include demonstrations by technological advances and field demonstrations of new methods and procedures, and demonstrations of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of energy resources.

##### 917.7002 Application.

(a) The DOE cost participation policy set forth in 917.7001 applies to all prime contracts to the extent stated therein.

(b) Cost participation is not contemplated in contracts for the operation of Government-owned or leased, contractor-operated facilities or continuing cost-reimbursement type contracts for mission-oriented, large-scale research programs performed, using equipment or facilities which are either partially or wholly Government-owned.

(c) Potential benefits to a performer is less likely where basic research is involved and therefore cost participation, if any, is expected to be less than in circumstances where a product is being developed. As projects or proposed efforts reach stages approaching commercial viability, cost participation should be based on the overall project risk.

(d) Except for demonstration projects, the requirement for a cost participation contract in accordance with 917.7001 may be waived by the cognizant Program Assistant Secretary where it is determined that payment of the full allowable cost of the contractual effort is in the best interests of the Government.

(e) The performer's cost participation may be provided by other companies or associations with which it has contractual arrangements to perform the project. The fact that a project is jointly funded, e.g., where DOE and an industry association fund a third party performer, does not preclude cost participation by the performer.

##### 917.7003 Amount of cost participation.

(a) Cost participation may be in various forms or combinations, which includes but is not limited to cash outlays, real property, or interest therein, needed for the project, personal property or services, cost matching, foregone fee, or other in-kind participation. Cost participation may include the value of contributions of other non-Federal sources, provided the contributions were not previously obtained free of charge from Federal sources. The value of any noncash contribution shall be established by



DOE after consultation with the performer. Cost participation may be accomplished by a contribution to either direct or indirect costs provided such costs are otherwise allowable in accordance with the cost principles of the contract. Allowable costs which are absorbed by the performer as its share of cost participation may not be charged directly or indirectly to the Federal Government under other contracts, agreements, or grants.

(b) Organizations should contribute a reasonable amount of the total project cost covered under the contract. The ratio of cost participation should correlate to the apparent advantages available to performers and the proximity of implementing commercialization. In setting the levels of cost participation by the performer, the contracting officer, in consultation with the program office, should consider such factors as:

(1) The availability of the technology to the performer's competitors;

(2) The risks involved in achieving commercial success;

(3) The length of time before the project is likely to be commercially successful;

(4) Improvements in the performer's future commercial competitive position;

(5) Disposition of property at project's end;

(6) Whether the potential benefits will be lessened if the performer lacks production or other capabilities with which to capitalize the results of the project. However, if the results of the project are transferable to commercial organizations with production capabilities, and the performing organization would obtain patent of other property rights which could be sold or licensed, this should be considered; and

(7) Whether the performing organization lacks adequate non-Federal sources of funds from which to make cost participation.

(c) The manner of cost participation and how it is to be accomplished shall be set forth in the contract.

(d) The handling of any return from sale of products from the project shall be set forth in the contract.

(e) The solicitation document shall state whether any cost participation is required and may set forth a target level of cost participation. Though technical considerations are normally most important the degree of cost participation will be considered when cost to the Government is to be a major factor in a selection decision.

(f) Unsolicited proposals will be considered on a case-by-case basis by the program office, in consultation with

contracting officer, as to the appropriateness of cost participation. If cost participation is considered to be appropriate, guidance for determining an appropriate level may be included in the procurement authorization package. The extent and type of cost participation is subject to negotiation, however.

(g) The extent to which a performing organization contributes to the cost of a project will be taken into consideration in the allocation of patent rights under DOE's waiver policy.

(h) Fee or profit will not be paid the performer under a cost participation contract. Foregone fee or profit will be considered in establishing the degree of cost participation.

(i) Where cost participation is appropriate, fee or profit will not be paid to any member of the proposing team having a substantial and direct interest in the project. Competitive subcontracts placed with the prior written consent of the contracting officer and subcontracts for routine supplies and services are not covered by this prohibition.

#### **917.7004 Disposition of property and equipment furnished or acquired.**

Disposition instructions for any property and equipment furnished or acquired using Federal funds during performance shall be set forth in the contract.

#### **917.7005 Records.**

Contracts which provide for cost participation shall require the contractor to maintain records adequate to reflect the nature and extent of their cost contribution as well as those costs charged to DOE. Such records shall be subject to audit by DOE.

#### **917.7006 Payments under contract with third party cost contributions.**

Arrangements between DOE and non-Government organizations for jointly sharing the cost of projects performed by third party contractors shall provide that each party to the cost sharing agreement shall pay its share of program costs directly to the performing contractor. Any alternative arrangement must be approved in advance by the Controller or designee.

#### **917.7007 In-kind contributions.**

(a) In-kind contributions represent non-cash contributions provided by the performing contractor or a non-Federal third party who is participating with DOE in a co-sponsored project or contract. In-kind contributions may be in the form of personal property (equipment and supplies), real property (land and buildings) or services which are directly beneficial, specifically

identifiable and necessary to performance of the project or program.

(b) In-kind contributions proposed to the DOE as part of a performer's cost participation must meet all of the following criteria before acceptance:

(1) Be verifiable from the performer's books and records, if performer donated;

(2) Not be included as contributions for any other Federal program;

(3) Be necessary to effective and efficient accomplishment of project objectives;

(4) Provide for types of charges that would otherwise be allowable under applicable Federal cost principles appropriate to the contractor's organization; and

(5) Not be paid for by the Federal Government under any contract, agreement or grant, unless specifically authorized by legislation.

(c) In-kind contributions accepted from a performer will be valued as set forth below provided the established values do not otherwise exceed fair market values.

(1) Where the Government receives title to donated land, buildings, equipment or supplies and the property is not fully consumed during performance of the co-sponsored project, the property's in-kind value should be established based on the performer's booked cost (i.e., acquisition cost less depreciation, if any) at the time of donation. In the event the booked costs reflect totally unrealistic values when compared to current market conditions, another appropriate value may be established if supported by an independent appraisal of the fair market value of the donated property or property in similar condition and circumstance.

(2) The value of any services or the use of personal or real property donated by a performer should be established, when necessary to do so, in accordance with generally accepted accounting policies and the appropriate Federal cost principles applicable to the performer's organization.

(d) Values established for in-kind contributions accepted from a non-Federal third party should be reasonable and shall not exceed the fair market value of the item at the time of donation. Specific requirements for selected in-kind items involving third party donors are as follows:

(1) *Donated Employee Services.* Employee services donated by a non-Federal third party shall be valued at the employee's regular rate of pay (exclusive of fringe benefits and indirect costs) provided the donated services require use of the same skills for which



the employee is normally paid. Otherwise, the rate of pay, for valuation purposes, shall be consistent with the rates paid for similar work in the labor market in which the performer competes for such skills.

(2) *Volunteer Services.* Rates used to value volunteered personal services of professional, clerical, or other individuals should be consistent with those regular rates paid by the performer for similar work and be established in accordance with the procedures specified in subparagraph (1) above.

(3) *Property.* Values for personal or real property, or the use thereof, donated by a non-Federal third party shall be established, dependent upon the donor's intended disposition of the property upon project completion, as follows:

(i) When title is donated at no cost to the Government or the property will be fully consumed during project performance, a reasonable value not in excess of the fair market value of the donated property, or comparable property in similar condition, shall be established provided the fair market value of land or buildings is established by an independent appraisal.

(ii) When title is retained by the donor or acquired by the performer, reasonable usage values not in excess of the fair rental value of the donated property or comparable property shall be established provided the fair rental value of donated space is established by an independent appraisal.

#### **Subpart 917.71—Special Research Contracts With Educational Institutions**

##### **917.7100 Scope of subpart.**

This subpart sets forth policies and procedures applicable to the negotiation and administration of Headquarters-designated special research contracts for basic research with educational or other nonprofit institutions. These policies and procedures should also be followed for Headquarters-designated contracts for applied research with educational institutions and for educational and training activities with educational or other nonprofit institutions. The policy of reimbursing only DOE's share of actual costs up to a ceiling should be reflected in all contracts with educational institutions. The procedures in this subpart regarding acceptance of unsolicited proposals from educational institutions and use of the special research contracts may be used only when the annual DOE support does not exceed \$1,000,000. If the annual DOE support exceeds \$1,000,000, or a

determination is made under the provisions of Pub. L. 95-224 that a grant or cooperative agreement is to be used as the instrument for providing support regardless of the dollar amount, then a special research contract may not be used. If the annual DOE support exceeds \$1,000,000, and a contract is determined to be the instrument to provide such support, an appropriate type contract will be used in accordance with FAR 16, with clauses as prescribed in 952 and FAR 52 and the coverage of 917.7108.

##### **917.7101 Definitions.**

"Headquarters-designated contract" means a special research contract which results from an authorization to a field office from a Headquarters office to enter into or continue such a contract on the basis of an approved research proposal.

"Contractor" means the educational or nonprofit research organization which enters into a contract with DOE for the performance of specified research.

"Research proposal" means a request by or an unsolicited proposal as defined in FAR 15.501 from an institution for support of a research project, together with a detailed description of the project and its relationship to DOE's program, and detailed information as to background and experience of principal investigators, facilities, and environment of the institution, and cost and cost-sharing arrangements, if any.

##### **917.7102 General.**

The DOE, by statute, is permitted to participate in research programs that are related to atomic and other forms of energy.

##### **917.7103 Research program objectives.**

(a) Under sections 31 and 31a of the Atomic Energy Act of 1954, as amended, DOE is directed to exercise its powers in such manner as to ensure the continued conduct of research and training activities and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge in the following fields:

- (1) Nuclear processes;
- (2) The theory and production of atomic energy, including processes, material, and devices related to such production;
- (3) Utilization of special nuclear material and radioactive material for medical, biological, agricultural, health, or military purposes;
- (4) Utilization of special nuclear materials, radioactive material, and processes entailed in the utilization or production of atomic energy or such material for all other purposes, including

industrial and commercial uses, the generation of usable energy and the demonstration of advances in the commercial or industrial application of atomic energy;

(5) The protection of health and the promotion of safety during research and production activities; and

(6) the preservation and enhancement of a viable environment by developing more efficient methods to meet the nation's energy needs.

##### **917.7104 Other objectives.**

(a) Headquarters-designated special research contracts are entered into by negotiation under the authority of section 31c of the Atomic Energy Act of 1954 and section 302(c)(5) of the Federal Property and Administrative Services Act of 1949. In planning, negotiating, and administering such contracts, the objectives are to:

(1) Assure a continuing flow of new knowledge in fields related to the responsibilities of DOE;

(2) Respect the traditions of the contracting institution and encourage the quest for new knowledge without restrictions or scientific initiative, to the extent compatible with the laws and the protection of the public interest;

(3) Provide reasonable levels of support which will increase the national capability in energy fields and enable the contracting institution to strengthen its research programs in areas of interest to DOE; and

(4) Maintain effective contact with the scientific community so that:

(i) Scientists and students will be encouraged to expand their interests in fields of importance to DOE;

(ii) The scientific strength of the country can be brought to bear more effectively on DOE problems;

(iii) The DOE will be continuously aware of developments of value to its activities in the academic communities; and

(iv) An adequate supply of suitably trained scientists will be available for employment to meet energy program needs.

(b) The contractor is responsible for conducting the research and is expected to carry out the project or projects in a manner consistent with the agreed-upon objectives and requirements. These include the obligation to comply with applicable laws and regulations. The contractor is generally expected to follow its normal business practices and to use its existing accounting system.

##### **917.7105 Unsolicited research proposals.**

Unsolicited proposals for DOE assistance may be initiated by scientists



interested in doing research. Prior to submitting proposals, the interested scientists, at his or her initiative may discuss the project informally with DOE.

Following such discussions, the proposal should be submitted in accordance with FAR Subpart 15.5 and 915.506 of this Chapter. If the DOE desires to solicit proposals, the procedures in 917.73 or other existing solicitation procedures will be used.

#### **917.7106 Selection, preparation, and award.**

##### **917.7106-1 General.**

In order to maintain a comprehensive and well-integrated research program, evaluation of research proposals and selection of educational institutions to conduct scientific research is centralized in Headquarters program office. However, field offices may be assigned responsibility for handling the final arrangements and nontechnical administration of such contracts.

##### **917.7106-2 Responsibilities.**

(a) The program office interested in particular research is responsible for evaluating the technical aspects of the proposals. The program office must determine that the proposal has sufficient technical merits and program value in comparison to other available proposals to justify providing support. This includes judgments as to the merit of the proposed research objectives, the probability of achieving the objective(s), the capabilities of the researchers, and how the proposals will specifically promote the objectives in 917.7103 and 917.7104. The program office also reviews the proposer's requested cost and other estimates to determine the reasonableness, the propriety, and the advisability of proceeding with the project. Specifically, Senior Program Officials or their designees at Headquarters are responsible for:

- (1) Selecting and approving research proposals and determining the amount to be funded;
- (2) Documenting the rationale for funding in accordance with (a) above;
- (3) assuring that the statement of work is clear and complete;
- (4) Providing a copy of the documents prepared in (a)(2) and (3) to the field office;
- (5) Reviewing the items in the proposal budget or itemized account of the proposed work, and, if necessary, requesting the assistance of the appropriate field office;
- (6) Determining the ownership of property;
- (7) Reviewing and following the technical progress of the work;

(8) Providing contractors with the technical guidance and direction as may be required to meet broad program objectives; and

(9) Keeping the field offices fully informed of technical correspondence and discussions with contractors that may have contractual or non-technical administrative implications.

(b) Field offices are responsible for the consummation of contracts with the institution in accordance with directives from the program office, and for administering and making payments under such contracts. Specifically, field offices are responsible for:

- (1) Performing any necessary cost or price analysis, obtaining audit service when needed, and negotiation of budget and contract terms;
- (2) Finalizing and executing the contract (where necessary, obtaining further instructions from the program office);
- (3) Administering the contract in accordance with its terms and conditions and making payments thereunder; and
- (4) Providing technical and administrative assistance requested by program officials.

##### **917.7106-3 Review of research proposals.**

(a) If, in the judgment of the program office, an appraisal from representatives of the scientific community is required, reviewers may be selected on the basis of their familiarity with either the field of research or the competence of the investigator. See also 924.70.

(b) Occasionally, the program office may find it necessary to obtain additional information from the research institution or to visit the site. In some cases, the comments, assistance, or participation of staff members of the appropriate field office will be requested.

(c) At the time it reviews a research proposal, the sponsoring program office shall review the prospective contractor's budget or itemized account of the proposed work and activities and the materials, equipment, and facilities involved, for the purpose of reaching mutual understanding of the estimated cost of the research and the other major aspects of the contemplated contract. Questions about the cost elements that required further investigation may be referred to the appropriate field office when the contract is authorized.

(d) When reviews are conducted by representatives who are not Government employees, the policies for avoidance of organizational conflicts of interest in 909.5 shall be followed.

##### **917.7106-4 Compensation for personal services of professional staff.**

Compensation for personal services of professional staff must be in accordance with Office of Management and Budget Circular A-21, revised. The certification required by Appendix C of 917.7113 fulfills the certification requirement of section K of OMB Circular A-21 for the special research contract.

##### **917.7106-5 Notice of selection or rejection.**

The program office shall notify the proposer of the decision to fund or reject the proposal. In the event of a decision to fund, this notification shall advise: (a) that the proposal has been selected for funding subject to completion of a satisfactory contract; (b) which field office will negotiate and execute the contract; and (c) that DOE assumes no obligation until a contract has been executed. A copy of the notice of acceptance or rejection shall be sent to the field office concerned. The notice shall indicate the basis for rejection and shall constitute DOE's record of action for the files. If the proposal is accepted, a justification shall be prepared in accordance with 917.7106-2.

##### **917.7106-6 Selection of field office.**

(a) When the program office has determined that a proposal shall be funded, a field office shall be requested to make the final arrangements with the institution concerned. Usually the field office geographically nearest to the research institution will be selected, but occasionally other factors such as existing contractual relationships and location of the research project will make the selection of some other field office desirable.

(b) Traineeship agreements under the nuclear science and engineering traineeship program are exempt from the policy in (a) and shall continue to be assigned to the Oak Ridge Operations Office. Research contracts with foreign educational institutions shall be assigned to the Chicago Operations Office.

(c) Any transfers of assignments between field offices will be accomplished when the particular contract is next renewed or otherwise modified.

##### **917.7106-7 Information to be furnished to field office.**

The sponsoring program office shall provide the Contracting Activity with an authorizing directive early enough (generally 60 days) to permit timely completion of the contract award before the work is scheduled to start. The following shall be furnished:



(a) A copy of the detailed proposal and any modifications;

(b) Copies of correspondence with the research institution that are pertinent to the completion of the negotiation or that have some specific significance as to the preliminary review of arrangements made with the institution; and

(c) An authorizing directive which:

(1) Authorizes the execution of a special research of contract for a specified term, with DOE support limited to a specified amount or a specified percentage of costs up to a specified support ceiling;

(2) Summarizes the background of the proposal and any pertinent discussion not reflected in the papers attached to the memorandum;

(3) Indicates the extent to which the scope of the work proposed has been approved;

(4) Indicates the principal investigator and other necessary details;

(5) Determines the availability of legal authority to transfer title to property and indicates the total estimated cost of the research and other major aspects of the contract, by reference to the proposal or otherwise;

(6) Indicates whether title to property to be acquired under the contract is to be vested in DOE or the contractor;

(7) Indicates whether restricted data or other classified information is likely to be used or developed in the course of the work and such classification and security determination as may be appropriate;

(8) Indicates directions for special reports, if any;

(9) Gives such additional information as may assist the field office in negotiating the contract; and

(10) Designates the appropriate organizational unit and individual in the program office that will have technical cognizance over the work under the contract.

#### 917.7106-8 Changes in scope and level.

After a contract has been authorized by the program office but prior to execution, the field office shall not approve any significant change in technical scope, funding, specified result, performance, principal investigator, or other major aspects of the work without prior approval of the program office.

#### 917.7106-9 Notification of contract execution.

Promptly after execution of a contract, the program office shall be notified of such action.

#### 917.7107 Contract content.

##### 917.7107-1 General.

A standard outline (format) for a special research contract for research performed in facilities owned and controlled by the contractor (as distinguished from Government-owned or Government-controlled facilities), is set forth in 917.7113. This document is intended to provide a vehicle by which research tasks can be accomplished with a minimum of administrative effort. It is, therefore, important that such contracts be written so as to assure the complete understanding of the parties as to the job to be performed and the financial and administrative details connected therewith. Of special consideration is the nature of research contracting as contrasted to the acquisition of supplies and activities of a production nature. Wide latitude in the conduct of research by the institutions is generally desirable and the standard contract forms are designed to permit such latitude in the establishment of the rights and obligations of the parties.

##### 917.7107-2 Financial requirements.

(a) The special research contract outlined in 917.7113, is generally used for basic research with educational institutions when the annual DOE support under the contract does not exceed \$1,000,000. It provides that DOE's monetary obligations will be a specified amount, which is referred to as the support ceiling, or a lower adjusted amount (referred to as the cumulative support cost) if actual costs chargeable to DOE during the total period of the contract are less than expected. The ceiling on DOE's monetary support shall be determined and established as a support ceiling at the outset of the initial contract period.

(1) The total contract period of performance should be established based upon the estimated period of performance necessary to accomplish the research effort. If available funding is less than that needed to fully fund the effort, the available funding will be provided as the cumulative Government cost as defined at Article A-III(b) of 917.7113 with the remainder of the funding subject to the availability of funds.

(2) In such circumstances the standard Special Research Contract format provided at 917.7113 shall be revised at Article II, The Period for Performance, to indicate the period of time for which the available funding is estimated to suffice and at Article A-III to show the additional funding to be provided subject to the availability of funds.

(b) If the parties agree to extend the contract for an additional period or periods of performance, the ceiling on the DOE's funding (Government ceiling) shall be increased to reflect any increased support by reason of the extended period or periods. The costs chargeable to the DOE (Government cost) will be reported for each pertinent period of the contract specified in Appendix A (generally an annual period) in accordance with paragraphs (b), (c), and (d) of this section, and the Government cost determined for each such period will be accumulated for all periods of performance, as will the Government ceiling.

(1) The monetary obligation to the contractor will not exceed the cumulative Government cost or the accumulated Government ceiling, whichever is less.

(2) Upon termination, or expiration of the total period of performance, the contractor must refund to DOE, or make such other disposition as the contracting officer may direct, any funds advanced in excess of the cumulative Government cost incurred under the contract. Payment shall be made in consideration of the contractor's performance of research activities described in the contract and in accordance with the provisions of the contract.

(3) The contractor shall have the right to discontinue performance of research under the contract, upon written notice to the contracting officer, at any time when or after the total costs chargeable to DOE equal or exceed the cumulative Government cost or the Government ceiling whichever is less.

(4) Certain deviations in performance and other actions require the contracting officer's approval as stated in 917.7113. Among other approval requirements, the contractor must obtain the contracting officer's approval to incur costs for items set forth in Article A-II(a), during the pertinent period stated in Appendix A, in excess of 110 percent of the total estimated cost specified in Article A-III for the specific period. In those cases in which there is to be proportionate sharing of costs, the percent of the cost to be borne by DOE will be set forth in Article A-III of the agreement (see paragraph (d) of this section).

(c) The contractor shall be required to furnish a certified statement (within three months after the expiration of the pertinent contract period set forth in 917.7113, Appendix A and at the termination of or expiration of the contract), signed by an authorized official, showing the total cost, Government cost, and contractor's contribution, if any, for the prior



contract period. The format for this report is found in 917.7113, Appendix C.

(d)(1) It is expected that in many cases the contractor will propose to contribute to the cost of the research work. Such contribution shall be set forth in Appendix A of the contract, either as items under (b) or (c) of Article A-II which will be contributed solely by the contractor without charge to DOE, or as a proportionate cost-sharing agreement in Article A-III which will provide that the contractor will charge DOE only a specified percentage of the actual cost incurred from items under (a) of Article A-II.

(2) Proposed contractor contributions should ordinarily be listed under (b)(1) of Article A-II when: (i) The contribution is that of the principal investigator or other senior personnel who are likely to be involved in the research work to the same extent whether their cost is included in or excluded from proportionate cost sharing; (ii) the proposed contribution to the work is being paid for by a third party; e.g., personnel or equipment, the cost of which is being reimbursed under another contract or grant from public or private sources; and (iii) the proposed contribution does not involve any cash expenditure by the contractor.

(3) Only those items, the cost of which is to be charged to DOE or proportionately shared by the parties, should be listed under Article A-II(a). Proportionate sharing of the cost of items under Article A-II(a) should be provided for only when the contractor agrees to pay a specified percentage of the cost of all such items, and when such sharing is expected to be of financial benefit to DOE.

(4) In those cases in which there is to be proportionate cost-sharing, the contractor should generally be encouraged to continue the same sharing ratio throughout the life of the contract so as to provide for ease of administration and to avoid difficulties in determining proper charges to DOE. It should be understood that the DOE will pay only the specified percentage of the actual cost of items under Article A-II(a) incurred during the pertinent period specified in Appendix A, up to a maximum of 110 percent of the estimated Government cost set forth in Article A-III for the pertinent period unless otherwise specifically approved by DOE and subject to the Government ceiling set forth in Article III.

(e)(1) If the contractor proposes to contribute the cost of the principal investigator(s) on the project and requests that the contribution be excluded from A-II(b), the contributed time or effort should be shown in A-

II(d). The contractor shall not be required to maintain records regarding the amount of effort contributed by the principal investigator, and the contractor shall not be required to certify, in accordance with Appendix C of the contract, the amount of effort contributed by the principal investigator.

(2) The principal investigator may be included in Article A-II(a) for purposes of obtaining reimbursement of costs during the summer months, and excluded from Article A-II(a) for academic year if the contractor proposes to contribute the costs for that period. The contract generally will not require the contractor's commitment that any particular amount of time or effort by the principal investigator(s) or other personnel will be devoted to the work.

(3) In the event a proposed contractor contribution is included in Article A-II(b)(1), the contract should reflect the nature and extent of the contractor's intent to contribute the item, and the contractor shall maintain records adequate to permit DOE to determine the extent of the contribution. The contractor must certify, in accordance with Appendix C of the contract, the extent to which the item or items under Article A-II(b)(1) have been contributed.

(4) Government-owned property to be procured, fabricated, or furnished under Article IV or Article B-IX of the contract and other Government-furnished equipment, supplies, materials, or services should be excluded from Article A-II(a) and listed under Article A-II(b)(2).

(f) When the special research contract outlined at 917.7113 is used for nonprofit organizations other than educational institutions:

(1) Article B-XXIX, Determination of Support Cost, should be revised to provide that the nonprofit cost principles (Subpart 931.7) will be used in determining actual cost, or

(2) Revised at the direction of the cognizant Headquarters office to provide for a lump-sum payment to the contractor in consideration for its performance of particular research at a specified level of effort.

(g) The special research contract outlined in 917.7113 may also be used to fund research at educational institutions in foreign countries; when so used:

(1) The outline of 917.7113 may be revised at the discretion of the cognizant Headquarters or field office, to provide for a lump-sum payment to the foreign institution in consideration of its performance of particular research at a specified level of effort.

(2) Approval requirements shall be limited to those consistent with the

nature of the support to the foreign institution.

(3) All such contracts with foreign institutions shall provide that any unused funds available to the foreign institutions at the end of the contract shall be used in a renewal period, returned to the DOE, or otherwise disposed of, in accordance with instructions from the contracting officer.

#### 917.7108 Personal property.

##### 917.7108-1 Transfer of title to equipment to nonprofit educational or research institutions.

(a) In accordance with Pub. L. 95-224, DOE has discretionary authority, where it is deemed to be in furtherance of the objectives of DOE to vest in nonprofit institutions of higher education or nonprofit organizations whose primary purpose is the conduct of scientific research, without further obligation to the Government or on such other terms and conditions as may be appropriate, title to equipment purchased or fabricated with contract funds.

(b) It is deemed to be in the furtherance of the objectives of DOE, pursuant to Pub. L. 95-224, to vest in those educational and nonprofit institutions title to equipment purchased or fabricated with contract funds for research. This will promote the progress of scientific research, reduce the amount of expense and unnecessary labor due to the necessity for maintaining records, transporting, or storing such property which is often unsuitable for any other use. Contracting officers (coordinating with program officials) shall impose such terms or conditions as they determine to be appropriate in individual cases.

(c) The vesting of title to equipment, fabricated or purchased for work to support a SRC shall be as follows:

(1) Contracts with nonprofit institutions of higher education or nonprofit organizations whose primary purpose is the conduct of scientific research, shall provide that title to equipment having an acquisition cost of less than \$1,000 and purchased or fabricated with contract funds available for the conduct of basic and applied research rest in the contractor at acquisition, provided prior approval of the purchase is obtained from the contracting officer. This prior approval may be in the form of an approved budget which calls out the equipment to be acquired, either on a line-item basis or for clearly defined classes of items, or by other means, as long as the contracting officer can determine that the proposed acquisition is essential to the performance of the contract. Title to



such equipment shall vest in the contractor upon acquisition or as soon thereafter as feasible.

(2) Contracts with those institutions cited in (1) above shall provide that title to equipment having an acquisition cost of \$1,000 or more, and purchased with contract funds available for the conduct of basic and applied research, shall vest in the institution upon acquisition or as soon thereafter as feasible without further obligation to the Government, unless it is determined not to be in furtherance of the objectives of DOE and is provided for in the contract. The contract may reserve the right of the Government to transfer title of equipment costing \$1,000 or more per unit to the Government or to a third party named by the Government, at any time prior to final payment under the contract.

(d) When title to equipment is vested in the institution as provided in this subsection, the institution shall not be reimbursed for any depreciation, amortization, or use charges with respect to such equipment under any Government contract, cooperative agreement, grant or any subcontract under a Government contract.

(e) The determination to vest title in the institution under this subsection will be provided by the cognizant program office on the procurement request, or other appropriate document.

(f) In addition to the authority referred to in paragraph (a) of this subsection, the Atomic Energy Act of 1954, as amended, authorized DOE to vest title to items of equipment and other personal property in a contractor when the transfer serves a nuclear programmatic purpose. When applicable programmatic determination to transfer title to the institution will be provided by the cognizant program office and made a part of the official contract file.

#### **917.7108-2 Acquisition of excess Government personal property.**

(a) The utilization of certain items of excess Government personal property by educational institutions is encouraged in the interest of conserving funds otherwise designated for similar items of property in existing research contracts or agreements with such institutions. Excess Government personal property includes all types of equipment and materials, used or new, which are owned by the Federal Government and are no longer needed by the holding Federal agency, but have additional useful life.

(b) Consistent with GSA regulations, excess personal property may be furnished to a contractor (with or without transfer of title) upon

authorization by DOE, provided a determination is made that acquisition will result in a reduction in the cost to the Government of the contract. This procedure will not normally be used for the acquisition of general purpose equipment (e.g., desks, typewriters, air conditioners).

(c) Contractors shall be advised they may obtain information concerning the availability of certain kinds of equipment or materials by requesting the contracting officer to include them on the GSA mailing list for excess property catalogs. When an item of equipment or material is selected, the contractor should reserve it by notifying the cognizant GSA office and confirming the reservation in writing. Availability is usually on a first-come, first-serve basis, but GSA will give preference in a competing situation to those agencies which do not vest title to property in the contractor. The contractor should then submit a Standard Form 122, Transfer Order Excess Personal Property, to the cognizant DOE office, accompanied by a written justification of need, including the estimated cost of acquisition (e.g., packing, shipping, installation, rehabilitation, etc.), signed by the principal investigator and an authorized administration official. The written justification shall contain a statement as to whether or not the contractor desires title to the property under the authority of the Atomic Energy Act and 917.7108-1(g). If the acquisition is approved, the DOE office shall forward the SF-122 to the appropriate GSA office with a notation as to whether or not DOE intends to vest title to the property in the contractor. A copy of the approved SF-122 with the notation regarding the vesting of title shall be returned to the contractor. When the property is received, the contractor shall forward to the DOE office a receipted copy of the SF-122 which lists the items of property.

(d) In those instances where the contractor's acquisition of title has been approved by DOE, title to the property shall pass to the contractor when the receipted SF-122 is received by the DOE office, pursuant to Article B-IX(b), Property Items, of 917.7113. Contract funds may be used to pay for necessary costs of packing, transportation, installation, rehabilitation, and maintenance, if required.

(e) In those instances where the contractor did not desire title or where the cognizant DOE office has determined that title to the excess property should remain in the Government, the property will be handled as Government property in accordance with Article B-IX of 917.7113.

#### **917.7108-3 Management of Government-owned equipment.**

When title to equipment is retained by the Government, the institution shall be required to establish and maintain a program for the utilization, maintenance, repair, protection, preservation, and reporting of Government property in accordance with sound business practice and the provisions of FAR Subpart 45.5 and 945.5 of this Chapter.

#### **917.7108-4 Reports.**

Excess property acquired from other Government agencies or from GSA and provided to institutions under the authority of 917.7108-2, above, will be included in the report required by FPMR 41 CFR 101-43.4701(c).

#### **917.7109 Reporting requirements.**

##### **917.7109-1 Purpose of reports.**

Research reports from contractors are necessary to show the progress achieved under projects receiving DOE funding. In many instances, the research reports are of value in making information available to scientists working on closely allied problems.

##### **917.7109-2 Notice of Energy R&D Project.**

Immediately after a special research contract is negotiated, a Notice of Energy R&D Project, DOE Form 538, which summarizes the purpose and scope of the project should be prepared by the contractor and sent to the contracting officer, the program manager, and the technical information officer. Annual updates are required.

##### **917.7109-3 Progress reports.**

Progress reports are required which should briefly describe the scope of investigations undertaken and the significant results obtained. They should also explain any significant differences between the actual level of activity (expressed in the various categories of labor-months, facilities acquired, travel performed, etc.) and that contemplated in the contract.

##### **917.7109-4 Technical reports.**

Technical reports, reprints, and articles prepared for publication during the period covered by the contract shall be required to be listed with bibliographic references. Reprints of all such material not previously submitted to the DOE shall be required to be appended and material contained in them need not be duplicated in the report.

##### **917.7109-5 Special reports.**

Special reports or additional progress, status, or topical reports shall be



requested as required by program officials or submitted as deemed necessary by the contractor. For example, brief status reports shall be requested when developments are of immediate interest or when a significant point in the investigation has been reached. The value relative to the costs incurred in providing special reports must be considered when requesting any additional reports.

#### 917.7109-6 Final report.

A final report summarizing the entire investigation shall be required from the contractor upon expiration of each contract. Satisfactory completion of a

contract will be contingent upon the receipt of this report. The final report should follow the outline agreed upon for progress reports, or when a project has extended over a long period of time, the final report may refer to previously submitted technical reports for details and may be a synopsis of the entire project. Manuscripts prepared for publication should be appended.

#### 917.7109-7 Summary and distribution of reports.

(a) A table summarizing the various types of reports, time for submission, number of copies and distribution is set forth below. The distribution and schedule of reports shall be as

prescribed in this table, unless the authorizing program office specifies otherwise. Frequently, an annual progress report and a 200-word summary are sufficient for fundamental research, but additional reporting may be required in many cases. All reports shall be prepared by the contractor and submitted to the appropriate field office for distribution. The field office shall transmit these reports with a cover memorandum indicating: (1) The other DOE offices receiving the documents; (2) the name of the contractor; and (3) the contract number. Each copy of the documents shall bear the contract number.

DISTRIBUTION AND SCHEDULE OF DOCUMENTS

| Type                                                                                                                                             | When due                                                                                    | Number of copies for |                   |               |                |
|--------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------|----------------------|-------------------|---------------|----------------|
|                                                                                                                                                  |                                                                                             | Field office         | HQ program office | TIC Oak Ridge | HQ patents OGC |
| 1. Summary: 200 words on scope and purpose (S.I.E. Form)                                                                                         | At start of initial contract and period.                                                    | 1                    | 3                 | 1             |                |
| 2. Renewal proposal                                                                                                                              | Not later than 4 months nor earlier than 6 months before contract expires.                  | 2                    | 4                 |               |                |
| 3. Annual progress reports                                                                                                                       | With renewal proposal, but bound separately.                                                | 2                    | 4                 | 2             |                |
| 4. Other progress reports, brief topical reports, etc. (Desired when significant results developed or when work has direct programmatic impact). | As deemed necessary by investigator or as specifically requested by appropriate Hq. office. | 2                    | 4                 | 2             |                |
| 5. Conference papers                                                                                                                             | Same as 4 above.                                                                            | 2                    | 4                 | 2             |                |
| 6. Final report                                                                                                                                  | Three months after completion of the work.                                                  | 2                    | 2                 | 2             | 2              |

(b) The DOE contracting officer shall inform the contractor which types of documents are to be transmitted to TIC. For each document so identified, the contractor shall send an additional copy to the contracting officer for transmittal to TIC, accompanied by one copy of DOE Form 427.

(c) The research effort shall be prefaced by an informative abstract of no more than 200 words.

(d) A listing of technical reports, articles, and reprints and the appendage of reports not previously submitted are required.

#### 917.7110 Dissemination of results.

##### 917.7110-1 Prompt dissemination.

Prompt dissemination of research results to the scientific community is encouraged. Publication in open literature is recognized as the normal and most desirable means for reporting the findings of unclassified fundamental research. Although DOE reserves the right to utilize, and have others utilize, to the extent it deems appropriate, the reports resulting from research contracts, DOE will attempt, to the maximum extent practicable and consistent with the Government's best interest, to permit the institutions and the authors to effect their own

publication in established technical journals.

##### 917.7110-2 Publication.

(a) Contractors should be urged to publish results through normal publication channels. As a further inducement, page charges or other printing assessments for publishing articles in recognized scientific journals, or any additional costs incurred in obtaining a limited supply of reprints of articles, shall be considered an appropriate budget item under contracts receiving DOE support where:

(1) The document reports work funded by the Government;

(2) The charges are levied impartially on all research papers published by the journal, whether by non-Government or by Government authors;

(3) Payment of such charges is in no sense a condition for acceptance of manuscripts by the journal;

(4) The journals involved are not operated for profit; and

(5) The author does not receive an emolument for the research paper.

(b) A credit line shall be included in any such publication to indicate that the research has been funded, in whole or in part, by DOE. A patent check shall be made in advance of release to the public of any material prepared for publication.

(c) The contractor or principal investigator may publish contract data as approved by DOE in accordance with the provisions of the Patent Rights clause.

#### 917.7111 Extension of contracts.

##### 917.7111-1 Renewal proposals.

(a) Where additional time, beyond the current expiration date, is required to continue or complete the work under a special research contract, the contractor shall be requested to submit six copies of its renewal proposal to the contracting officer not later than four months nor earlier than six months before the date of expiration of the contract. If a renewal proposal has not been received four months prior to the contract expiration date, the contracting officer shall determine if a renewal proposal is to be submitted and take necessary action for contract close-out or processing the renewal proposal as appropriate.

(b) The renewal proposal shall outline and justify a program and budget for the succeeding year, showing in detail the estimated cost of the project, together with an indication of the items for which the contractor is requesting reimbursement or proportionate cost-sharing, the percentage of any such costs to be shared by the contractor, and



any items to be contributed solely by the contractor. It should include the same type of information as that required for initial proposals, or reference this information to the extent contained in earlier proposals. Any contemplated change in program or scope for the ensuing period should be justified and explained clearly, and the cost estimates and other items should be based upon past experience. Any deviation from the contract which has not received DOE approval should be explained in detail.

(c) The renewal proposal should include a financial statement of the work under the current contract including:

(1) Total project costs for the current period to date, indicating the amount chargeable to DOE;

(2) An estimate of the total costs to be incurred during the remainder of the current contract period, indicating the amount chargeable to DOE;

(3) The anticipated difference, if any, between the accumulated support cost at the end of the current contract period and the cumulative Government ceiling; and

(4) A footnote to show the estimated amount of outstanding commitments for property at the end of the current contract period.

#### 917.7111-2 Evaluation of requests for renewals.

(a) Requests for renewals are required to be evaluated by the appropriate program office in the light of:

(1) Progress reports submitted by the contractor;

(2) Research results published in scientific media;

(3) Field visits to the research site by technical personnel;

(4) Contractor's performance and progress;

(5) Continued relevance to DOE's mission;

(6) Scientific and technical merit of the research and a comparison of the relative importance of the project in relation to other research proposals, proposed and ongoing; and

(7) Availability of funds.

(b) Requests for renewals generally follow the same process of review and evaluation of technical aspects, funding, and preparation, and execution of the contract, and administration as a new project, although less use would normally be made of outside consultants.

(c) Contracts authorized by program offices shall not be extended for a new term or on an interim basis or modified in scope without specific prior authorization from the appropriate

program office except as provided at 917.7111-3(c).

#### 917.7111-3 Authorization to renew.

(a) When a determination has been made to extend a special research contract, the sponsoring program office is required to provide the contracting officer with notification 60 days in advance of expiration to permit an orderly completion of the extension before the expiration date. The authorizing directive generally should include the same type of information provided in the authorization of a new contract, including pertinent information concerning any changes in scope of work, level of funding, scheduled dates for completion of certain phases of work, target dates for submission of report, etc. The directive will describe the results of the prior funding period and what is expected to be accomplished in the new funding period.

(b) An authorization to renew a special research contract shall state the estimated total cost of items to be included under Article A-II(a) of Appendix A for the renewal period, the percentage of such costs to be reimbursed by DOE, and the amount of new funds authorized to increase the Government ceiling.

(c) The field office that has administrative jurisdiction of an existing contract may extend the term of an existing contract without authorization from the cognizant program office, provided that:

(1) Any such extension does not provide for an increase in DOE's monetary obligation under the contract;

(2) The scope of work is not revised by such extension;

(3) Such extension is necessary to permit completion of the scope of work authorized by Headquarters, including preparation of required reports; and

(4) Any such extension will not be for a period in excess of 90 days.

#### 917.7112 Administration.

##### 917.7112-1 Responsibilities of program offices.

(a) Technical representatives of program offices will make, to the extent practicable, periodic site visits. A written summary of the results of all visits will be prepared and filed promptly. Copies of such reports shall be forwarded to the contracting officer whenever they contain information of administrative interest or other information pertinent to the assigned responsibilities of the Contracting Activity. These visits are for the purpose of:

(1) Determining that the research is being performed in accordance with the contract;

(2) Ascertaining that schedules are being met to ensure timely submission of interim and final reports;

(3) Determining whether the project has adequate facilities, equipment, and scientific, technical, and other personnel for the specified research;

(4) Ascertaining that any equipment requested for purchase is not reasonably available within the institution;

(5) Assisting the principal investigator to clarify specific technical aspects as work progresses;

(6) Exploring future budget requirements, but without making any commitments as to future funding level; and

(7) Obtaining information regarding the status of work for administrative and technical purposes of the program sponsor.

(b) Program offices will provide guidance to the contracting offices in connection with:

(1) Any contractor requests for approval of proposed deviations or other actions requiring DOE approval which are brought to their attention by Contracting Activity, or which have been brought to their attention through site visits, progress reports, or other agreements or contacts with the contractor;

(2) Increasing the obligational authority under any special research contracts;

(3) Whether or not required contractor reports are satisfactory; and

(4) The renewal or close-out of contracts. Instructions should be provided at least four weeks prior to the expiration date of a contract.

##### 917.7112-2 Responsibilities of field offices.

Field offices are responsible for the following:

(a) Assisting Headquarters program offices, as requested, in carrying out the functions set forth in 917.7112-1;

(b) Performing the necessary administrative functions required by the terms of the contract, and making payments in accordance with the contract;

(c) Bringing to the attention of the appropriate Headquarters offices:

(1) Any contractor requests for approval which are required by the contract;

(2) The upcoming expiration date of a contract whenever required instructions on renewal or close-out have not been received on a timely basis;



(3) Any request by a contractor to revise an established stipulated salary support amount, and any notification by a contractor that is reducing the charges under the stipulated salary support procedure (see 917.7106-4(c)); and

(d) Determining whether to use Pub. L. 95-224 or the Atomic Energy Act of 1954, as amended, as the authority for vesting title to personal property in the contractor when authorized to do so pursuant at 917.7106-7(c)(6). Pub. L. 95-224 shall be used to the maximum extent consistent with the authority contained therein.

**917.7112-3 Payments under special research contracts.**

(a) Payments will be made to contractors under a special research contract in accordance with its provisions (see Article B-XI of 917.7113). The letter-of-credit procedures, as provided for in Treasury Fiscal Requirements Manual, Part 6, Chapter 2000, shall be used to the maximum extent feasible when the total of DOE contracts and agreements with advance financing to an institution provides for a continuing annual level of support of \$120,000 or more. When the total DOE contracts and agreements with advance financing provide for a continuing annual level of support of less than \$120,000, DOE shall make advance payments covering the first 90 percent of the amount of the new funds as set forth in Article A-III(b) of the contract. The contracting officer may revise Article B-XI of 917.7113, regarding the timing and amounts of advance payments, in accordance with the following provisions.

(1) The advance payments may be made at times and in amounts determined appropriate provided that no single payment will exceed 45 percent of the new funds as set forth in Article A-III(b) of the contract for the pertinent period except on the basis of a request from the contractor evidencing that a specified amount is required in connection with expenditures or commitments made under the contract.

(2) The timing and amounts of payments should be determined on the basis of limiting the amount of advances to the extent feasible, consistent with effective and efficient administration and performance of the research, for the purpose of slowing the rate of cash withdrawals from the Treasury and thereby decreasing the financing costs to the Federal Government.

(3) In determining the timing and amounts of payments, consideration should be given to funds already available to the contractor, the expected expenditures under the contract, any

information from the contractor regarding the need for funds, and the administrative cost of additional payments.

(b) If the contract is to be extended for an additional period of performance with additional funding, there may be paid at the time of execution of the extension, the amount withheld from the expiring period which, when added to the payments already made, does not exceed the new funds set forth in Article A-III(b) for the expiring period. The final payment under both of the procedures referred to in paragraph (a) of this section shall be made on the basis of determinations by the contracting officer that: (1) The required reports are satisfactory; (2) the research was performed in accordance with the provisions of the contract; (3) an additional payment is required to reimburse for all costs chargeable to DOE; and (4) an appropriate patent clearance has been obtained. If necessary in making these determinations, the contracting officer should obtain advice from technical personnel. It is expected that the annual progress and final reports and the contractor's certified cost statements will provide an adequate basis for making the required determinations. If the determinations cannot be made on the basis of the reports, visits to and other contacts with the research project during the contract period, and the contractor's certified statements, and the contracting officer determines that the contractor has not satisfied the contractual undertakings, appropriate steps shall be taken to protect the Government's interest.

**917.7112-4 Approval of deviations in performance and other specified actions.**

(a) Contractors should be advised to inform the contracting officer as soon as possible of contemplated deviations and other proposed actions which require DOE approval. Specific deviations and approval actions include the following:

(1) A change of the principal investigator, co-investigator, or other key people as might be named in the contract, or continuation of the research work for any period in excess of three months without direction by an approved principal investigator. The principal investigator may increase or decrease the amount of effort which he devotes to the project without obtaining the contracting officer's approval; however, a representative of the institution shall consult with the appropriate Headquarters program representative if the principal investigator plans to, or becomes aware that he will, devote substantially less

effort to the work than anticipated in Article A-I. The purpose of such consultation will be to determine what effect, if any, the anticipated change will have on the research work and what modification to the contract, if any, may be appropriate.

(2) A change in the phenomenon or phenomena under study (i.e., broad category of the research under the contract) requires the specific written approval of the contracting officer; ordinarily such changes, if approved by the contracting officer, will be accomplished through a new contract or modification. The contractor may change the specific objectives in the research work described in the contract, provided it gives the contracting officer prompt notification of such changes; and the contractor may continue to follow the new objectives while DOE determines whether it wishes to continue the program under the changed approach. Significant changes in methods or procedures employed in performing the research should be reported in the first technical progress report issued subsequent to the changes.

(3) Acquisition of an item of equipment not itemized in the contract, the cost of which is \$1,000 or more. Approval is not required if the equipment is merely a different model of an item listed in the contract. If plant and capital equipment funds are provided for the acquisition of equipment, with title to be vested in the Government, the total cost of such equipment shall not exceed the amount provided for such equipment unless prior approval has been obtained.

(4) Purchase of any general-purpose equipment, such as office equipment or furniture, air conditioning, etc., not specifically provided for in 917.7113, Appendix A of the contract will require prior approval.

(5) Incurring costs for items set forth in Article A-II(a), during the pertinent contract period stated in 917.7113, in Appendix A, in excess of 110 percent of the total estimated cost specified in Article A-III. Charges to DOE for any such costs incurred with approval of the contracting officer shall also be subject to the limitations of Article III.

(6) Any proposed foreign travel (defined as any travel outside of Canada and the United States and its territories and possessions) if requires prior approval.

(7) Expenditures for domestic travel if such expenditures exceed the amount shown in Article-II(a) for such travel by \$500 or by 25 percent, whichever is greater, requires prior approval.



(8) Acquisition of excess personal property.

(9) Such other items as, in the judgment of the program office or the contracting officer, in specific cases need to be separately identified in the contract. (When plant and capital equipment funds are provided for the acquisition of Government property, the program offices shall require that such funds be used only for acquiring the equipment designated in the contract, unless prior approval has been obtained.)

(b) The contracting officer will present (in any manner considered appropriate) all such requests for approval to the cognizant program office for consideration, and will issue such authorizations and modifications under the contract as are necessary and appropriate.

(c) Contractors should be required to provide such statements of the project's financial and program status as are believed necessary for considering requests for approval.

#### 917.7112-5 Auditing.

(a) As a part of the management of the research program accomplished through special research contracts, auditing of participating institutions shall be initiated by the contracting officers administering the contracts. The purpose of this audit program is to corroborate that the participating institutions are properly using the funds and personal property provided by the contracts, and to identify any changes needed in the arrangement or in related administrative requirements in order to further the effectiveness of the contracts in accomplishing their intended programmatic research purposes. In addition to these general objectives, the principal specific objectives of the audits of special research contracts should determine that: (1) The amounts as submitted in the contractor's certified cost statement are accurate and were incurred in connection with the work; (2) satisfactory documentary evidence is available in support of the costs incurred; (3) DOE approval was obtained where required; and (4) the proportion of total cost charged to DOE is in accordance with the percentage stipulated in the contract.

(b) The review of special research contracts should be made on a selective basis with the selected sample including all special research contracts where the contracting officer requested that an audit be performed pursuant to the provisions of 917.7112-3(b).

(c) In the event of termination prior to the expiration date of a special research contract, unless the costs incurred by

the contractor are relatively small or can be otherwise adequately corroborated, an audit should be made to determine the nature of the costs and other relevant data for use in arriving at a termination settlement.

(d) While audit is not a prerequisite to payment under a contract, the contracting officer, before authorizing final payment, should consider the necessity for an audit to determine whether the charges to the contract are proper. If any such audits result in findings which may be of value to program offices in their determinations regarding selection and renewal of research projects, such findings should be made available to them.

#### 917.7112-6 Security.

As a general rule, investigators should not need access to classified information in the conduct of basic research funded by DOE. The contractor should be advised when, in the judgment of the principal investigator, information is developed which should be classified, the DOE field office must be notified immediately. When, in the opinion of the cognizant program office, the work moves into a classified area, prompt steps shall be taken to notify the contractor and appropriate field office.

#### 917.7113 Format for Special Research Contracts (SRC) with educational institutions/or other nonprofit institutions.

##### Contract No. \_\_\_\_\_

This contract is effective as of the —, 19—, between the United States of America (hereinafter referred to as the "Government"), acting through the U.S. Department of Energy (hereinafter referred to as the "DOE"), and — (hereinafter referred to as the "Contractor").

##### Recitals

DOE wishes to have the Contractor perform certain research. This contract states the terms and conditions under which the Contractor agrees to perform the work.

This contract is authorized by the Department of Energy Organization Act of 1977 and other applicable law.

##### Agreement

Now therefore, the parties hereto agree as follows:

#### Article I—The Research To Be Performed

(a) The Contractor shall furnish personnel, facilities, equipment, materials, supplies, and services, except such as are furnished by the Government, necessary for the performance of the research provided for in Appendix A and shall perform the research and report thereon pursuant to the provisions of this contract. It is understood that Appendix A, a guide to the performance of this contract, may be deviated from by the Contractor subject to the specific requirements of this contract.

(b) This work shall be conducted under the direction of or such other members of the Contractor's staff as may be mutually satisfactory to the parties.

**Note A.**—The description of the research in Appendix A may be omitted and Appendix A appropriately modified to incorporate, by pertinent references to the proposal or other documents, the type of data necessary to describe the research as called for by Appendix A; and where there is no cost sharing, other features may be referenced in lieu of insertion in Appendix A. In such cases, the referenced material will be retained as part of the permanent contract file.

#### Article II—The Period for Performance

The period of performance under this contract shall commence on —19—, and expire on —19—. Performance may be extended for additional periods by the mutual written agreement of the parties. It is presently expected that this contract will be extended by mutual agreement until —19—. \*

\*This sentence is optional and may be omitted.

#### Article III—Consideration

(a) In full consideration of the Contractor's performance hereunder, DOE shall furnish the equipment, supplies, materials, and services, if any, listed in Article A-11(b)(2) and pay the Contractor the sum of —, hereinafter called the Government "Ceiling" which sum shall be subject to adjustments as hereinafter provided.

(b) Payments to the Contractor shall equal the "cumulative Government cost" of performance of this contract, as the term "cumulative Government cost" is defined in Article B-XXIX\*; provided however, and notwithstanding any other provisions of this contract, that the Government's monetary liability under this contract shall not exceed the Government ceiling or an amount equal to the cumulative Government costs, whichever is less. The Contractor shall be obligated to perform under this contract throughout the agreed-upon period of performance, and to bear all costs which DOE has not agreed to pay; provided however, that the Contractor shall have the right to cease to perform the research provided for in this contract, upon written notice to DOE to that effect, at any time, when or after the cumulative Government cost equals or exceeds the Government ceiling.

(c) The Government ceiling specified in (a) above may be increased unilaterally by DOE by written notice to the Contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification to this contract). In the event that the stated period of performance is extended, the Government ceiling will be revised to reflect any increased DOE funding for the extended period or periods.

(d) Upon termination or expiration of the total period of performance, the Contractor shall promptly refund to DOE (or make such disposition as DOE may in writing direct) any sums paid by DOE to the Contractor under this contract, through direct payment or



under letter or credit, in excess of the cumulative Government cost incurred in performance under the contract.

\*The term cumulative Government costs refers to the cost of items under A-II(a) of Appendix A, for the initial contract period plus any extension period that may be properly chargeable to DOE. If proportionate cost sharing is involved, the cost is DOE's share of such costs, and does not include the cost of items excluded from Article A-II(a), such as items to be contributed solely by the Contractor or property to be furnished by the Government. Charges to DOE will be reported after the conclusion of each contract period set forth in Appendix A (generally an annual period); in addition to the limitations on charges to DOE provided for by this Article III, charges to DOE for a specified contract period may not exceed the 110 percent limitation mentioned above as well as to the provisions of this Article III.

#### Article IV—Government Property

The following items of property acquired or fabricated by the Contractor are hereby listed as "Government Property;" (List all property and equipment, title to which is to remain in the Government. Insert the word "none" if title to all of the property is to be vested in the Contractor. If title to property acquired or fabricated by the Contractor is to remain in the Government, add appropriate provisions for payment for such property from plant and equipment funds. Such funds should be in addition to, and not a part of, the "Government Ceiling" funds provided under Article III).

#### Article V—Appendices

Appendix A—Performance guide,  
Appendix B—General Provisions, and  
Appendix C—Statement of Costs, are hereby attached to and made a part of this contract.

In witness whereof, the parties have executed this contract.

United States of America

By \_\_\_\_\_  
Date \_\_\_\_\_  
Contracting Officer \_\_\_\_\_  
Contractor \_\_\_\_\_  
By \_\_\_\_\_  
Date \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_  
Contract No. \_\_\_\_\_

#### Appendix A—Performance Guide

Contractor \_\_\_\_\_  
Contract No. \_\_\_\_\_  
For the contract period \_\_\_\_\_ through \_\_\_\_\_

Article A-I. Research to be performed by the Contractor. (Insert description of research activity and state the appropriate percentage of time or effort which the principal investigator(s) expects to devote to the work.)

Article A-II. Ways and means of performance. The listing under (a), (b), and (c) below should be in a form to permit determination of which items of costs are to be chargeable to DOE or proportionately shared, and which items are to be contributed solely by the Contractor or solely by DOE. The listing should also permit application of the approval requirements of the contract. Excessive detail in listing should be avoided.

(a) Items for which funding will be provided as indicated in A-III below. Do not include in this paragraph (a) any items which are to be contributed solely by the Contractor.

(1) Salaries and wages. State total dollar amount. If any stipulated salary amounts for professional staff members are established in accordance with FAR 31.3 or 31.7 the stipulated amounts, along with any limitations or requirements on the use of such stipulated amounts should be provided for in the contract.

(2) Equipment to be purchased or fabricated by the Contractor. List equipment to be purchased or fabricated by the Contractor and for which title is to remain in the Contractor and state the total dollar amount budgeted for such equipment. Such equipment may be set forth in general classifications as specifically as possible, if it is not feasible to list them individually. However, any individual piece of equipment, the estimated cost of which is over \$1,000 will be separately identified. Except where the contract may otherwise specifically provide, equipment for the purpose of this paragraph A-II shall mean an item of personal property having a useful life expectancy in excess of 1 year and an acquisition cost in excess of \$500. Failure to identify equipment may result in disallowance of its cost if subsequently purchased.

(3) Travel. (Show amounts for both foreign and domestic. If none, state none).

Domestic \_\_\_\_\_  
Foreign \_\_\_\_\_

(4) Other direct costs.

(5) Indirect costs based on applicable rates or predetermined rate of \_\_\_\_\_ percent if with a educational institution for FY year(s) \_\_\_\_\_. Show base or bases of costs to which rate apply.

(b) Items, if any, significant to the performance of this contract, but excluded from computation of Government costs and from consideration in proportioning costs. (See 917.7107-1(c)).

(1) Items to be contributed by the Contractor. In accordance with Article B-II(c), if a proposed Contractor contribution is included in this paragraph (b)(1), the Contractor shall maintain records adequate to permit DOE to determine the extent of the contribution. If the time or effort of the principal investigator(s) is to be contributed by the Contractor and excluded from A-II(a) and A-II(b), the contributed time or effort should be listed under A-II(d).

(2) Items to be contributed by the Government.

(c) Time or effort of principal investigator(s) contributed by Contractor but excluded from computation of Government cost and from consideration in proportioning costs. Where covered under A-II(a) or A-II(b) above, state: "None." See 917.7107-1(e).

Article A-III. The total estimated cost of items under A-II(a) above for the contract period stated in this Appendix A is \$\_\_\_\_\_. DOE will pay \_\_\_\_\_ percent of the actual costs of these items incurred during the contract period stated in this Appendix A, subject to the provisions of Article III and Article B-XXIX of Appendix B. The estimated Government cost for the contract period stated in this Appendix A is \$\_\_\_\_\_.

The estimated Government cost is funded as follows:

(a) Estimated unexpended balance from the prior period(s) \$\_\_\_\_\_.

(b) New funds for the current period \$\_\_\_\_\_.

The new funds being added in A-III(b) constitute the basis for advance payments provided under Article B-XI.

(c) Subject to their availability, additional funds anticipated for the contract in the amount of \$\_\_\_\_\_.

Note.—Do not include this provision in fully funded SRCs.

#### Appendix B—General Provisions

##### Article B-I—Definitions

(a) The terms "DOE" means the U.S. Department of Energy or any duly authorized representative thereof, including the contracting officer except for the purpose of deciding an appeal under the article entitled "Disputes."

(b) The term "contracting officer" means an official designated to enter into or administer contracts and make related determinations and findings.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

##### Article B-II—Inspection, Reports, Records, and Accounts\*

(a) DOE shall have the right to inspect, in such manner and at all reasonable times as it deems appropriate, all activities of the Contractor arising in the course of its undertakings under this contract.

(b) The Contractor shall make progress and other reports in such manner and at such time as specified under this contract, as DOE may reasonably require from time to time.

(c) The Contractor agrees to keep records and books of account, in accordance with generally accepted accounting principles and practices, and consistent with the requirements of OMB Circular A-21, and FAR 31.3 or 31.7 as constituted on the effective commencement date of the contract period, covering its costs and expenditures for items included under Article A-II(a) of Appendix A and which are furtherance of the research work under this contract. In the event a contractor contribution is listed in Article A-II(b), the Contractor shall maintain records adequate to permit DOE to determine the extent of the contribution. If professional staff members are included under Article A-II(b), the Contractor shall maintain records on such personnel in accordance with the payroll distribution procedure of section J.6 of OMB Circular A-21.

(d) DOE shall at all reasonable times be afforded access to the premises and to these books and records and to related correspondence receipts, vouchers, memoranda, and other data of the Contractor; and the Contractor shall preserve such books and papers, without additional compensation therefor, in accordance with the retention requirements referenced in Article B-XVIII, Examination of Records.

\*If the contract is with a nonprofit organization rather than an educational institution, this article should be revised to provide that the cost principles at FAR 31 as



may be modified by 931 depending on the nature of the contractors organization, will be used in determining actual cost.

#### Article B-III—[Reserved]

#### Article B-IV—Disclosure of Information

This clause should be used in place of the clauses entitled "Security," 952.204-1, and "Classification" 952.204-2, in SRCs with educational institutions for off-site research that are not likely to produce Restricted Data or other classified information.

#### Disclosure of Information

(a) It is mutually expected that the activities under this contract will not involve Restricted Data or other classified information or material. It is understood, however, that if in the opinion of either party, this expectation changes prior to the expiration or termination of all activities under this contract, said party shall notify the other party accordingly in writing without delay. In any event, the Contractor shall classify, safeguard, and otherwise act with respect to all Restricted Data and other classified information and material, in accordance with applicable law and the requirements of DOE, and shall promptly inform DOE in writing if and when Restricted Data or other classified information and material becomes involved. If and when Restricted Data or other classified information or material becomes involved, the Contractor shall have the right to terminate performance of the work under this contract and in such event the provisions of this contract regarding termination for the convenience of the Government shall apply.

(b) The Contractor shall not permit any individual to have access to Restricted Data, or other classified information, except in accordance with the Atomic Energy Act of 1954, as amended, and DOE regulations or directives.

(c) The term "Restricted Data" as used in this article means all data concerning the design, manufacture or utilization of atomic weapons, the production of special nuclear material or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

#### Article B-V—Responsibility for the Work

(a) The Contractor is solely responsible for the conduct of the work.

(b) In instances where the carrying out of the work involves a DOE license, the provisions of the pertinent license shall prevail over any inconsistent provisions of this contract.

#### Article B-VI—[Reserved]

#### Article B-VII—Rights in Technical Data (Short Form)

Insert the clause in 952.227-7700.

#### Article B-VIII—Patent Rights—Small Business Firms or Nonprofit Organizations

Insert the clause in 952.227-7100.

#### Article B-IX—Property Items

(a) Except as otherwise provided in this paragraph (a) and paragraph (b) of this Article B-IX, title to all material, supplies, and equipment purchased or otherwise acquired by the Contractor in the performance of its research activities shall be and remain in the Contractor. Said materials, supplies, and equipment shall be used for the benefit of research under this contract and any extensions or successor contractors hereto; and provided there is no interference with said research, shall be made available for use by investigators working on any Federal research contract at the same location. Subject to these priorities, materials, supplies, and equipment may be used as the Contractor wishes. Except as otherwise agreed in writing, title to any items of property listed as "Government property" shall pass directly to the Government; such property shall be subject to paragraphs (b), (c), (d), (e), and (f) of this Article B-IX.

(b) Subject to the mutual agreements of DOE and Contractor, the Government may furnish the Contractor items of equipment, materials, supplies or facilities for use by the Contractor in performance of the work, title to these items shall remain in the Government unless otherwise agreed in writing. Such items of property and the items of property listed elsewhere in this contract as Government property, are hereinafter referred to as "Government property." Title to Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government or shall any such property, or any part thereof, be or become a fixture or lose its identity as property by reason of affixation to any realty.

(c) To the extent practicable, the Contractor shall cause all items of Government property to be suitably marked with an identifying mark or symbol indicating that the items are the property of the Government. The Contractor shall maintain, at all times and in a manner satisfactory to DOE, records showing the use and disposition of Government property. Such records shall be subject to DOE inspection at all reasonable times and DOE shall at all reasonable time have access to the premises wherein any items of Government property are located. Unless otherwise authorized in writing by DOE, the Contractor shall use Government property only for the purposes of this contract, provided, however, that the Contractor is hereby authorized to use items of equipment constituting Government property for other Federal research contracts to the extent such use: (1) Does not interfere with its work under this contract; (2) is not prohibited by provisions of the other Federal agreements; and (3) is promptly reported by the Contractor to contracting officer.

(d) The Contractor shall promptly notify DOE of any loss or destruction of or damage to Government property. It is understood that the Contractor shall not be liable for any such loss, destruction, or damage, unless same results from willful misconduct or lack of good faith on the part of any corporate officer of the Contractor, or of one or more of the contract's representatives having supervision or direction of all or substantially

all of the activities under this contract. If the Contractor is liable for such loss, destruction, or damage, it shall promptly account therefor to the satisfaction of DOE; if the Contractor is not liable therefor, and is indemnified, reimbursed, or otherwise compensation for such loss, destruction, or damage, it shall promptly account therefor to the satisfaction of DOE.

(e) With the written approval of DOE, the Contractor may sell, transfer, or otherwise dispose of items of Government property to such parties and upon such terms as so approved, or itself acquire title to items of Government property upon such terms as may mutually be agreed upon in writing by the Contractor and DOE. The proceeds of any such disposition, and any agreed price of any such Contractor acquisition, shall be paid by the Contractor to the Government, or credited on account of DOE, payments to be made under this contract as DOE may direct. Subject to the other provisions of this contract, the Contractor shall deliver Government property to DOE upon request (suitably packed and shipped at the Government's expense).

(f) The Contractor shall utilize for the benefit of the work under this contract such items of property available to the Contractor by reason of its activities under other Federal research agreements as are appropriate for utilization under this Contract pursuant to the provisions of the pertinent Federal agreement.

#### Article B-X—Termination for Convenience of the Government

Insert the requirements of FAR 49.

#### Article B-XI—Payments

(a) DOE shall make payments to the Contractor with respect to the amount of consideration prescribed in Article III of this contract as follows:

(1) A maximum of an additional 45 percent of the new funds as set forth in Article A-III(b) of this contract following execution of this contract (and following the effectuation of each extended period) upon receipt of a request or requests in writing from the Contractor evidencing that the requested amount is currently needed in connection with planned expenditure or commitments for contract performance.

(2) A maximum of an additional 45 percent of the new funds as set forth in Article A-III(b) of this contract upon receipt of requests from the Contractor evidencing that the amount requested is then required in connection with the work under the contract.

Note.—Subparagraphs (1) and (2) of this paragraph (a) may be revised, as deemed appropriate by the contracting officer, in accordance with 917.71.

(3) If, following submission of an annual progress report, the contract is to be extended for an additional period of performance, and additional payment may be made at the time of execution of the extension which, when added to the payments already made under (1) and (2) above for the expiring period, will not exceed the new funds set forth in Article A-III(b) for the expiring period. A concluding payment



for the pertinent period, if appropriate, may be made following submission of a certified statement showing Government cost and evidencing the Contractor's performance under this contract.

(4) If the contract is not to be extended, the final payment of the consideration provided for in Article III shall be made following submission by the Contractor of a final report required by Article B-XXI, in form and content satisfactory to DOE, and submission of a certified statement showing Government cost and evidencing the Contractor's performance and compliance with the patent provisions.

(b) The payments made pursuant to paragraph (a) above shall not prejudice or otherwise affect adversely any of the Government's rights under the contract. For purposes of settlement in the event of termination pursuant to article B-X hereof, these payments shall not be construed as evidentiary, and any excess payment in the light of Article B-X shall be promptly returned to DOE.

(c) DOE, at its option, may invoke the following with respect to any amount of consideration remaining to be paid at any given time:

(1) DOE shall issue a letter of credit as provided for by Treasury Fiscal Requirements Manual, Part 6 Chapter 2000 under which payments to the Contractor with respect to the amount of consideration provided for in Article III will be made. The Contractor agrees that the first ninety (90) percent of the new funds as set forth in Article A-III(b) will be under the letter of credit and will be subject to the submission by the Contractor of a Payment Voucher on Letter of Credit (TUS 5401), in accordance with procedures based upon Treasury Fiscal Requirements Manual, Part 6 Chapter 2000 which are agreed to by the parties. Following submission by the Contractor of a final report provided for in Article B-XXI, in form and content satisfactory to DOE, and submission of a certified statement showing the total expenditures and evidencing the Contractor's performance, and upon submission by the Contractor to DOE of such invoices or vouchers as are satisfactory to DOE, DOE shall pay the Contractor the concluding payment of the consideration provided for in Article III: or said concluding payment will be included under the letter of credit and will be subject to submission by the Contractor of a payment voucher on letter of credit, in accordance with the procedures described above. If, following submission of an annual report, the contract is extended for an additional period of performance, an additional payment may similarly be made at the time of execution of the extension which, when added to the payments already made for the expiring period, will not exceed the new funds as set forth in Article A-III(b) for the expiring period. A concluding payment for the pertinent period, if appropriate, may be made following submission of a certified statement showing Government cost for the pertinent period and evidencing the Contractor's performance.

(2) DOE reserves the right to increase, decrease, or cancel the amount covered by the letter of credit, provided that such action

is required because of a change in the amount of consideration provided for in Article III or is taken pursuant to paragraph (c)(1) of this article. The issuance and use of a letter of credit and receipt of funds pursuant thereto shall not prejudice or otherwise adversely affect any of the Government's rights under the agreement.

#### Article B-XII—Equal Opportunity

Insert the clause from FAR 52.222-26.

#### Article B-XIII—Convict Labor

Insert the clause from FAR 52.222-3.

#### Article B-XIV—Contract Work Hours and Safety Standards Act—Overtime Compensation—General

Insert the clause from FAR 52.222-4 with appropriate insertions.

#### Article B-XV—Disputes

Insert the clause in FAR 52.223-1.

#### Article B-XVI—Officials Not To Benefit

Insert the clause in FAR 52.203-1.

#### Article B-XVII—Covenant Against Contingent Fees

Insert the clause in FAR 52.203-5.

#### Article B-XVIII—Examination of Records

Insert the clause from FAR 52.215-1. The Examination of Records clause in FAR 52.215.1 may be omitted from foreign contracts in accordance with procedures in FAR 25.9.

#### Article XIX—[Reserved]

#### Article B-XX—Assignment; Subcontracting

Neither this contract nor any interest therein nor claim thereunder shall be assigned or transferred by the Contractor, except as expressly authorized in writing by the contracting officer. The Contractor shall not subcontract any research or development work under this contract, except as expressly authorized in writing by the contracting officer.

#### Article B-XXI—Reports and Renewal Proposals

The Contractor shall furnish six (6) copies of the following reports to the appropriate field office.

(a) *Progress report.* The progress report shall briefly describe the scope of investigations undertaken and the significant results obtained. It shall also indicate compliance with the contract requirements and any failures to comply. The report shall indicate the approximate percentage of time or effort which the principal investigator(s) has devoted to the project since the beginning of the current term of the contract and indicate the amount of effort which is expected to be devoted during the remainder of the current term. Technical reports, preprints, and articles prepared for publication shall be listed with bibliographical references. Reprints of all such material not previously submitted shall be appended and material contained therein need not be duplicated in the report. Progress reports shall be submitted approximately 4 months in advance of the expiration of the current contract term and shall give the

Contractor's best estimate of the probable events and occurrences in regard to the remainder of the current term. Except as DOE may otherwise request, no further progress report will be required for any contract year unless there has been a significant change in scientific results or compliance between the latest progress report by the contractor and its actual experience which shall be reported promptly.

(b) *Final report.* Upon termination or expiration of the total period of performance, the Contractor shall submit, promptly, a summary of its activities for the entire period, including a list of publications issued during the entire period and copies of any reprints not previously submitted, as well as a comprehensive evaluation of progress in the area of research funded by the contract.

(c) *Renewal proposals.* A renewal proposal, if any, shall be submitted along with the technical progress reports, and each of the two documents shall be separately bound. Renewal proposals are submitted to the DOE contracting officer.

#### Article B-XXII—Foreign travel

Foreign travel shall be subject to the prior approval of the contracting officer for each separate trip, regardless of whether funds for such travel are contained in an approved budget. Foreign travel is defined as any travel outside of Canada and the United States and its territories and possessions.

#### Article B-XXIII—[Reserved]

#### Article B-XXIV—Utilization of Labor Surplus Areas Concerns

Insert the clause in FAR 52.220-3 under the conditions prescribed therein.

#### Article B-XXV—Utilization of Small Business Concerns and Small Disadvantaged Business Concerns

Insert the clause in FAR 52.219-8.

#### Article B-XXVI—Utilization of Women-Owned Small Business

Insert the clause in FAR 52.219-13.

#### Article B-XXVII—Sensitive Foreign Nations Controls

Insert the clause at 952.204-71 if the contract involves research in nuclear technology and it is appropriate. The contracting officer should confirm its inclusion with the local security office.

#### Article B-XXVIII—Affirmative Action for Special Disabled and Viet Nam Era Veterans

Insert the clause in FAR 52.222-35.

#### Article B-XXIX—Determination of Government Costs

\* (a) The term "Government cost" as used in this contract means DOE's share\*\* of the sum of costs incurred by the Contractor for items included under Article A-11(a) of Appendix A furtherance of the work hereunder, incurred in accordance with the provisions of this contract, and which are reported to DOE in accordance with (b) below. The term "cumulative Government costs" as used in this contract means the total of the Government costs incurred during



the initial contract period plus any extension periods.

(b) Within 3 months after the end of each contract period set forth in Appendix A, and within 3 months after the termination or expiration of the total period of performance, the Contractor shall furnish a certified statement, executed by an official of the Contractor showing the Contractor's cost and evidencing its performance under the contract, during the contract term just completed. The statement shall show all cost incurred during the pertinent contract term set forth in Appendix A for items under Article A-II(a) of Appendix A, including the Contractor's share, if any, of such costs, and show the extent of the Contractor's contribution of items under Article A-II(b)(1) of Appendix A. Costs included in the certified statement may include the following: expenditures of cash, the cost of material and supplies transferred from store's inventory, and the amount due the Contractor for indirect costs in accordance with the rate and factor shown in Appendix A of the contract for the pertinent period. The costs for the pertinent period shall be consistent with the principles of OMB Circular A-21 as constituted as of the effective commencement date of said period. The certified statement shall be in the form set forth in Appendix C.

(c) The certified statement shall be in agreement with the institution's financial record and shall reflect only expenditures actually made during the period covered, including transfers from inventory. It shall not include commitments as a part of such expenditures for goods or services on order but not received or those received but not paid for, unless the Contractor is operating under an established and consistently applied system of accrual accounting. If this is the case, the certified statement shall be so footnoted. A combination of accrual and cash accounting for cost accumulation and reporting purposes shall not be used. The renewal proposal budget should be footnoted to show the estimated amount of outstanding commitments for property at the end of the current period. The certified statement contains a space in which office should be inserted the actual amount of outstanding commitments for property at the end of the period covered by the statement. This commitment amount is for information only and is not a part of the expenditure calculation. The Contractor understands that DOE expects to rely on this certified statement for determining the Government cost for the period. With respect to any period in which proportionate cost sharing is applicable, the support costs for the pertinent period will be determined by applying the percentage figure included in Article A-III for the pertinent period to the certified cost of items included under Article A-II(a) incurred during the pertinent period. All charges to DOE shall be subject to the approval requirements of this contract. The Contractor is expected to maintain auditable records as contemplated by Article B-II(c) to substantiate the costs incurred for items under Article A-II(a) and to show the extent of the Contractor's contribution of the items listed under Article A-II(b)(1).

\*If the contract is with a nonprofit organization other than an educational

institution or a research foundation established by an educational institution, this article should be revised to provide that the commercial cost principles (FAR 31.2) will be used in determining actual cost.

\*\*In those cases in which there is no proportionate sharing of costs, DOE's "share" will be 100 percent. With respect to any period in which proportionate cost sharing is applicable to Article A-III, it is understood that Government cost for that specified period will equal the stipulated percent of the sum of costs incurred by the Contractor during the stated period for items under A-II(a) of Appendix A, not shown in Appendix A of the contract for the pertinent period. The costs for the pertinent period shall be consistent with the principles of OMB Circular A-21 and FAR 31.3 or FAR 31.7 as constituted on the effective commencement date of said period. The certified statement shall be in the form set forth in Appendix C.

#### Article B-XXX—Additional Approvals

In addition to such approvals as are specifically required by other provisions of this contract, the Contractor shall obtain DOE's approval for:

(a) A change of the principal investigator, co-investigator, or other key people as might be named in this contract or continuation of the research work for any one period in excess of 3 months without direction by an approved principal investigator. The principal investigator may increase or decrease the amount of effort which he devotes to the project without obtaining DOE approval; however, a representative of the institution shall consult with the appropriate DOE Headquarters program representative if the principal investigator plans to, or becomes aware that he will devote substantially less effort to the work than anticipated in Article A-1. The purpose of such consultation will be to determine what effect, if any, the anticipated change will have on the research work and what modification to the contract, if any, may be appropriate.

(b) No change in the phenomenon or phenomena under study, i.e., broad category of the research under the contract, shall be made without the specific written approval of the contracting officer. Ordinarily, such changes, if approved by the contracting officer, will be accomplished through a new contract or mutually agreed to modification. The Contractor may change the specific objectives in the research work described in the contract, provided it gives the contracting officer prompt notification of such changes, and the Contractor may continue to follow the new objectives while DOE determines whether it wishes to continue the program under the changed approach. Significant changes in methods or procedures employed in performing the research should be reported in the first technical program report issued subsequent to the changes.

(c) Prior approval is required. Acquisition of an item of equipment not itemized in Appendix A, the cost of which is \$1,000 or more. Approval is not required if the equipment is merely a different model of an item listed in Appendix A. (If plant and capital equipment funds are provided for the acquisition of equipment with title to be

vested in the Government, the total cost of such equipment shall not exceed the amount provided for such equipment unless prior DOE approval has been obtained.)

(d) Prior approval is required. Purchase any general-purpose equipment, such as office furniture, air conditioning, automatic data processing equipment, etc., not specifically provided for in Appendix A.

(e) Incurring costs for items set forth in Article A-II(a), during the pertinent contract period stated in Appendix A, in excess of 110 percent of the total estimated cost specified in Article A-III. Charges to DOE for any such costs incurred with the approval of DOE shall also be subject to the limitations of Article A-III.

(f) Any proposed foreign travel (see Article B-XXII).

(g) Prior approval is required. Expenditures for domestic travel if such expenditures exceed the amount shown in Article A-II(a) for such travel by \$500 or by 25 percent, whichever is greater.

(h) Acquisition of excess personal property.

#### Article B-XXXI—[Reserved]

#### Article B-XXXII—Clean Air and Water

Insert the clause in FAR 52.223-2 under the conditions set forth therein.

#### Article B-XXXIII—Affirmative Action for Handicapped workers

Insert the clause set forth in FAR 52.222-36 under the conditions set forth in the section.

#### Article B-XXXIV—Security

Insert the clause in 952.204-1 under the conditions set forth therein.

#### Article B-XXXV—Classification

Insert the clause in 952.204-70 under the conditions set forth therein.

#### Article B-XXXVI—Preference for U.S. Flag Air Carriers

Insert the clause in FAR 52.247-63 under the conditions set forth in FAR 47.4.

#### Article B-XXXVII—Preservation of Individual Occupational Radiation Exposure Records

Insert the clause set forth in 952.223-75 where appropriate.

#### APPENDIX C.—STATEMENT OF COST

|                                                                                                                                                                                                                 |          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| 1. Name and address of Contractor .....                                                                                                                                                                         |          |
| 2. Contract number .....                                                                                                                                                                                        |          |
| 3. Beginning and ending date of pertinent contract period .....                                                                                                                                                 |          |
| 4. Costs incurred during the pertinent contract period (List only those costs which are to be reimbursed by DOE or proportionately shared by the parties in accordance with Article A-II(a) and Article A-III.) |          |
|                                                                                                                                                                                                                 | Amount   |
| a. Salaries and wages .....                                                                                                                                                                                     | \$ ..... |
| b. Equipment .....                                                                                                                                                                                              | \$ ..... |
| (List separately the cost of each piece of the equipment separately listed in Appendix A to the agreement or for which separate approval was obtained from DOE.)                                                |          |
| c. Travel .....                                                                                                                                                                                                 | \$ ..... |
| (Show amounts for both foreign and domestic. If none, state none.)                                                                                                                                              |          |
| Foreign .....                                                                                                                                                                                                   | \$ ..... |
| Domestic .....                                                                                                                                                                                                  | \$ ..... |
| d. Other direct costs .....                                                                                                                                                                                     | \$ ..... |
| e. Total direct expenditures .....                                                                                                                                                                              | \$ ..... |
| f. Indirect charges .....                                                                                                                                                                                       | \$ ..... |



APPENDIX C.—STATEMENT OF COST—  
Continued

(Indicate percent and expenditures to which percent is applied.)

5. Total costs for items under Article A-II(a) for pertinent period. \$
6. Government costs for the pertinent period set forth in Appendix A, as defined in Article B-XXIX, chargeable to DOE for the pertinent period (percent of total costs using percent shown in Article A-III of Appendix A) for pertinent period of. \$
7. Cumulative Government cost (Government cost under this statement plus Government costs for previous periods). \$
8. Accumulated Government ceiling in Article III. \$
9. The difference between lines 7 and 8. \$
10. Provide information regarding contributions by the Contractor of items in Article A-II(b) of Appendix A during pertinent period. State the extent of the Contractor's actual contribution, the measure of such contributions should be in the same terms as the Contractor's commitment under Article A-II(b), e.g., time, dollar, etc. \$
11. Actual outstanding commitments for property at the end of the period covered by this statement. \$

I hereby certify that this report is true and correct to the best of my knowledge and belief and that the costs listed herein were incurred in connection with the performance of the research provided for under this contract and in accordance with the terms and conditions set forth therein

(Name and Title of an Authorized Representative)

(Signature)

(Date)

\*The listing of categories should be consistent with the itemization in Appendix A.

Supart 917.72—Program Opportunity  
Notices for Commercial  
Demonstrations

## 917.7200 Scope of subpart.

(a) This subpart establishes procedures for the submission, evaluation, and selection for award or support of proposals offered in response to program opportunity notices (PONs) issued by DOE to accelerate the demonstration of the technical feasibility and commercial application of all potentially beneficial non-nuclear energy sources and utilization technologies.

(b) As a result of a PON, a contract, grant or cooperative agreement may be entered into. If the intended relationship is expected to be a contract this regulation shall be followed. If the intended relationship is expected to be a financial assistance instrument the DOE Assistance Regulations (DOE-AR) shall be followed. Specifically, DOE-AR 600.233 (10 CFR Part 600.233) will apply if the intended relationship is expected to be a cooperative agreement. In any event, any public notice, solicitation, or request for applications or proposals should indicate whether the intended relationship will be one of acquisition or assistance and state that acquisition regulation will govern if an acquisition contract is entered into and that the assistance regulation will govern if a financial assistance instrument is utilized.

(c) This subpart applies to demonstrations performed by individuals, educational institutions, other commercial or industrial organizations, or other private entities, or by public entities, including State and local governments, but not other Federal agencies. For purposes of this subpart, commercial demonstration projects include demonstrating technological advances and field demonstrations of new methods and procedures, and demonstration of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of non-nuclear energy resources.

## 917.7201 Policy.

## 917.7201-1 General.

(a) It is DOE's intent to encourage the submission of proposals to accelerate the demonstration of the technical, operational, economic, and commercial feasibility and environmental acceptability of particular energy technologies, systems, subsystems, and components. Program opportunity notices will be used to provide information concerning scientific and technological areas encompassed by DOE's programs. DOE shall, from time to time, issue program opportunity notices for proposals for demonstrations of various forms of non-nuclear energy and technology utilization.

(b) Synopsis of the notice shall be published in the Commerce Business Daily prior to release. In addition, the notice shall be circulated directly to potentially interested individuals, private and public entities (excluding Federal agencies) and associations thereof to the maximum extent feasible. Special attention in this regard should be given to small business concerns, small disadvantaged concerns, and women-owned small business concerns to insure that they are given every opportunity to participate in such acquisitions. Consideration should be given to distributing the notice to all eligible entities which, during the preceding two years, have expressed an interest in participating in, or entering into arrangements for, commercial demonstration in the particular energy field.

## 917.7201-2 Determination to use and approval of content.

(a) *Determination to use.* (1) Before the PON is selected as the appropriate solicitation procedure the Head of the Contracting Activity expected to issue the notice will be consulted to assure that the PON is the appropriate

solicitation method. A written program determination shall be made to show that the conditions in 917.7201-3 exist to support the conclusion that the use of the PON procedure is both necessary and appropriate. The determination must not be merely conclusive but shall be supported by specific facts and explanations.

(2) The Senior Program Official or designee may approve the determination.

(3) The approved determination shall be included in the PON file.

(b) *Approval of content.* (1) When the dollar amounts are less than Source Evaluation Board (SEB) level, a PON may be originated at whatever level is consistent with the program objectives established by the Senior Program Official. When a source evaluation board is not required, notices may be approved by the Senior Program Official or designee after prior concurrence by Counsel.

(2) When an SEB is required, notices shall be reviewed and approved by the SEB after prior concurrence by Counsel, and the Senior Program Official or designee.

(3) All PONs shall be issued by the cognizant Head of the Contracting Activity or designee.

## 917.7201-3 Federal support criteria.

In determining the appropriateness of DOE involvement through the PON mechanism in any particular area of demonstration activity, consideration shall be given to the extent to which the proposed undertaking meets Federal support criteria including, but not limited to, the following:

(a) The urgency of public need for the potential results of the research, development, or demonstration effort is high, and it is unlikely that similar results would be achieved in a timely manner in the absence of Federal assistance;

(b) The potential opportunities for non-Federal interests to recapture the investment in the undertaking through the normal commercial utilization of proprietary knowledge appear inadequate to encourage timely results;

(c) The extent of the problems treated and the objectives, sought by the undertaking are national or widespread in their significance;

(d) The opportunities to induce non-Federal support of the undertaking through regulatory actions, end-use controls, tax and price incentives, public educations, or other alternatives to direct Federal financial assistance are limited;



(e) The degree of risk of loss of investment inherent in the research is high, and the availability of risk capital to the non-Federal entities which might otherwise engage in the field of the research is inadequate for the timely development of the technology;

(f) The research, development, and application objectives anticipated by the activities or facilities proposed, support national interests or objectives;

(g) The economic, environmental, and societal significance which a successful demonstration may have for the national fuels and energy system; and

(h) The availability of non-Federal participants to construct and operate the facilities or perform the activities associated with the proposal and to contribute to the financing of the proposal.

**917.7201-4 Information to be included in program opportunity notices.**

Each program opportunity notice shall include:

(a) The goal of the intended demonstration effort;

(b) A time schedule for submission of, and action on, proposals;

(c) Evaluation criteria, including an indication, when determined practicable to do so, of the approximate cost and time duration contemplated for individual projects resulting from the notice;

(d) Program policy factors.

(e) A statement that additional information, consistent with the overall concepts and approaches developed in the proposal, may be required regarding the statement of work and the proposed budget (e.g., a notice that a detailed cost breakdown may be required from the proposers being considered);

(f) Such other information, terms, or conditions that shall apply to the particular program opportunity notices;

(g) A place and manner of submission; and

(h) A late proposal provision (see FAR 15.412).

**917.7201-5 Information to be provided in proposals offered pursuant to program opportunity notices.**

(a) Name and address of the entity(ies) submitting the proposals;

(b) Date of preparation of submission;

(c) Type of entity(ies) (public, including State and local governments, and private, including profit and nonprofit organizations and educational institutions);

(d) Representations and certifications as specified in the notice; and

(e) Concise title and abstract of the proposed demonstration project for which assistance or participation is being sought.

(f) An outline and discussion of the proposed demonstration which shall, if applicable and to the extent possible, specifically address and reference the evaluation criteria and include:

(1) Specification of the technology;

(2) Proposed statement of work to be performed;

(3) Description of prior operation experience with the technology;

(4) Preliminary design of the demonstration plant;

(5) Time tables containing proposed construction or fabrication and installation and operation plans;

(6) Budget-type estimates of construction or fabrication and operation costs;

(7) Description and proof of title to land for proposed site, natural resources, electricity and water supply, and logistical information related to access to raw materials to construct and operate the plant and dispose of salable products from the plant;

(8) Assessment of the environmental impact of the proposed plant and plans for disposal of wastes resulting from the operation of the plant;

(9) Plans for continued use of the technology if the demonstration is successful;

(10) Plans for continued use of the plant if the demonstration is successful;

(11) Plans for dismantling of the plant if the demonstration is unsuccessful or otherwise abandoned;

(12) Form and amount of assistance or participation being sought;

(13) Form and amount of funding, or other contribution to be provided by the proposer, including proposed disposition of revenues generated; and,

(14) The extent to which the proposed expenditures would constitute permanent (nonseverable) improvement to property now owned by the Government; and proposed plans for the disposal (through acquisition by the offeror or otherwise) of any such improvements.

The information called for under this section relates primarily to a demonstration project involving the construction and operation of a "plant." In instances where the proposed project concerns a demonstration that does not involve a plant (for example, the demonstration of a process, apparatus, or device), the program opportunity notice shall state what additional information is to be submitted with the proposal;

(g) Names of key personnel to be involved, brief biographical information, including relevant experience;

(h) A current financial statement;

(i) The period for which proposal is valid;

(j) Names and telephone numbers of proposer's primary business and technical personnel whom DOE may contact during evaluation or negotiation;

(k) Each proposal containing technical data or proprietary or business confidential information, which the proposer intends to be used by DOE for evaluation purposes only, should be marked on the cover sheet with the legend prescribed in 927.402-3(d); and

(l) Signature and title of official of the proposing organization authorized to contractually obligate such organization

**917.7202-1 Forms of assistance and participation.**

(a) In providing for demonstration, DOE may utilize various forms of Federal assistance and participation. These include but are not limited to:

(1) Contracts;

(2) Grants;

(3) Loans;

(4) Incentives, including financial awards, to individual inventors;

(5) Joint Federal-industry demonstration corporation;

(6) Federal purchase(s) or guaranteed price of the products of the demonstration project; and

(7) Cooperative agreements.

**917.7202-2 Cost participation.**

The provisions of DOE's cost participation policies contained in 917.70 shall apply, as applicable, to proposals hereunder.

**917.7203-2 Method and criteria for evaluation and selection.**

(a) *General policy.* (1) Information contained in proposals offered in response to PONs shall be handled in accordance with the policies and procedures set forth in 927.402-3(d) pertaining to the marking and handling of proprietary data.

(2) Late proposals, modifications of proposals, and withdrawals of proposals shall be handled in accordance with FAR 15.412.

(b) *Selection.* (1) When the aggregate of expected award values, plus costs shared by the performer and/or other parties, together with later phases of the same project, is expected to meet the SEB dollar threshold, comprehensive evaluation shall be conducted by a specially constituted board which shall follow procedures and documentation requirements of the SEB Handbook modified as appropriate to conform to the solicitation process as set forth herein.

(2) When the aggregate of expected award values, plus costs shared by the performer and/or other parties, together with the later phases of the same project



is not expected to meet the SEB dollar threshold, proposals submitted in response to a PON will be evaluated by a panel which shall be appointed by the cognizant program office. The panel should utilize any of the procedures and documentation requirements of the SEB Handbook (as modified as appropriate to conform to the solicitation process as set forth herein) whenever necessary to ensure the impartial, equitable and thorough evaluation of each proposal. The panel will be composed of program office and other personnel, including representatives of Procurement, Counsel, and, as deemed appropriate by the appointing official, supplemented by Personnel from other Government agencies. The representative of Counsel will be an ex-officio (nonvoting) member of the panel. Personnel from DOE management or operating contractors may be used as advisors to the panel when their services are necessary and available as long as the approvals and procedures in 927.70 and 915.613(f) are followed.

(c) *Evaluation criteria.* The evaluation criteria shall be specified in the notice along with a narrative description of their relative importance. The criteria below, to the extent applicable, as well as any additional criteria stated in the program opportunity notice, shall be considered:

(1) The overall technical feasibility of the proposed effort;

(2) The contribution which the proposed effort is expected to make to DOE in carrying out its program responsibilities, including, but not limited to, solving energy extraction and storage, transportation, conversion, waste utilization, and conservation problems;

(3) The capabilities, related experience, facilities, instrumentation, or techniques which the proposer possesses and offers, and which are considered to be integral factors for achieving the objective(s) of the proposal;

(4) The qualifications, capabilities, experience, and availability of the proposed key personnel;

(5) The ability of the proposer to furnish necessary financial support;

(6) Project and financial plans for management of the activities including the adequacy of proposed arrangements among all participants;

(7) Plans for involvement of the small business community;

(8) Cost realism and probable cost to the government.

(d) *Program policy factors.* Program policy factors are those factors which, while not appropriate indicators of a proposal's individual merit (i.e.,

technical excellence, proposer's ability, cost, etc.), are relevant and essential to the process of choosing which of the proposals received will, taken together, best achieve the program objectives. All such factors shall be predetermined and specified in the notice so as to notify proposers that factors which are essentially beyond their control will affect the selection process. The following are examples of possible program policy factors:

(1) It is desirable, because of the nature of the energy source, the type of projects envisioned, or limitations of past efforts, to select for award or support a group of demonstration projects with a broad or specific geographic distribution;

(2) It is desirable to select for award or support (for reasons that must be stated) projects from diverse types and sizes of proposing organizations;

(3) It is desirable to select for award or support a group of projects which represents a diversity of methods, approaches, applications, or kinds of work; and

(4) It is desirable, due to the nature of certain projects or proposing organizations, to select for award or support duplicative or complementary efforts or projects.

(e) *Selection official.* The selection official will be as provided in 915.

(f) *Preliminary review.* (1) Prior to making a comprehensive evaluation of a proposal, the SEB, or the receiving office when an SEB is not required, shall determine that it:

(i) Contains sufficient technical, cost, and other required information to enable comprehensive evaluation; and

(ii) Has been signed by a responsible official of the proposing organization or a person authorized to obligate such organization.

(2) If the proposal does not meet these requirements, a comprehensive evaluation shall not be made. In such a case, a prompt reply shall be sent to the proposer, indicating the reason(s) for its not being selected for award or support under the PON.

(g) *Comprehensive evaluation.* The basic task in the evaluation and selection of proposals for award or support is to assess their relative merit in order to determine which of them offers the greatest likelihood for achievement of the program objectives stated in the notice, considering technical quality, ability of the proposer, estimated cost, and other relevant factors. Proposals which survive preliminary review shall be evaluated by an SEB or a panel, as applicable, in accordance with the criteria stated in the notice. The Source Selection Official

will select proposals for support or award from the findings established by the SEB or panel, as applicable. In this latter process, the selection official will take into account the relevant program policy factors in order to determine the mix of proposed projects which will best further specific program goals. All findings and selections are to be documented, signed, and maintained to provide an adequate record of the proceedings.

#### 917.7204 Award or support.

While only those proposals which further the needs of the program as specified in the notice will be considered for award or support, DOE may accept for award or support all, none, or any number or part of the proposals submitted.

#### 917.7205 Unsolicited proposals for commercial demonstrations.

See 915.503.

#### § 917.7206 Optional two-step method.

Where a large number of proposals are anticipated, proposals may be limited to technical considerations with cost proposals subsequently requested from those proposers whose technical proposals are evaluated as technically acceptable.

#### Subpart 917.73—Program Research and Development Announcements

##### § 917.7300 Scope of subpart.

(a) This subpart establishes procedures for the submission, evaluation, and selection for award or support of proposals offered in response to specific program research and development announcements (PRDAs) issued by DOE to conduct research, development, and related activities in the energy field.

(b) As a result of a PRDA, a contract, grant or cooperative agreement may be executed. If the intended relationship is expected to be a contract this regulation shall be followed. If the intended relationship is expected to be a financial assistance instrument the DOE Assistance Regulations (DOE-AR) shall be followed. Specifically, DOE-AR 600.234 (10 CFR 600.234) will apply if the intended relationship is expected to be a cooperative agreement. In any event, any public notice, solicitation, or request for applications or proposals should indicate whether the intended relationship will be one of acquisition or assistance and state that the DEAR will govern if a contract is entered into and that the DOE-AR will govern if a financial assistance instrument is utilized.



(c) This subpart applies to efforts by the DOE to conduct, or participate in joint or cooperative projects for research, development, and related activities with individuals, private entities (including educational institutions, nonprofit organizations, and commercial industrial organizations), or public entities (including State and local governments, but not Federal agencies), provided, however, that the conditions set forth in 917.7301-1(c) exist.

#### **§ 917.7301 Policy and prerequisites.**

##### **§ 917.7301-1 General.**

(a) PRDAs shall be used to provide potential proposers with information concerning DOE's interest in entering into arrangements for research, development, and related projects in specified areas of interest. It is DOE's intent to solicit the submission of ideas which will serve as a basis for research, development, and related activities in the energy field. It is DOE's desire to encourage the involvement of small business concerns, small disadvantage business concerns, and women-owned small business concerns in research and development undertaken pursuant to PRDAs.

(b) The PRDA should not replace existing acquisition procedures where a requirement can be sufficiently defined for solicitation under standard advertised or negotiated acquisition procedures. Similarly, it should not inhibit or curtail the submission of unsolicited proposals. However, a proposal which is submitted as though it were unsolicited but is in fact germane to an existing PRDA shall be treated as though submitted in response to the announcement or returned without action to the proposer, at the proposer's option. Further, the PRDA is not to be used in a competitive situation where it is appropriate to negotiate a study contract to obtain analysis and recommendations to be incorporated in the subsequent request for proposals.

(c) The PRDA is to be used only where:

(1) Research and development is required within broadly defined areas of interest to support program goals but it is difficult, if not impossible, to describe in any reasonable degree of detail the nature of the work contemplated because of:

(i) The multiplicity of possible approaches, within the current state of the art, available for solving the problems;

(ii) The desirability of involving a broad spectrum of organizations in seeking out solutions to the problems, posed;

(iii) The expectation that many individual proposers will have unique qualifications or specialized capabilities which will enable them to perform portions of the research or development program (without necessarily possessing the qualifications to perform the entire program) so that the overall support may be broken into segments which cannot be ascertained in advance; and

(iv) The desirability of fostering new and creative solutions;

(2) Consistent with (c)(1) above, it is anticipated that choices will have to be made among dissimilar concepts, ideas, or approaches; and

(3) It is determined that a broad range of organizations exist that would be capable of contributing towards the overall research and development goals identified in (c)(1) above.

(d) The PRDA shall be synopsisized in the Commerce Business Daily prior to release. The announcement shall also be circulated directly to interested individuals, private and public entities (excluding Federal agencies), and associations thereof to the maximum extent feasible.

##### **§ 917.7301-2 Determination to use and approval of content.**

(a) *Determination of use.* (1) Before the PRDA is selected as the appropriate solicitation procedure, the Head of the Contracting Activity expected to issue the announcement shall consult with requiring program office to assure that the PRDA is the appropriate solicitation method. A written program determination shall be made to show that the conditions in 917.7301-1(c) exist to support the conclusion that use of the PRDA procedure is both necessary and appropriate. The determination must not be merely conclusory but shall be supported by specific facts and explanations.

(2) [Reserved]

(3) The approved determination shall be included in the PRDA file.

(b) *Approval and content.* (1) A PRDA may be originated at whatever level is consistent with the program objectives established by the Senior Program Official.

(2) The PRDA content must be approved by the Senior Program Official or designee after prior concurrence by Counsel, and the Procurement Director of the office assigned to issue the PRDA.

(3) All PRDAs will be issued by the Head of the Contracting Activity or designee.

##### **§ 917.7301-3 Information to be included.**

Each PRDA shall include:

(a) A summary of the area(s) of program interest, expanded as

appropriate, to include problems and objectives;

(b) A time schedule for submission of, and action on, proposals;

(c) Information to be provided in the proposals;

(d) Evaluation criteria;

(e) Program policy factors;

(f) Other information, terms and conditions which shall apply to the particular PRDA;

(g) Place for, and manner of, submission;

(h) A unique number for identification purposes;

(i) A statement notifying potential proposers that an announcement does not commit DOE to pay any proposal preparation costs and that DOE reserves the right to select for award or support any, all, or none of the proposals received in response to an announcement, and

(j) A late proposal provision (see FAR 15.412).

##### **§ 917.7301-4 Information to be provided in proposals.**

(a) All proposals should be specific, concise, and require inclusion, as appropriate, the following information:

(1) Name and address of the entity(ies) submitting the proposal;

(2) Date of proposal submission;

(3) Identification of the PRDA (by number and title) to which the proposal responds;

(4) Type of entity(ies) submitting the proposal, whether public (including State and local governments), or private (including profit and nonprofit organizations and educational institutions);

(5) Concise title and abstract of the proposed project or effort;

(6) An outline and narrative of the proposed effort which shall specifically address and reference the evaluation criteria and, to the extent possible, include:

(i) Objectives of the proposed effort;

(ii) Detailed plan of approach (procedures, concepts, limitations, timetables of key milestones, and expected accomplishments or research results);

(iii) Internal management controls applicable to conduct of the work;

(iv) Scope and methods of management support;

(v) Details concerning previous or ongoing work performed in the category(ies) of research proposed, or in related fields;

(vi) Form and amount of funding, or other contribution, if any, to be provided by the proposer;



(vii) Location where the work will be performed;

(viii) Cost schedule detailing estimated costs for manpower and other resources (SF 1411 with supporting data as described at FAR 15.804-6); and

(ix) Projected date of completion of the proposed effort;

(7) Resumes of key personnel to be involved which include a description of relevant experience and associated dates;

(8) A current financial statement;

(9) Period for which the proposal is valid (if other than that stipulated in the announcement);

(10) Names and telephone numbers of proposer's primary business and technical personnel whom DOE may contact during evaluation; and

(11) Signature and title of an official of the proposing organization(s) authorized to obligate such organization(s).

(b) Proposer should be advised that if a proposal will contain proprietary data or privileged business information which the proposer intends to be used by the DOE for evaluation purposes only shall be marked on the cover sheet with the notice prescribed in 927.402-3(d).

(c) Representations, certifications and acknowledgements required by law or regulation shall also be submitted as specified in the announcement.

#### 917.7302 Cost participation.

The provision of DOE's cost participation policy in 917.70 shall apply, as applicable, to proposals submitted in response to PRDA's.

#### 917.7303 Method and criteria for evaluation and selection.

(a) *General policy.* (1) Information contained in proposals offered in response to PRDAs shall be handled in accordance with the policies and procedures set forth in 927.402-3(d) pertaining to the marking and handling of proprietary data and privileged business information.

(2) Late proposals, modifications of proposals, and withdrawals of proposals shall be handled in accordance with FAR 15.412.

(b) *Selection panel.* A panel appointed by the cognizant program office will evaluate proposals submitted in response to a PRDA. The panel will be composed of program office and other personnel, including representatives from Procurement, Counsel, and, as deemed appropriate by the appointing official, supplemented by personnel from other Government agencies. The representative of Counsel will be an ex-office (nonvoting) member of the panel. Personnel from prime management or operating contractors may be used as

advisors to the panel when their services are necessary and available as long as the approvals and procedures in 927.70 are followed.

(c) *Evaluation criteria.* The evaluation criteria shall be specified in the announcement along with a narrative description of their relative importance. The following items are illustrative of the elements which may be considered as evaluation criteria:

(1) Overall technical feasibility of the proposed effort;

(2) Adequacy and relevance of the proposed research plan, including validity tests as related to the proposed goals;

(3) The capabilities, related experience, facilities, instrumentation, or techniques which the proposer possesses and offers, and which are considered to be integral factors for achieving the objective(s) of the proposal;

(4) The qualifications, capabilities, experience, and availability of the proposed key personnel;

(5) The ability of the proposer to furnish necessary financial support;

(6) Project and financial plans for management of the activities including the adequacy of proposed arrangements among all participants.

(7) Plans for involvement of the small business community.

(8) Cost realism and probable cost to the government.

(d) *Program policy factors.* Program policy factors are those factors which, while not appropriate indicators of a proposal's individual merit (i.e., technical excellence, proposer's ability, cost, etc.) are relevant and essential to the process of choosing which of the proposals received will, taken together, best achieve the program objectives. All such factors shall be predetermined and specified in the announcement so as to notify proposers that factors which are essentially beyond their control will affect the selection process. The following are examples of possible program policy factors:

(1) It is desirable, because of the nature of the energy source, the type of projects envisioned, or limitations of past efforts, to select for award or support a group of projects with a broad or specific geographic distribution;

(2) It is desirable to select for award or support (for reasons which must be stated) projects for diverse types and sizes of proposing organizations;

(3) It is desirable to select for award or support a group of projects which represent a diversity of methods, approaches, applications, or kinds of work; and

(4) It is desirable, due to the nature of certain projects or proposing organizations, to select for award or support duplicative or complementary efforts or projects.

(e) *Selection official.* The selection official will be as provided in 915.612.

(f) *Preliminary review.* (1) Prior to making a comprehensive evaluation of a proposal, the selection panel shall determine that it:

(i) Contains sufficient technical, cost, and other required information to enable comprehensive evaluation; and

(ii) Has been signed by a responsible official of the proposing organization or a person authorized to obligate such organization.

(2) If the proposal does not meet these requirements, a comprehensive evaluation shall not be made. In such case, a prompt reply shall be sent to the proposer, indicating the reason(s) for its not being selected for award or support under the PRDA.

(g) *Comprehensive evaluation.* The basic task in the evaluation and selection proposals for award or support is to assess their relative merit in order to determine which of them offer the greatest likelihood for achievement of the program objectives stated in the announcement, considering technical quality, ability of the proposer, estimated cost, and other relevant factors. Proposals which survive preliminary review shall be evaluated by the panel in accordance with the criteria stated in the announcement. The Source Selection Official will select proposals for support or award from the findings established by the panel. The selection official will take into account the relevant program policy factors in order to determine the mix of proposed projects which will best further specific program goals. All findings and selections are to be documented, signed, and maintained to provide an adequate record of the proceedings.

#### 917.7304 Award or support.

While only those proposals which best further the needs of the program as specified in the announcement will be considered for award or support, DOE may accept for award or support, all, none, or any number part of the proposals submitted.

#### Subpart 917.74—Acquisition, Use, and Disposal of Real Estate

##### 917.7400 Scope of subpart.

This subpart addresses DOE policies and procedures to be applied in DOE cost-type contracts which include authorization to acquire, use, and



dispose of real estate or interest therein for the performance of a contract or contracts; and, DOE assumes liability for, or otherwise will pay, or may be expected to pay, for the acquired real estate as a reimbursable contract cost.

#### 917.7401 General.

Ordinarily Government agencies are not directly concerned with the real estate management procedures for fixed price or cost-type contractors. However, special circumstances and situations arise under cost-type contracts when, in the performance of their contract or subcontract, the performer shall be required, or otherwise find it necessary, to acquire real estate or interests therein by:

(a) Purchase, on DOE's behalf or in its own name, with title eventually vesting in the Government.

(b) Lease, and DOE assumes liability for, or otherwise will pay for the obligation under the lease.

(c) Acquisition of temporary interest through easement, license or permit, and DOE funds the cost of the temporary interest.

#### 917.7402 Policy.

It is the policy of the Department of Energy that when the real estate acquisitions described in 917.7401 are made, the following policies and procedures shall be applied to such acquisitions:

(a) Real estate acquisitions shall be mission essential; effectively, economically, and efficiently managed and utilized; and disposed of promptly, when not needed;

(b) Acquisitions shall be justified, with documentation which describes the need for the acquisitions, general requirements, cost, acquisition method to be used, site investigation reports, site recommended for selection, and property appraisal reports; and

(c) Acquisition by lease, in addition to the requirements in paragraphs (a) and (b) of this section:

(1) Shall not exceed a one-year term if funded by one-year appropriations.

(2) May exceed a one-year term, when the lease is for special purpose space funded by no-year appropriations and approved by the Department.

(3) Shall contain an appropriate cancellation clause which limits the Government's obligation to no more than the amount of rent to the earliest cancellation date plus a reasonable cancellation payment.

(4) Shall be consistent with Government laws and regulations applicable to real estate management.

#### 917.7403 Application.

(a) The Officer of Project and Facilities Management is the Headquarters contact point for Departmental policies and procedures governing the acquisition, use, and disposal of the Department's real estate or interests therein. Real estate interests include purchases, leases, easements, permits and licenses.

(b) It is the contracting officer's responsibility to coordinate with the Office of Project and Facilities Management when contractor real estate acquisitions meet the criteria set forth in 917.7401 in order to assure that appropriate procedures are followed by the contractor.

(c) The clause at 952.217-70 will be included in contracts or modifications where contractors acquisitions are expected to meet the criteria specified in this subpart.

#### 917.7404 Competition.

(a) Contracting officers shall make certain that solicitation documents:

(1) Require proposals to specify additional facilities and equipment which must be acquired for contract performance, the estimated cost of individual items, and whether acquisition of such property will be financed by the prospective contractor or whether the Government will be requested to provide the required items.

(b) Explain whether it is the Government's intention to provide property, when it is known prior to solicitation that contract performance will require additional facilities or equipment.

(c) Require prospective contractors to:

(i) List items (including dollar value) of Government-owned property in the offerors possession which is proposed to be used in performance of the prospective contract;

(ii) Identify the contract or other instrument under which the property is accountable; and

(iii) Present written permission to use such property in the performance of the prospective DOE contract from the Government contracting officer having cognizance of the property.

(d) Include a statement that the user will assume all costs related to making the property available for use (e.g., transportation, installation, rehabilitation, modification, etc.) unless the Government is to assume such costs.

(e) Include a statement which explains the consideration to be given Government property during evaluation of bids and proposals. This is insure that all prospective bidders and offerors understand that Government property

will be an important consideration in evaluating their bids and proposals.

#### Subpart 917.75—Multiple Awards-Phased Acquisitions

##### 917.7500 Scope of subpart.

Some projects lend themselves to the use of multiple phase, parallel contracts. The basic decision in regard to the use of multiple awards for phased acquisitions will be made by the program office based on technical, schedule, and cost considerations. In the first phase, more than one contractor may undertake a design effort. For the second and succeeding phases, one or more contractors may then be selected from the preceding phase's participants. Since there is an important selection decision to be made at the end of any phase, explicit evaluation and selection procedures will be made known to the contractors prior to competitive selection for succeeding phases.

##### 917.7501 RFP provisions.

Where multiple awards for phased acquisitions are contemplated, requests for proposals (RFPs) for the initial phase shall include:

(a) Notice that the initial negotiated contract will be for Phase I only; however, the Government reserves the right to require a proposal(s) for additional phases of the project as defined in the provisions of the RFP.

(b) If appropriate, notice that competition on subsequent phases will be restricted to the Phase I contractor(s).

(c) Evaluation and qualification criteria should not ordinarily be restricted to Phase I consideration only, but rather should be designed to assure that selected offerors have the requisite technical, management and financial capacity to compete for and perform all phases.

(d) A requirement that each contractor submit a proposal to perform subsequent phases. Instructions for proposal submission and the evaluation criteria to be used in the selection of contractor(s) for subsequent phases will be provided to the Phase I contractors, by letter, as early as possible and at least 90 days prior to the date for submission of proposals.

(e) A requirement of each Phase I, or subsequent phase, contractor to submit a comprehensive report covering actual and projected accomplishments under the present phase. This information will be used in addition to the proposal and the Government's assessment of contractor performance in the evaluation and selection process for subsequent phases. The report shall, as



a minimum address the technical, schedule, and cost aspects of the phase of work now under contract.

#### 917.7502 Evaluation.

(a) The contracting officer or other source selection official as appropriate, shall establish an evaluation team sufficiently in advance of the Phase II proposal due date. The evaluation team shall consist of a chairman from the program office and representatives of procurement and other DOE programmatic or functional areas as appropriate. Counsel will be included as a non-voting advisory member of the evaluation team as deemed appropriate.

(b) The evaluation team will develop the evaluation criteria and proposal instructions to be furnished to the contractors. The purpose of the evaluation is to select that or those offerors which best satisfies the DOE requirements for successful completion of the project. The evaluation shall consider such factors as technical, price, programmatic and other requirements. The evaluation process shall be accomplished in an impartial, equitable, comprehensive, and timely fashion to assure the selection of one or more organizations, which offer the best possibility for successful performance, cost and other factors considered. It is contemplated that the initial phase of multiphase parallel contracts awarded under these procedures will be performed in the same timeframe so that a single competitive evaluation and selection can be accomplished at one point in time. Accordingly, the contracts should contain provisions permitting the Government to synchronize contractor Phase I performances through acceleration or deceleration, as is appropriate, to achieve simultaneous completion of the Phase I activities by all firms under consideration. A thorough and detailed evaluation shall be completed so as to provide the basis on which the best selection can be made.

### PART 919—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

#### Subpart 919.2—Policies

Sec.

##### 919.201 General policy.

#### Subpart 919.5—Set-Asides for Small Business

##### 919.501 General.

##### 919.502-2 Total set-asides.

##### 919.503 Setting aside a class of acquisitions.

#### Subpart 919.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns

##### 919.705-5 Awards involving subcontracting plans.

##### 919.705-6 Postaward responsibilities of the contracting officer.

##### 919.708 Solicitation provisions and contract clauses.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### Subpart 919.2—Policies

##### 919.201 General policy.

(c) The Director, Office of Small and Disadvantaged Business Utilization (OSDBU), Headquarters, is responsible for the administration of the DOE small and small disadvantaged business programs. This includes responsibility for developing, implementing, executing, and managing these programs, providing advice on these programs, and representing DOE before other Government agencies on matters primarily affecting small and small disadvantaged businesses. Heads of Contracting Activities (HCAs) shall appoint a small business/small disadvantaged business (SB/DB) specialist.

#### Subpart 919.5—Set-Asides for Small Business

##### 919.501 General.

(c) The Department has established a comprehensive review and screening process for acquisitions over the small purchase threshold. The review is intended to enhance the prospect of participation by small business, small disadvantaged business, and women-owned small business concerns.

##### 919.502-2 Total set-asides.

In considering set-asides in the area of architect engineer contracts, contracting personnel must first consider the special procedures required by the Brooks Act, Pub. L. 92-582 pertaining to this type acquisition.

##### 919.503 Setting aside a class of acquisitions.

By agreement with SBA, the DOE has established a class set-aside for construction acquisitions not exceeding \$3 million, including new construction and repair and alteration of structures. Lists of other class set-asides shall be maintained by all DOE contracting offices. These lists shall be updated at least annually.

#### Subpart 919.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns

##### 919.705-5 Awards involving subcontracting plan.

(b) When the exigencies of the situation prevent obtaining a subcontracting plan prior to the award of a letter contract, the plan shall be obtained prior to definitization.

##### 919.705-6 Postaward responsibilities of the contracting officer.

A copy of the notification to the SBA of awards of contracts, amendments or modifications that contain subcontracting plans, as required by FAR 19.705-6(a), shall be provided to the OSDBU.

##### 919.708 Solicitation provisions and contract clauses.

(b) When using the clause at FAR 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan, it shall be modified as specified at 952.219-9. The effect of this modification is to relieve DOE contractors and subcontractors from the burden of submitting the SF295 quarterly report since DOE is able to extract this information from the SF294 report. However, in order to do this, DOE must obtain the SF294 on a quarterly basis rather than semiannually. The modification also requires DOE contractors and subcontractors to indicate, at the "Remarks" section of the form, the number and dollar value of awards to labor surplus area concerns if required by the terms of the contract. Upon receipt of these reports, contracting officers shall input the information to the DOE Subcontracting Data System.

(c) Advance approval of the Procurement Executive, or designee, is required prior to including any small and small disadvantaged business concerns incentive subcontracting provision in any solicitation or of this clause in any contract.

### PART 920—LABOR SURPLUS AREA CONCERNS

#### Subpart 920.1—General

Sec.

##### 920.102 General policy.

##### 920.106 Records and reports.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).



**Subpart 920.1—General****920.102 General policy.**

Acquisitions shall be reviewed for potential labor surplus area set-aside consideration in accordance with 919.501(c).

**920.106 Records and reports.**

Records and reports shall be as required by "A Guide to Preparation of DOE Quarterly Procurement and Financial Assistance Reports."

**PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION****Subpart 922.1—Basic Labor Policies**

Sec.

922.103 Overtime.

922.103-4 Approvals.

**Subpart 922.4—Labor Standards for Contracts Involving Construction**

922.470 Applicability.

922.471 Decisions and other guides in difficult areas.

922.472 Wage determinations.

922.473 Administration and enforcement.

**Subpart 922.6—Walsh-Healey Public Contracts Act**

922.608-3 Protests against eligibility.

922.608-4 Award pending final determination.

922.608-5 Award.

922.608-6 Postaward.

**Subpart 922.8—Equal Employment Opportunity**

922.800 Scope of subpart.

922.802 General.

922.803 Responsibilities.

922.804 Affirmative action programs.

922.804-1 Nonconstruction.

922.804-2 Construction.

922.805 Procedures.

922.807 Exemptions.

**Subpart 922.70—Special Concerns Affecting Construction Laborers and Mechanics**

922.7000 Scope of subpart.

922.7001 Responsibilities.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**Subpart 922.1—Basic Labor Policies****922.103 Overtime.****922.103-4 Approvals.**

(d) *Approvals.* (1) Where the cost to the Government may be affected, approval of hours of work in excess of the normal workweek is justified only in those instances and for those employees where it can be shown that overtime would provide needed and demonstrable impetus to the

accomplishment of DOE objectives and that all other means of meeting these objectives have been considered and found inadequate or not feasible. Accordingly, Heads of Contracting Activities shall:

(i) Establish controls to prevent excess casual overtime and to assure that such overtime work is in the best interest of the Government. By casual overtime is meant (A) work in excess of the normal workweek (or in excess of an authorized extended workweek) which cannot be regularly scheduled in advance; or (B) regularly scheduled work in excess of the normal workweek for a period of four consecutive weeks or less; and

(ii) Establish controls to assure that any use of any extended workweek schedule is in the best interest of the Government. Extended workweek means a workweek regularly scheduled and established in excess of the normal workweek for a period in excess of four consecutive weeks.

**Subpart 922.4—Labor Standards for Contracts Involving Construction****922.470 Applicability.**

(a) Although the statutes required to be followed per FAR 22.400 direction do not contain definitions, the Secretary of Labor's regulations in 29 CFR 5.2 include definitions, of "contract," "building," "work," "construction," "prosecution," "completion," "repair," "public building," and "public work." In general, contracts are classifiable as being covered by the statutes when performance by the contractor consists substantially of the erection or assembly of new plants (including laboratory or other buildings or works), or the alteration and/or repair including painting and decorating, of new and existing plants. The fact that certain contracts may be entered into without regard to general statutory requirements as to advertising for bids or proposals, or upon a cost-reimbursement basis or otherwise, is not determinative in the classification of such contracts, activities, construction projects, or other work or services performed thereunder.

(b) Contracts for servicing or maintenance work are not ordinarily subject to the requirements of this subpart. Maintenance includes the routine, recurring type of work necessary to keep a facility in such condition that it may be continuously used at an established capacity and efficiency for its purpose. However, if such maintenance or service contracts call for substantial and segregable task for construction, alteration or repair, the labor standards provision for

construction contracts will be applicable to those items. All contracts in excess of \$2,000 for painting of public buildings or public works, whether performed in connection with the original construction or as regular maintenance, are subject to the labor standards provisions for construction contracts.

(c) The requirements that must be followed as a result of FAR 22.4 and other parts of FAR 22 in respect to the Davis-Bacon and Copeland Acts do not apply to the following:

(1) Contracts, regardless of their nature, not in excess of \$2,000 (Does not apply to the Copeland Act). However, no item of work, the cost of which is estimated to be in excess of \$2,000, shall be artificially divided into portions less than \$2,000 for the purpose of avoiding the applicability of the Davis-Bacon Act.

(2) Contracts for furnishing supplies and equipment, including installation, where the installation requires only an incidental amount of work (as defined in paragraph (c) of this section) that would otherwise be considered construction, alteration and/or repair of a public building or public works.

(3) Contracts for servicing or maintenance work in an existing plant, including installation or movement of machinery or other equipment, and plant rearrangement, which involve only an incidental amount of work (as defined in paragraph (e) of this section) that would otherwise be considered construction, alteration and/or repair.

(4) Contracts for operational or maintenance activities (e.g., production, research and development, or community services, as distinguished from contracts for construction). In general, these are contracts where performance by the contractor consists primarily of the utilization of existing facilities and the services of personnel to produce materials, conduct research and development, or provide community-type services, and of the use of or maintenance of plant. However, the classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are not covered, since it may be necessary to separate out work which should be classified as covered. As used in connection with "operational activities," the term "produce" means to manufacture, make, or refine special nuclear or other material; to separate material from other substances in which it is contained; or to make new material. The "materials" includes supplies, articles, or equipment; the term "research and development" means the same as defined in 909.5703(b).



(5) Contracts to be performed outside the United States and the District of Columbia. (Does not apply to the Copeland Act.)

(6) Contracts for demolition, except when performed as a phase of a covered construction project or when subsequent construction activity at the site being cleared is contemplated.

(7) Contracts with a State or subdivision thereof.

(8) Contracts with railroads for construction services to the extent that the services are performed by railroad employees covered by the Railway Labor Act.

(d) It should be noted, however, that the requirements of FAR Subpart 22.4 do apply to work performed by laborers and mechanics employed by a construction contractor or subcontractor at the site of the work under a contract for the construction, alteration and/or repair, including painting and decorating of public buildings or public works, which is otherwise subject to these Acts whether or not such work would be covered if it were a separate contract.

(e) As used in paragraph (c) (2) and (3) of this section, "an incidental amount of work" is defined to mean work directly related to the installation, movement or rearrangement of equipment or machinery, relatively small in amount, and which does not include changes in a facility affecting its architectural or structural strength, stability, safety, size, or function as a public work.

#### 922.471 Decisions and other guides in difficult areas.

The following are examples of applications of the Davis-Bacon Act to particular situations.

(a) *Land-based prototypes.* (1) The Department of Labor has held that the construction of a full-scale operating prototype of a reactor and all necessary nuclear power components, systems, and propulsion equipment for a submarine is covered.

(2) The Department of Labor has held that assembling and fitting the components of nuclear steam propulsion units in a prototype ship situation into the hull sections, including installation of the pressure vessels, turbo-generator sets, heat exchangers, control wiring, etc., is covered.

(3) A later decision involving the prototype situation in (a)(2) above indicates that the earlier rulings should not be construed as intended to cover all equipment assemblies irrespective of the status of construction and other pertinent factors.

(b) *Paving.* The construction of roads, including grading, and their repair—where such repair includes work in

roadbeds before resurfacing, building up shoulders, forming ditches, culverts and bridges, and on the actual resurfacing of roads—is covered. However recurring-type maintenance work, such as patching surfaces, filling chuck holes, patching shoulders, and resurfacing railroad crossings is non-covered. Similarly, patch and maintenance work on a parking lot, the replacement of bumper stops, and the repainting of parking dividers is non-covered.

(c) *Stationary boilers.* The construction, alteration and/or repairs, including installation and rebuilding, of stationary boilers costing in excess of \$2,000 for labor and materials is covered. Inspection may reveal a need for replacement of pieces of insulation, individual tubes, or other defective parts. Such minor maintenance, necessary to keep the boiler in safe operating condition, is non-covered.

(d) *Start-up of operating activity after fire or other catastrophe.* Rebuilding of a plant following a catastrophe, such as replacement of structural members, roof trusses, walls, roof, utility services, and process piping is covered. However, where process equipment can be restarted and/or operational activities resumed prior to such rebuilding, the actual work of start-up, including preliminary activity, e.g., cleaning, drying, checking, adjustment, temporary services, and temporary weather protection of equipment, essential to such resumption of operational activity, is non-covered.

(e) *Rehabilitation of facilities.* By contrast with emergency services needed to restore or maintain functional usefulness, as above described, rehabilitation (e.g., painting, change-out, rearrangement and installation of equipment, replacement or repair of damaged parts of a structure or of building services or equipment) of a facility is covered. In such rehabilitation, the startup of equipment by operating employees is non-covered.

(f) *Painting.* Although painting and decorating are specifically mentioned in the Davis-Bacon Act, painting which is closely integrated within operation and maintenance activities and such repainting as color coding of process lines and service piping (including valves and directional arrows), is non-covered. Likewise, application of various materials for localizing contamination, painting of machine tools to identify degree of contamination, and preventive maintenance such as repainting of machine tools, equipment and plant structures are non-covered when performed with a stable work force employed by the operating contractor.

(g) *Installation, rearrangement of adjustment of equipment.* (1) *During construction.* In the construction of a new facility—whether it is a production plant, a laboratory, or supporting facilities, such as shops and warehouses—an integral part of a construction project is the installation of equipment (including mechanical equipment, building services, instruments, etc.) which permits the facility to be utilized for the purpose intended. Normally, the initial installation, arrangement, adjustment, balancing, calibration, and checking of such equipment is a logical part of the construction contract(s) for completion of the facility and, whether or not included within the scope of such contract(s), is covered.

(2) *Plant start-up.* At the time of the turnover of a DOE facility from construction to operating activities, if the facility is turned over a section at a time, some problems of coverage may arise. Usually, it is essential that final checkout of a plant prior to the start-up of plant operations be performed by personnel of the operating organization and, as such, is not covered. The important thing is to work out a practical plan that will assure: (i) Safe and effective start-up of the facility, (ii) the fulfillment of obligations under applicable statutes, and (iii) uninterrupted of continuing construction at the facility.

(3) *Equipment and equipment assemblies.* Although the current construction status of a public building or public work is not the controlling factor as to coverage of supply-installation type contracts, it is a factor to be considered in judging the applicability of the Davis-Bacon Act. The Department of Labor has ruled (Walsh-Healey Rulings and Interpretations No. 3, section 6(b)) that while contracts in excess of \$10,000 for equipment, including erection or installation, are subject to the Walsh-Healey Act, they may be also covered under the Davis-Bacon Act where more than an incidental amount (see 922.403-71(c)) of work is involved. Examples given in this ruling include furnishing and installation of mechanical equipment such as elevators or of generators requiring prepared foundations or housing. The Department has indicated that a contract for furnishing the initial installation of piping, wiring, gas exhaust fans, plumbing, sheet metal work, and related activities to install kitchen baking equipment was comparable to the basic plumbing, wiring, and heating contracts and was covered. While such a situation



involves an initial installation, alteration or rearrangement of existing facilities involving such work to accommodate new or different equipment is also covered. Conversely, it follows that where the test of more than an incidental amount of construction is not met, and where the installation, rearrangement or adjustment of equipment is not a logical part of any current related construction project, it is non-covered.

(4) *Telephone and utility systems.* Contracts involving the installation of telephone systems or utilities are not covered when the work is performed by employees of the telephone or utility company supplying the services, and the material and equipment installed are owned by the telephone or utility company. Such installation is considered to be an extension of the utility's services. However, a contract for a telephone central system to be installed by the manufacturer and owned by the United States has been held to be covered. In addition, relocation of utility lines to accommodate construction of a public work is covered.

#### 922.472 Wage determinations.

(a) The Heads of Contracting Activities are responsible for submitting to the Wage and Hours Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, all DOE requests for wage determinations, or individual determinations, or extensions or modifications thereto. Requests for such determinations shall be made on Standard Form 308, at least 30 calendar days before they are required for use in advertising for bids or requests for proposals.

(b) In general, the Davis-Bacon Act rates applicable to a contract at the time it is awarded continue in effect during its term regardless of whether it is a fixed-price or cost-reimbursement contract. However it should be noted that:

(1) The minimum wage rates that will be paid to laborers and/or mechanics engaged on jobs which are programmed on a fiscal year or shorter basis are those predetermined by the Secretary of Labor to be prevailing as of the date the program is approved by DOE for performance by the contractor. However, in the event of a substantial addition to the scope of a contract containing a "general or area wage determination," the current "general or area wage determination," including modifications thereto, shall be made applicable to the additional work. If the contract contains a "project area or

installation (54A) determination," or an individual determination, and substantial addition to the scope of the contract is made during the fiscal year or shorter basis but more than 120 days from the date of the determination, a new determination is required for the substantial addition. Programmed work will be performed by the contractor under continuing contracts for minor or miscellaneous construction, alteration and/or repair, including painting and decorating.

(2) The minimum wage rates that will be paid to laborers and/or mechanics engaged on subcontracts let by an operating contractor will be those in the wage determination decision of the Secretary of Labor which has been issued in conformance with 29 CFR 1.7.

(c) The Federal Register prints general or area wage determinations as they are issued by the Secretary of Labor or designee.

#### 922.473 Administration and enforcement.

(a) The statutes and regulations alluded to in FAR 22.400 impose direct responsibilities for administration and enforcement upon DOE. Therefore, Heads of Contracting Activities and others, consistent with their assignments of responsibilities and delegations of authority, shall assure that DOE contract activities are carried out consistent with these laws and regulations.

(b) Heads of Contracting Activities shall submit (to the Office of Contractor Industrial Relations) reports, recommendations, and requests for ruling and interpretations resulting from following the requirements of FAR 22.400 and 922.400.

#### Subpart 922.6—Walsh—Healey Public Contracts Act

##### 922.608-3 Protests against eligibility.

When an eligibility determination made by the contracting officer is challenged, this protest shall be handled in accordance with procedures for agency protests against award, except the matter shall be submitted to the Department of Labor for final determination. However, if the eligibility determination challenged pertains to a small business, the protest shall be forwarded to the Small Business Administration for determination.

##### 922.608-4 Award pending final determination.

(a) Award, as contemplated by FAR 22.608-4, may be made only with the approval of the Head of the Contracting Activity.

##### 922.608-5 Award.

The notice required by FAR 22.608-5(b) is to be sent to the appropriate Department of Labor Regional Office in which the contractor's place of business is located. Regional Office locations are specified at FAR 22.609.

##### 922.608-6 Postaward.

(c) Any postaward actions of the type discussed at FAR 22.608-6 should be coordinated in advance with the Office of Industrial Relations, Headquarters.

#### Subpart 922.8—Equal Employment Opportunity

##### 922.800 Scope of subpart.

This subpart implements FAR 22.800. It applies to all DOE contracts and subcontracts.

##### 922.802 General.

##### 922.803 Responsibilities.

(a) The Director, Office of Federal Contract Compliance Programs of the Department of Labor has been delegated authority and responsibility for carrying out the requirements of Executive Order 11246, as amended. In conjunction with the delegation, contracting officers shall be familiar with existing and any updated provisions of 41 CFR Ch. 60, and assist the Department of Labor in its compliance responsibilities. DOE contracting officers will include the applicable Equal Employment Opportunity (EEO) and Affirmative Action Program (AAP) requirements in their solicitations and obtain the applicable reports of compliance from the Office of Federal Contract Compliance Programs (OFCCP) (when required) prior to awarding of contracts. The provisions of 41 CFR Ch. 60, are applicable to all DOE contracts.

(d) The OFCCP requires that requests for pre-award clearances be directed to the OFCCP Regional Office in which the contractor's facility is (to be) located. If OFCCP finds the contractor in compliance, the contracting officer will be notified. Findings of non-compliance can be communicated to the contracting officer by the OFCCP or Headquarters Director or his designee. The appropriate Regional Office will provide the appropriate contact point in cases of non-compliance. The Director, Office of Industrial Relations (DOE HQ), when requested, will provide assistance to contracting officers resolving non-compliance issues by providing assistance in obtaining a final decision from the OFCCP.



**922.804 Affirmative action programs.****922.804-1 Nonconstruction.**

In the event a prospective contractor or subcontractor is entering into its first contract containing the Equal Opportunity clause, the contracting officer shall determine that the prospective contractor understands and appears able to conform to the requirements of the EEO clause.

**922.804-2 Construction.**

(a) Construction contracts, including cost-sharing contracts, are subject to OFCCP orders applicable in particular areas.

(1) When a proposed nonexempt construction contract is within a geographic area where construction is subject to the provisions of Federal EEO Bid Conditions, Part I or Part II, the solicitation shall contain those bid conditions. The contracting officer shall include in such solicitation a provision that "the offeror shall adhere to the affirmative action plan (bid conditions) set forth in this solicitation."

(2) Lists of areas for which OFCCP has designated specific affirmative action requirements are available through the Procurement Executive. Contracting officers should assure that this list and copies of pertinent orders are made available to all concerned DOE offices and to DOE contractors and construction subcontractors for work to be performed in the specified geographical areas.

(b) *Other nonexempt construction contracts.* (1) When a proposed nonexempt construction contract is not in a "plan area" and is in the amount of \$10,000 or more, offerors must agree to comply with the Equal Employment Opportunity clause.

(2) When proposed nonexempt contracts of \$1,000,000 or over are not in plan areas and have not been designated as high impact, offerors also must submit to the contracting officer details regarding specific affirmative action steps to be taken by the offeror in connection with all work under the contract. Such details shall include estimates of the percentage of minority group persons expected to be employed in each craft involved in the performance of the contract work. All solicitations for construction contracts shall reference the affirmative action requirements and the offeror's obligation to make good faith efforts to employ women in craft positions.

(3) Pursuant to the OFCCP order dated August 30, 1976, agencies shall develop "Special Bid Conditions" for use on high impact projects in non-plan areas. These special bid conditions will include

mandatory goals and timetables for the utilization of minorities. The Procurement Executive using the criteria issued by OFCCP will determine those projects that are "high impact." The contracting officer is responsible for compliance with policies and procedures contained in the OFCCP "Construction Compliance Program Operations Manual." Language for inclusion in solicitations or contracts contained in the manual may be modified, provided all of the requirements are retained. The contracting officer shall develop the goals and timetables and shall confer with the appropriate OFCCP regional office. The Office of Industrial Relations will provide assistance as necessary, when requested. Special bid conditions will be submitted by the contracting officer to the appropriate OFCCP regional office for approval unless otherwise directed by the Procurement Executive. When special bid conditions are applicable, adequate presolicitation lead time should be allowed for submission of the special bid conditions to OFCCP national and regional offices.

(c) An attempt to limit in any major respect the equal opportunity requirements included in an invitation for bids or request for proposals for a construction contract shall constitute grounds for a determination that the offeror does not qualify as a responsible offeror and for rejection of the bid or proposal.

**922.805 Procedures.**

(b) *Furnishing Posters.* The contracting officer may obtain posters from the Government Printing Office.

**922.807 Exemptions.**

(c) Contracting officer requests for exemption from EO 11246 should be directed to the Procurement Executive for submission to the Director, OFCCP.

**Subpart 922.70—Special Considerations Affecting Construction Laborers and Mechanics****922.7000 Scope of subpart.**

This subpart discusses DOE responsibilities and actions regarding DOE construction programs.

**922.7001 Responsibilities.**

(a) *General.* (1) As collective bargaining arrangements exist generally throughout the construction industry, the wages, hours and working conditions followed for construction laborers and mechanics normally will result from collective bargaining between management and labor. It is important that practices contributing to harmonious labor-management relations

prevail throughout the DOE program. All participants in the DOE program, including employees and their unions, have a special and continuing obligation to do their part in accomplishing a stable, efficient construction operation under adequate and reasonable conditions.

(2) In some areas, DOE construction is a minor part of local construction activity, while in other areas DOE construction may, at times, overshadow local construction. Normally, there will be a number of contractors and subcontractors, both cost-type and fixed price, engaged simultaneously on a single large DOE project. It is important that adequate coordination exist among all such contractors in order that similar conditions are provided for all construction employees, in a given classification, at a particular location.

(3) The problem of establishing appropriate conditions for the large projects is complicated by the essential requirements that initial conditions be clearly identified and fixed prior to recruitment of work force. This factor involves applicability of all pertinent Federal statutes, including the Davis-Bacon Act and the Labor Management Relations Act of 1947, as amended (29 U.S.C. 141 et seq.).

(b) *Steps preliminary to the staffing of new cost-reimbursement projects.* Preliminary to the actual recruitment of workers, it is important that sufficient data be accumulated by the field office concerned to reflect area practices accurately. These data should cover in detail the pattern of bargaining in the area; the proportion of the work force employed by employer parties to collective bargaining agreements in relation to the total construction work force; the terms of local area agreements; the extent of conformance with such agreements and any accepted interpretations of them; and a description of practices which may have developed outside of the local agreements. These data will furnish the basis for decision contemplated in (c) and (d) below. Where the data indicate local agreements are adequate for the contemplated work, there may still be areas that need to be filled by additional understandings to attain the desired stability of conditions. The data obtained in the initial survey will also be used in connection with the original Davis-Bacon predetermination.

(c) *Role of project contractor management in collective bargaining.* The DOE expects contractor management engaged in the negotiation and/or administration of collective bargaining agreements to assume



responsibility for assuring conditions which are consistent with the judicious expenditure of public funds, attracting and retaining the skills needed, and giving due consideration to the community's interests and established standards. To meet these responsibilities, it is important that the collective bargaining role to be played by project contractor management be clearly determined in the light of project requirements and local conditions.

(1) In an area where DOE construction does not overshadow total local construction activity, and the majority of construction is performed by members of local contractor associations, the DOE expects that basic conditions for labor on its projects will be negotiated between the local contractor associations and local unions and generally adhered to on construction work in the area. In such situations, DOE contractors will provide for clear identification and application of these local agreements to the DOE work. In such applications, the conditions to be followed will be those which obtain in actual practice in the area covered by the agreement and are consistent with applicable laws, rather than those appearing from a literal interpretation of the language of the agreement. Conditions not covered by local agreements may be provided for as necessary to meet project goals.

(2) In some areas, local agreements may be nonexistent, or inadequate, or the employer parties may not be representative of the employers of the bulk of the labor force in the area. In such event, DOE contractors are expected to carry their share of the responsibility for negotiations and to negotiate directly or in cooperation with others to establish appropriate conditions.

(3) In an area where DOE construction work is of such magnitude as to overshadow local construction, it may be desirable for DOE contractors to negotiate special project conditions (on either a craft or a multi-craft basis) as the best way to meet their obligations to the DOE. Such agreements usually involve the establishment of new bargaining units and are therefore dependent upon the voluntary cooperation of the building trades unions. Normally both the Building Trades Department (AFL-CIO) and the Senior Official, Office of Industrial Relations, should be consulted in respect to any proposed course of action.

(d) *Role of DOE in construction labor relations.* The DOE's role in construction labor relations is one of overall cognizance consistent with

DOE's ultimate responsibilities. The scope of the construction program, the complexity of the problems which may arise, and the need for coordination among contractors at the same site are factors which affect the degree of influence exercised by DOE in carrying out the following responsibilities:

(1) To assure that careful advance survey and analysis is made of each contract situation and that the role of the contractor management is in accordance with the considerations in (c) above;

(2) To establish effective machinery for coordination among project contractor management;

(3) With respect to DOE contracts carried out under area practices, to assure that conditions proposed are actually prevalent in the area or have other substantial foundation and that, to the extent consistent with the terms of fixed-price contracts, practices established by fixed-price contractors are not of a character that will destabilize other DOE work;

(4) With respect to DOE contracts carried out under project agreement, both union and management, to take into account all relevant factors pertaining to any conditions peculiar to the project, duration of project, tenure of employment, housing and travel accommodations, length of regular work week, uniformity of shift, special subsidies, etc.;

(5) To encourage contractor officials and representatives of employees to establish similar conditions among all construction employers for each class or classification of employees at a particular location;

(6) To encourage contractor officials and representatives of employees to provide clear identification and application of practices under local agreements, or to make and maintain project agreements on DOE construction projects; and

(7) To encourage contractor officials and representatives of employees to establish reliable working contact between the DOE project contractors and any unions that are cooperating in staffing the job.

(e) *Initial wage rates.* The wage rates initially established under both cost-reimbursement and fixed price contracts will not be less than, and will normally conform to, those determined by the Secretary of Labor pursuant to the requirements of the Davis-Bacon Act. On cost-reimbursement work, the total compensation on the DOE project will be comparable with the total compensation allowed similar workers in an appropriate area of comparison. Where the DOE project is applying the

practices under local agreements, the area of comparison normally will be the geographic area within the jurisdiction of each local union cooperating in staffing the project. In this situation, the application of local practices and agreements will usually be carried out on an item-by-item basis. Where a project agreement has been agreed on as the foundation for project conditions, the area of comparison for each craft should be large enough to provide a sound base which will result in realistic wage rates. In the development of a project agreement, the Office of Industrial Relations should be consulted.

(f) *Adjustments in compensation.* Subject to limitations imposed by applicable labor laws, changes in established wage rates and working conditions under cost-reimbursement contracts may be effected as follows:

(1) Adjustments in wage rates and other job conditions established in project collective bargaining agreements may be effected by the renegotiation or modification of the agreements at appropriate times and by the reopening of existing agreements as provided therein. The Office of Industrial Relations should be consulted as appropriate criteria to follow in review of such reopenings.

(2) In situations where DOE contractors working under cost-reimbursement type contracts apply local established job conditions included in applicable bargaining agreements, adjustments in wages and job conditions may coincide with changes within the locality. Wage rates may be adjusted to bring rates into conformity with new rates which are verified as established in the area at the time of their acceptance for DOE work.

(g) *National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry.* Construction contractors and representatives of employees are encouraged to settle craft jurisdiction disputes, in accordance with the procedural rules and regulations of the National Joint Board.

(h) *Responsibility of the Office of Industrial Relations.* The Office of Industrial Relations, Headquarters, is responsible for coordinating all activities arising under this subpart, and for maintaining liaison with the Department of Labor, the Building Trades Department (AFL-CIO), and other construction labor and employer organizations.



## PART 923—ENVIRONMENT, CONSERVATION, AND OCCUPATIONAL SAFETY

### Subpart 923.70—Environmental, Conservation, and Occupational Safety Programs

Sec.

- 923.7001 Nuclear safety.  
923.7002 Contract clauses.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 923.70—Environmental, Conservation, and Occupational Safety Programs

#### 923.7001 Nuclear Safety.

(a) The DOE regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The DOE also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

#### 923.7002 Contract clauses.

(a) A decision to include or not include environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in consultation with appropriate environmental, safety and health program management personnel.

(b) When work is to be performed at a facility where the DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 952.223-71 shall be used in such contract or subcontract if conditions (a) (1) through (3), are satisfied:

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(c) In facilities not meeting the requirements of 923.7002(b) above and which are a production or utilization facility where there is use or possession of source, special nuclear, or byproduct materials, DOE policy is not to enforce radiological safety and health standards pursuant to the contract or subcontract but rather to rely upon Nuclear Regulatory Commission (NRC) licensing requirements (including agreements with

states under section 274 of the Atomic Energy Act). Pursuant to this policy, neither the clause found at 952.223-71 nor 952.223-72 is to be incorporated in the contracts or subcontracts for work at such facilities. Notwithstanding this general policy with respect to facilities not meeting the requirements of paragraph (b) above, the Secretary or his designee may determine in special cases, that DOE needs to enforce radiological safety and health standards pursuant to the contract or subcontract (see paragraph (d) below). When such a determination is made, the clause found at 952.223-72 shall be included in the contract or subcontract.

(d) In facilities not meeting the requirements of either 923.7002(b) or 923.7002(c) above and where there is a machine capable of producing ionizing radiation, it is DOE policy not to regulate such activity where it is adequately regulated by a state or other Federal agency. In such cases, neither clause 952.223-71 nor 952.223-72 shall be incorporated in the contract. Where the contracting officer, with appropriate environmental, safety and health advice determines that no state or other Federal agency exists to adequately regulate the operation and/or use of such machines, the clause found at 952.223-72 shall be included in the contract. The Deputy Assistant Secretary for Environment, Safety and Health shall be consulted to determine if a non-agreement (NRC) state or a facility located in a non-agreement state has been reviewed by any other DOE office to establish that the state agency has the essential authority and resources for enforcing the radiation protection standards. This is to assure reasonable consistency in the assessment of radiation protection in non-agreement states and subsequent use of 952.223-72.

(e) In a situation where the contractor or subcontractor is performing DOE work at more than one location, inclusion of either, or both, 952.223-71 and 952.223-72 may be appropriate. In such cases, the contract or subcontract must include language to specify the extent of applicability of each clause used. For example, with a parenthetical: (Applicable only to work performed at a contractor site which has 952.223-71 or 952.223-72 clause in its contract or subcontract).

## PART 924—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

### Subpart 924.1—Protection of Individual Privacy

Sec.

- 924.103 Procedures.

### Subpart 924.2—Freedom of Information Act

924.202 Policy.  
Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 924.1—Protection of Individual Privacy

#### 924.103 Procedures.

(b)(2) See 10 CFR Part 1008, Records maintained on Individuals (Privacy Act), for the DOE regulations relating to the maintenance or disclosure of information from systems of records on individuals. In addition, see DOE order 1800.1, Privacy Act, for internal DOE procedures to be followed in the establishment and maintenance of systems of records.

### Subpart 924.2—Freedom of Information Act

#### 924.202 Policy.

(b) See 10 CFR Part 1004, Freedom of Information for the DOE regulations relating to the availability of DOE records to the public.

## PART 925—FOREIGN ACQUISITION

### Subpart 925.1—Buy American Act—Supplies

Sec.

- 925.102 Policy.  
925.105 Evaluating offers.  
925.108 Excepted articles, materials, and supplies.

### Subpart 925.2—Buy American Act—Construction Materials

- 925.202 Policy.  
925.204 Violations.

### Subpart 925.5—Payment in Local Foreign Currency

- 925.501 Policy.

### Subpart 925.9—Omission of the Examination of Records Clause

- 925.903 Conditions for omission.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 925.1—Buy American Act—Supplies

#### 925.102 Policy

(a)(4) Contracting officers may make the determination required by FAR 25.102(a)(4), provided such determination is factually supported in writing. If the contract is estimated to exceed \$1 million, the Head of the Contracting Activity shall approve the determination.



**925.105 Evaluating offers.**

(c) Proposed awards shall be submitted (in triplicate) through the Procurement Executive, to the Head of the Agency for decisions required by FAR 25.105(c).

**925.108 Excepted articles, materials, and supplies.**

(b) Suggestions for changes and additions to the FAR 25.108(d) list, with appropriate justifications, shall be submitted to the Procurement Executive.

**Subpart 925.2—Buy American Act—Construction Materials****925.202 Policy.**

(b) Contracting officers may make the determination required by FAR 25.202(a)(3). If the cost of the materials is expected to exceed \$100,000, the Head of the Contracting Activity shall approve the determination.

**925.204 Violations.**

(d) Contracting officers shall make a complete written report (in triplicate) to the Secretary through the Procurement Executive of each violation of the Buy American Act—Construction Materials clause at 52.225-5.

**Subpart 925.5—Payment in Local Foreign Currency****925.501 Policy.**

(b) The contracting officer, prior to award of a contract requiring payment to be made in a foreign currency, should ensure that sufficient DOE funds will be available to purchase the foreign currency needed for making such payments.

(c) The contracting officer, when required by applicable financial regulations or directives, may obligate funds in excess of the current contract price, or contract with a financial organization dealing in foreign exchange for the future delivery of the required foreign currency. The official contract file should be appropriately documented to reflect the amount of funds reserved or other actions to be taken in the event additional U.S. dollars are required to make such payments because of an increase in the value of the foreign currency.

**Subpart 925.9—Omission of the Examination of Records Clause****925.903 Conditions for omission.**

Any proposed determinations and any reports mentioned at FAR 25.903 shall be forwarded to the Procurement Review Office, Headquarters.

**PART 927—PATENTS, DATA, AND COPYRIGHTS****Subpart 927.3—Patent Rights Under Government Contracts**

Sec.

**927.300 General.****Subpart 927.4—Technical Data and Copyrights****927.400 Scope of subpart.****927.401 Definitions.****927.402 Acquisition and use of technical data.****927.402-1 General.****927.402-2 Policy.****927.402-3 Procedures (supply, research, development, or demonstration contracts).****927.403 Negotiations and deviations.****Subpart 927.70—Disclosure of Proposal Information****927.7000 Disclosure outside Government.****927.7001 Proposal information.****927.7002 Treatment of proposal information.****927.7003 Handling notice.****927.7004 Identification of proprietary data in proposals.****927.7004-1 Solicited proposals.****927.7004-2 Solicitations.****927.7004-3 Unsolicited proposals.****927.7005 Required notice of right to request patent waiver.**

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy of 1954, as amended (42 U.S.C. 2168).

**Subpart 927.3—Patent Rights Under Government Contracts****927.300 General.**

(a) The provisions of 41 CFR 9-9.1 shall continue in effect; provided, however, that the provisions of 41 CFR 9-9.107-1 through 9-9.107-6 and 9-9.109-6 shall apply only to contracts with other than small business firms and domestic nonprofit organizations which do not fall within the provisions of 35 U.S.C. 202(a) (i), (ii), or (iii). The following sentences shall be substituted for the first sentence of paragraph (j)(2) of the Patent Rights (Long Form) clause of 41 CFR 9-9.107-5(a) and paragraph (e)(2) of the Patent Rights (Short Form) clause of 41 CFR 9-9.107-6:

The contractor will include the clause at 952.227-71 "Patent Rights—Small Business Firms or Nonprofit Organizations" of the Department of Energy Acquisition Regulation 48 CFR Part 952 suitably modified to identify the parties, in all subcontracts regardless of tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization. In all other subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the contractor will include the Patent Rights clause of 41 CFR 9-9.107-

5(a) or 41 9-9.107-6 as appropriate, modified to identify the parties.

(b) The clause at 952.227-71 shall be used in contracts with small business firms and nonprofit organizations in accordance with OMB Circular A-124 and Chapter 18 of Title 35 of the United States Code.

**Subpart 927.4—Technical Data and Copyrights****927.400 Scope of subpart.**

This subpart sets forth DOE's policy, procedures, and instructions for contract clauses with respect to the acquisition and use of technical data and copyrights in contracts or subcontracts entered into, with or for the benefit of the Government.

**927.401 Definitions.**

"Technical data" means for the purpose of this subpart, recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, demonstration, or engineering work or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data, as used in this subpart, do not include financial reports, cost analyses, and other information incidental to contract administration.

"Proprietary data" means for the purpose of this subpart, technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(1) Are not generally known or available from other sources without obligation concerning their confidentiality;

(2) Have not been made available by the owner to others without obligation concerning their confidentiality; and



(3) Are not already available to the Government without obligation concerning their confidentiality.

"Contract data" means for the purpose of this subpart, technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, technical data that may be called for under the Additional Technical Data Requirements clause of the contract, if any, or technical data actually delivered in connection with the contract.

"Unlimited rights" means for the purpose of this subpart, rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

#### 927.402 Acquisition and use of technical data.

##### 927.402-1 General.

(a) The provisions herein pertain to research, development, demonstration and supply contracts. Special considerations for contracts for the operation, design, or construction of Government-owned facilities are covered by Subpart 970.27. Under DOE's broad charter to perform research, development, and demonstration work, in both nuclear and nonnuclear fields, and to meet the objectives stated in 927.402-2, DOE has extensive needs for technical data. The satisfaction of these needs and the achievement of DOE's objectives through a sound data policy are found in the balancing of the needs and equities of the Government, its contractors, and the general public.

(b) It is important to keep a clear distinction between contract requirements for the delivery of technical data on the one hand, and rights in technical data on the other. The legal rights which the Government acquires in technical data in DOE contracts (other than "facilities" contracts) are set forth in the Rights in Technical Data (long form) clause of 952.227-75. However, this clause does not obtain for the Government the delivery of any data whatsoever. Rather, known requirements for the technical data to be delivered by the contractor shall be set forth as part of the contract (e.g. in the statement of work). The Additional Technical Data Requirements clause at 952.227-73 may be used along with the clause at 952.227-75 to enable the contracting officer to require the contractor to furnish additional technical data, the requirement for which was not known at the time of contracting. There is, however, a built-in limitation on the

kind of technical data which a contractor may be required to deliver under either the contract statement of work or the Additional Technical Data Requirements clause. This limitation is found in the withholding provision of paragraph (e) of the Rights in Technical Data (long form) clause of 952.227-75 which provides that the contractor need not furnish "proprietary data." It is specifically intended that the contractor may withhold "proprietary data" even though a requirement for technical data specified in the statement of work or called for pursuant to the Additional Technical Data Requirements clause would seemingly require the furnishing of proprietary data. This withholding of proprietary data is the primary means by which the contractor may protect its proprietary position.

(c) There are, however, two situations where the Government, or its representative, may need to have limited access to a contractor's proprietary data.

(1) First, paragraph (f) of the Rights in Technical Data (long form) clause gives the contracting officer's representatives the limited right to inspect at the contractor's facility the contractor's proprietary data which were withheld from delivery under paragraph (e) of the clause for the purpose of verifying that such data were properly withheld or to evaluate work performance. In carrying out the inspection, normally the contracting officer's representative is a DOE employee although he may be an employee of a DOE contractor acting under an agreement to treat in confidence the proprietary data to be inspected. However, where the contractor whose data are to be inspected demonstrates that there would be a possible conflict of interest if the inspection were made by such a contractor employee, the contracting officer's representative may be limited to a DOE employee. Paragraph (f) has a built-in exclusion from these inspection rights for "specific items of proprietary data" when they are so specified in the contract schedule. Such exclusions limit even DOE's minimum rights of evaluating contract work performance and verifying that technical data withheld by the contractor is proprietary in fact. Such exclusions should be sparingly used, and only in situations where program personnel stipulate to the fact that DOE has no need for access to the specified items to be excluded from paragraph (f), i.e., that the nondisclosure and nonaccessibility will not adversely affect the DOE program involved. It should also be noted that paragraph (f) permits exclusion of "specific items" of proprietary data and,

accordingly, should not be used to exclude classes of technical data or all technical data pertaining to specific items or processes or classes of items or processes.

(2) The second situation, where the Government may have limited access to a contractor's proprietary data, is provided in optional paragraph (g) of the Rights in Technical Data (long form) clause at 952.227-75 Alternate I. When used, optional paragraph (g) provides the Government the right to require the contractor to furnish with limited rights the proprietary data previously withheld under paragraph (e). In this situation, the limited rights in proprietary data and the Government's obligation for limited use and disclosure of such data as set forth in the Rights in Technical Data (long form) clause provides the means by which the contractor protects its proprietary position. Paragraph (g) will be used only where it is determined by DOE that for programmatic reasons there is a need for the delivery of proprietary data to the Government. Where proprietary data is to be delivered under paragraph (g) and subparagraph (a) or (b) of the limited rights legend is to be applied to the data, the contractor may, if he can show the possibility of a conflict of interest regarding disclosure of such data to other contractors, limit or modify subparagraphs (a) or (b) as set forth in 927.402-3(e)(2), to exclude or include certain contractors.

(d) The contractor licensing provisions of optional paragraph (h) at 952.227-75 Alternate II of the Rights in Technical Data (long form) clause enable DOE to require limited licenses in proprietary contract data to be granted to the Government and responsible parties in certain circumstances. Such a license may parallel or supplement the license obtained in background patents under the provisions of paragraph (k) of the Patent Rights clause of 41 CFR 9-9.107-5(a). Paragraph (h) is normally to be included in contracts for research, development or demonstration where it is deemed by DOE that the limited license afforded therein is necessary to ensure widespread commercial use or practical utilization of a subject of the contract. As explained in 927.402-3(e)(3), paragraph (h) provides that upon request by DOE, the contractor will grant to the Government and responsible third parties a license in proprietary data only where such data in the form of results obtained by its use, i.e., essential equipment, articles, products, and the like which were the subject of the contract, are not otherwise available, or cannot be made



available in a reasonable time as set forth in paragraph (h).

(e)(1) It is the responsibility of prime contractors and higher tier subcontractors, in meeting their obligations with respect to contract data, to obtain from their subcontractors the rights in, access to, and delivery of such data on behalf of the Government. Accordingly, subject to the policy set forth in these regulations, and subject to the approval of the contracting officer where required, selection of appropriate technical data provisions for subcontracts is the responsibility of the prime contractor or higher-tier subcontractor. In many but not all instances, inclusion in a subcontract of the Rights in Technical Data (long form) clause of 952.227-75 will suffice to obtain for the benefit of the Government the rights in and, if appropriate, access to technical data. Access by DOE to technical data, i.e., the inspection rights afforded in paragraph (f) of the Rights in Technical Data (long form) clause at 952.227-75 normally should be obtained only in first-tier subcontracts having as a purpose the conduct of research, development, or demonstration work or the furnishing of supplies for which there are substantial technical data requirements as reflected in the prime contract. If a subcontractor refuses to accept technical data provisions affording rights in and access to technical data on behalf of the Government, the contractor shall so inform the Contracting Officer in writing and not proceed with the subcontract without written authorization of the Contracting Officer. In prime contracts (or higher-tier subcontracts) which contain the Additional Technical Data Requirements clause, it is the further responsibility of the contractor (or higher-tier subcontractor) to determine whether inclusion of such clause in a subcontract is required to satisfy technical data requirements of the prime contract (or higher-tier subcontract).

(2) As is the case for DOE in its determination of technical data requirements, the Additional Technical Data at 952.227-73 Requirements clause should not be used at any subcontracting tier where the technical data requirements are fully known, and normally the clause will be used only in subcontracts having as a purpose the conduct of research, development, or demonstration. Prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to inequitably acquire rights in the subcontractor's proprietary data for their private use, and they shall not acquire rights on

behalf of the Government to proprietary data for standard commercial items unless required by the prime contract.

(f) Related to the acquisition and use of technical data are the contractor's rights in contract data as well as technical data furnished to the contractor by DOE or its contractors. These rights are set forth in paragraph (b)(2) of each Rights in Technical Data clause and provide that the contractor may, subject to patent, security and other provisions of the contract, use for its private purposes contract data it first produces in the performance of the contract, provided that the contractor has met its data requirements (e.g., delivery of data in form of progress or status reports specified to be delivered) as of the date of the private use of such data. It is not necessary that a final report be submitted in order to privately use data if all required progress and interim reports and other technical data then due have been delivered. Paragraph (b)(2) further provides that technical or other data received by the contractor in the performance of the contract must be held in confidence by the contractor in accordance with restrictions accompanying the data.

(g) An additional clause described further at 927.402-3(f), the text of which is found at 952.227-76 entitled Rights in Data—Special Works, is to be used in place of or in addition to the Rights in Technical Data (long form) clause in contracts where a purpose of the contract is the production of copyrightable material, a substantial portion of which is to be first produced in the performance of the contract, such as motion pictures, television recordings, books, histories, etc. Where, during contract negotiations, it may be determined to purchase, i.e., "specifically acquire," unlimited rights in technical data, or to lease or obtain a license therein, or to obtain rights in existing data, an appropriate clause therefor should be obtained from patent counsel. In situations where technical data including computer software are to be leased or licensed, the terms of any agreement restricting the Government's rights will be included in the contract as either a special clause or an agreement annexed thereto. Another clause, the Rights in Technical Data (short form) clause further described at 927.402-3(g), the text of which is found at 952.227-77, is provided for use in research contracts with educational institutions and consultants. Such contracts may, for example, include those for conducting symposia, training, or education, or other contracts not involving possible use of proprietary data.

(h) In contracts involving access to certain categories of DOE-owned restricted data, as set forth in 10 CFR Part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. Accordingly, in contracts where access to such restricted data is to be provided to contractors, the following parenthetical phrase shall be inserted after "contract data" in paragraph (b)(2)(ii) of the clause at 952.227-75, after "technical data" in paragraph (b)(2) of the clause at 952.227-77, or after "technical data" in paragraph (b)(2)(ii) of the clause at 952.227-78 as appropriate: "(except Restricted Data in category C-24, 10 CFR Part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology)." In addition, there are other types of contract situations (e.g., no cost contracts for studies or evaluation) wherein the contractor is given access to restricted data. In such contract situations, limitations on the use of such data may be appropriate.

#### 927.402-2 Policy.

The technical data policy is directed toward achieving the following objectives:

(a) Making the benefits of the energy research, development and demonstration programs of DOE widely available to the public in the shortest practicable time;

(b) Promoting the commercial utilization of the technology developed under DOE programs;

(c) Encouraging participation by private persons in DOE energy research, development, and demonstration programs; and

(d) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

#### 927.402-3 Procedures (supply, research, development, or demonstration contracts).

(a) *Known requirements for technical data.* Technical data requirements are determined in relation to the intended use of the data which in turn depends upon the intended use of the contract end item. In many contracts for research, the end item may often be a technical report or series of such reports, while in contracts beyond research, the subject of the contract may be a feasibility model, an engineering or advance development model, or a



prototype. The extent to which required technical data may be needed often depends on the level of maturity of design and perfection of the end item, and for a demonstration plant or prototype, may include data pertaining to performance, operational and environmental testing, repair, maintenance, operation, quality assurance, detailed design, logistics, training, etc. Known technical data requirements shall be programmatically ascertained prior to contracting and shall be included in requests for proposals or disclosed during contract negotiations for incorporation as data requirements in the contract statement of work.

(b) *Additional requirements for technical data.* In contracts for research, development, or demonstration, it is not normally possible or appropriate for the Government to ascertain all actual needs for technical data in advance of contracting. Accordingly, the Additional Technical Data Requirements clause at 952.227-73, shall normally be used in such contracts (and, if appropriate, in subcontracts) to enable the ordering of technical data as the actual need and requirement therefor becomes known during the course of the contract. If all technical data requirements are known in advance of contracting and are set forth in the contract statement of work, this clause need not be used. The Additional Technical Data Requirements clause should not normally be used in supply contracts because the required technical data therefor are ordinarily known in advance and thus are specified in the contract statement of work or specification. When the Additional Technical Data Requirements clause is used, the Rights in Technical Data-Long Form clause at 952.227-75 shall also be used.

(c) *Clause text.* The text of the Additional Technical Data Requirements clause is found at 952.227-73.

(d) *Proposals.* (1) The policy and procedures for treatment of proposal information are set forth in FAR 15.413 for solicited proposals, in FAR 15.509 for unsolicited proposals, and 927.70.

(2) Solicited proposals are to be handled in accordance with the procedures of FAR 15.413-2. Evaluation of such proposals outside the Government is authorized in accordance with the procedures of FAR 15.413-2(f) and paragraph (d)(4) below. In order to assure that solicited proposals are properly handled, the handling notice of FAR 15.413-2(e) shall be affixed to a cover sheet attached to each proposal upon receipt by DOE. Use of the notice

neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose the information.

(3) Unsolicited proposals are to be handled in accordance with FAR 15.509. Outside evaluations of such proposals are authorized in accordance with the procedures of 925.7000.

(4) It is DOE policy to have proposals evaluated by the most competent persons available in Government. In addition, DOE may meet its evaluation needs by having proposals reviewed by evaluators and contractor organizations operating or managing government-owned facilities. Where it is determined to evaluate a proposal outside the Government, such as by consultants, grantees and contractors including those who operate or manage Government-owned facilities, the agreement of 927.7000 or an equivalent arrangement for the treatment of the proposal shall be obtained from the outside evaluator before DOE furnishes a copy of the proposal to such person. In addition, care should be taken that the required handling notice is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator.

(5) Should a contract be awarded based on a proposal, it is DOE policy, in consideration of the award, to obtain unlimited rights for the Government in the technical data contained in the proposal unless the prospective contractor marks those portions of the technical information which it asserts as "proprietary data", or specifies those portions of such technical data which are not directly related to or will not be utilized in the work to be funded under the contract. "Proprietary data" is defined in 927.401(b). A proposer who receives a contract award shall mark the data identified as proprietary by specifying the appropriate page numbers to be inserted in the Rights to Proposal Data clause of 952.227-82, which clause shall be inserted in the contract. Subject to the concurrence of the contracting officer, information unrelated to the contract may be deleted from the proposal by the contractor. The responsibility, however, of identifying technical data as proprietary or deleting it as unrelated, rests with the prospective contractor.

(e) *Rights in technical data.* (1) The Rights in Technical Data (long form) clause set forth at 952.227-75 shall be used in all contracts having as a purpose the conduct of research, development, or demonstration, or in contracts for supplies, or in any other contract where technical data are expected to be first produced under the contract, where technical data are specified to be

delivered in the contract, or where the contract contains the Additional Technical Data Requirements clause. Accordingly, all such contracts shall contain the Rights in Technical Data (long form) clause at 927.227-75, except as noted in 970.2702 and 927.402-3 (f) and (g) and except contracts for standard commercial off-the-shelf supplies where technical data such as operating or repair manuals are routinely furnished with the supplies.

(2) *Optional paragraph-Limited Rights in Proprietary Data.* In research, development, or demonstration contracts, and supply contracts where it is determined that delivery of proprietary data is necessary with limited rights in the Government, the Rights in Technical Data (long form) clause at 952.227-75 shall be supplemented by the additional paragraph (g) set forth at Alternate I to the clause. It should be noted that this paragraph does not entitle the contractor to place a limited rights legend on any technical data furnished to the Government under paragraph (g) unless the contracting officer requests in writing delivery of identified technical data previously withheld under paragraph (e) of the Rights in Technical Data clause. Paragraph (g) provides that proprietary data may be specified in the contract as being excluded from the delivery requirements of paragraph (e). Alternatively, the limited rights legend specified in Alternate I may be made applicable to only those classes of proprietary data determined as being necessary for delivery with limited rights. In addition, when furnishing proprietary data with the limited rights legend, subparagraphs (a), (b) and (c) thereunder may be modified as follows. When proprietary data is to be furnished only for evaluation, subparagraph (a) of the limited rights legend shall be used, and subparagraphs (b) and (c), if otherwise inapplicable, may be deleted. When there is a programmatic requirements that proprietary data be disclosed to other DOE contractors only for information or use in connection with work performed under their contracts, subparagraph (b) of the limited rights legend shall be used, and subparagraphs (a) and (c) may be deleted if otherwise inapplicable. In either of the foregoing examples, the contractor may, if it can show the possibility of a conflict of interest because of disclosure of such data to certain contractors or evaluators, exclude such contractors or evaluators from subparagraphs (a) or (b). If the data is required solely for emergency repair or overhaul, subparagraph (c) of



the limited rights legend shall be retained, and subparagraphs (a) and (b) may be deleted, unless otherwise applicable. In the event it is determined that all of the subparagraphs (a), (b) and (c) of the limited rights legend are to be deleted, the word "none" shall be inserted in the legend after the colon(:).

(3) *Optional paragraph-Contractor Licensing.* In many contracting situations the achievement of DOE's objectives would be frustrated if the Government, at the time of contracting, did not obtain on behalf of responsible third parties and itself limited license rights in and to proprietary contract data. Where, for example, the contractor is required to license background patents, consideration should be given to securing co-extensive license rights to the Government and responsible third parties at reasonable royalties, and under appropriate restrictions, for contract data which are proprietary data in order to practice the technology which is a subject of the contract. When such a license right is deemed necessary, the Rights in Technical Data (long form) clause at 952.227-75 should be supplemented by the addition of paragraph (h) at 952.227-75 Alternate II. Paragraph (h) will normally be sufficient to cover proprietary contract data for items and processes that were used in the contract and are necessary in order to insure widespread commercial use of a subject of the contract. The expression "subject of the contract" is intended to limit the licensing required in paragraph (h) below to the fields of technology specifically contemplated in the contract effort and may be replaced by a more specific statement of the fields of technology intended to be covered in the manner described in 41 CFR 9-9.107-5(b)(9) pertaining to "Background Patents." Where, however, proprietary contract data cover the main purpose or basic technology of the research, development, or demonstration effort of the contract, rather than subcomponents, products or processes which are ancillary to the contract effort, the limitations set forth in subparagraphs (h) (1)-(4) should be modified or deleted. Paragraph (h) further provides that technical data may be specified in the contract as being excluded from or not subject to the licensing requirements thereof. This exclusion can be implemented by limiting the applicability of the provisions of paragraph (h) to only those classes or categories of proprietary data determined as being essential for licensing. Although contractor licensing may be required under paragraph (h), the final resolution of questions

regarding the scope of such licenses, the terms thereof, including provisions for confidentiality and reasonable royalties, is then left to the negotiation of the parties with resolution of the issues being made, if necessary, by a court of competent jurisdiction.

(f) *Rights in Data—Special Works.* (1) The clause set forth in 952.227-76 shall be used in all contracts where the principal purpose or a task of the contract is the production of copyrightable works, even through such works may incorporate uncopyrighted material or material previously copyrighted by the contractor or others. Such contracts include those:

(i) Primarily for production of motion picture or television recordings or scripts, musical compositions or arrangements, sound tracks or recordings, translations, adaptations, and the like;

(ii) For books, compilations, surveys, histories, or technology information pamphlets;

(iii) For works pertaining to management studies, support services, training, career guidance, or similar functions of DOE; and

(iv) For works pertaining to guidance or instruction of DOE officials or employees in the discharge of official duties.

(2) The Rights in Data—Special Works clause at 952.227-76 should be modified with the assistance of Patent Counsel where the contract calls for the editing, translation, addition, or other modification of the subject matter of an existing work.

(g) *Rights in Technical Data (short form).* The clause set forth in 952.227-77 may be used in contracts for basic research including grants, special research contracts with educational institutions, contracts with consultants, contracts for symposia, or for the conduct of training and educational programs, and in other contracts of a similar nature. This clause shall not be used in any contract where proprietary information of the contractor may be utilized in the performance of work under the contract; in such instances the Additional Technical Data Requirements clause of 952.227-73 and the Rights in Technical Data (long form) clause of 952.227-75 shall be used. The short form clause of this section shall not be used in situations involving long-term consultancy arrangements for work in DOE programs providing opportunities for specialized work experience at DOE-owned facilities for scientific, engineering, and other employees of private firms and

institutions engaged in civilian applications of atomic energy.

#### 927.403 Negotiations and deviations.

Contracting officers shall contact the Patent Counsel assisting their contracting activity, or the Assistant General Counsel for Patents, for assistance to the contracting officer in selecting, negotiating, or approving appropriate data and copyright clauses in accordance with the procedures as set forth in 927.402 and 970.27. In particular, advice of Patent Counsel should be obtained regarding the appropriateness or modification of optional paragraphs (g) and (h) of the Rights in Technical Data (long form) clause, the exclusion of specific items of proprietary data from paragraph (f) in said clause, and the exclusion of the Additional Technical Data Requirements clause of 952.227-73.

#### Subpart 927.70—Disclosure of Proposal Information

##### 927.7000 Disclosure outside Government.

(a) It is DOE policy to have proposals evaluated by the most competent persons available in the Government. In addition, DOE may meet its evaluation needs by having proposals reviewed by evaluators and contractor organizations operating or managing government-owned facilities. Outside evaluations may be made provided the requirements in (b) and (c) below are met. A decision to employ outside evaluators shall take into consideration requirements for avoidance of organizational conflicts of interest set forth in 909.5 and the competitive relationship, if any, between the proposer and the outside evaluator.

(b) Decisions to evaluate proposals outside the government shall be made only by the Source Selection Official with the concurrence of the Procurement Executive, Headquarters, for all source evaluation board acquisitions, or by the Senior Program Official or designee with the concurrence of the HCA or his designee for other acquisitions. If the proposal under consideration expressly indicates that only Government evaluation is authorized and evaluation outside the Government is nevertheless desired, the proposer shall be advised that DOE may be unable to give full consideration to the proposal unless the proposer consents in writing to having the proposal evaluated outside the Government.

(c) Where it is determined to evaluate a proposal outside the Government, such as by consultants, grantees or contractors including those who grant or manage Government-owned facilities



the following agreement or an equivalent arrangement for the treatment of the proposal shall be obtained from the outside evaluator before DOE furnishes a copy of the proposal to such person. In addition, care should be taken that the handling notice required by 927.7003 is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator.

#### Agreement

##### Conditions for Evaluating Proposal

Whenever DOE furnishes a proposal for evaluation, the recipient agrees to use the information contained in the proposal only for DOE evaluation purposes and to treat the information obtained in confidence. This requirement does not apply to information obtained from any source, including the proposer, without restriction. Any notice or restriction placed on the proposal by either DOE or the originator of the proposal shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of the evaluation, it is agreed all copies of the proposal and abstracts, if any, shall be returned to the DOE office which initially furnished the proposal for evaluation. Unless authorized by the contracting officer, it is agreed the recipient shall not contact the originator of the proposal concerning any aspect of its contents.

Recipient: \_\_\_\_\_

Date: \_\_\_\_\_

#### 927.7001 Proposal information.

Information contained in proposals will be used only for evaluation purposes except to the extent such information is generally available to the public, is already the property of the Government, or the Government already has unrestricted use rights, or is or has been made available to the Government from any source, including the proposer or offeror, without restriction. The term "proposal," as used in this section, includes responses to program opportunity notices (PONs), program research and development announcements (PRDAs) and solicitations of a similar nature, in addition to requests for proposals (RFPs) and unsolicited proposals. As a practical matter, DOE cannot assume any responsibility for disclosure or use of any such information unless it is identified by the proposer or offeror in accordance with this section. Unless a solicitation specifies otherwise, DOE will not refuse to consider a solicited proposal or an unsolicited proposal merely because the proposal is restrictively marked.

#### 927.7002 Treatment of proposal information.

(a) A proposal may include technical data and other data, including trade secrets and/or privileged or confidential

commercial or financial information which the offeror does not want disclosed to the public or used by the Government for any purpose other than proposal evaluation. To protect such data the offeror should specifically identify each page including each line or paragraph thereof containing the data to be protected and mark the cover sheet of the proposal with the notice set forth at FAR 52.215-12, as prescribed at FAR 15.407(c)(8) for solicited proposals or FAR 15.509 for unsolicited proposals. Solicitation documents shall include instructions to proposers to mark their proposals in the prescribed manner.

(b) A reference to that notice on a proposal cover sheet shall be placed on each page to which the notice applies. Data, or abstracts of data, marked with that notice will be retained in confidence and used by the DOE or its designated representative(s) including Government contractors and consultants, as set forth in paragraph (c) below solely for the purpose of evaluating the proposal. The data so marked will not otherwise be disclosed or used without the proposer's prior written permission except to the extent provided in any resulting contract, or to the extent required by law. Offerors should be made aware of the provisions of paragraph (c) below if they desire to modify the notice at FAR 52.215-12 or otherwise seek to limit the evaluation to the Government only. The restriction contained in the notice does not limit the Government's right to use or disclose any data contained in the proposal if it is obtainable from any source, including the offeror, without restriction. Although it is the policy of the DOE to treat all proposals as confidential, the Government assumes no liability for disclosure or use of unmarked data and may use or disclose such data for any purpose. See FAR 15.1001(b) regarding disclosure to other offerors.

(c) Should a contract be awarded based on a proposal, it is DOE policy, in consideration of the award, to obtain unlimited rights for the Government in the technical data contained in the proposal unless the prospective contractor marks those portions of the technical information which he asserts "proprietary data," or specifies those portions of such technical data which are not directly related to or will not be utilized in the work to be funded under the contract. "Proprietary data" is defined in 927.401. An offeror who receives a contract award shall mark the data identified as proprietary by specifying the appropriate page numbers to be inserted in the Rights to Proposal Data clause of 952.227-82, which clause

shall be inserted in the contract. Subject to the concurrence of the contracting officer, information unrelated to the contract may be deleted from the proposal by the contractor. The responsibility, however, of identifying technical data as proprietary or deleting it as unrelated, rests with the prospective contractor.

(d) The clause at 952.227-82 shall be included in any contract which resulted from a proposal that was the basis of negotiation and award of the contract. This clause is intended to apply only to technical data and not to other data such as privileged or confidential commercial or financial information.

#### 927.7003 Handling notice.

In order that proposals may be handled in confidence consistent with the policies set forth in this section and pursuant to 927.402-3(d)(2), the notice at FAR 15.413-2(e) for solicited proposals and FAR 15.509(d) for unsolicited proposals shall be affixed to a cover sheet attached to each proposal upon receipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

#### 927.7004 Identification of proprietary data in proposals.

##### 927.7004-1 Solicited proposals.

Even though the statement of work contained in a solicitation sets forth the known requirements for technical data, i.e., technical data which will be specified to be delivered, there is no assurance that the contractor will deliver all of this data because paragraph (e) of the Rights in Technical Data (long form) clause at 952.227-75 permits the contractor to withhold proprietary data from delivery. In order to ascertain the technical data the proposer intends to withhold as proprietary data, and as an aid in determining whether to include the provision for limited rights in proprietary data set forth in optional paragraph (g) of the Rights in Technical Data (long form) clause, the provision set forth in 952.227-83 shall be included in the solicitation. This provision explains that solicitations will include DOE's known requirements for technical data, and that the proposer must submit a list identifying to the best of its knowledge which of this data will be withheld as proprietary data, or state that no technical data will be withheld. The submission of such a list does not constitute a stipulation or determination by the Government that the data identified therein are in fact proprietary.



In addition, the provision to be included in the solicitation refers to the Additional Technical Data Requirements clause at 952.227-73, as being included in the proposed contract where, due to programmatic considerations, it is contemplated that all of the requirements for technical data will not be known at the time of contracting. When a proposer specifically identifies the proprietary data to be withheld, the contracting officer shall determine as advised by the appropriate program manager, whether:

(a) the Government needs limited rights in the proprietary data, in which case the optional paragraph (g) will be included in the Rights in Technical Data (long form) clause;

(b) the Government needs to require the contractor to license proprietary data to the Government and responsible third parties, in which case optional paragraph (h) will be included in the Rights in Technical Data (long form) clause; and

(c) the Government needs unlimited rights in the proprietary data, in which case negotiations may be held to purchase or obtain a suitable license to the proprietary data.

#### 927.7004-2 Solicitations.

The provision at 952.227-83 shall normally be included in solicitations which may result in contracts calling for research, development, or demonstration work or solicitations for supplies in which delivery of required technical data is contemplated.

#### 927.7004-3 Unsolicited proposals.

The contracting officer, during contract negotiations, shall identify technical data which will be required to be furnished under the contract. The proposer shall be required to submit a list identifying, to the best of his knowledge, which of this data will be withheld as proprietary under paragraph (e) of the Rights in Technical Data (long form) clause, or to state that no technical data will be withheld. The contracting officer shall then make the determinations, in the same manner as set forth in 927.7004-1 for solicited proposals, pertaining to the proprietary data identified to be withheld.

#### 927.7005 Required notice of right to request patent waiver.

Offerors are to be provided with notice of the right to request, in advance of or within 30 days after the effective date of contracting, a waiver of all or any part of the rights of the United States with respect to subject inventions. In no event will the fact that an offeror has requested such a waiver

be a consideration in the evaluation of his offer or the determination of his acceptability. Accordingly, the notice at 952.227-84 shall be given to all prospective contractors and shall be inserted in all solicitations which may result in contracts calling for research, development, or demonstration work.

### PART 928—BONDS AND INSURANCE

#### Subpart 928.1—Bonds

##### Sec.

928.101-1 Policy on use.

928.101-70 Review of bid bonds for construction.

928.102-70 Review of performance and payment bonds for construction.

928.103-2 Performance bonds.

928.103-3 Payment bonds.

928.103-70 Review of performance and payment bonds for other than construction.

928.170 Fidelity bonds.

#### Subpart 928.2—Sureties

928.202-1 Corporate sureties.

928.202-70 Partnerships as sureties.

928.202-71 Substitution or replacement of a surety.

#### Subpart 928.3—Insurance

928.301 Policy.

928.370 Service-type insurance policies.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy of 1954, as amended (42 U.S.C. 2168).

#### Subpart 928.1—Bonds

##### 928.101-1 Policy on use.

(a) In addition to the restriction on use of bid guarantees in FAR 28.101-1(a), a bid guarantee may be required only for fixed price or unit price contracts entered into as a result of formal advertising. They may not be required for negotiated contracts.

##### 928.101-70 Review of bid bonds for construction.

Prior to award of a contract, the contracting officer shall obtain a review from Counsel of the bid bond furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety. Prior to award of a subcontract, the contracting officer shall review the bid bond furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety and adequacy of the bond.

##### 928.102-70 Review of performance and payment bonds for construction.

Prior to the award of a contract for construction the contracting officer shall obtain review of performance and payment bonds as to legal form and sufficiency, acceptability of the surety, and adequacy of the bond. A

performance or payment bond, other than an annual bond, shall not antedate the contract to which it pertains.

#### 928.103-2 Performance bonds.

Situations in addition to those listed in FAR 28.103-2, which may warrant requiring a performance bond for other than construction contracts are:

(a) Where doubt exists as to the financial or technical ability of all possible suppliers;

(b) Where the contractor's talent is overly concentrated in a few key personnel whose illness or departure could seriously impair the contractor's ability to perform the proposed work;

(c) Where other commitments of the contractor might delay performance;

(d) Where performance of the proposed work might disrupt other operations of the contractor and impair its overall efficiency; and

(e) Where the item being manufactured is a component for another article and is required by a particular date in order to avoid delay in delivery of the end product.

#### 928.103-3 Payment bonds.

(a) A determination that is in the best interest of the Government to require payment bonds in connection with other than construction contracts may be made by the contracting officer on individual acquisitions. Such approval is subject to the approval of the Head of the Contracting Activity. In the case of either advertised or negotiated acquisitions, whenever the contracting officer has reason to believe that work under a proposed contract might be delayed because of the concern of subcontractors or suppliers over the credit standing of a potential prime contractor, the contracting officer should consider requiring a payment bond.

##### 928.103-70 Review of performance and payment bonds for other than construction.

Prior to the award of a contract for other than construction the contracting officer shall obtain review of performance and payment bonds as to legal form and sufficiency, acceptability of the surety, and adequacy of the bond. A performance or payment bond, other than an annual bond, shall not antedate the contract to which it pertains.

#### 928.170 Fidelity bonds.

Fidelity bonds shall not be required in connection with fixed-price contracts. They may be required, however, in connection with cost-reimbursement contracts for supplies, or construction, where it is determined that a fidelity bond is necessary for the protection of the Government or the contractor, or



when it is considered desirable to obtain the investigative and claim services of the surety company.

#### Subpart 928.2—Sureties

##### 928.202-1 Corporate sureties.

Each corporate surety, may, by setting forth the limit of its liability in the bond as a definite and specified sum, limit such liability. The co-sureties must, however, bind themselves "jointly and severally" for the purpose of allowing a joint action or actions against any or all of them.

##### 928.202-70 Partnerships as sureties.

A partnership or other unincorporated association, as such, shall not be accepted as a surety. The individual members of the partnership or association may, of course, qualify as sureties, provided they meet the requirements set forth in FAR 28.202-2. Individual members of a partnership or association shall not, however, be acceptable as sureties on bonds under which the partnership or association, or any co-partner or member thereof, is the principal obligor.

##### 928.202-71 Substitution or replacement of a surety.

In case of financial inadequacy, failure, or other disqualifying cause on the part of a surety under a bond, the contracting officer shall require the substitution of a new surety satisfactory to the contracting officer.

#### Subpart 928.3—Insurance

##### 928.301 Policy.

The DOE policies and procedures for indemnification of DOE contractors are set forth in FAR Part 50 and 950.

##### 928.370 Service-type insurance policies.

(a) Service-type insurance policies are cost-reimbursement type contracts or subcontracts in which the insurer provides claim and loss adjustment services on a cost reimbursement basis, which satisfies state and Federal insurance requirements.

(b) Service-type insurance policies may be used with contracting officer approval, when one or more of the following conditions are present:

(1) Pure risk commercial insurance is not available or, if available, cost is not considered reasonable;

(2) Inherent risks in the contract are new and a part of the process of commercialization;

(3) The service-type insurance is needed to implement jointly funded projects; or

(4) The service-type insurance arrangement is considered in the Government's best interest.

#### PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

##### Subpart 931.1—Applicability

Sec.

931.102 Fixed-price contracts.

##### Subpart 931.2—Contracts With Commercial Organizations

931.205-18 Independent research and development and bid and proposal costs.  
931.205-32 Precontract costs.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy of 1954, as amended (42 U.S.C. 2168).

##### Subpart 931.1—Applicability

##### 931.102 Fixed-price contracts.

The intent of the first sentence of FAR 31.102 is that applicable subparts of FAR Part 31 shall be used by the Government in (a) pricing fixed-price prime contracts and modifications, (b) evaluating the reasonableness of a prime contractor's (or prospective prime contractor's) proposed subcontract (or subcontract modification) prices, and (c) determining the allowability of contractor payments to subcontractors in accordance with the provisions of FAR 31.204(b).

##### Subpart 931.2—Contracts With Commercial Organizations

931.205-18 Independent research and development and bid and proposal costs.

(c)(3) In determining the amount of cost recoverable under DOE contracts the maximum total amount of annual IR&D costs recoverable under all DOE contracts with a business unit or segment shall not exceed (i) those contracts' allocable share of the business unit's (or segment's) total allocable IR&D amounts (as established in accordance with paragraphs FAR 31.205-18(c)(1) and (2)), or (ii) the total cost of the business unit's (or segment's) annual IR&D activities determined to have potential benefit or relationship to the DOE program, whichever is less. The maximum total amount of B&P cost which is recoverable under DOE contracts with a business unit (or segment) shall be those contracts' share of the allocable B&P expense computed in accordance with FAR 31.205-18(c)(1) and (2).

(4) For purposes of 931.205-18(c)(3), the term "DOE program" encompasses the DOE total mission and its objectives. However, IR&D costs that exceed the benefit threshold at one business unit or segment of a business organization cannot be used to offset IR&D costs that

are less than the benefit threshold of another segment or business unit.

##### 931.205-32 Precontract costs.

(a) To the extent practical, known expenditures of precontract costs under DOE contracts should be governed by establishing advance understandings as contemplated by FAR 31.109. Contracts that include authorized precontract costs shall include the "Date of Incurrence of Cost" clause specified at 952.321-70.

(b) The following limitations apply to establishment of advance understandings relative to precontract costs:

(1) Precontract cost authorizations shall not be used to cover a period in excess of 15 days, unless a longer period is approved by the HCA based upon a written finding that such an allowance is reasonable, and shall not be extended or renewed. A copy of the findings shall be forwarded to the Procurement Executive at the time of approval. If prolonged coverage is necessary, a letter contract shall be issued.

(2) All precontract cost authorizations shall be reviewed and approved at a management level above the contracting officer.

(3) Retroactive precontract cost authorization and the predating of contractual agreements shall not be used.

(4) Precontract cost authorizations shall not authorize the delivery or furnishing of any goods or services from a contractor until after the contract is executed.

#### PART 932—CONTRACT FINANCING

##### Subpart 932.1—General

Sec.

932.102 Description of contract financing methods.

932.111 Contract clauses.

##### Subpart 932.3—Loan Guarantees for Defense Production

932.304-2 Certificate of eligibility.

##### Subpart 932.4—Advance Payments

932.402 General.

932.407 Interest.

##### Subpart 932.5—Progress Payments Based on Costs

932.501-2 Unusual progress payments.

##### Subpart 932.6—Contract Debts

932.605 Responsibilities and cooperation among Government officials.

##### Subpart 932.7—Contract Funding

932.703-1 General.

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- 932.803 Policies.  
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#### Subpart 932.70—DOE Loan Guarantee Authority

- 932.7000 Scope of subpart.  
932.7001 Definitions.  
932.7002 Authority.  
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- 932.7100 Scope of subpart.  
932.7101 Definitions.  
932.7102 General.  
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932.7105 Payment due dates.  
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932.7107 Contract clauses.  
932.7107-1 DOE payment clauses.  
932.7107-2 Modified FAR clauses.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### Subpart 932.1—General

##### 932.102 Description of contract financing methods.

(e)(2) Progress payments based on a percentage or stage of completion are authorized for use as a payment method under DOE contracts or subcontracts for construction, alteration or repair, and shipbuilding and conversion. For all other contracts, progress payment provisions shall be based on costs, as provided in FAR Subpart 32.5, and Subpart 932.5 of this chapter, except that progress payments based on a percentage or stage of completion may be authorized by the Head of the Contracting Activity when a determination is made that progress payments based on costs cannot be practically employed and that there are adequate safeguards provided for the administration of progress payments based on a percentage or stage of completion.

##### 932.111 Contract clauses.

Payment due dates shall be established in accordance with the provisions set forth in Subpart 932.71, Contract Payments.

#### Subpart 932.3—Loan Guarantees for Defense Production

##### 932.304-2 Certificate of eligibility.

(h) Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Bank only by the Secretary or designee specified for that purpose.

#### Subpart 932.4—Advance Payments

##### 932.402 General.

(e)(1) The Head of the Contracting Activity or designee shall have the responsibility and authority for making findings and determinations, and for approval of contract terms concerning advance payments.

(2) Before authorizing any advance payment arrangements, the approving official shall obtain the advice, and other inputs of the servicing finance office.

##### 932.407 Interest.

(d)(4) Advance payments may be made without interest under cost-reimbursement contracts for construction or engineering services.

#### Subpart 932.5—Progress Payments Based on Costs

##### 932.501-2 Unusual progress payments.

(a)(3) The Head of the Contracting Activity shall forward all requests which are considered favorable, with supporting information, to the Procurement Executive, who, after coordination with the Controller, will approve or deny the request.

(d) Requests for unusual progress payments will not be considered as a handicap or adverse factor in the award of a contract; provided the bid or proposal is not conditioned on approval of such request.

#### Subpart 932.6—Contract Debts

##### 932.605 Responsibilities and cooperation among Government officials.

(b) The DOE contracting officer has primary responsibility for determining the amount of contract debt and notifying the cognizant finance office of such debt due the Government. The servicing DOE finance office making payments under the contract has primary responsibility for debt collection.

#### Subpart 932.7—Contract Funding

##### 932.703-1 General.

(a) The contracting officer shall, prior to contract award and obligation of funds, ensure sufficient funds are available to cover the maximum amount of Government liability being created under a fully funded contract; e.g., the ceiling price under a fixed-price incentive or redeterminable contract.

(b) For incrementally funded contracts the contracting officer shall limit the Government's liability to available funds and only require a contractor to provide:

(1) The property or services for which funds are available under a fixed price arrangement; or

(2) The intended increment of work and a proportionate amount of fee under a cost-reimbursement contract.

#### Subpart 932.8—Assignment of Claims

##### 932.802 Conditions.

(d)(1) This paragraph covers all unpaid amounts payable under the contract except that partial assignments may be permitted when primarily for the benefit of the Government.

##### 932.803 Policies.

(d) In the case of prime contracts, when it has been determined that the financing of contracts will be facilitated in the interest of DOE programs, it is the policy of DOE that such contracts provide, or be amended without consideration (see Assignment of Claims Act of 1940) to provide, in conformance with FAR 32.804, that payments to be made to an assignee shall not be subject to reduction or setoff. In the case of subcontracts, when loans are made for the purpose of financing performance of subcontracts under DOE prime contracts, financing institutions or the Government as guarantor in those instances in which such loans are guaranteed should not be required to incur risks of loss by reason of possible diversion of assigned subcontracts proceeds for payment of other claims of the prime contractor against the borrower, otherwise unrelated to the assigned subcontracts. The Head of the Contracting Activity shall require the adoption of these policies and practices by DOE prime contractors with respect to DOE subcontract work. The Head of the Contracting Activity should inform the Controller of each DOE contractor who is unwilling to adopt policies consistent with this paragraph and the reasons given in support of the contractor's position.

##### 932.805 Procedure.

(f) For classified contracts, the assignee should ordinarily be furnished, upon request, with the following information, as applicable, in lieu of a copy of the contract:

(1) Name and address of the DOE prime contractor;

(2) Prime contract number and date;

(3) Name, address, and phone number of responsible official in the

(i) DOE office receiving the material or service; and

(ii) DOE finance office making payments;



- (4) Subcontract number or purchase order number;
- (5) Date of the subcontract or purchase order;
- (6) Date on which prime contract, subcontract, or purchase order is to be completed;
- (7) Total amount of the subcontract or purchase order;
- (8) Dollar amount remaining to be delivered on prime contract, subcontract, or purchase order; and
- (9) A statement as to the assignability of the prime contract, subcontract, or purchase order.

#### **Subpart 932.70—DOE Loan Guarantee Authority**

##### **932.7000 Scope of subpart.**

This subpart prescribes policies and procedures for guarantees of loans made by a private financial institution to borrowers performing DOE contracts relating to DOE programs for which guaranteed loans are authorized by legislation.

##### **932.7001 Definitions.**

(a) The terms "borrower," "Federal Reserve Board," and "guaranteed loan" have the same meaning set forth in FAR 32.301.

(b) "Guaranteeing Agency" as used in this subpart, means the Department of Energy when authorized to guarantee loans through the Federal Reserve Banks.

##### **932.7002 Authority.**

Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Board only by the Secretary, or designee specified for that purpose, and only when made pursuant to enabling legislation or other authority; e.g., by executive order or regulation.

##### **932.7003 Policies.**

The following policies governing the exercise of its loan guarantee authority have been established by DOE:

- (a) The use of the loan guarantee authority is not restricted to contracts or subcontracts of any particular type or of class. Each case is to be evaluated on its own merits and under the particular circumstances applicable thereto.
- (b) The fact that a contract has been awarded as a result of competitive bidding should not, of itself, render the loan ineligible for guarantee by DOE if the contractor is financially responsible and its need for working capital is the result of the impact of a defense program or any other DOE program for which guaranteed loans are authorized.
- (c) The guarantee authority should, in general, not be used in connection with

loans to contractors required to furnish performance bonds, except in those cases in which the time likely to be required for the surety or DOE to take over in the event of default will result in delays which cannot be tolerated by the particular program concerned. When performance bonds have been furnished, the surety shall be required to subordinate its rights in favor of the guaranteed loan.

(d) The criterion that the materials or services to be provided cannot readily be acquired from alternative sources does not require the finding that the materials or services are absolutely unobtainable elsewhere. The criterion should be so applied as to permit guarantees of loans when, although the materials or services can be obtained elsewhere, such factors as the urgency of supply schedules, technical capacity of the contractor, comparative prices, and time and expense involved in reissuing the contract, including termination payment, establish that it is to the Government's advantage not to resort to alternative sources merely because the contractor or subcontractor may require a guaranteed loan.

(e) If it is known at the time the contract is to be awarded that the low offeror who is technically qualified and competent to furnish the required materials and services will require a guaranteed loan, the contracting officer should obtain appropriate advice and in reaching a decision should consider at least the following:

- (1) The savings to be realized by awarding the contract to the low offeror;
  - (2) The risk to the Government in guaranteeing a loan; and
  - (3) The likelihood, if award is made to the second low offeror, of that offeror's applying for a guaranteed loan at a later date.
- Extreme care should be exercised in rejecting a low bid or proposal simply because the low offeror requires a guaranteed loan.

(f) The amount of the loan should bear reasonable relationship to such factors as the value and terms of the contract, the probable investment required to be made by the contractor in payrolls and inventories, the frequency with which contract payments are to be made, and the borrower's current working capital position.

(g) Borrowings for working capital purposes under guaranteed loans shall be limited to the amount necessary to perform the contract for which the loan is sought. In order that the contractor will also use its own funds in the performance of the contracts, amounts outstanding under the loan or line-of-credit shall be limited to an amount not

to exceed 90 percent of the borrower's investment in its contracts, regardless of the total amount of the loan or line of credit authorized. The borrower's investment includes all items for which the borrower would be entitled to payment on performance or termination of contracts, but does not include any items for which no work has been done nor expenditures made.

(h) Unless there are exceptional circumstances, the loan should mature not later than 30 days after the estimated date of final payment under the contract.

##### **932.7004 Procedures.**

###### **932.7004-1 Guaranteed loans for civilian programs.**

The procedures for authorizing a guaranteed loan under legislation other than section 301 of the Defense Production Act of 1950 (50 U.S.C. App. 2091) shall be essentially the same as those set forth in FAR 32.304, Procedures, FAR 32.305, Loan Guarantees for Terminated Contracts, and FAR 32.306 Loan Guarantee for Subcontracts; except that any contrary provisions required by enabling legislation authorizing the loan shall govern.

###### **932.7004-2 Criteria.**

(a) The materials or services to be furnished by the contractor are necessary to the Government interest.

(b) The materials or services cannot as a practical matter be obtained from alternate sources without delay or impeding the Government's interest, except that no small business concern shall be held ineligible for the issuance of such guarantee by reason of alternative sources of supply.

(c) The contractor has demonstrated its inability to obtain the necessary financing in conventional credit channels without the guarantee.

(d) There is reasonable assurance that the loan can be repaid.

(e) The contractor is competent to perform the contract.

###### **932.7004-3 Eligibility.**

The applicant's eligibility for a guaranteed loan will be based on:

(a) Contracting officer determinations and findings regarding items (a), (b) and (e) in 932.7004-2 as incorporated in a Certificate of Eligibility (FAR 32.304-2); and

(b) The Controller's determination for items (c) and (d) in 932.7004-2 based on information contained in the application, the Federal Reserve Bank's report, and information furnished by the contracting activity concerned.



**Subpart 932.71—Contract Payments****932.7100 Scope of subpart.**

This subpart prescribes policies and procedures on (a) the inclusion of payment terms in DOE contracts and purchase orders (b) the requirements of the Prompt Payment Act (31 U.S.C. 3901 et seq.) Office of Management and Budget (OMB) Circular No. A-125, Prompt Payment, and (c) invoice requirements and matters concerning payments to contractors.

**932.7101 Definitions.**

"Business Concern" means any person or organization engaged in a profession, trade, or business; and nonprofit entities (including State and local governments, but excluding Federal entities) operating as contractors.

"Contract" means any enforceable agreement, including rental and lease agreements and purchase orders, between an agency and a business concern for the acquisition of property or services.

"Designated payment office" means the place named in the contract for the forwarding of invoices for payment, or in certain instances for approval.

"Due date" means the date on which Federal payment should be made. Determination of such dates is discussed in 932.7105.

"Discount date" means the date by which, if payment is made, a specified discount can be taken.

"Payment date" means the date on which a check for payment is dated or an electronic funds transfer payment is made.

"Proper invoice" means a bill or written request for payment prepared and submitted by a contractor in accordance with contract specified terms and conditions.

"Receipt of invoice" means the date a proper invoice is actually received in the designated payment office; or, the date on which the DOE accepts the property or service; whichever is the later.

**932.7102 General.**

(a) It is the policy of the Department of Energy to include payment terms in its contracts and to make payments due thereunder on the due dates determined in accordance with such terms. Adherence to this policy will avoid interest penalties for overdue payments, establish better business relationships with suppliers, and increase competition for Government contracts.

(b) In accordance with guidelines set forth in Chapter 8000, Cash Management, section 8040.20,

Timeliness of Disbursements, of the Treasury Fiscal Requirements Manual (TFRM), it is also the policy of the Government to defer payment until as close as administratively possible to the due date for payment or, if appropriate, the discount date. Discounts for early payments shall not be taken, however, unless such discounts are determined to be economical in accordance with section 8040.30 of the TFRM. These practices will tend to maximize cash balances available to the Treasury, reduce the need for borrowing, and thus contribute to lowering the public debt.

(c) When not established contractually, it is the DOE policy that the payment due date for invoices, bills, statements, or any other documents including progress and final payments (hereinafter referred to as "invoices") shall be the thirtieth (30th) calendar day after date of invoice receipt, as defined in this subpart, unless a different date is required by law or regulations.

(d) Notice of an apparent error, defect, or impropriety in an invoice shall be given to a business concern within 15 days of invoice receipt (3 days for meat or meat food products and 5 days for perishable agricultural commodities). When provided by telephone, the notice shall be suitably documented.

(e) The contracting officer and other responsible officials shall ensure that receipt and acceptance of goods and services are executed as promptly as possible. Receiving reports shall be forwarded in time to be received by the designated payment office by the fifth business day after acceptance, unless other arrangements are made. Designated payment offices shall stamp receiving reports and invoices with the date received in those offices.

(f) DOE Payment Offices are required to schedule contractual payments to occur on or as near as administratively possible to established payment due dates. Payments made by Treasury checks will be mailed or transmitted on or about the same day for which the check is dated.

(g) When the DOE accepts property or services from a business concern, but does not make payment for each such complete delivered item of property or service by the required payment date, an interest penalty shall be paid to such business concern unless such payment is made within 15 days after the due date (3 days for meat or meat products and 5 days for perishable agricultural commodities) or is exempted pursuant to 932.7103 below.

(h) If a business concern offers the DOE a discount from the amount otherwise due under a contract for property or services in exchange for

payment within a specified period of time, payment will be made in an amount equal to the discounted price only if payment is made within such specified period of time. Violation of this provision shall result in payment of an interest penalty on any amount which remains unpaid and on which the Department fails to correct the underpayment within 15 days of the expiration of the discount period (3 days for meat and meat food products, and 5 days for perishable agricultural commodities).

(i) To ensure prompt payment of amounts due, all DOE contracts shall incorporate appropriate payment provisions enabling the Government, at its option, to determine at the time of payment the method of payment to be used (e.g., check, electronic funds transfer).

**932.7103 Exemptions.**

The interest penalty provisions of this subpart are not applicable to the following types of contract payments.

(a) Advance payments, progress payments or other payments made for financing purposes before receipt of complete delivered items of property or service.

(b) Payments under cost-reimbursement contracts or similar payments under other types of contracts providing for cost-reimbursements; e.g., a Time-and-Materials or Labor-Hour Contract, a Personal Services Contract.

(c) Payments for utilities (gas, water, electricity, etc.) where the contract includes provisions for late payment charges established by tariffs or State regulatory commissions.

(d) Payments under informal contracts for the purchase of utilities under a tariff when such tariff provides for late payment charges.

(e) Late payments, if any, made under a contract awarded prior to October 1, 1982; unless such contract contains a specific interest penalty clause.

**932.7104 Procedures.**

(a) In all DOE contract and purchase order solicitations and awards, the contracting officer shall:

(1) Establish specific payment terms, payment due dates, stated inspection periods, invoice requirements, notification of defective invoice requirements and interest penalty provisions as set forth in this subpart; and

(2) Ensure awards specify the name (where practicable), title, phone number, office name and complete mailing address, of officials of:



(i) The business concern to be notified when the Government receives a defective or improper invoice, and

(ii) The Government office where the invoices or vouchers are to be sent by the contractor.

#### 932.7105 Payment due dates.

(a) The contracting officer shall provide for contract payment due dates that are equitable and give proper consideration to prevailing industry practices for the same or similar products or services and the financial condition of the prospective contractor. To the extent feasible and appropriate, payment cycles should be established to minimize or avoid entirely the necessity for the making of advance payments or progress payments.

(b) Contract specified payment due dates, shall generally be predicated on a payment cycle of thirty (30) calendar days after invoices receipt, as defined herein, in order to permit DOE officials to routinely receive, review, approve, and otherwise administratively process invoices for payment of cost reimbursement vouchers or invoices for complete delivered products or services. However, payment due dates based on different payment cycles may be established for a contract, or class of contracts, as appropriate or required by law, regulation, the contractor's financial condition or the payment procedures and practices of the awarding office.

(c) Payment cycles of less than thirty (30) calendar days may be appropriate when:

(1) An award is made to a small business concern.

(2) Advance payments or progress payments are authorized to finance contract work or such financing payments can be curtailed by making payments sooner for completed work.

(d) When authorized, separate payment due dates shall be established for progress payments. The absence of a contract specified due date may preclude progress payments from being made on other than a thirty (30) day payment cycle.

(e) Advance payments, when provided, shall be timed to coincide with the contractor's financial need for such payments in accordance with applicable Treasury Department requirements.

(f) In connection with the acquisition of meat and meat food products, as defined in section 2(a)(3) of the Packers and Stockyards Act of 1921 (7 U.S.C. 182(3)), the Prompt Payment Act requires payment to be made not later than 7 days after the date of delivery. Similarly, for perishable agricultural

commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), the required time for payment is 10 calendar days after delivery.

(g) When contract payment due dates other than those established by local policy are to be incorporated, or are requested by the contractor, the contracting officer shall first obtain concurrence from cognizant finance and program officials.

#### 932.7106 Inspection periods.

(a) In order to ensure timely payments when contract payment due dates are partially or wholly based on a specified number of days after Government acceptance of complete delivered property or services, the contract shall specify an agreed to maximum period for Government inspection and acceptance.

(b) For purposes of determining such payment due dates, a delivered item shall be deemed constructively accepted on the last day of the contract specified inspection period if actual acceptability has not yet been determined.

(c) For purposes of determining payment due dates for purchase orders, constructive acceptance shall be deemed to occur on the date of receipt at the specified delivery point unless the contracting officer specifically requires otherwise in the purchase order.

(d) Failure by the Government to accept or reject delivered items within specified time period may result in the payment of interest penalties. However, such failure shall not be considered a breach of contract terms.

(e) Contract specified inspection periods shall be predicated on the estimated number of calendar days required to determine the acceptability of the delivered item(s) after the date of receipt at the contract specified delivery point.

(f) When more than a ten (10) calendar day inspection period is contractually established, approvals of contracting and program officials should be included with the contract file.

#### 932.7107 Contract clauses.

##### 932.7107-1 DOE payment clauses.

(a) The contracting officer shall insert—

(1) The basic clause at 952.232-70, Payment Due Dates, Invoice Requirements and Penalties, in solicitations and awards containing the clause at FAR 52.232-1, Payment (applicable to fixed-price supply contracts, fixed-price service contracts, and contracts for nonregulated communication services), FAR 52.232-2,

Payment under Fixed-Price Research and Development Contracts, or FAR 52.232-4, Payment under Transportation Contracts and Transportation-Related Services Contracts;

(2) Alternate I of the basic clause at 952.232-70 in solicitations and awards containing the clause at FAR 52.232-3, Payment under Personal Services Contracts, or FAR 52.232-7, Payments under Time-and-Materials and Labor-Hours Contracts, when such contracts provide for cost-reimbursements;

(3) Alternate II of the basic clause at 952.232-70 in solicitations and awards containing the clause at FAR 52.232-5, Payments under Fixed-Price Construction Contracts, or FAR 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts;

(4) Alternate III of the basic clause at 952.232-70, or a clause substantially the same as alternate III, in solicitations and awards containing the clause at FAR 52.232-8, Payments under Communication Service Contracts with Common Carriers, in order to establish appropriate due dates and to provide for late payment charges established by tariffs or state regulatory commissions; or

(5) Alternate IV of the basic clause at 952.232-70 in fixed-price solicitations and awards providing for the acquisition of meat and meat products or perishable agriculture commodities to ensure compliance with Prompt Payment Act requirements.

(b) The contracting officer shall insert the clause at 952.232-71, Payment Due Dates and Invoice Requirements, in all cost-reimbursement contract solicitations and awards containing the clause at FAR 52.216-7, Allowable Cost and Payment, as modified at 952.216-7; or, FAR 52.216-13 Allowable Cost and Payment-Facilities.

(c) Fixed-price purchase orders shall incorporate the prompt payment clauses at 952.232-72.

(d) The contracting officer shall insert the clause at 952.232-73, Payment Methods, in all DOE contract solicitations and awards in order to provide proper notice and require contractor acceptance of electronic funds transfers for any required contract payments not to be made under a letter-of-credit advance payment arrangement.

##### 932.7107-2 Modified FAR clauses.

(a) For consistency with the applicable clauses prescribed in 932.7107-1 above, the payment clauses prescribed in FAR 32.111 shall be modified as provided below:

(1) Revise the payment clauses at FAR 52.232-1 through FAR 52.232-6, as



prescribed in FAR 32.111(a)(1) through FAR 32.111(a)(6), to indicate payments will be made "after" rather than "upon" invoice receipt or acceptance.

(2) Revise the clause cited at FAR 52.232-7, as prescribed in FAR 32.111(b), to indicate payments will be made "after" rather than "upon" invoice receipt or acceptance.

(3) Modify the clause at FAR 52.232-8, Discounts For Prompt Payment, as prescribed in FAR 32.111(c)(1), to reflect the term "proper" in lieu of "correct" and the last sentence to read as follows—For the purpose of computing the discount earned, payment shall be considered to have been made on the date either a government check was dated or an electronic funds transfer payment was made.

(4) Revise the clause at FAR 52.232-10, Payments Under Architect-Engineer Contracts, as prescribed at FAR 32.111(d)(1), to indicate payments shall be made "after" rather than "upon" invoice receipt or acceptance.

## PART 933—DISPUTES AND APPEALS

### 933.011 Contracting officer's decision.

(a) In addition to the information specified in FAR 33.011, the contracting officer's decision shall include the contracting officer's written findings of fact.

(b) The contracting officer shall also furnish the contractor a copy of the rules established by the DOE Board of Contract Appeals.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

## PART 935—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

- 935.007 Solicitations.
- 935.010 Scientific and technical reports.
- 935.014 Government property and title.
- 935.015 Contracts for research with educational institutions and nonprofit organizations.
- 935.070 Contract clauses.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### 935.007 Solicitations.

See Subpart 917.72 for the conditions under which Program Research and Development Announcements may be used, and the procedures for their use.

### 935.010 Scientific and technical reports.

(c) All research and development contracts which have as a requirement

the submission of a scientific or technical report shall include a provision which requires the contractor to submit a copy of the final, edited report to the following address: U.S. Department of Energy Technical Information Center, P.O. Box 62, Oak Ridge, TN 37830.

(d) Contractors shall be required to submit with the report a completed DOE Form RA-426, "DOE and Major Contractor Recommendations for Announcement and Distribution of Documents," except when the contract is with an educational institution, in which case the contractor shall be required to submit with the report a completed DOE Form RA-427, "University Contractor, Grantee and Cooperative Agreement Recommendations for Announcement and Distribution of Documents."

### 935.014 Government property and title.

(b) As authorized by FAR 35.014(b), DOE has established a threshold of \$1,000 with respect to consideration of vesting title to property to the contractor in contracts with nonprofit and educational institutions as contemplated by FAR 35.014(b)(1) and 35.014(b)(2).

### 935.015 Contracts for research with educational institutions and nonprofit organizations.

See Subpart 917.71 for the conditions and procedures under which Special Research Contracts may be used and the procedures for their use.

### 935.070 Contract clauses.

Insert the clause at 952.235-70, Key Personnel, in Research and Development contracts under which performance is largely dependent on the expertise of specific key personnel. To prevent administrative burden, the list should be as limited as possible.

## PART 936—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

### Subpart 936.2—Special Aspects of Contracting for Construction

Sec.

- 936.202 Specifications.

### Subpart 936.6—Architect-Engineer Services

- 936.601 Policy.
- 936.602-2 Evaluation boards.
- 936.602-3 Evaluation board functions.
- 936.602-4 Selection authority.
- 936.602-70 DOE selection criteria.
- 936.603 Collecting data on and appraising firm's qualifications.
- 936.605 Government cost estimate for architect-engineer work.
- 936.606 Negotiations.
- 936.609-3 Work oversight in architect-engineer contracts.

### Subpart 936.7—Standard Forms for Contracting Architect-Engineer Services and Dismantling, Demolition or Removal of Improvements

- 936.702 Forms for use in contracting for architect-engineer services.

### Subpart 936.70—Rental of Construction Equipment

- 936.7000 Scope of subpart.
- 936.7001 General policy.
- 936.7002 Rental of contractor-owned equipment.
- 936.7002-1 Rental agreements.
- 936.7002-2 Rental period.
- 936.7002-3 Rental rates.
- 936.7002-4 Application of rates.
- 936.7002-5 Insurance.
- 936.7002-6 Rental limitation.
- 936.7002-7 Record of negotiation.
- 936.7002-8 Responsibility for repair and replacement.
- 936.7002-9 Equipment condition and inspection.
- 936.7003 Rental of third-party-owned equipment.
- 936.7003-1 Rental agreement.
- 936.7003-2 Rental rates.
- 936.7003-3 Insurance.
- 936.7003-4 Option to purchase equipment.

### Subpart 936.71—Inspection and Acceptance

- 936.7100 Scope of subpart.
- 936.7101 Construction contracts.

### Subpart 936.72—Acquisition of Special Equipment

- 936.7200 Scope of subpart.
- 936.7201 Definition.
- 936.7202 Description of acquisition services.

### Subpart 936.73—Outline for Equipment Rental Agreement

- 936.7300 Scope of subpart.
- 936.7301 Outline of agreement for rental of contractor-owned construction equipment.
- 936.7302 Outline of agreement for rental of third-party owned construction equipment.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 936.2—Special Aspects of Contracting for Construction

#### 936.202 Specifications.

(a) Construction specifications shall allow the use of concrete which contains fly ash as an optional or alternate material in accordance with 910.004 unless a determination is made that its use is technically unacceptable.

(b) The list of excepted supplies appearing at FAR 25.108 shall be noted in the specifications.

(c) To support all invitations for bids, plans and specifications will be available on request to all prospective bidders, including general contractors, subcontractors, and material and



equipment suppliers. Where the cost of reproduction is \$10 or more, the charge shall be a minimum of \$10 and subject to a maximum of \$500, depending upon the size of the project and the number of drawings and the volume of specifications involved. Where the cost of reproduction is less than \$10, the contracting officer has authority to make distribution at cost of reproduction, or free of charge, as a particular situation dictates.

(d) No refund for the return of plans and specifications will be made except when the invitation is canceled. Under such circumstances, refund of payments will be made upon return of the plans and specifications in good condition to the issuing office.

(e) Plans and specifications will be issued without charge to such organizations as The Associated General Contractors of America, American Road Builders' Association, Dodge Reports, Blue Reports, Brown's Letters, Inc., builders and contractors exchanges in the locality in which the project is to be constructed, and others that maintain public plan display rooms.

(f) Payments received for plans and specifications shall be handled in accordance with the regulations prescribed by the General Accounting Office in sections 3020-10 and 3030 of Title 7 of GAO Manual for Guidance of Federal Agencies.

(g) If the contracting officer desires to have the architect-engineer or construction manager handle the furnishing of plans and specifications and payments therefor, the invitations for bids should so state, and the architect-engineer or construction management contract shall provide the manner in which the receipts are to be handled, generally as a credit to the contract.

(h) No charge will be made to original receivers of plans and specifications for revised sheets of drawings and revised pages of specifications which are issued by amendments to invitations.

(i) Plans and specifications may be issued in complete sets only, or in complete sets and parts of sets, as the Head of the Contracting Activity determines to be best. If less than complete sets of plans and specifications are issued, the distribution should be based on an applicant's request for specific pages and drawing sheets.

(j) When a non-refundable fee is to be charged, a provision substantially the same as 952.236-72 shall be included in the solicitation.

## Subpart 936.6—Architect-Engineer Services

### 936.601 Policy.

To ensure the broadest publicity concerning DOE's interest in obtaining architect-engineer services, a notice of intention to contract for architect-engineer services shall be prepared and published for each acquisition of architect-engineer services, in accordance with the requirements of FAR 5.205(c) and 5.207. The submissions requested and received as part of the architect-engineer selection process differ in substance from proposals received for other types of acquisition. Consequently, the policies and procedures contained in FAR 15.412, and 915.412 concerning the consideration of the late responses are not applicable to proposals submitted under the provisions of this Subpart 936.6.

### 936.602-2 Evaluation boards.

(a) Architect-engineer evaluation boards shall be used for the selection of professional architect-engineer services when the estimated cost of the contract is \$500,000 or more. Except as provided by this subpart, the use of architect-engineer evaluation boards shall be governed by the general policies and procedures contained in FAR 36.603 and the policies concerning the selection of such contractors by board process contained in internal DOE Directives. These policies and procedures are also applicable to the selection of architect-engineers for awards of less than \$500,000. However, less formal procedures and practices may be followed, depending upon the circumstances in each particular selection, at the discretion of the selecting official. The Source Selection Office, as designated in 915.612, shall establish an architect-engineer evaluation board and select the contractor.

### 936.602-3 Evaluation board functions.

(a)(1) Firms indicate their general interest in providing services by annual submittal of Standard Form 254; and indicate specific interest in providing services for a particular project, in response to the public announcement, by submittal of Standard Form 255 (and Standard Form 254 if not previously submitted). Supplemental information may be solicited as a means of initiating the discussion phase of the architect-engineer selection process. This may be particularly appropriate for the larger or more complex projects where sufficient qualification and performance data are not available from the Standard Forms 254 and 255, and additional information

beyond that already furnished is needed to apply the selection criteria and evaluate and rank the firms. Firms should not be requested to furnish the same information previously submitted on Standard Forms 254 and 255, nor should they be requested to submit preliminary designs, plans and drawings, except in appropriate circumstances involving design competitions.

(2) After the notice of intention of contract for architect-engineer services has been published and the date for submission of the standard forms has passed, the evaluation board and/or the selecting official shall review and evaluate the Standard Form 254 and the Standard Form 255, where applicable, submitted in response to the public announcement. Consideration should be given to requesting submission of a Standard Form 255, by qualified firms which fail to respond to the public announcement to assure adequate competition. Based on this evaluation, no less than three firms shall be selected for the purpose of holding discussions. It is not necessary to hold discussions with any firm that fails to submit a Standard Form 255, where required.

(c)(1) Normally, only those firms which are compatible with the size and complexity of the job requirements should be considered for discussions; that is, for a small, relatively simple job, firms whose resources and qualifications are far in excess of the job requirements should not be considered unless no satisfactory response is received from any other compatible highly qualified firm, and where size and simplicity of the project permit, consideration should be limited to the geographic area of the project.

(2) Every opportunity and encouragement shall be given to small business, small disadvantaged businesses and women-owned small business concerns firms. Toward this end, groups that propose to form a joint venture or engage the services of small consulting firms for portions of the effort shall be given full consideration by the evaluation board and the selection official of their combined qualifications.

(3) After three or more firms have been selected in accordance with 936.602-70, discussions shall be held with these firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services. These discussions may be used to obtain additional qualification, performance, and management data, and other information needed to properly apply



the evaluation criteria and evaluate the firms under consideration.

(4) Requests for supplemental information shall not request firms to submit price proposals. Such requests can be used only to obtain information that will enable DOE to select the best qualified contractor. When a request for supplemental information is made, some wording should be included to identify it with the discussion phase of the selection process similar to the following: "As a result of our evaluation of material on file with this office and the SFs 254 and/or 255 submitted in response to Public announcement —, we have selected your firm for further consideration for selection and award of a contract to perform the architect-engineer services which are described below. The principal purpose of this request is to obtain additional specific qualification and performance data concerning your firm."

(5) The term "discussions" includes telephone conversations, exchange of correspondence, or interviews. The term "interview" as used in FAR 5.207(d), Note 63, means "discussions" as defined above.

(d) When the evaluation board completes its functions, it shall prepare a report, including its recommendations, and submit it along with the solicitation, selection criteria, weights, and other information and documents, as may be requested, to the Source Selection Official through the Procurement Executive, or designee, when the Source Selection Official is in Headquarters. The Procurement Executive, or designee, shall arrange for appropriate Headquarters review of the report and prepare an action memorandum to the Source Selection Official for consideration in making the selection.

(e) The evaluation board's duties will ordinarily include preparation of the public announcement (936.601) and development of evaluation criteria, based on architect-engineer services requirements established by the appropriate DOE program and staff organization; development of evaluation criteria weighting; review and evaluation of Standard Forms 254 and 255; review and evaluation of information from other sources, such as appraisals of performance on previous contracts awarded to the architect-engineer firm; development of additional information requirements and conduct of discussions with firms selection for further consideration; determination of ranking of the firms evaluated; preparation of the evaluation board report and presentation of the board's findings, or recommendations, to the selecting official.

(f) The public announcement (see 936.601) covering the requirement for architect-engineer services, criteria and relative weightings, as developed by the evaluation board, shall be submitted to the Procurement Executive or designee, for appropriate review and comment prior to issuance of the announcement, where it is a Headquarters' selection or requires Headquarters' review and approval of the contract action. Commerce Business Daily announcements shall be prepared in accordance with FAR Subpart 5.2.

#### 936.602-4 Selection authority.

(b) Upon completion of discussions and evaluation of the firms that were selected for discussions, the board shall recommend to the selecting official, in order of preference, based upon the criteria in 936.602-70 and any special criteria included in the public announcement, no less than three firms deemed to be the most highly qualified to provide the services required. The Standard Form 255 submitted by firms with which written or oral discussions were held should be retained in selection file; all other Standard Forms 254 may be discarded 90 days after award. The selecting official shall then select the firm determined to be most highly qualified. Should the firm selected be other than that ranked highest in qualifications by the evaluation board, the selecting official shall provide complete documentation of his decision which shall become part of the contract file.

#### 936.602-70 DOE selection criteria.

Contracting officers or architect-engineer evaluation boards shall apply the evaluation criteria contained in this subsection, as appropriate, and any special criteria developed for individual selections. When special and additional criteria are to be used, they shall be set forth in the public announcement required by 936.601, and a written justification for their use shall be placed in the DOE file maintained for the project.

(a) *General qualifications, including:*

- (1) Reputation and standing of the firm and its principal members;
- (2) Experience and technical competence of the firm in comparable work;
- (3) Past record in performing work for DOE, other Government agencies, and private industry, including projects or contracts implemented with no overruns; performance from the standpoint of cost including cost overruns (last 5 years); the nature, extent, and effectiveness of contractor's cost reduction program; quality of work;

and ability to meet schedules including schedule overruns (last 5 years) (where applicable);

(4) The volume of past and present workloads;

(5) Interest of company management in the project and expected participation and contribution of top officials;

(6) Adequacy of central or branch office facilities for the proposed work, including facilities for any special services that may be required;

(7) Geographic location of the home office and familiarity with the locality in which the project is located;

(b) *Personnel and organizations.*

(1) Specific experience and qualifications of personnel proposed for assignment to the project, including, as required for various phases of the work:

(i) Technical skills and abilities in planning, organizing, executing, and controlling;

(ii) Abilities in overall project coordination and management; and

(iii) Experience in working together as a team;

(2) Proposed project organization, delegations of responsibility, and assignments of authority;

(3) Availability of additional competent, regular employees for support of the project, and the depth and size of the organization so that any necessary expansion or acceleration could be handled adequately;

(4) Experience and qualifications of proposed consultants and subcontractors; and

(5) Ability to assign adequate qualified personnel from the proposed organization (firms own organization, joint-venture organizations, consulting firms etc.) including key personnel and a competent supervising representative.

(c) Additional (or special) criteria developed for the specific project shall be considered and evaluated as may be appropriate.

#### 936.603 Collecting of data on and appraising firms' qualifications.

(a) *Establishing offices.* DOE offices that regularly acquire architect-engineer services shall collect and maintain current qualifications and performance data files on architect-engineer firms, including information on their past experience on various types of construction projects. Normally, Standard Form 254, Architect-Engineer and Related Services Questionnaire, shall be used for this purpose. Information from other sources, such as appraisals of performance of previous projects awarded to the firm, may also be included in the files.



**936.605 Government cost estimate for architect-engineer work.**

(a) Prior to the initiation of negotiations, an independent Government estimate of the cost of the required architect-engineer services will be prepared based on a detailed analysis of the costs expected to be generated by the work. Consideration shall be given to the estimated value of the services to be rendered, and to the scope, complexity, and nature of the project. The independent Government estimate shall be revised as required during negotiations to reflect changes in or clarification of the scope of the work to be performed by the architect-engineer. On construction projects, a fee estimate based on the application of percentage factors to project cost estimates of the various segments of the work involved may be developed for comparison purposes, but such a cost estimate shall not be used as a substitute for the independent Government estimate.

(b) The Government estimate shall include the following information:

(1) A sufficiently detailed description and cost estimate of the work to permit an evaluation of services to be performed by the various participants and the degree of complexity of its principal components. When A-E contracts are fixed price, the information as to the work should be in more detail and on a firmer basis, particularly as to estimated costs, than for a CPFF contract. The estimated cost of the component items (including the cost of material and equipment furnished by DOE) and their descriptions, insofar as available, should be included as follows:

(i) Major buildings and other structures for which complete designs and specifications are to be prepared by the architect-engineer, including number and cost of each type, with as much information as is available (within security requirements) as to the functional requirements for such structures;

(ii) Major utilities, including classifications and costs, in as much detail as practicable;

(iii) Special equipment to be procured by a DOE operating contractor, construction contractor, or architect-engineer, or furnished by DOE;

(iv) Special equipment to be designated by the architect-engineer; and

(v) Special equipment to be installed by the construction contractor.

(2) A statement should be provided indicating total estimated cost of the work exclusive of the construction contractor's fee, and to the extent

available, identifying labor, material, and indirect costs, and any amount included for contingencies; estimated cost of architect-engineer services; and the estimated time of completion of design or construction work with an explanation of the basis for establishing the completion schedules.

(c) A written statement should be prepared which gives the extent to which the services of the architect-engineer include any of the services set forth below.

(1) Conceptual Design—Provide preliminary studies to develop a project scope that satisfies a program need, statutory requirements; validate feasibility and attainable performance levels; identify and quantify risks; develop a reliable budget estimate and a realistic performance schedule; develop project criteria and design parameters for all engineering disciplines, identify applicable codes and standards, quality assurance requirements, environmental studies, materials of construction, space allowances, energy conservation features, health, safety, safeguards, and security requirements and any other features or requirements necessary to describe the project.

(2) Title I—Provide the necessary topographical and other field surveys, test boring, and other subsurface investigation; prepare preliminary studies, sketches, layout plans, and outline specifications; and prepare reports including estimates of cost of the proposed project and of all structures, utilities, and appurtenances thereto.

(3) Title II—Provide complete design of the work including preparation of all required preliminary and final working drawings, specifications, estimates, and contract documents; and assist in securing, analyzing, and evaluating bids or proposals for construction; and consult with DOE on all questions arising in connection with the services performed by the architect-engineer.

(4) Title III—Provide complete architect-engineer supervision and inspection of construction under the direction of a responsible representative, check shop drawings, and furnish drawings to show construction has actually been accomplished.

(5) Process design—Process design normally requires the preparation of flow diagrams showing each operating step to perform the process; material and heat balances where required; determination of the nature, capacity and design characteristics of production equipment; the general design of connecting flow lines to handle the calculated rates of product and by-product flow; and schematic layouts.

(6) Procurement of materials and equipment (describe fully) if specified for accomplishment in conjunction with Title I, II, and III services and approved by the Procurement Executive.

(7) Other special services (describe fully) if specified for accomplishment in conjunction with Title I, II, and III services and approved by the Procurement Executive.

**936.606 Negotiations.**

(a) A fixed-price contract for architect-engineer services should be used wherever it is practicable to compile, in advance of the preparation of plans and specifications, adequate information specifically describing the character and extent of services required. When there is insufficient scope information available to permit contracting for complete services (Title I, II, and III) on a fixed-price basis, and when it may be to the advantage of the Government to do so, appropriate consideration should be given to contracting only for a study contract or for the preliminary engineering (Title I), on either a reimbursable or fixed-price basis, in order to permit entering into a fixed-price contract for the remaining portion of architect-engineer service (Title II and III), based upon information developed in the first phase.

(b) The contracting officer shall request the selected architect-engineer firm to submit its price proposal with supporting cost or pricing data in accordance with FAR 15.804. Revisions of the price and supporting cost or pricing data may be made as required during negotiations to reflect changes in or clarification of the scope of work to be performed by the architect-engineer or findings derived from preaward audits conducted pursuant to FAR 15.805-5.

(f) The contracting officer shall negotiate a price considered fair and reasonable based on a comparative study of the independent Government estimate and the architect-engineer's proposal. Significant differences between elements of the two figures and between the overall figures shall be discussed and the contracting officer shall ascertain the reasons therefor. Under the authority of section 602(d) (13) and (20) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 474) as amended, contracts for architect-engineer services for former AEC functions and those of BPA now being performed by DOE shall not be limited to the six percentum fee restriction in section 304 of the Act. 41 U.S.C. 245(b).



(g) Promptly at the conclusion of each negotiation, a memorandum setting forth the principal elements of the negotiation shall be prepared in accordance with the requirements of FAR 15.808, for use by the reviewing authorities and for inclusion in the contract file. The memorandum shall contain sufficient detail to reflect the significant considerations controlling the establishment of the price and other terms of the contract.

#### **936.609-3 Work oversight in architect-engineer contracts.**

In addition to the clause at FAR 52.236-24, the contracting officer shall insert the clause at 952.236-71 in architect-engineer contracts.

#### **Subpart 936.7—Standard Forms for Contracting Architect-Engineer Services and Dismantling, Demolition or Removal of Improvements**

##### **936.702 Forms for use in contracting for architect-engineer services.**

(a) The contracting officer shall also include the additional terms at 952.236-70 in Standard Form 252 item 6.

#### **Subpart 936.70—Rental of Construction Equipment**

##### **936.7000 Scope of subpart.**

This subpart sets forth general policy and instructions which shall be applied to rental of construction equipment for use by DOE contractors with cost-reimbursement type contracts.

##### **936.7001 General policy.**

(a) It is the policy of the DOE to use presently owned DOE construction equipment to the fullest extent. Careful investigation shall be made of the equipment available, not only at the field office concerned, but at other field offices, to determine whether such equipment can be economically utilized on the job. The Procurement Executive or designee, can assist in the investigation of excess equipment available in other offices.

(b) It is the policy of the DOE to rent construction equipment, where available, rather than purchase it, unless in the case of third-party-owned equipment, the contracting activity determines that accrued rentals on a particular item of equipment will approximate the cost of ownership of it except, however, that individual items of construction equipment having an original cost of less than \$1,000 ordinarily should be purchased and not rented. Where it is clearly to the advantage of the Government, items having a cost of less than \$1,000 may be

rented with the approval of the Head of the Contracting Activity. Whenever it is practical, cost and other factors considered, Contractor-owned equipment shall be rented in preference to renting third-party-owned equipment.

(c) It is the policy of the DOE to pay rental for construction equipment at rates not higher than those prevailing in the locality, except under unusual circumstances, and at as low a rate as is consistent with securing modern equipment in good operating condition. Costs of repair, job interruption due to poor equipment, transportation and in-transit rental may well offset any apparent savings in rental rates. Rental paid shall be subject to any Government price ceiling regulations that may be in effect.

##### **936.7002 Rental of contractor-owned equipment.**

##### **936.7002-1 Rental agreements.**

The terms and conditions governing rental by DOE of construction equipment from a cost-type construction contractor are set forth in 936.7301. Outline of agreement for rental of contractor-owned construction equipment. This form of agreement is designed for use as an appendix to a DOE cost-type construction contract. It may be modified for rental of equipment under other contractual arrangements and it may be modified for use as a separate contract or as an attachment to a subcontract. Some of the aspects of this agreement to which particular attention should be given are set forth in 936.7002-2 through 936.7002-9.

##### **936.7002-2 Rental period.**

The base rental period shall extend from the time the equipment is accepted at the job site until the contractor is notified in writing by DOE's representative that the equipment is no longer required. Subject to applicable limitations covered in the rental agreement form, the contractor shall be paid rental during the in-transit time and during the time required for equipment repair or replacement prior to return to the contractor.

##### **936.7002-3 Rental rates.**

(a) Rates for rental of contractor-owned equipment shall be fair and equitable. The rental rates contemplate that the DOE will pay incoming and outgoing transportation costs and rental during in-transit time for both inbound and outbound transportation of equipment; however, terms more favorable to DOE may be negotiated where appropriate. The rental rates to be paid for the use of contractor-owned equipment under normal conditions

should not exceed 65 percent of the rates quoted in the latest edition of the Associated Equipment Distributor's (A.E.D.) "Compilation of Average Rental Rates for Construction Equipment." However, Heads of Contracting Activities may approved rates in excess of 65 percent of the current A.E.D. schedule when local conditions require higher rates. When it becomes necessary as a general practice to exceed 65 percent of the current A.E.D. schedule, Heads of the Contracting Activities shall be advised.

(b) For items of equipment that are not covered by the A.E.D. schedule, use the latest edition of "Contractors' Equipment Ownership Expense" document published by the Associated General Contractors of America, Inc., and information on prevailing local rates for developing rates that would be consistent with the 35 percent reduction of the A.E.D. rates (i.e., taking into consideration the expenses paid by the Government under the rental agreement).

##### **936.7002-4 Application of rates.**

(a) Rental rates shall be based upon one shift of 8 hours per day, 40 hours per week, or 176 hours per month of a 30-consecutive-day period.

(b) The monthly rental rate and its pro-rata share shall apply to all rental periods of 1 month or more. The weekly rate and its pro-rata shall apply to all rental periods of 1 week or more up to 1 month. The daily rate and its pro-rata shall apply to all rental periods up to 1 week.

(c) Inasmuch as there are certain elements of cost to an equipment owner which do not change even though the equipment is used on more than one shift per day, it is believed equitable to pay a lower rental rate during a second and third shift than would be paid during a single shift. Therefore, the rental agreement form provides for payments for overtime at a rate equal to one-half the rate for the first shift.

##### **936.7002-5 Insurance.**

(a) Generally, rental rates should include the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods. The rental agreement for contractor-owned equipment is so worded.

(b) However, if the contracting officer determines that it is not practical to include the cost of such insurance in the rental rates, paragraphs 3(d) and 7(a) shall be amended as indicated in the applicable notes following these paragraphs in 936.7301.



**936.7002-6 Rental limitation.**

The rental agreement form provides that when the total amount of rental paid to the contractor for any one unit of equipment equals 75 percent of the mutually agreed value of that unit, as set forth in the initial inspection report, the equipment is to remain available for the work under the construction contract as long as it will be required without any further rental payments to the contractor. The rental ceiling of 75 percent of the agreed-upon value of the equipment applies to all rental paid, including rental paid during in-transit time to and from the site of the work and down time from any operating repairs or restoring of the equipment after it is no longer needed at the site. The purpose of the provision is to prevent the Government from paying rental in excess of the contractor's investment, and is included in lieu of an "option to purchase" clause. Once a particular piece of equipment has been released, the contractor will be required to return it to the job under the original rental period.

**936.7002-7 Record of negotiation.**

A record of negotiation shall set forth the information used to determine the reasonableness of the rental rates, including a breakdown of the contractor's equipment ownership expense, similar to that itemized in the Associated General Contractors of America's document, "Contractors' Equipment Ownership Expense."

**936.7002-8 Responsibility for repair and replacement.**

The rental agreement describes the responsibilities of the parties with respect to maintenance and repair necessary to the operation of the rented equipment, or replacement of such equipment. The DOE's responsibility includes repairs resulting from normal wear and tear, provided they were necessary in order to continue the equipment in service. However, when the equipment is no longer required on the job, the extent of the DOE's obligation is only to return the equipment to the contractor in as good operating condition as when received, less wear and tear.

**936.7002-9 Equipment condition and inspection.**

(a) Construction equipment shall be given a rigid and detailed inspection by representatives of the DOE and, at the contractor's option, by representatives of the contractor, before its shipment and acceptance or use on the job. Equipment shall be inspected under actual workloads insofar as practicable.

In cases where it is not practical to inspect equipment prior to its shipment to the job site, the contractor should be informed of the extent of inspection and the expected condition of his equipment in the event the equipment does not meet required standards. The transportation, rental, or any other expenses shall be paid by DOE unless, at contractor's expense, the equipment is repaired to acceptable standards in a reasonable length of time. A similar inspection shall be made immediately prior to scheduled return shipment of an item of equipment.

(b) A detailed inspection report shall be signed by each representative inspecting. The initial inspection report shall be used at the time of release as a basis of determining the repairs necessary to place the equipment in as good operating conditions as when accepted less normal wear and tear. After necessary repairs are completed, a final inspection report shall be completed by a representative of the DOE and, at his option, the contractor.

(c) If initial detailed inspection discloses that the condition of the equipment is doubtful, arrangements should be made with the contractor for a trial period of operation to prove the equipment, with provisions that if equipment is found unacceptable in the trial period, no rental, transportation, or other expenses will be due the contractor. Repairs to equipment which fails in service due to defects not reasonably ascertainable on initial inspection shall be at the contractor's expense.

**936.7003 Rental of third-party-owned equipment****936.7003-1 Rental agreement.**

The terms and conditions governing rental of construction equipment from a third party which does not operate the equipment are in accordance with 936.7002-2, 936.7002-4, 936.7002-8, and 936.7002-9, and the following subsections of this part, and are set forth in 936.7302, Outline of agreement for rental of third-party-owned construction equipment. Heads of Contracting Activities shall assure that these terms and conditions are used by DOE cost-reimbursement construction contractors and that similar terms and conditions are used by other DOE cost-reimbursement contractors or subcontractors in renting construction equipment from a third party. These terms and conditions may be suitably modified to provide for rental of equipment with operators. Some of the aspects of this agreement to which particular attention should be given are set forth in the next three subparts.

**936.7003-2 Rental rates.**

Third-party equipment shall be rented on the basis of competitive bids, rental rates, transportation costs, and other factors being considered. The rental specifications shall be based on the circumstances of a particular case, including the length of rental period, the availability of equipment in certain localities, and the work requirements.

**936.7003-3 Insurance.**

The provisions of 936.7002-5(a) also apply to the rental of construction equipment from a third party. However, if the contracting officer determines that the rental rates are not to include the cost of insurance or self-insurance covering loss of or damage to the equipment, the rental agreement shall reflect this condition.

**936.7003-4 Option to purchase equipment.**

When accrued rentals on a particular item of equipment will likely approximate the appraised value of equipment and a decision has been made not to purchase in accordance with 936.7001(b), consideration shall be given to including in the rental agreement, an option to purchase the equipment.

**Subpart 936.71—Inspection and Acceptance****936.7100 Scope of subpart.**

This subpart implements and supplements FAR Part 36 by prescribing the policies and requirements for inspection and acceptance under construction contracts.

**936.7101 Construction contracts.**

(a) Inspection services may be performed by the architect-engineer responsible for the design. Inspection services may not be procured from a construction contractor with respect to its own work.

(b) When one contractor is to inspect the work of another, the inspection contractor will be given written instructions defining its responsibilities and stating that it is not authorized to modify the terms and conditions of the contract, to direct additional work, to waive any requirements of the contract, or to settle any claim or dispute. Copies of the instructions will be given to the contractor who is to be inspected, with a request to acknowledge receipt on a copy to be returned to the contracting officer. In this manner, both contractors are on express notice of the authority and limitations of the authority of the inspecting contractor.



**Subpart 936.72—Acquisition of Special Equipment****936.7200 Scope of subpart.**

Contracts for acquisition services only are rarely used. Acquisition of special equipment is generally contracted for in conjunction with CPFF contracts for construction, operating, or architect-engineer services. In special situations, acquisition of other equipment and construction materials is also contracted for in conjunction with CPFF contracts for operating or architect-engineer services. The description of acquisition services in paragraph (936.7202) below is applicable to all of these cases.

**936.7201 Definition.**

Special equipment is equipment for which the purchase price is of such a magnitude compared to the cost of installation as to improperly reflect the amount of technical direction and management effort required of the contractor. Generally, special equipment is considered to be a capital-asset-type of equipment (typically, equipment costing more than \$1,000 and having a service life of more than two years) for which the cost of installation and handling (including unloading, hauling and warehousing) is 5 percent or less, of the purchase price of the equipment. However, the determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved for each project. This category of equipment would generally include items such as:

(a) Major items of prefabricated process or research equipment.

(b) Major items of preassembled equipment such as packaged boilers, generators, machine tools, and larger electrical equipment. In some cases it would also include special apparatus or devices such as reactor vessels and reactor charging machines.

**936.7202 Description of acquisition services.**

(a) Acquisition as herein considered is an activity involving judgment, knowledge, and experience relating to the manufacture, use, or application of the article or process to be purchased. It may include the development or location of sources of supply, and generally includes preparation of bidding documents, solicitation of proposals, analysis of proposals received (including, where necessary, technical and sometimes complicated evaluation of performance characteristics of the equipment of different manufacturers), inspection at manufacturer's plant as distinguished from inspection supplied

under Title III services of an architect-engineer contract, and evaluation of production capacities to meet required delivery. Acquisition includes necessary coordination with participating contractors and DOE for especially designed equipment, general and specific expediting, and special assistance to the manufacturers in helping to locate scarce materials and machine tools and in supporting allocation for critical materials where this is a necessary function. Acquisition normally includes inspection and receiving upon delivery at the site (this may be a joint activity where the contracting agent is not the constructor) and payment. All on-site physical activities after delivery, including unloading, warehousing, hauling, and installation are considered a construction activity and not acquisition.

(b) Coordination, timing, and technical know-how are important factors to be considered in the selection of a contracting agent. The advantages and disadvantages of placing full responsibility in one contractor for construction and acquisition, or split responsibility where the acquisition is placed under a contract with architect-engineer or operating contractor, should be evaluated in the light of the above factors.

**Subpart 936.73—Outline for Equipment Rental Agreement****936.7300 Scope of subpart.**

This subpart contains agreement formats which are suggested for use where DOE rents construction equipment from a prime cost-type construction contractor, or third-party-owned equipment. The outline for rental from the prime contractor is designed for use as an appendix to the prime cost-type construction contract. The format for use with third parties is an agreement within itself.

**936.7301 Outline of agreement for rental of contractor-owned construction equipment.**

Attached to and made a part of Contract No. \_\_\_\_\_.

Contractor: \_\_\_\_\_.

The following provisions shall govern the use and rental of the Contractor's construction plant and equipment (hereinafter called the "equipment") under the contract:

1. *Equipment rented.* The Contractor agrees to furnish for his own use in the performance of the contract the equipment itemized in Schedule 1 (attached to and made part of this agreement). Each item of the equipment shall be clearly marked with the identification number assigned to it on Schedule 1. The Contractor and DOE may from time to time

amend Schedule 1 by deleting items or adding items.

2. *Payments.* As provided in the clause of the contract entitled "Allowable Cost and Payment," the allowable costs of the performance of the contract shall include:

(a) *Rental.* Rental of equipment, for rental periods determined in accordance with paragraph 4 and at the rates set forth in Schedule 1 applied in accordance with paragraph 3.

(b) *Transportation.* Transportation of equipment in accordance with paragraph 5.

(c) *Repair.* Maintenance, repair, and replacement of equipment to the extent provided in paragraphs 6 and 7.

Payment shall be made in accordance with procedures set forth in the clause of the contract entitled "Allowable Cost and Payment."

3. *Application of rates.* The rates set forth in Schedule 1 shall be applied in accordance with the following rules:

(a) *Basis of rates.* The rates are based upon one shift of 8 hours per day, 40 hours per week, or 176 hours per month (of 30 consecutive days).

(b) *Apportionment of rates.* The monthly rate and its pro-rata share shall apply to all rental periods of 1 month or more. The weekly rate and its pro-rata share shall apply to all rental periods of 1 week or more up to one month. The daily rate and its pro-rata share shall apply to all rental periods up to 1 week.

(c) *Overtime.* If the equipment is rented by the day, the rate for overtime is one-sixteenth ( $\frac{1}{16}$ ) of the daily rate for each hour of use in any day in excess of 8 hours; if it is rented by the week, the rate for overtime is one-eighth ( $\frac{1}{8}$ ) of the weekly rate for each hour of use in any week in excess of 40 hours; and if it is rented by the month, the overtime rate is one-third hundred and fifty-second ( $\frac{1}{552}$ ) of the monthly rate for each hour of use in excess of 176 hours in any one 30 consecutive day period.

(d) *Insurance.* Rental rates include the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods, as indicated in Schedule 1 and copy of policy attached. The Contractor agrees to maintain this insurance coverage for loss of or damage to the equipment during the entire term of this agreement. The Contractor shall waive any right of action against the government to the extent that loss is recovered from insurance applicable to loss, damage or destruction of leased equipment.

*Note.—When rental rates do not include the cost of insurance or self-insurance, substitute the following text for paragraph (d):*

"Rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods."

4. *Rental period.* The rental period for which rental is payable for an item of equipment shall consist of a base period, beginning upon the date stipulated in a written notice from the contracting officer to the Contractor that DOE has accepted the item of equipment at the job site, and ending upon the date stipulated in a written notice



from the contracting officer to the Contractor that use of the item of equipment is terminated, subject to the following additions, deductions, and conditions:

(a) In-transit time. There shall be added to the base period:

(1) The actual in-transit time of inbound transportation from one point of shipment to the job site, not exceeding the time required for such transportation by commercial carrier via the most expeditious routing available, of any item of equipment subsequently accepted by DOE and

(2) The actual in-transit time of outbound return transportation from the job site, to the original point of inbound shipment, or other destination at equal or less distance from the job site, not exceeding the time required for such transportation by commercial carrier via the most expeditious routing available, of any item of equipment whose use has been terminated by DOE.

(b) Delay due to repairs.

(1) The time required for repair of equipment shall be deducted from the base period if such repair is necessitated by willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, or made necessary by defects not reasonably ascertainable on initial inspection by DOE.

(2) If an item of equipment has been accepted by DOE, the subsequent withdrawal by the Contractor of such item from the work for necessary repairs (due to causes other than those mentioned in the preceding paragraph) shall not interrupt the running of the base period unless the contracting officer finds that the Contractor has not exercised due diligence in effecting the repairs or in returning the item to use, and in such event the time which the contracting officer finds to have been excessive shall be deducted from the base period.

(c) Time for repairs on termination. In the event DOE, in accordance with paragraph 6(c), elects to effect repair or replacement of an item of equipment prior to scheduled return shipment, the time required for such repair or replacement shall be added to the base period.

(d) Trial period. If initial inspection by DOE discloses that the condition of an item of equipment is doubtful, it will not be accepted by DOE without a trial period of operation to prove such item, upon terms and conditions agreed upon by the Contractor and DOE. If the equipment is found unacceptable in the trial period, no rental, transportation, or other expenses will be due the Contractor.

(e) Rental limitation. When the aggregate of rental paid for an item of equipment equals 75 percent of its appraised value, as agreed upon by the Contractor and the contracting officer at or prior to the time of acceptance by DOE and set forth in the initial inspection report, the rental period shall cease as to such item for purposes of rental payment. Such item shall thereafter remain available for use under the contract without further rental payments but otherwise in accordance with the terms and conditions of this agreement, until the contractor receives written notice from the contracting officer that use of the item is terminated. The limitation of rental to 75 percent of the agreed value shall apply to the total of all rental due

under this paragraph 4. A failure to agree as to the value of an item of equipment shall be deemed to be a dispute within the meaning of the article of the contract entitled "disputes."

5. *Transportation.* Inbound transportation of equipment, f.o.b. cars from the original point of shipment to the job site, and outbound return transportation of shipment f.o.b. cars to the original point of shipment or to another destination selected by the Contractor at equal or less distance from the job site, shall be at the expense of the Government, subject to the following conditions:

(a) Limitation on return transportation. The Government shall not bear any expense for outbound return transportation in excess of the amount paid for inbound transportation to the job site, except additional amounts representing or equivalent to increase in freight rates applicable to the route to the original point of shipment.

(b) Limitation on long distance transportation. Transportation over a distance in excess of 500 miles shall be subject to the approval of the contracting officer.

(c) Transportation by other than common carrier. The expense borne by the Government hereunder for transportation by a method other than common carrier shall be the actual expense of such transportation as shown by evidence satisfactory to the contracting officer.

(d) Loading and unloading. Only such costs of loading and unloading equipment as are incurred at the job site shall be borne by the Government.

(e) Equipment not in required condition. The Government shall not bear the expense of transportation of any item of equipment which arrives at the job in a condition which does not fulfill the requirements of paragraph 6(a) and which is not placed in the condition required under paragraph 6(a) by the Contractor at the Contractor's expense within a reasonable time.

6. *Condition of equipment.* The following conditions apply.

(a) Condition on delivery. The equipment shall, on delivery at the job site, be in good operating condition to render efficient, economical, and continuous service, and shall be equipped with necessary and required safety devices according to ICC regulations and other applicable Federal and State laws. Each item of the equipment shall have been registered by the Contractor at the Contractor's own expense with all Federal, State, and local authorities requiring registration, and registration plates or other evidence of registration shall be displayed in accordance with the requirements of the registering authority. The cost of subsequent registration shall also be borne by the Contractor. If any item of equipment on arrival at the job site is not placed in the condition required by this paragraph within a reasonable time, the contracting officer may reject the item and require its removal from the job site, and in that event, the Government shall not be liable for rental, transportation, or any other expense in connection with such item.

(b) Condition on the job. Equipment accepted by DOE shall be maintained by the

Contractor in the condition required for its operation until use of the equipment is terminated by the contracting officer. Maintenance and repair required to keep accepted equipment in such condition during such time and replacement (at the agreed value set forth in the initial inspection report, less depreciation) of accepted equipment lost or destroyed during such time, shall be at the expense of the Government unless such maintenance, repair, or replacement is made necessary by loss or damage covered by any policy of insurance (or self-insurance), or caused by willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, or is made necessary by defects not reasonably ascertainable on initial inspection of DOE.

(c) Condition on termination. Upon termination by DOE of the use of any item of equipment, the item shall be returned by DOE to the Contractor at the job site in as good condition as when received by DOE (as shown by the initial inspection report) less normal wear and tear, except for any loss or damage which is due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, or defects not reasonably ascertainable on initial inspection by DOE, or which is covered by any policy of insurance (or self-insurance). If the inspection report to be made immediately prior to the scheduled return shipment of an item of equipment discloses the necessity for repairs or replacement the cost of which is the responsibility of the Government under this paragraph, DOE may at its election either (A) effect such repairs or replacements or (B) allow the Contractor the agreed estimated reasonable cost of such repairs (or the agreed value set forth in the initial inspection report, less depreciation, if replacement is required), and a sum in lieu of rental for the time estimated by the contracting officer to be necessary for such repairs. Failure to agree as to the estimated reasonable cost of affecting such repairs or replacement under (C) above, shall be deemed to be a dispute within the meaning of the article of the contract entitled "Disputes."

(d) Inspection. For the purpose of establishing the condition of the equipment, each item of equipment shall be inspected, tested and inventoried by representatives of DOE and at the Contractor's option, together with representatives of the Contractor, prior to its acceptance by DOE and also immediately prior to scheduled return shipment. The results of such inspections and tests, and the inventories compiled, shall be incorporated in reports submitted to the contractor and to the contracting officer. For any item of equipment which the Contractor has failed to inspect, test, and inventory, or has failed to report as provided herein, the Contractor agrees that the report submitted hereunder by a representative of DOE shall be conclusive evidence of the condition as of the date of inspection.

(e) Excessive repairs. The contracting officer may deduct from payments otherwise due the Contractor, any amounts previously allowed the Contractor under this agreement for repairs made at the Government's expense which the contracting officer finds to



have been in excess of the requirements of this agreement.

7. *Protection of equipment—steps to be taken in event of loss.* The following apply.

(a) The Contractor shall take all reasonable and necessary precautions to safeguard and protect the equipment. Any loss of or damage to the equipment is not reimbursable to the extent that such loss or damage is required to be covered by insurance under paragraph 3(d) of this agreement.

**Note.**—When paragraph 3(d) of the agreement provides that rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods, the following paragraph (a) shall be used

(a) The Contractor shall take all reasonable and necessary pre-cautions to safeguard and protect the equipment. Any loss or damage to the equipment will be at the Contractor's risk to the extent that such loss or damage is covered by any policy of insurance (or self-insurance).

(b) Upon the happening of any loss or damage which is at the risk of the Government under this agreement, the Contractor shall immediately notify the contracting officer of the occasion and extent thereof, shall at the contracting officer's request effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such loss or damage, shall, if required by the contracting officer, authorize representatives of the Government to settle or prosecute to final judgment any such claims, and shall furnish to the Government on request all reasonable assistance in obtaining recovery.

8. *Liquidation of indebtedness.* The Contractor warrants full and complete title and right to possession of all the equipment, subject only to those liens, encumbrances or claims to title or possession securing the indebtedness detailed on Schedule 1, Part 2. The Contractor agrees to apply such portion of the rental payment hereunder as may be necessary for the prompt discharge of such indebtedness. If at any time any person holding a lien, encumbrance, or claim against any item of equipment shall submit to DOE evidence that the Contractor is not discharging the indebtedness secured thereby in accordance with the terms under which the indebtedness is payable or dischargeable, DOE shall have the right upon three day's written notice to the Contractor to impound such part of the unpaid rental hereunder, as DOE in its sole discretion deems necessary, until the rights of the Contractor and any such person are determined and all just and proper claims of such persons are satisfied, provided, that nothing contained in this paragraph shall be construed to pay to such person any sum not required to be paid by the terms under which the indebtedness was incurred or to pay any sum prior to the time it becomes due.

9. *Taxes.* Unless otherwise directed by the contracting officer, the Contractor shall at the Contractor's own expense pay and discharge any and all taxes levied upon any item of the equipment.

## Schedule 1

### Part 1—Items and Rental Rates

Item No. \_\_\_\_\_

Item description (equipment No.; type of equipment; serial No.; manufacturer; year of model; original point of shipment; etc.) \_\_\_\_\_

Description of any insurance coverage for loss or damage to equipment \_\_\_\_\_

Item Rental Rates \_\_\_\_\_

Attach certified copy of insurance policy.

(Continue, if necessary, on reverse side or on separate sheets.)

### Part 2—Liens, Encumbrances and Claims

The following is a complete and correct statement of the amount of any and all indebtedness secured by liens or other encumbrances of any nature, legal or equitable, which are held by any person, firm or corporation against the equipment, items Nos. 1 through \_\_\_\_\_.

(Contractor) \_\_\_\_\_

By \_\_\_\_\_

(Title) \_\_\_\_\_

Item No. \_\_\_\_\_

Name and address of present creditor \_\_\_\_\_

Present unpaid balance \_\_\_\_\_

Amounts and date of future payments \_\_\_\_\_

(Continue, if necessary, on the reverse side or on separate sheets.)

### 936.7302 Outline of agreement for rental of third-party-owned construction equipment.

This agreement, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by and between \_\_\_\_\_ ("hereinafter called the lessor") and \_\_\_\_\_ ("hereinafter called the lessee") Witnesseth:

Whereas, the lessee has entered into a contract, dated \_\_\_\_\_, (hereinafter called the "construction contract"), with the United States of America (hereinafter called the "Government"), represented by the U.S. Department of Energy hereinafter called "DOE", for the performance of certain construction work in connection with the construction at \_\_\_\_\_; and

Whereas, the lessor is the owner of certain construction plant and equipment (hereinafter called the "equipment"), listed on the attached Schedule 1 attached to and made a part of this agreement; and

Whereas, the lessee desires to rent the equipment for use in performing the construction contract.

Now, therefore, in consideration of the mutual covenants and conditions herein set forth, it is agreed as follows:

**Article I—Equipment rented.** The lessor agrees to furnish for use by the lessee in the

performance of the construction contract the equipment itemized in Schedule 1 at time specified as follows:

(Each item of equipment shall be clearly marked with the identification number assigned to it on Schedule 1. The lessor and the lessee may from time to time amend Schedule 1 by deleting or adding items.)

**Article II—Payments.** Payments shall be made by the lessee to the lessor at monthly intervals on invoices rendered by the lessor for:

(a) *Rental.* Rental of equipment, for rental periods determined in accordance with the article entitled "Rental Period" and at the rates set forth in Schedule 1 applied in accordance with the article entitled "Application of Rates."

(b) *Transportation.* Transportation of equipment in accordance with the article entitled "Transportation."

(c) *Repair.* Maintenance, repair, and replacement of equipment to the extent provided in the articles entitled "Conditions of Equipment" and "Protection of Equipment—Steps to be Taken in Event of Loss."

**Article III—Application of rates.** The rates set forth in Schedule 1 shall be applied in accordance with the following rules:

(a) *Basis of rates.* Rates are based upon one shift of 8 hours per day, 40 hours per week, or 176 hours per month (30 consecutive days).

(b) *Apportionment of rates.* The monthly rate and its pro-rata share shall apply to all rental periods of 1 month or more. The weekly rate and its pro-rata share shall apply to all rental periods of 1 week or more up to 1 month. The daily rate and its pro-rata share shall apply to all rental periods up to 1 week.

(c) *Overtime.* If the equipment is rented by the day, the rate for overtime is one-sixteenth ( $\frac{1}{16}$ ) of the daily rate for each hour of use in any day in excess of 8 hours; if it is rented by the week, the rate for overtime is one-eighth ( $\frac{1}{8}$ ) of the weekly rate for each hour of use in any week in excess of 40 hours; and if it is rented by the month, the overtime rate is one-third hundredth and fifty-second ( $\frac{1}{352}$ ) of the monthly rate for hour of use in excess of 176 hours in any one 30-consecutive-day period.

(d) *Insurance.* Rental rates include the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods as indicated in Schedule 1 and copy of policy attached. The lessor agrees to maintain this insurance coverage for loss or damage to the equipment during the entire term of this agreement. The lessor shall waive any right of action against the contractor or the United States Government for loss, damage or destruction of the leased equipment to the extent that the lessor recover from insurance applicable to loss, damage or destruction of the leased equipment.

**Note.**—When rates do not include the cost of insurance or self-insurance, substitute the following text for paragraph (d) Insurance:

"Rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods."



**Article IV—Rental period.** The rental period for which rental is payable for an item of equipment shall consist of a base period, beginning upon the date stipulated in a written notice from the lessee to the lessor that the lessee has accepted the item of equipment at the job site, and ending upon date stipulated in a written notice from the lessee to the lessor that use of the item of equipment is terminated, subject to the following additions, deductions, and conditions.

(a) *In-transit time.* There shall be added to the base period:

(1) The actual in-transit time of inbound transportation from the point of shipment to the job site, not exceeding the time required for such transportation by commercial carrier via the most expeditious routing available, of any item of equipment subsequently accepted by the lessee.

(2) The actual in-transit time of outbound return transportation from the job site to the original point of inbound shipment, or other destination at equal or less distance from the job site, not exceeding the time required for such transportation by commercial carrier via the most expeditious routing available, of any item of equipment whose use has been terminated by the lessee.

(b) *Trial period.* If initial inspection by the lessee discloses that the condition of an item of equipment is doubtful, it will not be accepted by the lessee without a trial period of operation to prove such item upon terms and conditions agreed upon by the lessor and the lessee and approved by DOE. If the equipment is found unacceptable in the trial period, no rental, transportation, or other expenses will be due the lessor.

(c) *Delay due to repairs.*

(1) The time required for repair of equipment shall be deducted from the base period if such repair is necessitated by willful misconduct or lack of good faith on part of the lessor, of an individual, or the partners or corporate officers of the lessor, or a supervising representative of the lessor, or made necessary by defects not reasonably ascertainable on initial inspection by the lessee.

(2) If arrangements are made for the lessor to repair an item of equipment, the withdrawal of such item from work for necessary repairs (due to causes other than those mentioned in the preceding paragraph) subsequent to acceptance of the item by the lessee shall not interrupt the running of the base period, unless the lessee or DOE finds that due diligence in effecting the repairs or in returning the item to use has not been exercised. In the latter event, the time found to have been excessive shall be deducted from the base period.

(d) *Time for repairs on termination.* In the event the lessee, in accordance with the article entitled "Condition of Equipment," elects to effect repair or replacement of an item of equipment prior to scheduled return shipment of the item, the time required for such repair or replacement shall be added to the base period.

**Article V—Transportation.** Inbound transportation of equipment to the job site, f.o.b. cars and return to the original point of shipment or to another destination selected

by the lessor at equal or less distance from the job site, shall be at the expense of the lessee, subject to the following conditions:

(a) *Limitation on return transportation.* The lessee shall not bear any expense for outbound return transportation in excess of the amount paid for inbound transportation to the job site, except additional amounts approved by DOE representing or equivalent to increase in freight rates applicable to the route to the original point of shipment.

(b) *Limitation on long distance transportation.* Transportation over a distance in excess of 500 miles shall be subject to the approval of the lessee and DOE.

(c) *Transportation by other than common carrier.* The expense borne by the lessee hereunder for transportation by a method other than common carrier shall be the actual expense of such transportation as shown by evidence satisfactory to the lessee and DOE, but shall in no case exceed the amount which would be paid for such transportation by a suitable and available common carrier, unless otherwise authorized by the lessee and DOE.

(d) *Loading and unloading.* Only such costs of loading and unloading equipment as are incurred at the job site shall be borne by the lessee.

(e) *Equipment not in required condition.* The lessee shall not bear the expense of transportation of any item of equipment which arrives at the job site in a condition which does not fulfill the requirements of the article entitled "Condition of equipment" and which is not placed in the condition required under that article by the lessee at the lessor's expense within a reasonable time.

**Article VI—Condition of equipment.**

(a) *Condition on delivery.* The equipment shall, on delivery at the job site, be in good operating condition to render efficient, economical, and continuous service and shall be equipped with necessary and required safety devices according to ICC regulations and other applicable Federal and state laws. Each item of the equipment shall have been registered by the lessor at the lessor's own expense with all Federal, State, and local authorities requiring registration, and registration plates or other evidence of registration shall be displayed in accordance with the requirements of the registering authority. The cost of subsequent registration shall also be borne by the lessor. If any item of equipment on arrival at the job site is not in the condition required by this paragraph, its use on the work shall not be permitted unless and until it is placed in the condition required by this paragraph at the lessor's expense and within a reasonable time. If any such item is not placed in the condition required by this paragraph within a reasonable time, the lessee may reject the item and require its removal from the job site, and in that event, the lessee shall not be liable for rental, transportation, or any other expense in connection with such item.

(b) *Condition on the job.* Maintenance and repair necessary to keep accepted equipment in the condition required for its operation until use of the equipment is terminated by the lessee, and replacement (at the value agreed upon by the lessor and the lessee with

the approval of DOE at or prior to the time of acceptance by the lessee and set forth in the initial inspection report, less depreciation) of accepted equipment, lost or destroyed during such time, shall be at the expense of the lessee. Except, however, such maintenance, repair, or replacement will not be at the expense of the lessee if it is made necessary by loss or damage covered by any policy of insurance (or self-insurance), or caused by willful misconduct or lack of good faith on the part of the lessor, of an individual, or the partners or corporate officers of the lessor, or a supervising representative of the lessor, or is made necessary by defect not reasonably ascertainable on initial inspection by the lessee.

(c) *Condition on termination.* Upon termination by the lessee of the use of any item of equipment, the item shall be returned by the lessee to the lessor at the job site in as good conditions as when received by the lessee (as shown by the initial inspection report), less normal wear and tear, except for any loss or damage which is due to willful misconduct or lack of good faith on the part of the lessor, of an individual, or the partners or corporate officers of the lessor or a supervising representative of the lessor, or defects not reasonably ascertainable on initial inspection by the lessee, or which is covered by any policy of insurance (or self-insurance). If the inspection report is to be made immediately prior to the scheduled return shipment of an item of equipment discloses the necessity for repairs or replacements, the cost of which is the responsibility of the lessee under this paragraph, the lessee may, at its election, either (1) effect such repairs or replacements, or (2) with the approval of DOE, allow the lessor the agreed estimated reasonable cost of such repairs (or the agreed value less depreciation, if replacement is required), and a sum in lieu of rental for the time estimated by the lessee to be necessary for such repairs.

(d) *Inspection.* For the purpose of establishing the condition, the equipment shall be inspected, tested, and inventoried by representatives of the lessee and, at the lessor's option, together with representatives of the lessor (and of DOE, if DOE so elects), prior to its acceptance by the lessee and immediately prior to scheduled return shipment. The results of such inspections and tests, and the inventories compiled, shall be incorporated in reports submitted to the lessor and to the lessee (and to DOE if DOE so requires). For any item of equipment which the lessor has failed to inspect, test, and inventory, or has failed to report as provided herein, the lessor agrees that the report submitted hereunder by a representative of the lessee shall be conclusive evidence of the condition as the date of inspection.

(e) *Excessive repairs.* DOE may require the lessee to deduct from payments otherwise due the lessor any amounts previously allowed the lessor under this agreement for repairs made at the lessee's expense which DOE finds to have been in excess of the requirements of this agreement.

**Article VII—Protection of equipment—Steps to be taken in event of loss.**



(a) The lessee shall take all reasonable and necessary precautions to safeguard and protect the equipment. Any loss of or damage to the equipment will be at the lessor's risk to the extent that such loss or damage is required to be covered by insurance under Article III(d) of this agreement.

**Note.**—When Article III(d) of the agreement provides that rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods, the following paragraph (a) shall be used:

"(a) The lessee shall take all reasonable and necessary precautions to safeguard and protect the equipment. Any loss of or damage to the equipment will be at the lessor's risk to the extent that such loss or damage is covered by any policy of insurance (or self-insurance)."

(b) Upon the happening of any loss or damage which is at the risk of the lessee under this agreement, the lessee shall immediately notify the lessor of the occasion and extent thereof, and the lessor shall thereupon, at the lessee's request, effect an assignment and subrogation in favor of the lessee or the Government of all the lessor's rights and claims (except those against the lessee or the Government) arising out of any such loss or damage, shall, if required by the lessee or the Government, authorize representatives of the lessee or the Government to settle or prosecute to final judgment any such claims, and shall furnish to the lessee or the Government on request all reasonable assistance in obtaining recovery.

**Article VII—Liquidation of indebtedness.** The lessor warrants full and complete title and right to possession of all the equipment, subject only to those liens, encumbrances or claims to title or possession securing the indebtedness detail on Schedule 1, Part 2. The lessor agrees to apply such portion of the rental payable hereunder as may be necessary for the prompt discharge of such indebtedness. If at any time, any person holding a lien, encumbrance, or claim against any item of the equipment shall submit to the lessee evidence that the lessor is not discharging the indebtedness secured thereby in accordance with the terms under which the indebtedness is payable or dischargeable, the lessee shall have the right upon three day's written notice to the lessor to impound such part of the unpaid rental hereunder as the lessee, with the approval of DOE, deems necessary until the rights of the lessor and any such person are determined and all just and proper claims of such person are satisfied, provided that nothing contained in this paragraph shall be construed to require the lessor to pay to such person any sum not required to be paid by the terms under which the indebtedness was incurred or to pay any sum prior to the time it becomes due.

**Article IX—Taxes.** Unless otherwise directed by DOE, the lessor shall at the lessor's own expense pay and discharge any and all taxes levied upon any item of equipment.

**Article X—Definition.** As used herein the term "DOE" means the U.S. Department of

Energy or any duly authorized representative thereof, including the contracting officer under the construction contract.

In witness, thereof, the lessor and the lessee have executed this agreement as of the day and year above written.

(Lessor) \_\_\_\_\_  
By \_\_\_\_\_  
(Title) \_\_\_\_\_  
(Lessee) \_\_\_\_\_  
By \_\_\_\_\_  
(Title) \_\_\_\_\_

**Note.**—The following articles shall be inserted along with the required socio-economic articles:

#### EXAMINATION OF RECORDS

#### COVENANT AGAINST CONTINGENT FEES

##### Schedule 1

##### Part 1—Items and Rental Rates

Item No. \_\_\_\_\_  
Item description (equipment No.; type of equipment; serial No.; manufacturer; year of model; original point of shipment; etc.) \_\_\_\_\_

Description of any insurance coverage for loss or damage to equipment \_\_\_\_\_

Item Rental Rates \_\_\_\_\_

Attach certified copy of insurance policy.  
(Continue, if necessary, on reverse side or on separate sheets.)

##### Part 2—Liens, Encumbrances and Claims

The following is a complete and correct statement of the amount of any and all indebtedness secured by liens or other encumbrances of any nature, legal or equitable, which are held by any person, firm or corporation against the equipment, items Nos. 1 through \_\_\_\_\_.

(Contractor) \_\_\_\_\_  
By \_\_\_\_\_  
(Title) \_\_\_\_\_  
Item No. \_\_\_\_\_

Name and address of present creditor \_\_\_\_\_

Present unpaid balance \_\_\_\_\_

Amounts and date of future payments \_\_\_\_\_

(Continue, if necessary, on the reverse side or on separate sheets.)

#### PART 937—SERVICE CONTRACTING

##### Subpart 937.2—Consulting Services

##### 937.205 Management controls.

(b) DOE contracting personnel should familiarize themselves with the pertinent DOE Directives coverage before any acquisition involving

consulting services is undertaken and shall comply with the appropriate DOE Directives. See DOE Orders 3304.1 and 4200.3.

(7) In accordance with FAR 37.205(b)(7), purchase requests for consulting services initiated in the fourth quarter of the fiscal year, must be approved at the second management level above that of the initiator or such equivalent level as the Head of Contracting Activity may designate.

(Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy of 1954, as amended (42 U.S.C. 2168)).

#### PART 942—CONTRACT ADMINISTRATION

Sec.  
942.000 Scope of part.  
942.001 General.  
942.002 DOE policy and responsibilities.  
942.003 Organizational structure.

##### Subpart 942.1—Interagency Contract Administration and Audit Services

942.101 Policy.

##### Subpart 942.2—Assignment of Contract Administration

942.202 Assignment of contract administration.

##### Subpart 942.7—Indirect Cost Rates

942.704 Billing rates.  
942.705-1 Contracting officer determination procedure.  
942.705-3 Educational institutions.  
942.705-4 State and local governments.  
942.705-5 Nonprofit organizations other than educational and state and local governments.  
942.708 Quick closeout procedures.

##### Subpart 942.8—Disallowance of Costs

942.803 Disallowing costs after incurrence.

##### Subpart 942.10—Negotiating Advance Agreements for Independent Research and Development/Bid and Proposal Costs

942.1004 Location of negotiators in a central office.  
942.1008 Administrative appeals.

##### Subpart 942.14—Traffic and Transportation Management

942.1401 General.  
942.1402 Volume movements within the continental United States.  
942.1403-1 U.S. Government bills of lading.  
942.1403-2 Contractor-prepaid commercial bills of lading.

##### Subpart 942.70—Audit Services

942.7000 Scope of subpart.  
942.7001 Definition.  
942.7002 General.  
942.7003 Types of services.  
942.7003-1 Incurred cost.  
942.7003-2 Indirect expenses (overhead cost).  
942.7003-3 Accounting systems.



- 942.7003-4 Management systems.
- 942.7003-5 Financial analysis evaluations.
- 942.7003-6 CAS disclosure statements.
- 942.7003-7 CAS compliance.
- 942.7003-8 Estimating systems.
- 942.7003-9 Consultation and advice.
- 942.7004 Procedures.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy of 1954, as amended (42 U.S.C. 2168).

#### 942.000 Scope of part.

This part discusses the requirements for and the management of activities that occur after the award of a contract.

#### 942.001 General.

(a) Those government actions taken subsequent to award of a contract to monitor the performance of the contractor and the contractor's adherence to the terms and conditions thereof through completion of the contract are commonly referred to as contract management and administration. The specific actions included in this process are as generally defined in FAR 42.302. This post-award management is essential to ensure the purpose of the contract is achieved and is in accordance with the terms and conditions of the contractual instrument. Contract management is broad and involves the expertise of many specialists including technical (programmatic) legal, financial, administrative, acquisition, and others.

(b) Post-award contract management functions are executed by the various specialists assigned the responsibility and procedural guidance as to how to perform the required functions. Generally, acquisition personnel in the person of a contracting officer, act as the overall business manager for administering and maintaining the integrity of the contract. Such responsibility ensures that only a contracting officer modifies a contract, payments are prompt and represent reimbursements or payments for only allowable cost, funds are obligated in a timely manner, and contracts are officially closed.

#### 942.002 DOE policy and responsibilities.

(a) It is the policy of the Department of Energy that the performance of its contractors be monitored to assure compliance with the terms and conditions of the contract instrument and products are received on time, at a reasonable cost which meet technical requirements and specifications.

(b) The responsibility for ensuring effective post-award management of DOE contractual programs involves many elements of the Department. The various procedures and policies that

implement and support project and contract management systems are promulgated in various DOE Orders.

#### 942.003 Organizational structure.

(a) The Department of Defense has initiated a formal system of independent organizations responsible for performance of post-award management functions. A field structure of Contract Administration Offices (CAO) responsible for contract management and administration of contracts for major defense contractors has been established. DOD agencies (Army, Navy, Air Force) have organized plant residencies of contract management specialists for specific DOD contractors and their various business units. The Defense Logistics Agency performs contract management functions both at onsite residencies of contractors not assigned to a service and on a mobile basis from centrally located management areas for other defense contractors. A complete listing of the DOD's contract administration service components is contained in the Defense Directory cited in FAR 42.102.

(b) Civilian agencies for the most part have not established formal, organizationally independent CAO's responsible for performance of contract management functions. The post-award contract management and administration functions performed by civilian agencies are performed by contracting, program and other staff (accounting, legal, etc.) personnel and specialists located in the contracting offices and/or Operational units in a less formal manner than the DOD. Sometimes such services may be acquired from a cognate Defense CAO, when dealing with a defense contractor.

(c) The DOE has no field or resident contract administration offices. Contract management of DOE contracts is performed by the contracting office or is obtained from a Department of Defense (DOD) Contract Administration Office (CAO) if the contract warrants requesting contract administration services from such an activity. There is no specific DOE rule or policy on requesting and assigning DOE contracts for DOD administration services. It is a matter of judgment of the contracting office. To the extent any functions cited in FAR 42.302 are required for proper post-award management of the contract, assignment to a DOD CAO or the requesting of certain supporting services (FAR 42.201) from the CAO should be considered if it is (1) beyond capability of the DOE office (2) cost effective (3) eliminates duplication of effort, and (4)

would provide for consistent treatment of the contractor.

### Subpart 942.1—Interagency Contract Administration and Audit Services

#### 942.101 Policy.

(a) The Department of Energy has entered into cross-servicing contract management arrangements with:

- (1) The Defense Logistic Agency
- (2) The Air Force Contract Management Division
- (3) The Office of Naval Research

(b) The above arrangements are established and maintained by the Business and Financial Policy Branch, Office of Policy, Procurement and Assistance Management Directorate, Headquarters. Questions concerning these agreements should be directed to that organization.

(c) The Department of Energy Inspector General has established a memorandum of understanding with the Defense Contract Audit Agency and the Office of Audit of the Department of Health and Human Services for providing audit support service (942.70) to the DOE in support of its procurement mission. Procedures for acquiring these services are discussed in 942.70.

### Subpart 942.2—Assignment of Contract Administration

#### 942.202 Assignment of contract administration.

(d)(5) Contracts assigned for administration support shall be entered and reported in the Procurement and Assistance Data System.

### Subpart 942.7—Indirect Cost Rates

#### 942.704 Billing rates.

(b) When the contracting officer or auditor responsible for establishing billing rates, in accordance with FAR 42.704, has not established such rates or such rates are not current for the performance periods (contractor FY) under contract, the DOE contracting officer responsible for administration of the contract shall establish an appropriate rate(s) for billing purposes. If the contractor holds more than one DOE contract covering that period of performance, the DOE office with the largest unliquidated obligations as of the beginning of that performance period shall take the lead in establishing the required billing rate for use on DOE contracts. Once appropriate billing rates are established by the responsible contracting officer designated by FAR 42.704, such rates shall be adopted by the contracting officer and all billings and payments shall be retroactively



revised to reflect the agreed upon rate(s).

#### 942.705-1 Contracting officer determination procedure.

(a)(3) The Department of Energy shall use the contracting officer determination procedure for all business units for which it shall be required to negotiate final indirect cost rates. A listing of such business units is maintained by the Business and Financial Policy Branch, Office of Policy, Procurement and Assistance Management Directorate, Headquarters, and published as a separate publication in the DOE Order system.

(b)(1) The Department of Energy shall not require or direct contractors to submit their final indirect cost rate proposals reflecting actual cost experience during the covered period to the auditor. The DOE negotiating official shall request all needed audit service in accordance with the procedures in 942.70, Audit Services.

#### 942.705-3 Educational institutions.

(a)(2) The negotiated rates established for the institutions cited in OMB circular No. A-88 are centrally maintained by the Business and Financial Policy Branch, Office of Policy, Procurement and Assistance Management Directorate, Headquarters.

#### 942.705-4 State and local governments.

A list of cognizant agencies for State/local government organizations is maintained by the Office of Management and Budget (OMB) which is periodically published in the Federal Register. The responsible agencies are notified of such assignments. A listing of the cognizant agencies and the current negotiated rates for State/local government activities is maintained by the Business and Financial Policy Branch, Office of Policy, Procurement and Assistance Management Directorate, Headquarters.

#### 942.705-5 Nonprofit organizations other than educational and state and local governments.

OMB Circular A-122 establishes the rules for assigning cognizant agencies for the negotiation and approval of indirect cost rates. The Federal agency with the largest dollar value of awards (contracts plus federal financial assistance dollars) will be designated as the cognizant agency. DOE is not currently assigned cognizance over any such nonprofit organizations. There is no published listing of assigned agencies. The Business and Financial Policy Branch, Office of Policy, Procurement and Assistance Directorate, Headquarters, does

maintain a DOE central file of rates established by the cognizant agency.

#### 942.708 Quick closeout procedures.

(a) Contracting officers shall use the quick-closeout procedure to finalize indirect expenses under any DOE contract when it appears appropriate to establish such expenses by means other than the formal negotiation procedures of FAR Subpart 42.7 and use of this procedure is agreeable to the contractor. The quick-closeout procedure is considered to include the establishment of either indirect cost rates established for the closeout of a contract(s) or lump-sum indirect expenses dollars that shall be agreed to as chargeable to the contract. Such lump-sum amounts are appropriate for all categories of contractors—commercial, State/local governments, educational, and nonprofit organizations.

The contracting officer shall apply the quick-closeout procedure in closing DOE contracts in lieu of using the rates established in accordance with FAR 42.705, when:

(1) See FAR 42.708(a)(1)  
(2) The amounts of indirect expense to be reimbursed by a single DOE contract will not exceed \$250,000 per contractor fiscal year or the indirect expense amount reimbursed by all DOE contracts using the quick-closeout procedure will not exceed \$1,000,000 per contractor fiscal year.

(3) Amounts of and the allowability of claimed or proposed indirect expenses will be readily determinable based on a review of the contractor's indirect cost experience (reviews may be made by the contracting officer with or without the assistance of a professional auditor).

(4) The contractor does not have a history of disputes, disallowed cost of any consequence, and there are no known potential cost issues of significance.

(5) There is a low potential (risk) for any significant over payment of indirect expense under the contract.

(6) Administrative cost of obtaining the annual negotiated final rate(s) is known to, or would be expected to, exceed any benefit of the final rates established in accordance with FAR Subpart 42.7.

(d) A decision to request audit assistance in applying the quick-closeout procedure should be decided on a case-by-case basis. The extent of any required services may vary. If possible, closeout rates or lump-sum expenses should be established with limited use of audit especially when acquiring the support service would defeat the quick-closeout approach by lengthening the evaluation and contract

closeout process. Audits should not be requested if it is reasonably apparent that the audit would have little effect on the rates or expense finally agreed upon and any overpayments would be relatively insignificant.

#### Subpart 942.8—Disallowance of Costs

##### 942.803 Disallowing costs after incurrence.

(a) Contracting officer receipt of vouchers. Vouchers and invoices submitted to DOE shall be submitted to the contracting officer or designee for review and approval for payment. If the examination of a voucher or invoice raises a question regarding the allowability of a cost submitted therein, the contracting officer, shall:

(1) Hold informal discussion with the contractor as appropriate.

(2) Issue a notice (letter, memo, etc.) to the contractor advising of cost disallowed or to be disallowed and advising the contractor that it may:

(i) Submit a written claim as to why the cost should be reimbursed—if in disagreement with the disallowance.

(ii) File a claim under the disputes clause, which will be processed in accordance with disputes procedures in the event disagreements cannot be settled.

(3) Process the voucher or invoice for payment and advise the finance office to deduct the disallowed cost when scheduling the voucher for payment.

(c) Auditor reports and other sources of questioned costs. (1) From time to time reports are received from professional auditors that may question the allowability of an incurred cost. Such reports are received as the result of auditors, in their independent role under OMB Circular A-73 or their own charters, scheduling and conducting financial or compliance audits of government contracts or as the result of an independent request for auditor service, as discussed in 942.70 Audit Services.

(2) When auditor reports or other notifications question cost or consider them unallowable, the contracting officer shall follow up such reports and resolve all such cost issues promptly by determining, through discussions with the contractor and/or auditor within six months of the audit report date, or date of receipt if a non-Federal audit. One of the following courses of action shall be pursued:

(i) Accept and implement audit recommendations as submitted.

(ii) Accept the principle of the audit recommendation but reject the cost questioned amount.



(iii) Reject audit findings and recommendations.

(3) When implementing the accepted course of action, the contracting officer shall—

(i) Hold discussions with the auditor and contractor as appropriate.

(ii) Issue a notice in writing advising the contractor of the government's intent to disallow the cost questioned, if the contracting officer agrees with the auditor concerning the questioned costs.

(iii) Negotiate a mutual settlement of questioned costs if they are agreed with in principle but there is a difference of opinion as to a proper amount.

(iv) Negotiate a mutual settlement of questioned costs if the auditor recommendations are acceptable to the contracting officer but the contractor does not accept the finding or disallowance.

(v) Issue a final decision of the contracting officer disallowing the questionable cost where differences cannot be resolved, advising of the contractor's right to appeal the decision, and advising the procedure to be followed if it is decided to make such an appeal.

(vi) Initiate immediate recoupment actions for all disallowed cost owed the government by:

(A) Requesting the contractor to provide a credit adjustment (offset) against amounts billed the government on the next or future invoice(s) if such shall be submitted under a contract for which the disallowed cost applies.

(B) Deducting (offset) the disallowed cost from the next or future invoice(s) submitted under the contract; if the contractor provides no adjustment under the contract for which the disallowed cost applies; provided such reduction is deemed appropriate.

(C) Advising the contractor that a refund shall be directly payable to the government in situations where there are insufficient payments owed by the government to effect recovery via (A) or (B) above or an offset is otherwise inappropriate.

(vii) Promptly notify the appropriate finance office of refunds directly payable to the government to ensure proper billing and followup action for collection.

#### **Subpart 942.10—Negotiating Advance Agreements for Independent Research and Development/Bid and Proposal Costs**

##### **942.1004 Location of negotiators in a central office.**

The central office within the Department of Energy for negotiating independent research and development/

bid and proposal (IR&D/B&P) advance agreements, as required in accordance with FAR 42.1004, is established in the Procurement and Assistance Management Directorate, Headquarters, DOE contracting officers should advise offerors, suppliers, potential contractors, and contractors that are required, or expect they will be required, to establish advance agreements for allowability of IR&D/B&P cost and where the DOE is to be the lead negotiating agency in accordance with FAR 42.1003, their IR&D/B&P proposals and/or other correspondence shall be submitted to: Business & Financial Policy Branch, Office of Policy, Procurement and Assistance Management Directorate, Department of Energy, 1000 Independence Avenue SW, Washington, D.C. 20585.

##### **942.1008 Administrative appeals.**

The official within the DOE to hear administrative appeals of a contracting officer's decision to reduce payment, as prescribed in FAR 42.1008, is the Procurement Executive.

#### **Subpart 942.14—Traffic and Transportation Management**

##### **942.1401 General.**

DOE contracting officers or designees will consult and coordinate with the Office of Operations and Traffic, Defense Programs, Headquarters, as required in 41 CFR Part 109-40 and implemented by DOE Order 1540.1.

##### **942.1402 Volume movements within the continental United States.**

(a)(2) DOE activities will be reported to the Office of Operations and Traffic, Defense Programs Headquarters.

##### **942.1403-1 U.S. Government bills of lading.**

(a) The Office of Operations and Traffic, Defense Programs Headquarters, has responsibility for prescribing DOE's shipping documents.

(c)(1) Any limited authority for the use of commercial forms and procedures to acquire freight or express transportation for small shipments of a recurring nature will be prescribed by the Office of Operations and Traffic, Defense Programs, Headquarters.

##### **942.1403-2 Contractor-prepaid commercial bills of lading.**

(a) Use of commercial bills of lading for movement of supplies should be on a limited manner. Shipments of questionable quantity should be discussed with the Office of Operations and Traffic, Defense Programs, Headquarters.

#### **Subpart 942.70—Audit Services**

##### **942.7000 Scope of subpart.**

This subpart prescribes policies and procedures for requiring and using audit support services in the post-award management of DOE contracts. Such services shall be obtained in accordance with the provisions of FAR Subpart 42.1 and this subpart.

##### **942.7001 Definition.**

Auditors are professional accountants who although organizationally independent are viewed as one of several sources of counsel to the contracting officer on accounting and other financial subjects. They are the principal advisors to contracting officers on audit matters and provide the contracting officers with various audit services.

##### **942.7002 General.**

Contract management practices require the review of a contractor's contract cost records and controls, billings, and claims to assure their completeness, accuracy, and compliance with contract requirements. Such services are available from and provided by independent government audit activities such as the Defense Contract Audit Agency, the Inspector General, and commercial audit firms. Such services are generally referred to as "Contract Audit." In addition to providing "Contract Audit" services in direct support of the contracting officer and other program officials, departmental audit activities, pursuant to Office of Management and Budget policies set forth in Circular A-73, Audit of Federal Operations and Programs, conduct their own independent economy and efficiency reviews of government contractors and performers. Their purpose is to determine whether the business entity is managing and utilizing its resources economically and efficiently and any causes of inefficiencies or uneconomical practices.

##### **942.7003 Types of services.**

An efficient and effective contract management and administration program requires that the contracting officer responsible for post award contract management and administration functions seek the service of the professional auditor in several areas. The primary areas of needed audit support and areas in which auditors have agreed to support the DOE acquisition mission are:

(a) Incurred cost audits (direct & indirect cost)



- (1) Vouchers, billings, invoices, claims, and other settlement proposals
- (2) Financial records, contract cost records, work-in-process costs, etc.
- (b) Overhead rate reviews (establishment and verifications)
- (c) Accounting systems reviews
- (d) Management control systems reviews
- (e) Financial analysis evaluations
- (f) Review Cost Accounting Standards (CAS) Disclosure Statements
- (g) Cost Accounting Standards compliance
- (h) Estimating system reviews
- (i) Consultation and advice

**942.7003-1 Incurred cost.**

(a) Financial audits of a contract's cost records and charges, particularly material and labor cost, shall be requested of the auditors as is considered warranted by the financial condition, integrity, and reliability of the contractor; prior audit experience; adequacy of the accounting system; and unaudited claims, vouchers, invoices, and billings. Audits of such cost should be requested when needed or desirable, but no less frequently than once yearly for any contract where such annual cost exceed \$500,000 or \$1,000,000 under all DOE contracts. Such audits should cover cost-reimbursement type contracts, including fixed-price contracts with cost-reimbursement portions, letter contracts with reimbursement provisions, time-and-materials contracts, and labor-hour contracts.

(b) Vouchers and invoices provisionally approved and paid may be submitted to the auditor for specific review and verification of the accounting records and for an opinion on the allowability of the cost when situations warrant.

**942.7003-2 Indirect expenses (overhead cost).**

Auditors look at indirect expenses (overhead cost) on an after-the-fact basis to review the incurred cost and to assist in the negotiation of a final overhead payment rate, when such rates are provided for in the contract. Auditors also assist the contracting officer in the administration of indirect cost by making appropriate recommendations concerning the establishment of before-the-fact overhead rates for billing purposes and/or establishing predetermined overhead rates. Contracting officers should seek the assistance of the auditor as they deem warranted or appropriate or as may be required by FAR 42.700 and 942.7.

**942.7003-3 Accounting systems.**

Auditors are available to advise the contracting officer on the adequacy of a contractor's accounting system and its suitability for administration of Government contracts. The contracting officer should always obtain such service to assure himself/herself of the contractor's financial competence or credit needs, unless prior experience or other available information shows the contractor to have financial integrity and acceptable accounting and cost control systems.

**942.7003-4 Management systems.**

Auditors are available to help the contracting activity and the contracting officer in a review, and assessment of a contractor's various management systems and systems of internal control. The objective of the reviews, is to assure cost effective and efficient methods of operations. Reviews should be requested as deemed warranted.

**942.7003-5 Financial analysis evaluations.**

Auditors are available to assist the contracting officer in a review and evaluation regarding a contractor's financial competence or credit needs. Such service may be helpful in determining the need for advance payments, loans, etc. When the contracting officer is aware of or is otherwise concerned about the financial viability of the contractor, financial reviews by the auditors should be requested as the contracting officer believes the situation warrants.

**942.7003-6 CAS disclosure statements.**

The audit activity is available and, in accordance with FAR 30, Cost Accounting Standards, is responsible for making recommendations to the contracting officer as to whether the CAS disclosure statement submitted by the contractor as a condition of the contract, adequately describes the actual or proposed cost accounting practices, and is in compliance with the Cost Accounting Standards required under the terms of the contract (required by Pub. L. 91-379, 50 U.S.C. APP 2168, for Defense contracts). The contracting officer shall request the auditor to review all Disclosure Statements submitted by a contractor or potential contractor.

**942.7003-7 CAS compliance.**

The audit activity also performs audits for contractor compliance with the standards of the Cost Accounting Standards Board, when such Standards are required to be followed under the terms of the contract; and, the audit activity advises whether a contractor or

subcontractor has failed to comply with the applicable Standards or to follow consistently its disclosed cost accounting practices and whether the failure has resulted in or may result in any increased cost paid by the government. The auditors also review proposed price changes for contractor changes to disclosed or established cost accounting practices to assure that the changes are fair and reasonable.

**942.7003-8 Estimating systems.**

Many contractors, particularly where a large portion of the business is government work, have formal cost estimating systems used in the development of program estimates and/or the submittal of price/cost proposals to the Government. Other contractors which perform less Government work often have some type of system, too. Estimating systems are encouraged by the Government, but it should be recognized that systems will vary between contractors, and may vary between plants or divisions of a contractor due to differences in products, size and methods of operation (i.e., production versus research), and other factors. Advantages of estimating systems are that they: (a) Provide a greater degree of confidence in estimates, (b) expedite the negotiation process, (c) reduce the amount of detailed explanations that need be included in each proposal on the estimating procedural rationale used, and (d) reduce need for and scope of reviews by technical, financial and audit personnel. Auditors are available to assist the acquisition organization in reviewing a contractor's estimating systems or processes. The contracting officer shall decide whether an estimating system review should be undertaken as a team effort, including an auditor, or if the auditors can sufficiently perform a system check by themselves. It is not DOE policy to generally request such reviews.

**942.7003-9 Consultation and advice.**

Auditors are available for general consultation and advice to acquisition and supporting personnel (including counsel) with or without providing an audit.

**942.7004 Procedures.**

(a) The Department of Energy Inspector General (IG) has established formal cross-servicing arrangements with the Defense Contract Audit Agency (DCAA) and the Health and Human Services Inspector General. Audits are available to contracting officer pursuant to terms of these arrangements.



(b) The following procedures are to be followed by the contracting officer when requesting needed audit services:

(1) Upon award of a contract to an existing DOE or DOD contractor which is being audited by the DCAA, all requests for normal postaward audit services shall be directed to the cognizant DCAA office.

(2) Upon award of a contract to a contractor who is not currently being audited by DCAA, and/or for which the DCAA is not the cognizant audit activity, all requests for postaward audit services shall be directed to the DOE Assistant Inspector General for Audits.

(3) Requests to the DOE Assistant Inspector General for audit services shall be made to the appropriate Regional Office.

(c) In determining if DCAA is currently auditing a contractor or has audited it in the past, the contracting officer should refer to the contractor's pricing proposal or ask the contractor.

(d) In the event a contracting officer considers that an economy and efficiency system review or a program results audit will be beneficial to the Government's interest, the appropriate Regional office of the DOE Assistant Inspector General for Audits should be notified.

(1) Such request should be made to the IG's office even in situations where the DCAA or another audit activity is known to be cognizant for contract audit.

#### PART 943—CONTRACT MODIFICATIONS

##### 943.170 Extension of contracts resulting from unsolicited proposals.

(a) Where additional time beyond the formal contract period is required to complete or continue the work undertaken as the result of the acceptance of an unsolicited proposal and award of a contract therefor, the Contractor should be instructed to submit six copies of an extension proposal to the contracting office in sufficient time to allow evaluation and possible processing before the date of expiration of the contract. This requirement does not apply to requests for no-cost extensions as may sometimes be needed to complete all details such as a final report of the project.

(b) The extension proposal should outline and justify a program and budget for the succeeding year(s), showing in detail the estimated cost for the additional period(s) requested. It should include the same type of information to the extent as was contained in the initial proposal. Any contemplated change in

program or scope for the ensuing period(s) should be justified and explained clearly, and must remain consistent with the original method, approach or idea which was accepted as the basis for award by DOE as a result of the initial unsolicited proposal. This is not, however, intended to preclude a redirection based upon a discovery or breakthrough occurring under the contract to date.

(c) The extension proposal should include a financial profile of the existing contract including:

(1) Total project costs to date, indicating the amount chargeable to DOE;

(2) An estimate of the total costs to be incurred during the remainder of the current period, including a statement of unextended balance.

(d) All requests for extensions of contract work as a result of an unsolicited proposal should be evaluated by the appropriate program office in light of:

(1) Progress reports submitted by the Contractor;

(2) Research results published in scientific media;

(3) Field visits by technical personnel;

(4) Contractor's progress and potential for achieving desired results;

(5) Continued relevance to DOE's mission;

(6) Scientific and technical merit of the research;

(7) Availability of funds;

(8) Likelihood that competition at this stage in the project would hasten achieving the desired results.

(e) Requests for extensions of contract work originating from an unsolicited proposal should generally follow the same process of review and evaluation of technical aspects and funding, preparation and execution of contract, and administration as does a new project.

(f) When an extension request receives a favorable technical evaluation and a determination is made that similar conditions exist relative to those that justified acceptance of the initial unsolicited proposal, a justification for extension of the award shall be processed for review and approval as indicated in 915.506.

(g) As a minimum, extension justification should contain:

(1) A statement of the result of the technical evaluation (915.570-2).

(2) An evaluation of any contemplated change in the contract scope of work for the renewal period and a justification explaining why this change is consistent with the original method, approach or idea which was accepted as the basis

for award by the DOE as a result of the initial unsolicited proposal.

(3) An assessment of the current status of the original circumstances and conditions which justified acceptance of the initial unsolicited proposal identifying any changes that may have developed and providing rationale as to why such change(s) should not preclude renewal.

(h) If, after evaluation, it is decided that an extension period should not be supported on the basis of technical merit or other reasons, such as lack of funding, or changed mission relevance, the project officer should:

(1) Prepare a written statement setting forth the basis for rejection, submit one copy to the responsible program official for approval and transmittal to the proposer and retain one copy in the permanent file.

(2) Promptly notify the contracting officer in order that the current contract may be closed out.

(i) Under certain circumstances it may be in the Government's best interest to continue or complete the work begun under a contract awarded as a result of an unsolicited proposal but which is not appropriate for extension. Continuation or completion of the work shall be accomplished by means of competition, unless non-competitive acquisition can be justified in accordance with FAR 15.507(b).

**Authority:** Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### PART 944—SUBCONTRACTING POLICIES AND PROCEDURES

##### Subpart 944.1—General

Sec.

944.101 Definitions.

##### Subpart 944.2—Consent to Subcontracts

944.202-1 Responsibilities.

944.202-2 Considerations.

944.203 Consent limitations.

##### Subpart 944.3—Contractors' Purchasing Systems Reviews

944.302 Requirements.

944.304 Surveillance.

944.305 Granting, withholding, or withdrawing approval.

944.305-1 Responsibilities.

944.307 Reports.

**Authority:** Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).



**Subpart 944-1—General****944.101 Definitions.**

"DOE cognizant contractors" refers to those contractors over which DOE has been assigned cognizance by the Office of Management and Budget, or those with which DOE has the preponderance of Government business. The term includes pilot and demonstration plant contractors.

"Industrial facilities" means property (other than material, special tooling, and special test equipment) for production, maintenance, research, development, or test, including real property and rights therein, buildings, structures, improvements, and plant equipment.

**Subpart 944.2—Consent to Subcontracts****944.202-1 Responsibilities.**

(b) The responsible contracting officer shall—

(1) Promptly evaluate the contractor's requests for consent to subcontract;

(2) Obtain assistance in the evaluation from subcontracting, audit, pricing, technical, or other specialists as necessary;

(3) Withhold consent to subcontracts with subcontractors on the DOE consolidated List of Debarred, Suspended, Ineligible, and Voluntarily Excluded Awardees (DOE List) (see 10 CFR 1035.15) or the GSA Consolidated List of Debarred, Suspended, and Ineligible Contractors (GSA List), to the extent that the award falls within the scope of the suspension, proposed debarment, debarment, ineligibility, or voluntary exclusion unless the Procurement Executive determines in writing that there is a compelling reason for such action (see 10 CFR 1035.13 and 1035.13(c)); and

(4) Notify the contractor in writing of consent or the withholding of consent, including any changes or corrections required.

**944.202-2 Considerations.**

(a)(13) In addition to the considerations in FAR 44.202-2, the contracting officer responsible for consent shall review the request and supporting data and consider whether the proposed subcontractor or any proposed key person(s) is on the DOE List.

**944.203 Consent limitations.**

(d) For determining profit/fee objectives under negotiated subcontracts, the prime contractor should have considered use of and applied a weighted guidelines or a structured approach that distinguishes different levels of investment if the

acquisition would be subject to the weighted guidelines under a prime DOE contract. If the acquisition falls into one of the exceptions to the DOE weighted guidelines applications as cited in 915.970-4, the prime contractor should have applied other techniques to establish profit objectives.

**Subpart 944.3—Contractors' Purchasing Systems Reviews****944.302 Requirements.**

(a) Heads of Contracting Activities shall consider whether the best interest of DOE would be served by the initiation of a Contractor Purchasing System Review (CPSR) for those contractors whose sales to DOE are expected to exceed \$5,000,000 during the next 12 months and for which DOE is the cognizant Government agency for CPSR purposes. In exceptional circumstances, consideration of a CPSR may be warranted for contractors with sales to DOE of less than \$5,000,000. When considering the initiation of a CPSR, such a review should not be conducted if the extent of the contractor's subcontracting program does not appear to justify the review.

(b) DOE contracting officers, or designees, will conduct CPSRs of DOE cognizant contractors. Other Federal Agencies/Departments may be requested to conduct CPSRs, as appropriate, for other than DOE cognizant contractors. DOE contracting officers shall normally recognize other Federal Agency/Department approvals of contractors' purchasing systems within the limitation identified by approving officials of such agencies.

(c) Initial, subsequent, and followup review teams should include appropriate representatives from DOE field offices; other Federal Agency participation may be additionally requested as appropriate. Generally, team composition should not consist exclusively of those who have a day-to-day relationship with the contractor regarding subcontract consent or approval.

(d) The Procurement Executive is responsible for the overall conduct of the DOE CPSR program.

**944.304 Surveillance.**

(b) The surveillance plan required by FAR 44.304(b) shall be approved by the Head of the Contracting Activity.

**944.305 Granting, withholding, or withdrawing approval.****944.305-1 Responsibilities.**

(a) Team findings and recommendations contained in a CPSR Report shall be approved by the Head of

Contracting Activity before the contracting officer makes a determination to continue, grant, withhold, or withdraw approval.

**944.307 Reports.**

(b) Copies of CPSR reports; notifications granting, continuing, withholding, or withdrawing approval of a contractor's purchasing system; copies of recommendations for improvement of an approved system notifications (or contract modifications) altering the subcontract consent dollar thresholds; and information received from the contractor pursuant to 944.305-3(b) shall be transmitted to the Director, Procurement Management Review Division, Procurement and Assistance Management Directorate, Headquarters.

**PART 945—GOVERNMENT PROPERTY****Sec.**

945.000 Scope of part.

**Subpart 945.1—General****945.101 Definitions.**

945.102-70 Reporting of contractor-held property.

945.102-71 Maintenance of records.

945.104-70 Review and correction of contractors' property management systems.

**Subpart 945.3—Providing Government Property to Contractors**

945.303-1 Policy.

945.304 Providing motor vehicles.

**Subpart 945.4—Contractor Use and Rental of Government Property**

945.407 Non-Government use of plant equipment.

**Subpart 945.5—Management of Government Property in the Possession of Contractors**

945.501 Definitions.

945.502-70 Physical protection of property.

945.502-71 Control of sensitive items of property.

945.502-72 Management of precious metals.

945.505-5 Records of plant equipment.

945.505-11 Records of transportation and installation costs of plant equipment.

945.505-14 Reports of Government property.

945.506 Identification.

945.508 Physical inventories.

945.570 Motor vehicle and aircraft management.

945.570-1 Classification of motor vehicles.

945.570-2 Acquisition of motor vehicles.

945.570-3 Selection of type of motor vehicles.

945.570-4 Identification of motor vehicles.

945.570-5 Utilization of motor vehicles.

945.570-6 Maintenance of motor vehicles.

945.570-7 Disposition of motor vehicles.

945.570-8 Reporting motor vehicle data.

945.570-9 Aircraft.



**Subpart 945.6—Reporting, Redistribution, and Disposal of Contractor Inventory**

- 945.601 Definitions.
- 945.603 Disposal methods.
- 945.603-70 Plant clearance function.
- 945.603-71 Disposal of radioactively contaminated personal property.
- 945.607-2 Recovering precious metals.
- 945.608-2 Standards screening.
- 945.608-3 Agency screening.
- 945.608-4 Limited screening.
- 945.608-5 Special items screening.
- 945.610-4 Contractor inventory in foreign countries.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**945.000 Scope of part.**

This part and FAR Part 45 are not applicable to the management of property by operating and management contractors. In addition, the policies and procedures contained in FAR Part 45 governing the management, control, reporting, and disposal of special test equipment and special tooling are not followed by the DOE.

**Subpart 945.1—General****945.101 Definitions.**

"Personal property" as used in this part, means property of any kind or interest therein, except real property, records of the Federal Government, and nuclear and special source materials, atomic weapons, and by-product materials.

"Capital equipment" as used in this part means personal property items having a unit acquisition cost of \$1,000 or more and an anticipated service life in excess of one year, regardless of type of funding, and having the potential for maintaining their integrity as capital items; i.e., not expendable due to use.

**945.102-70 Reporting of contractor-held property.**

Within 30 days after the end of each fiscal year, the Head of the Contracting Activity shall report the following information to the Director, Property and Equipment Management Division, Procurement and Assistance Management Directorate, Headquarters:

(a) Name and address of each contractor with DOE property in their possession, or in the possession of their subcontractors (do not include grantees, cooperative agreements, interagency agreements, or agreements with state or local governments).

(b) Contract number of each DOE contract with Government property.

(c) Date contractor's property management system was approved and by whom (DOE office, Defense Contract

Administration Service, or the Office of Naval Research).

(d) Date of most current appraisal of contractor's property management system, who conducted the appraisal, and status of the system (satisfactory or unsatisfactory).

(e) Total dollar value of DOE property as reported on last semiannual asset report (including date of report), for each DOE contract administered by the contracting activity.

**945.102-71 Maintenance of records.**

The contracting activity shall maintain records of approvals and reviews of contractors' property management systems, the dollar value of DOE property as reported on the most recent semiannual financial report, and records on property administration delegations to other Government agencies.

**945.104-70 Review and correction of contractors' property management systems.**

DOE offices shall follow the provisions of this section in the review and approval of a contractor's property management system. If contracts are formally delegated to other Government activities for property administration, the DOE will accept their method of approving the contractor's system and document the file accordingly.

(a) *Initial review.* (1) The contracting officer, or his/her representative assigned the responsibility as property administrator, shall review contractors' property systems within six months after the execution of the contract to assure compliance with the Government property clauses of the contract.

(2) Appraisals of complex property management operations may require detailed tests and evaluations on-site over an extended period of time.

However, an evaluation of a contractor's operation involving only small dollar amounts of property and simple property control methods can often be accomplished without an on-site visit or extensive testing by the property administrator, by utilizing the Off-Site Contractor's Property Management Self-Evaluation

Questionnaire, telephone contacts, or other appropriate methods necessary to assure that the system is adequate.

(3) In those instances where a contractor has contracts with more than one DOE contracting office, the DOE office with the contract(s) having the largest dollar value of property should normally be responsible for making the necessary reviews and appraisals of the contractor's system. Contracting officers should determine if a contractor has

multiple DOE contracts by inquiry of the Procurement and Assistance Data System (PADS).

(4) When the contractor's property management system has previously been approved and a new contract requires the expansion of existing, or the establishment of additional controls, the review should normally be limited to the new requirements. If the system is adequate, the property administrator shall record this fact. Notification to the contractor is not required. However, if the property administrator determines that the contractor's property management system does not adequately meet the new contract requirements, the contractor shall be notified in writing of the required changes.

(5) The property administrator shall examine the contractor's procedures to be used to determine the extent to which they meet the criteria for property management required by FAR Subparts 45.5 and 45.6 and Subparts 945.5 and 945.6 of this chapter. Necessary tests will be made of the contractor's system, as appropriate, and, as each functional area is analyzed, the acceptability of the procedures shall be appropriately noted or commented upon and used as the basis for preparation of the record of system evaluation. Worksheets should be maintained by the property administrator.

(6) Upon completion of the property administrator's review, an exist interview will be held with the contractor to discuss any areas of the contractor's property management controls or systems found to be defective, and to recommend corrective actions to be completed before an approval of the system can be granted. Agreement shall be reached as to corrective measures necessary and a reasonable time schedule established for completion of the corrective actions.

(7) Following the exist interview, the property administrator shall prepare a written summary of findings to support approval of the system or the requirements for corrective action to be taken prior to such approval.

(8) The property administrator shall advise the contractor in writing when the contractor's property management system is considered acceptable.

(9) The property administrator shall notify the contractor in writing when its property management system is not acceptable, and request correction of the deficiencies within the agreed upon time schedule.

(10) Appropriate follow-up shall be taken by the property administrator to ensure that corrective actions are taken.



(11) If the contractor does not correct the deficiencies within the time period, the property administrator shall request action by the contracting officer administering the contract. The contracting officer shall notify the contractor in writing including the details specified at FAR 45.104(c). If the contractor also has contracts with other DOE contracting activities, the contracting officer shall notify the Property and Equipment Management Division, Headquarters.

(12) When the contract involves Government property at subcontractor facilities or prime contractor secondary locations, and the controls for the property at such locations have been determined to be adequate, the approval shall be expanded to include the procedures governing Government property at such locations.

(b) *Follow-up reviews.* Every two years after the initial approval of the contractor's system, the property administrator shall reappraise the contractor's property management operations in accordance with the provisions of paragraph (a) above.

#### **Subpart 945.3—Providing Government Property to Contractors**

##### **945.303-1 Policy.**

The DOE has established specific policies concerning special nuclear material requirements needed under DOE contracts for fabricating end items using special nuclear material, and for conversion or scrap recovery of special nuclear material. These special nuclear material needs means "uranium enriched in the isotope U233, U235 and plutonium other than PU238." The policies to be followed are:

(a) Special nuclear material will be furnished by the DOE for fixed-price contracts and subcontracts, at any tier, which call for the production of special nuclear products, including fabrication and conversion, for Government use. (The contractor or subcontractor must have the appropriate license or licenses to receive the special nuclear material. The Nuclear Regulatory Commission is the licensing agency.)

(b) Contracts and subcontracts for fabrication of end items using special nuclear material generally shall be of the fixed-price type. Cost-type contracts or subcontracts for fabrication shall be used only with the approval of the Head of the Contracting Activity. This approval authority shall not be further delegated.

(c) Contracts and subcontracts for conversion or scrap recovery of special nuclear material shall be of a fixed-price

type, except as otherwise approved by the Head of the Contracting Activity.

##### **945.304 Providing motor vehicles.**

Additional guidance and information concerning the provision of motor vehicles are found at:

- (a) 945.570 Motor vehicle and aircraft management.
- (b) 908.11 Leasing of motor vehicles.
- (c) 908.7101 Acquisition of motor vehicles.
- (d) FAR 51.2 GSA Interagency Motor Pool System.

#### **Subpart 945.4—Contractor Use and Rental of Government Property**

##### **945.407 Non-Government use of plant equipment.**

The type of plant equipment and dollar threshold for non-Government use of DOE plant equipment will be determined by the Head of the Contracting Activity which awarded the contract. Approval of the Head of the Contracting Activity is required to authorize non-Government use exceeding 25% of operational use.

#### **Subpart 945.5—Management of Government Property in the Possession of Contractors**

##### **945.501 Definitions.**

"Government-furnished motor vehicles" are DOE-owned vehicles, vehicles leased from the General Services Administration Interagency Motor Pool System (GSA-IMPS), and vehicles leased from commercial sources.

"Precious metals," as used in this subpart, means uncommon and highly valuable metals characterized by their superior resistance to corrosion and oxidation. Included are silver, gold, and the platinum group metals—platinum, palladium, iridium, osmium, rhodium, and ruthenium.

"Sensitive items" as used in this subpart, means those items of property which are susceptible to being appropriated for personal use or which can be readily converted to cash. Examples are firearms, photographic equipment, binoculars, tape recorders, calculators, and power tools.

##### **945.502-70 Physical protection of property.**

(a) Controls such as property pass systems, memorandum records, marking of tools, regular or intermittent gate checks and perimeter fencing shall be implemented, recognizing the value of the property to prevent loss, theft, or unauthorized movement of Government property from the premises on which such property is located.

(b) Classified Government property will be handled in accordance with instructions of the contracting officer.

##### **945.502-71 Control of sensitive items of property.**

(a) The contractor shall assure that effective procedures and practices are established for the administrative and physical control of sensitive property items before and after issuance. Each contractor shall prepare a list of the types of property considered to be sensitive. This list, together with control procedures, shall be provided to the property administrator for review and approval.

(b) At a minimum, controls on sensitive property shall include property records, and memorandum receipts, bin or tool check systems, or combinations thereof. Procedures shall provide for physical inventories at least once each year, and methods for adjustment for inventory levels due to losses, thefts, and damage. More frequent inventories of sensitive property may be necessary where the value of the property, degree of security achieved, or loss experience indicates greater controls are required in order to protect the Government's interest. Such procedures and practices shall be subject to review and approval by the property administrator.

##### **945.502-72 Management of precious metals.**

(a) The contractor shall establish effective procedures and practices for the administrative and physical control of precious metals.

(b) At a minimum, procedures should provide for physical protection from theft or loss from time of receipt by the contractor to disposition.

(c) Responsible individuals will be designated as precious metals custodians. Records will be maintained of metals received, in use, in stock, and which have been issued or disposed of.

(d) Perpetual inventory records shall be maintained for each type of precious metals in terms of location, weight, and value. Metals consumed in use shall be removed from inventory records only after written certification by the custodian and higher level management official that they have been consumed or contaminated beyond recovery. The project consuming the metals shall be identified.

(e) Physical inventories of precious metals shall be taken at least semiannually, and either witnessed by independent observers or audited independently to verify the accuracy of the inventory. The results of the



inventory shall be promptly reported to the property administrator.

(f) All losses shall be promptly investigated and reported to the property administrator.

(g) Excess and termination inventory precious metals shall be reported to the DOE contracting officer for subsequent inclusion in the DOE precious metals pool.

#### 945.505-5 Records of plant equipment.

The requirements of FAR 45.505-5 apply to plant equipment having a unit cost of \$1,000 or more. The property record shall include the DOE asset type for reporting purposes.

#### 945.505-11 Records of transportation and installation costs of plant equipment.

The requirements of FAR 45.505-11 apply to plant equipment having a unit cost of \$1,000 or more.

#### 945.505-14 Reports of Government property.

(a) The contractor shall prepare a semiannual report, as of February 28 and August 31 of each year, for each contract and subcontract thereunder, for the following property. The reports will be submitted to the property administrator, and are due not later than 45 days after the end of the reporting period.

(i) Capital equipment and real property acquired or disposed of during the period by asset type (see below).

(ii) Government-owned materials held in storage for issue when the balance on hand at the end of the reporting period amounts to \$50,000 or more. Only the beginning and ending balance will be shown on the report.

(b) The report of physical inventory of capital equipment (see 945.506(b)) shall be submitted, as a minimum, with the fourth semiannual report after either the last physical inventory report or the inception of the contract.

#### DOE PLANT AND EQUIPMENT ASSET TYPES

| Asset type code No. | Name and definition                                                                                                                                                                                                                                                |
|---------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 401                 | <i>Land.</i> Includes the cost of land owned by the Government and under the control of DOE. The cost of land includes the purchase price, other acquisition costs, and removal costs less salvage realized in disposing of any facilities acquired with the land. |
| 410                 | <i>Land Rights.</i> Includes the costs of rights, interests, and privileges relating to land such as leaseholds, easements, rights-of-way, water and waterpower rights, diversion rights, and submersion rights.                                                   |
| 430                 | <i>Minerals.</i> Includes the cost of mineral rights and land containing mineral deposits owned by the Government.                                                                                                                                                 |

#### DOE PLANT AND EQUIPMENT ASSET TYPES—Continued

| Asset type code No. | Name and definition                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|---------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 440                 | <i>Timber.</i> Includes the cost and appraised value of timber and pulpwood; cost of reforestation program for the purpose of dust and soil erosion control, retention of water tables, etc.; cost of development and improvement of timber stand; and other forestry management costs. Use of this code is limited to the Savannah River Operations Office.                                                                                                                                                                                                                                                                                    |
| 460                 | <i>Site Preparation, Grading and Landscaping.</i> Includes the cost of general clearing, grading and drainage not directly related to the erection of buildings and structures. All landscaping is included.                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 470                 | <i>Roads, Walks, and Paved Areas.</i> Includes the costs of roads, bridges, streets, walks, paved parking areas and paved open areas between buildings, including any related costs of clearing, grading, base, surfacing, storm sewers or drains, curbs, gutters, culverts, lighting service, and other related facilities.                                                                                                                                                                                                                                                                                                                    |
| 480                 | <i>Fences and Guard Towers.</i> Includes the cost of security fences, guard towers and lighting service. Fences associated with specific facilities such as ball parks and substations are included with the facilities protected.                                                                                                                                                                                                                                                                                                                                                                                                              |
| 490                 | <i>Other Improvements to Land.</i> Includes the cost of improvements not includable under codes 460, 470, or 480, such as airports, playgrounds, tennis courts, and athletic fields.                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 501                 | <i>Buildings.</i> Includes the cost of buildings and permanently attached appurtenances, such as elevators, fire protection, lighting, plumbing, heating, ventilation, and built-in air-conditioning systems (excluding window or console air-conditioning units that require no duct work or cooling towers) and the cost of piping, conduit, and cable permanently attached to and made a part of the building and that cannot be removed without cutting into the walls, ceilings, or floors. The division between building costs and the costs of utility systems is generally to be at a point nominally 5 feet outside the building wall. |
| 550                 | <i>Other Structures.</i> Includes the cost of such structures as dams, retention basins, reservoirs, swimming pools, pits, platforms, underground oil storage reservoirs, and stacks (when not a part of a building).                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 610                 | <i>Communication Systems.</i> Includes the cost of telephone, intercommunication and teletype equipment; telephone instruments and protective devices; lines, poles, cables and conduits; and stationary and associated portable radio transmitting and receiving equipment.                                                                                                                                                                                                                                                                                                                                                                    |
| 615                 | <i>Electric Generation, Transmission and Distribution Systems.</i> Includes the cost of all electric generation equipment; boiler plant equipment primarily used to supply steam to steam-electric generation equipment; transmission and distribution lines, poles, towers, grounding systems, substations, transformers, controls, cables, conduit, services, meters and protective devices; lightning fixtures, wire, poles, standards and related accessories supplying electric lighting service to roads, walks, and fences.                                                                                                              |
| 620                 | <i>Fire Alarm Systems.</i> Includes the cost of central office equipment necessary for receiving and transmitting alarms, including control wiring, both cable and open, and other associated overhead and underground equipment.                                                                                                                                                                                                                                                                                                                                                                                                               |
| 625                 | <i>Gas Production, Transmission and Distribution Systems.</i> Includes the cost of equipment involved in the production, storage, transmission and distribution of natural and artificial gas, including pipelines, services, and associated regulating and metering equipment of buildings served.                                                                                                                                                                                                                                                                                                                                             |
| 630                 | <i>Irrigation Systems.</i> Includes the cost of canals, ditches, waterways, flumes, pipelines and equipment used for irrigation purposes.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 635                 | <i>Railroad Systems.</i> Includes the cost of railways, including bridges, trestles, culverts, crossing signals, clearing and grading, riprap, ties, ballast, rails, insulated joints, switches and accessories.                                                                                                                                                                                                                                                                                                                                                                                                                                |

#### DOE PLANT AND EQUIPMENT ASSET TYPES—Continued

| Asset type code No. | Name and definition                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|---------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 640                 | <i>Sewerage Systems.</i> Includes the cost of sewerage treatment and disposal facilities, including manholes, mains and lateral lines to point of tie-in with buildings served, and any septic tanks.                                                                                                                                                                                                                                                                                                                                   |
| 645                 | <i>Steam Generation and Distribution Systems.</i> Includes the cost of all equipment used for the generation and distribution of steam to the point of tie-in to buildings where such steam is utilized primarily for heating and for furnishing power to rotating equipment, including emergency turbo-generators. The cost of boiler plant equipment used primarily to supply steam to steam-electric generation equipment is included in code 615.                                                                                   |
| 650                 | <i>Water Supply, Pumping, Treatment and Distribution Systems.</i> Includes the cost of wells, pumping and distributing facilities to the point of tie-in with buildings served.                                                                                                                                                                                                                                                                                                                                                         |
| 655                 | <i>Nuclear Steam and Electric Generation and Transmission Systems.</i> Includes the cost of nuclear reactors and appurtenant equipment involved primarily and principally in the generation of steam for use in steam-electric generating equipment, fossil-fuel superheaters, electric generation equipment, and electric transmission facilities connecting the nuclear powerplant to the transmission or distribution network. The only reactors to be identified by this code are those which have significant electric generation. |
| 660                 | <i>SPR Crude Oil Piping System.</i> Includes the cost of pipelines and metering devices between the oil transporting vehicle and the oil storage site.                                                                                                                                                                                                                                                                                                                                                                                  |
| 665                 | <i>NPR Crude Oil Extraction and Distribution System.</i> Includes the cost of drilling equipment, piping, pumps, and storage facilities.                                                                                                                                                                                                                                                                                                                                                                                                |
| 710                 | <i>Heavy Mobile Equipment.</i> Includes the cost of heavy mobile equipment (other than motor vehicles) such as concrete mixers, power shovels, cranes, compressors, rollers, road graders, tractors, farm implements, boats, and barges. The cost of trucks is included in code 725.                                                                                                                                                                                                                                                    |
| 715                 | <i>Hospital and Medical Equipment.</i> Includes the cost of hospital, clinical, and dental equipment such as hospital beds, dentist chairs, instruments, sterilizers, and other scientific equipment used by dentists and doctors.                                                                                                                                                                                                                                                                                                      |
| 720                 | <i>Laboratory Equipment.</i> Includes the cost of laboratory equipment such as microscopes, analytical balances, electroanalyzers, oscillographs, refractometers, light sources, vibrometers, and other scientific equipment usually associated with laboratories. The cost of furniture and fixtures and shop equipment are included in codes 730 and 755.                                                                                                                                                                             |
| 725                 | <i>Motor Vehicles and Aircraft.</i> Includes the cost of passenger cars, trucks, buses, jeeps, trailers, and fire trucks.                                                                                                                                                                                                                                                                                                                                                                                                               |
| 730                 | <i>Office Furniture and Equipment.</i> Includes the cost of office furniture and equipment such as machines, desks, drafting sets, safes, photographic equipment, copy making equipment, printing equipment and other office equipment regardless of where located. The cost of automatic data processing equipment is included in code 770.                                                                                                                                                                                            |
| 735                 | <i>Process Equipment.</i> Includes the cost of equipment used specifically in product manufacturing and processing, including associated measurement and control instruments.                                                                                                                                                                                                                                                                                                                                                           |
| 740                 | <i>Railroad Rolling Stock.</i> Includes the cost of railroad rolling stock such as locomotives and cars.                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 745                 | <i>Reactors and Accelerators.</i> Includes the cost of reactors, proton synchrotrons, electron synchrotrons, cyclotrons, linear accelerators, Van De Graaff generators, and accessory equipment, including associated measurement and control instruments.                                                                                                                                                                                                                                                                              |
| 750                 | <i>Security and Protection Equipment.</i> Includes the cost of equipment used for security, police, and fire protection purposes, except that all associated automotive vehicles are included in code 725, and fire alarm systems are included in code 620.                                                                                                                                                                                                                                                                             |



DOE PLANT AND EQUIPMENT ASSET TYPES—  
Continued

| Asset type code No. | Name and definition                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|---------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 755                 | <i>Shop Equipment.</i> Includes the cost of shop equipment such as lathes, drilling machines, rolling mills, hoists, grinders, forges, pipe cutting machines, presses, saws, shapers, and other equipment usually associated with shops, garages and service stations. Similar equipment used in laboratories and other areas for research purposes should also be identified by this code.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 760                 | <i>Reserve Construction Equipment Pool.</i> Includes the costs of construction and automotive equipment held for the purpose of maintaining a reserve pool for use in emergencies as part of the DOE mobilization program, or for secondary use in future construction programs.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 770                 | <i>Automatic Data Processing Equipment.</i> Includes the cost of all equipment used in automatic data processing, such as (1) punched card and/or tape equipment, whether used alone or in conjunction with electronic computers; (2) electronic computers and all peripheral or auxiliary equipment; (3) data transmission systems employing devices communicating or transmitting data from place to place for processing in an ADP system; (4) all other equipment that is used in automatic data processing in conjunction with punched card equipment or electronic computers, and (5) the initial package of software that is required to make the system operational. Equipment such as flexowriters, IBM typewriters, equipment reading the results of experiments, etc., shall be classified as ADP equipment when used primarily in conjunction with an ADP system. Excludes the cost of equipment such as analog computers, card and/or tape file cabinets, and air-conditioning for the processing room. Also, excludes the cost of automatic data recording or electronic control systems used to furnish operating guidance for control of machine tools, equipment used in process operations, reactors, accelerators, etc. |
| 799                 | <i>Miscellaneous Equipment.</i> Includes the cost of furniture and fixtures for hotels, dormitories, and apartments; laundry equipment; restaurant, cafeteria, and canteen equipment; and other miscellaneous equipment not includable in other codes.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 800                 | <i>Improvements to Property of Others.</i> Includes the cost of improvements made by DOE to land, buildings, structures, building services, and utility systems not owned by DOE. Plants, laboratories, and similar facilities constructed by DOE on land owned by others are not to be classified in this category.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 900                 | <i>Unclassified Plant and Equipment.</i> Includes the cost of major construction projects or operative portions thereof that have been physically completed and placed in service for which the unitization and classification of costs into plant and equipment accounts have not been completed. Allocation to production, research, community, and general facilities and to asset types 401 through 800 will require approximation in some instances, particularly at year end when full allocation is required. (Year-end allocations may be reversed in October pending formal and more precise classifications.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

**945.506 Identification.**

The requirements of FAR 45.506 apply to Government property having a unit cost of \$1,000 or more.

**945.508 Physical inventories.**

The frequency of physical inventories shall be as follows:

(a) Permanently affixed plant (such as buildings, utilities, and fences)—Not less frequently than every 10 years.

(b) Capital equipment—Not less frequently than every two years. (See 945.505-14)

(c) Sensitive items—Not less frequently than every twelve months.

(d) Materials (held under inventory control)—Not less frequently than every twelve months.

(e) Precious metals—Not less frequently than every six months.

**945.570 Motor vehicle and aircraft management.**

(a) Normally, motor vehicles will not be furnished to fixed price or cost-reimbursable contractors. Further, Government-furnished motor vehicles may be provided to or acquired by contractors only when all of the criteria of FAR 45.304 are met and approved in writing by the contracting officer.

(b) Government-owned motor vehicles and aircraft shall be maintained and utilized by contractors in the most practical and economical manner consistent with DOE program requirements, safety consideration, fuel economy, and applicable laws and regulations.

(c) Contractors shall conform fully to the average fuel economy standards established by law and these regulations in the selection of Government-furnished motor vehicles.

**945.570-1 Classification of motor vehicles.**

Because of differences in controls or limitations on possession and use, Government vehicles are classified as follows:

(a) Passenger vehicles.

(1) Sedans and station wagons (small, subcompact, compact, mid-size, and large).

(2) Ambulances.

(3) Buses.

(b) Trucks.

(1) Light, less than 8,500 GVWR (Gross Vehicle Weight Rating).

(i) 4 x 2

(ii) 4 x 4

(2) Light, 8,500 to 12,499 GVWR.

(i) 4 x 2

(ii) 4 x 4

(3) Medium, 12,500 to 23,999 GVWR.

(4) Heavy, 24,000 GVWR or more.

(c) Special purpose vehicles.

(1) Fire trucks.

(2) Construction vehicles.

(3) Other vehicles equipped for special purposes.

**945.570-2 Acquisition of motor vehicles.**

(a) The GSA Interagency Motor Pool System (GSA-IMPS) is the first source of supply for providing motor vehicles to contractors; however, contracting officer

approval is required for contractors to utilize this service.

(b) Prior approval of GSA must be obtained before—

(1) Fixed-price contractors can use the GSA-IMPS;

(2) DOE-owned motor vehicles can be furnished to any contractor in an area served by a GSA-IMPS; and

(3) A contractor can commercially lease a motor vehicle for more than 60 days.

(c) GSA has the responsibility for acquisition of motor vehicles for Government agencies. All requisitions (GSA Form 1781) shall be processed in accordance with 41 CFR 101-26.501.

(d) Contractors shall submit all motor vehicle requirements to the contracting officer for approval.

(e) The acquisition of sedans and station wagons is limited to small, subcompact, and compact vehicles which meet Government fuel economy standards. The acquisition of light trucks is limited to those vehicles which meet the current fuel economy standards set by Executive Orders 12003 and 12375.

(f) Cost reimbursement contractors may be authorized by the contracting officer to utilize GSA Federal Supply Schedule 751, Motor Vehicle Rental, for short term rentals not to exceed 60 days, and are required to utilize available GSA consolidated leasing programs for long term (60 continuous days or longer) commercial leasing of passenger vehicles and light trucks.

(g) The Property and Equipment Management Division, Headquarters Procurement and Assistance Management Directorate (MA-422), shall certify all requisitions prior to submittal to GSA for the following:

(1) The acquisition of sedans and station wagons.

(2) The lease (60 continuous days or longer) of any passenger automobile.

(3) The acquisition or lease (60 continuous days or longer) of light trucks less than 8,500 GVWR.

(h) Purchase requisitions for other motor vehicles may be submitted directly to GSA when approved by the contracting officer.

(i) Contractors shall thoroughly examine motor vehicles acquired under a GSA contract for defects. Any defect shall be reported promptly to GSA, and repairs shall be made under terms of the warranty.

**945.570-3 Selection of type of motor vehicles.**

(a) All vehicles acquired for use, whether by purchase, rental, lease, forfeiture or transfer from another



agency, shall be limited to the minimum body size, engine size, maximum fuel efficiency, and only that operational equipment (if any) necessary to fulfill programmatic needs.

(b) The least expensive unit overall should be used, taking into consideration both acquisition and operating costs for units to be purchased, and rental rates for rented or leased units.

(c) Dual purpose vehicles capable of hauling both personnel and light cargo shall be used whenever appropriate to avoid the need for two vehicles when one can serve both purposes. However, truck-type or van vehicles shall not be acquired for passenger use merely to avoid limitations on the number of passenger vehicles which may be acquired.

#### 945.570-4 Identification of motor vehicles.

(a) Except as indicated in 945.570-4(b), DOE-owned and commercially leased (for 60 continuous days or longer) motor vehicles shall have Government license tags and the following identification, which shall be furnished and displayed as specified by the DOE contracting officer.

"For Official Use Only  
U.S. Government  
Department of Energy"

(b) Security vehicles may be exempted from the above identification requirements by the contracting officer. All other exemptions require approval by the Procurement Executive.

#### 945.570-5 Utilization of motor vehicles.

(a) Government-owned vehicles are to be used for official purposes only. Contracting officers may approve home-to-work or work-to-home transportation on a one-time exceptional basis. Home-to-work or work-to-home transportation on a continuing basis is discouraged; however, if justified, such use requires approval of the Head of the Contracting Activity and a determination that the facts sufficiently justify a conclusion of "official purpose." An authorization to use a motor vehicle for transportation between a domicile and place of employment shall be limited to a period of sixty days. Requests for renewals of authorizations shall be subject to the same justification as original requests, and must also show what attempts were made during the original period to eliminate the necessity for the request. Records, including full justification, of such approvals will be kept on file.

(b) The contractor shall prescribe and issue, subject to approval by the contracting officer, such local written guidelines regarding the use of motor vehicles or aircraft for "official

purposes" as may be necessary and appropriate for particular operating situations.

(c) The contractor shall establish written procedures to ensure that all motor vehicle operators are informed concerning:

(1) The statutory requirement that motor vehicles shall be used only for "official purposes";

(2) Personal responsibility for safe driving and operation of motor vehicles, and for compliance with Federal, State, and local laws and regulations, and all accident reporting requirements;

(3) The penalties for unauthorized use of motor vehicles;

(4) Procedures for reporting accidents;

(5) The prohibition against picking up strangers or hitchhikers or transporting family members;

(6) Care and control of credit cards; and

(7) Any other duties and responsibilities assigned to motor vehicle operators with regard to the use, care, operation, and maintenance of motor vehicles.

(d) Individual motor vehicle utilization cannot always be measured or evaluated strictly on the basis of miles operated or against any Department-wide mileage standard as stated in 41 CFR 109-38.5002. Other measures of use will need to be considered. Accordingly, as an aid in achieving maximum feasible utilization, local use objectives which represent practical units of measurement for vehicle utilization and for planning and evaluating future vehicle requirements should be established. Such objectives should generally be initiated by the organization involved and reviewed and adjusted as appropriate, but not less often than annually. The objectives will take into consideration past performance, future requirements, and special operating conditions and should be consistent with the justifications used to obtain vehicle authorizations. Both Department-wide and local objectives should be used in such a manner that their use does not stimulate vehicle use for the purpose of meeting the objectives. The ultimate standard against which vehicle use must be measured is that the minimum number of vehicles will be retained to satisfy program requirements.

(e) Methods and practices for achieving maximum economical utilization of motor vehicles shall include but not be limited to—

(1) The maximum use of equipment pooling arrangements, taxicabs, or other common service arrangements;

(2) The minimum, practicable assignment of equipment to individuals,

groups or specific organizational components;

(3) The careful selection of equipment types to permit the maximum appropriate use of multi-purpose equipment;

(4) The rotation of equipment between high and low mileage assignments where practicable to maintain the fleet in the best overall replacement age and mileage balance and operating economy, and

(5) The maintenance of individual equipment use records, such as trip tickets or vehicle logs, showing sufficiently detailed information to evaluate appropriateness of assignment and adequacy of use being made. If one-time use is involved, such as assignments from motor pools, the individual's trip records must, as a minimum, identify the vehicle and show the name of the operator, dates, destination, time of departure and return, and mileage.

#### 945.570-6 Maintenance of motor vehicles.

(a) Contractors shall maintain Government-owned vehicles according to a systematic written procedure and in accordance with manufacturer's specifications and the terms of the warranty and 41 CFR 101-38.10. The requirement for a written procedure may be waived by the contracting officer if the contractor has less than 15 Government-owned vehicles.

(b) Special attention shall be devoted to the warranty on each motor vehicle to ensure that maximum benefits are realized from each warranty. Defective materials and workmanship on vehicles under warranty should be corrected under the terms of the warranty to avoid maintenance and repair of such vehicles at Government expense.

#### 945.570-7 Disposition of motor vehicles.

(a) The contractor shall dispose of DOE-owned motor vehicles as directed by the contracting officer.

(b) DOE-owned motor vehicles may be disposed of as exchange/sale items when directed by the contracting officer; however, a designated DOE official must execute the Title Transfer forms.

#### 945.570-8 Reporting motor vehicle data.

(a) Contractors conducting motor vehicle operations shall forward annually (on or before November 1) to the contracting officer their plan for acquisition of motor vehicles for the next fiscal year for review, approval and submittal to DOE Headquarters. This plan shall conform to the fuel efficiency standards for motor vehicles for the applicable fiscal year, as established by



Executive Orders 12003 and 12375 and as implemented by GSA and current DOE directives. Additional guidance for the preparation of the plan will be issued by the contracting officer, as required.

(b) Contractors operating DOE-owned and/or commercially leased (for 60 continuous days or longer) motor vehicles shall prepare and submit the following annual year-end reports to the contracting officer:

(1) DOE Report of Motor Vehicle Data (passenger vehicles).

(2) DOE Report of Truck Data.

#### 945.570-9 Aircraft.

(a) Purchase of aircraft requires statutory authority. Contracting officers may authorize a lease, rental, hire, or loan of an aircraft if the period is less than 30 days. If longer than 30 days, approval must be obtained from the Procurement Executive.

(b) Aircraft shall be used for official purposes only.

#### Subpart 945.6—Reporting, Redistribution, and Disposal of Contractor Inventory

##### 945.601 Definitions.

"Personal property" (See 945.101).

##### 945.603 Disposal methods.

##### 945.603-70 Plant clearance function.

If the plant clearance function has not been formally delegated to another Federal agency, the contracting officer shall assume all responsibilities of the plant clearance officer identified in FAR Subpart 45.6.

##### 945.603-71 Disposal of radioactively contaminated personal property.

Special procedures regarding the disposal of radioactively contaminated property may be found at 41 CFR 109-45.50.

##### 945.607-2 Recovering precious metals.

(b) Excess precious metals shall be promptly reported to the contracting officer for review, approval and reporting to the DOE precious metals pool. This includes all precious metals in any form, including shapes, scrap or radioactively contaminated, except for silver. Only high grade nonradioactively contaminated silver should be reported to the precious metals pool. The Oak Ridge Operations Office is responsible for maintaining the DOE pool. Precious metals scrap will be reported to the DOE precious metals pool, operated by NLO, Inc., P.O. Box 39158, Cincinnati, Ohio 45239.

#### 945.608-2 Standard screening.

(b)(1) Prior to reporting excess property to GSA, all reportable property, as identified in Federal Property Management Regulations 41 CFR 101-43.4801, shall be reported to the contracting office. The contracting office shall transmit this information via terminal processing or hard copy to DOE Headquarters for centralized screening in the DOE Reportable Excess Automated Property System (REAPS). Agency screening will begin when the item is first included in the REAPS monthly catalog and will end upon the issuance of the following monthly catalog.

(i) REAPS requires the inclusion of a five character address code which identifies the reporting contractor. The address code will be assigned by DOE Headquarters upon receipt of a completed Address Notification form for the contractor or DOE office reporting the property as excess.

(ii) Excess screening documents and Address Notification forms shall be submitted to the Chief, Property and Supply Branch, REAPS, Office of Policy, Procurement and Assistance Directorate, Headquarters, by the contracting office.

#### 945.608-3 Agency screening.

Items shall be reported to the contracting office and should be screened informally within the contracting office's complex of contractors and with other known users of the property at other DOE locations.

#### 945.608-4 Limited screening.

(a) Prior to reporting to GSA, all nonreportable property, excluding scrap and salvage, shall be reported to the contracting office for a 15 day informal screening within the contracting office's complex of contractors and other appropriate DOE field locations.

#### 945.608-5 Special items screening.

Prior to reporting to GSA, that property in FAR 45.608-5 (a), (b), and (d) shall be reported and screened within DOE in accordance with 945.608-2 and 945.608-3.

(c) *Printing equipment.* All printing equipment excess to requirements shall be reported to the Office of Administrative Services, Headquarters.

#### 945.610-4 Contractor inventory in foreign countries.

Contractor inventory located in foreign countries will be utilized and disposed of in accordance with DOE-PMR 41 CFR 109-43.4, 44.3, and 45.51.

## PART 947—TRANSPORTATION

### Subpart 947.1—General

Sec.  
947.102 Transportation insurance.  
947.104-3 Cost-reimbursement contracts.

### Subpart 947.5 Ocean Transportation by U.S. Flag Vessels

#### 947.506 Procedures.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 947.1—General

#### 947.102 Transportation insurance.

(c)(1) If special circumstances dictate the need for the Government to buy insurance coverage, the contracting officer, after coordination with appropriate local transportation personnel shall ascertain that (i) there is no statutory prohibition, and (ii) funds for insurance are available.

#### 947.104-3 Cost-reimbursement contracts.

(d)(1) Include in contracts a statement requiring the contractor to use carriers providing services commensurate with DOE program needs, taking full advantage of special reduced rates where available.

### Subpart 947.5—Ocean Transportation by U.S. Flag Vessels

#### 947.506 Procedures.

For contract awards involving foreign suppliers which will necessitate ocean transportation, a copy of the award document is to be furnished to the Maritime Administration at the following address: Inter-Agency Liaison, Division of National Cargo, Office of Market Development, Maritime Administration, 400 7th Street, SW., Washington, D.C. 20590

## PART 949—TERMINATION OF CONTRACTS

### Subpart 949.1—General Principles

Sec.  
949.101 Authorities and responsibilities.  
949.106 Fraud or other criminal conduct.  
949.108-4 Authorization for subcontract settlements without approval or ratification.  
949.108-8 Assignment of rights under subcontracts.  
949.111 Review of proposed settlements.  
949.112-1 Partial payments.

### Subpart 949.2—Additional Principles for Fixed-Price Contracts Terminated for Convenience

949.206-1 Submission of settlement proposals.  
949.206-2 Bases for settlement proposals.



**Subpart 949.3—Additional Principles for Cost-Reimbursement Contracts Terminated for Convenience**

949.303-1 Submission of settlement proposal.

**Subpart 949.5—Contract Termination Clauses**

949.501 General.

949.505 Other termination clauses.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**Subpart 949.1—General Principles****949.101 Authorities and responsibilities.**

The Procurement Executive shall be notified prior to taking any action to terminate (a) contracts for the operation of Government-owned facilities, (b) any prime contract or subcontract in excess of \$10 million, and (c) any contract the termination of which is likely to provoke unusual interest.

**949.105 Fraud or other criminal conduct.**

Any evidence of fraud or other criminal conduct in connection with the settlement of a contract termination shall be reported in accordance with 909.406.

**949.108-4 Authorization for subcontract settlements without approval or ratification.**

The power to authorize a contractor to conclude settlements of its terminated subcontracts, when the amount of settlement is more than \$10,000, but not more than \$25,000, shall be exercised by contracting officers only with the approval of the Head of the Contracting Activity.

**949.108-8 Assignment of rights under subcontracts.**

The contracting officer's determination under FAR 49.108-8(b) that it is in the best interest of the Government to settle and pay directly a subcontractor's termination claim is subject to the approval of the Head of the Contracting Activity.

**949.111 Review of proposed settlements.**

(a) Heads of Contracting Activities shall establish settlement review boards for the review of each termination settlement or determination of amount due under the termination clause of a contract or approval or ratification of a subcontract settlement when the action involves \$50,000 or more.

(b) Settlement review boards may be established for actions below \$50,000 when considered desirable by the Head of the Contracting Activity or when specifically requested by the contracting officer.

(c) Proposed settlement agreements or determinations in excess of contractual authority of Heads of Contracting Activities will be transmitted to the Procurement Executive for review and approval.

(d) Contracting officers shall not conclude proposed settlement or determinations until the approvals required by this subsection have been obtained.

**949.112-1 Partial payments.**

(d) Protection of the Government's interest in partial payments, by means other than those specified in FAR 49.112-1(d), shall be subject to approval of the Head of the Contracting Activity.

**Subpart 949.2—Additional Principles for Fixed-Price Contracts Terminated for Convenience****949.205-1 Submission of settlement proposals.**

(c) When the standard forms are not appropriate for a particular contract, the Head of the Contracting Activity may authorize modification thereof. However, the certificate shall be substantially as set forth in the form.

**949.206-2 Bases for settlement proposals.**

(c) Settlement proposals shall not be submitted on any basis other than the inventory or total cost basis without the prior approval of the Head of the Contracting Activity.

**Subpart 949.3—Additional Principles for Cost-Reimbursement Contracts Terminated for Convenience****949.303-1 Submission of settlement proposal.**

When necessary, the Head of the Contracting Activity may authorize modification of the form prescribed in FAR 49.602-1. However, the certificate shall be substantially as set forth in the form.

**Subpart 949.5—Contract Termination Clauses****949.501 General.**

The standard clauses set forth in FAR Subpart 49.5 are applicable as prescribed subject to the following:

(a) Cost principles referenced in the various termination articles shall be in accordance with Part 931.

**949.505 Other termination clauses.**

(f) The clause at 952.249-70 is suggested for use in cost-plus-fixed-fee Architect-Engineer contracts.

**PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS****Subpart 950.1—General**

Sec.

950.104 Reports.

**Subpart 950.70—Indemnification of DOE Contractors**

950.7000 Scope of subpart.

950.7001 Applicability.

950.7002 Definitions.

950.7003 Statutory indemnity.

950.7004 Authority to negotiate statutory indemnity agreements.

950.7005 Substantial nuclear incident.

950.7006 Statutory indemnity contract article.

950.7007 Contractual assurance.

950.7008 "Representation" for use in subcontracts and purchase orders of prime contractor holding statutory indemnity agreement.

950.7009 Fees.

950.7010 Financial protection requirements.

950.7011 General contract authority indemnity.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**Subpart 950.1—General****950.104 Reports.**

The information required by FAR 50.104(b) for all actions taken under the extraordinary emergency authority shall be submitted to the Director, Contract Business Clearance Division, Headquarters no later than 30 days after the date of completion of processing the action. In the event no actions were taken under Pub. L. 85-804 during the preceding calendar year, a negative report should be submitted to the Director, Contract Business Clearance Division, Headquarters no later than January 20 of each year.

**Subpart 950.70—Indemnification of DOE Contractors**

950.7000 Scope of subpart.

This subpart describes the established policies concerning (a) indemnification of DOE contractors against public liability for a nuclear incident arising out of or in connection with the contract activity, and (b) indemnification of DOE contractors against liability for nonnuclear risks arising out of or in connection with the contract activity.

950.7001 Applicability.

(a) With respect to indemnification against public liability for a nuclear incident, the pertinent policies and procedures set forth in this subpart shall



be applicable in entering into indemnity agreements with:

(1) DOE contractors engaged in the operation of production or utilization facilities; and

(2) DOE contractors whose work entails the risk of public liability for a substantial nuclear incident.

(b) With respect to indemnification against liability for nonnuclear risks, the pertinent policies and procedures set forth in this subpart shall be applicable in entering into indemnity agreements with any DOE contractors.

#### 950.7002 Definitions.

"DOE contractor" means any DOE prime contractor, including any agency of the Federal Government with which DOE has entered into an interagency agreement.

"Construction contractor" means a DOE contractor who is constructing an installation for DOE which, when completed, will be a production or utilization facility.

"Nuclear incident" means:

(1) Any occurrence within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material; and

(2) Any such occurrence outside the United States, if such occurrence involves a facility or device owned by, and used by or under contract with, the United States.

"Person indemnified" means:

(1) With respect to a nuclear incident occurring within the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability; or

(2) With respect to any nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of activities under any contract with DOE or any project to which indemnification under the provisions of section 170d of the Atomic Energy Act 1954, as amended, has been extended, or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(3) With respect to a nonnuclear incident the person with whom an indemnity agreement is executed.

"Nuclear reactor" means an apparatus, other than an atomic weapon, designed or used to sustain

nuclear fission in a self-supporting chain reaction.

"Production facility" means:

(1) Any nuclear reactor designed or used primarily for the formation of plutonium or uranium 233; or

(2) Any facility designed or used for the separation of the isotopes of uranium or the isotopes of plutonium, except laboratory scale facilities designed or used for experimental or analytical purposes only; or

(3) Any facility designed or used for the processing of irradiated materials containing special nuclear material, except laboratory scale facilities designed or used for experimental or analytical purposes only.

"Public liability" means any legal liability (including liability for loss of, or damage to, or loss or use of property which is located at the site of and used in connection with the contract activity arising out of or resulting from a nuclear incident) except: (1) Claims under State or Federal workmen's compensation acts of employees of persons indemnified, who are employed at the site of and in connection with the activity where the nuclear incident occurs, and (2) claims arising out of an act of war. "Public liability" also includes damage to property of persons indemnified, provided that such property is covered under the terms of any financial protection that may be required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

"Utilization facility" means any nuclear reactor other than one designed or used primarily for the formation of plutonium or U 233.

#### 950.7003 Statutory indemnity.

Section 170d of the Atomic Energy Act of 1954, as amended, authorized DOE "to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident." Contractors identified in 950.7001(a) are eligible for such statutory indemnity.

#### 950.7004 Authority to negotiate statutory indemnity agreements.

(a) Heads of Contracting Activities are authorized to negotiate statutory indemnity agreements with contractors identified in 950.7001(a)(1).

(b) Pursuant to 950.7005, Heads of Contracting Activities may enter into a statutory indemnity agreement

whenever it has been determined that a contractor in 950.7001(a)(2) is engaged in activities involving the risk of public liability for a substantial nuclear incident. Such a determination may be based upon either the risk of liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work, or the risk of liability for a substantial nuclear incident caused by a product delivered to or for the DOE under the contract where such product is expected to be used in connection with a facility or device not covered by a statutory indemnity agreement. If, pursuant to 950.7005, a Head of a Contracting Activity determines that the maximum conceivable damage which could result from a nuclear incident arising in the course of a contractor's activities falls between \$1 million and \$60 million, they shall submit the proposed indemnification with a recommendation, and all supporting data, to the Head of the Agency, or designee, for appropriate action.

#### 950.7005 Substantial nuclear incident.

(a) With respect to 950.7001(a)(2), and pursuant to the provisions of 950.7004, a Head of a Contracting Activity may be required to determine whether a contractor's activities involve the risk of public liability for a substantial nuclear incident and thus make the contractor eligible to obtain a statutory indemnity agreement from the DOE. The determination by a Head of a Contracting Activity shall be based on the criteria in paragraph (b) below.

(b) If, after a study of the maximum conceivable damage which can result from an incident arising out of or in connection with the contractor's activities, the Head of a Contracting Activity concludes that the maximum conceivable damage per incident to property and persons is \$60 million or more, the contractor may be found to be under a risk of public liability for a substantial nuclear incident and the Head of the Contracting Activity is authorized to execute a statutory indemnity agreement under such a contract. If such a study of the maximum conceivable damage indicates a figure of \$1 million or less, the contractor should not be considered to have a risk of public liability for a substantial nuclear incident, and therefore, shall not be made a party to a statutory indemnity agreement. If the study indicates that the maximum conceivable damage falls between \$1 million and \$60 million, the Head of a Contracting Activity will submit the proposed indemnification of such contractor to the Head of the Agency or designee with a



recommendation and all supporting data.

(c) The Head of the Agency or designee may take one of the following actions:

(1) Determine that the contractor is under risk of public liability for a substantial nuclear incident and that the contractor should be extended a statutory indemnity agreement; or

(2) Determine that the contractor should not be extended a statutory indemnity.

(d) When statutory indemnity is not extended, the Head of the Agency or designee may authorize the Head of a Contracting Activity to authorize the contractor to purchase nuclear liability insurance or to offer the contractor a general authority indemnity agreement.

#### 950.7006 Statutory indemnity contract article.

The contract clause contained in 952.250-70 shall be incorporated in all contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work. The contract clause contained in 952.250-71 shall be incorporated in all contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability only for a substantial nuclear incident caused by a product delivered to or for the DOE, under the contract where such product is expected to be used in connection with a facility or device not covered by a statutory indemnity agreement.

#### 950.7007 Contractual assurance.

Heads of Contracting Activities are authorized to include assurances that the DOE will enter into a statutory indemnity agreement with the contractor who will operate a production or utilization facility on its completion. Such assurances may be authorized in contracts for:

(a) Architect-engineer services in connection with the construction of a production or utilization facility;

(b) Component parts for a production or utilization facility;

(c) Construction at a production or utilization facility, where the work does not entail the risk of a substantial nuclear incidences; or

(d) Equipment or services which would be a part of, or contribute to, or be used in connection with the construction or operation of a production or utilization facility.

Assurances will be given only to those contractors and suppliers which might be held liable in connection with a substantial nuclear incident occurring after completion of the facility. The clause to be used to provide contractual assurance is found in 952.250-72.

#### 950.7008 "Representation" for use in subcontracts and purchase orders of prime contractor holding statutory indemnity agreement.

(a) A DOE contractor with whom a statutory indemnity agreement has been executed in the form contained in 952.250-70 may include in any of its subcontracts and purchase orders a representation that the work under the prime contract is covered by a statutory indemnity agreement with the DOE, and that this indemnity covers all persons who may be liable for public liability for any nuclear incident arising out of or in connection with the activity under the prime contract. A suggested form of "representation" that may be provided to the contractor follows:

The contractor represents that there is included in its prime contract with DOE an indemnity agreement, entered into by DOE under the authority of Section 170 of the Atomic Energy Act of 1954, as amended by Public Law 85-256 (the "Price-Anderson Act"), a copy of which may be obtained from the contractor (or is attached hereto); that, under said agreement, DOE has agreed to indemnify the contractor and other persons indemnified, including the subcontractor, against claims for public liability (as defined in said Act) arising out of or in connection with the contractual activity; that the indemnity applies to covered nuclear incidents which (1) take place at a "contract location" (which term, as defined in the indemnity agreement, does not include the location of the subcontractor's plant and facilities); or (2) arise out of or in the course of transportation of source, special nuclear or nuclear by-product material to or from a "contract location;" or (3) involve items produced or delivered under the prime contract. The obligation of DOE to indemnify is subject to the conditions stated in the indemnity agreement.

(b) The DOE shall not approve the inclusion, in the subcontracts and purchase orders of an indemnified prime contractor, of any provision whereby the prime contractor indemnifies the subcontractor or supplier against public liability for a nuclear incident because any such liability will be covered by the statutory indemnity agreement of the prime contractor.

#### 950.7009 Fees.

No fee will be charged a DOE contractor for a statutory indemnity agreement.

#### 950.7010 Financial protection requirements.

(a) DOE contractors with whom statutory indemnity agreements under the authority of section 170d of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents, except: (1) That DOE contractors now covered by insurance against such liability, with the approval of the DOE, may continue to carry such insurance; and (2) with the approval of the Office of Industrial Relations, contractors engaged in the operation of DOE facilities may be required or permitted to furnish financial protection in an amount not to exceed \$1 million.

(b) If nuclear liability insurance is carried by a contractor who is a Nuclear Regulatory Commission (NRC) licensee, the DOE will pay an equitable portion of the insurance premium under its contract (or would include such an item in the calculation of a fixed price), but normally a statutory indemnity agreement would not be granted under the contract.

#### 950.7011 General contract authority indemnity.

(a) The DOE also has general contract authority to enter into indemnity agreements with its contractors. Under such authority a certain measure of protection is extended to the DOE contractor against risk of liability, but the assumption of liability by DOE will be expressly subject to the availability of appropriated funds. Prior to enactment of section 170 of the Atomic Energy Act 1954, as amended, this authority was exercised in a number of Atomic Energy Commission contracts and this type of indemnification remains in some DOE contracts.

(b) It is the policy of the DOE, subsequent to the enactment of section 170, to restrict indemnity agreements with DOE contractors, with respect to protection against public liability for a nuclear incident, to the statutory indemnity provided under section 170. However, it is recognized that circumstances may exist under which a DOE contractor may be exposed to a risk of public liability for a nuclear occurrence which would not be covered by the statutory indemnity.

(c) While it is normally DOE policy to require its contractors to obtain insurance coverage against public liability for nonnuclear risks, there may be circumstances in which a contractual indemnity may be warranted to protect



a DOE contractor against liability for uninsured nonnuclear risks.

(d) If circumstances as mentioned in paragraph (b) or (c) of this section do arise, it shall be the responsibility of the Heads of Contracting Activities to submit to the Head of the Agency or designee for review and decision, all pertinent information concerning the need for, or desirability of, providing a general authority indemnity to a DOE contractor.

(e) Where the indemnified risk is nonnuclear, the amount of general authority indemnity extended to a fixed-price contractor should normally have a maximum obligation equivalent to the amount of insurance that the contractor usually carries to cover such risks in its other commercial operations or, if the risk involved is dissimilar to those normally encountered by the contractor, the amount that it otherwise would have reasonably procured to insure this contract risk.

(f) In the event that a DOE contractor has been extended both a statutory indemnity and a general authority indemnity, the general authority indemnity will not apply to the extent that the statutory indemnity applies.

(g) The provisions of this subsection do not restrict or affect the policy of DOE to pay its cost-reimbursement type contractors for the allowable cost of losses and expenses incurred in the performance of the contract work, within the maximum amount of the contract obligation.

## PART 951—USE OF GOVERNMENT SOURCES BY CONTRACTORS

### Subpart 951.1—Contractor Use of Government Supply Sources

Sec.

951.101 Policy.

951.102 Authorization to use Government supply sources.

951.103 Ordering from Government supply sources.

### Subpart 951.2—Contractor Use of Interagency Motor Pool Vehicles

951.201 Policy.

Authority: Section 644 of the Department of Energy Organization Act, Pub L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### Subpart 951.1—Contractor Use of Government Supply Sources

951.101 Policy.

(a) It is DOE policy that contractors performing under cost-reimbursement contracts should meet their requirements from Government sources of supply when these sources are available to them, and if it is

economically advantageous or otherwise in the best interest of the Government.

### 951.102 Authorization to use Government supply sources.

(a) The Head of the Contracting Activity may authorize contractors performing under cost-reimbursement contracts and subcontractors performing under cost-reimbursement contracts, where all higher tier contracts and subcontracts are cost-type, to use Government supply sources in accordance with the requirements and procedures in FAR Part 51, DOE PMR 41 CFR 109-26, and any necessary approval from the agency involved. This authority may be redelegated to the level of contracting officer. Direct acquisition by the DOE, rather than by a contractor under cost-reimbursement contracts, shall be required where deemed necessary by the Head of the Contracting Activity in order to carry out special requirements of appropriation acts or other applicable laws relating to particular items.

(c)(1) The DOE central point of contact for the assignment, correction, or deletion of FEDSTRIP activity address codes is the Property and Equipment Management Division, Office of Policy, Procurement and Assistance Directorate, Headquarters.

(e)(4)(iii) Materials, supplies, and equipment acquired from Government sources of supply under the procedures described herein must be used exclusively in connection with Government work, except as otherwise authorized by the Head of the Contracting Activity.

### 951.103 Ordering from Government supply sources.

(b) The Procurement Executive shall be informed of instances in which GSA sources of supply are not used because of the quality of the items available from GSA or when a Federal Supply Schedule contractor refuses to honor an order.

### Subpart 951.2—Contractor Use of Interagency Motor Pool Vehicles

951.201 Policy.

(a) If it is in the Government's interest, the contracting officer may authorize cost-reimbursement contractors to obtain, for official purposes only, interagency motor pool vehicles and related services, including: (1) Fuel and lubricants, (2) vehicle inspection, maintenance, and repair, (3) vehicle storage, and (4) commercially rented vehicles for short-term use under Federal Supply Schedule Industrial Group 751.

## PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### Subpart 952.0—General

Sec.

952.000 Scope of part.

952.001 General policy.

### Subpart 952.1—Instructions for Using Provisions and Clauses

952.102-1 Incorporation by reference.

### Subpart 952.2—Text of Provisions and Clauses

952.202 Clauses related to definitions.

952.202-1 Definitions.

952.204 Clauses related to administrative matters.

952.204-2 Security requirements.

952.204-70 Classification.

952.204-71 Sensitive foreign nations controls.

952.204-72 Disclosure of information.

952.204-73 Foreign ownership, control, or influence over contractor (Representation).

952.204-74 Foreign ownership, control, or influence over contractor.

952.208 Clauses related to required sources of supply.

952.208-2 Tagging of leased vehicles.

952.208-70 Printing.

952.209 Clauses related to contractor's qualifications.

952.209-70 Organizational conflicts of interest—disclosure or representation.

952.209-71 Organizational conflicts of interest—general.

952.209-72 Organizational conflicts of interest—special clause.

952.212 Clauses related to contract delivery or performance.

952.212-70 Rated or authorized controlled material orders for energy programs.

952.212-71 Priorities, allocations and allotments for energy programs.

952.212-72 [Reserved]

952.212-73 Cost and schedule control systems criteria.

952.214 Clauses related to formal advertising.

952.214-27 Price reduction for defective cost or pricing data—modifications—formal advertising.

952.215 Clauses related to contracting by negotiation.

952.215-18 Order of precedence.

952.215-22 Price reduction for defective cost or pricing data.

952.215-23 Price reduction for defective cost or pricing data—modifications.

952.215-70 Required subcontractor representations and certifications.

952.216 Clauses related to types of contracts.

952.261-7 Allowable cost and payment.

952.216-15 Predetermined indirect cost rates.

952.217 Clauses related to special contracting methods.

952.217-70 Acquisition of real property.

952.219 Clauses related to small business.



- 952.219-9 Small business and small disadvantaged business subcontracting plan.
- 952.223 Clauses related to environment, conservation, and occupational safety.
- 952.223-71 Safety and health (Government-owned or leased facility).
- 952.223-72 Radiation protection and nuclear criticality.
- 952.223-73 [Reserved]
- 952.223-74 Nuclear facility safety applicability.
- 952.223-75 Preservation of individual occupational radiation exposure records.
- 952.223-76 [Reserved]
- 952.224 Clause relating to protection of privacy and freedom of information.
- 952.224-70 Paperwork Reduction Act.
- 952.227 Provisions and clauses related to patents, technical data, and copyrights.
- 952.227-70 [Reserved]
- 952.227-71 Patent rights—small business firms or nonprofit organizations.
- 952.227-72 [Reserved]
- 952.227-73 Additional technical data requirements.
- 952.227-74 [Reserved]
- 952.227-75 Rights in technical data—long form.
- 952.227-76 Rights in data—special works.
- 952.227-77 Rights in technical data—short form.
- 952.227-78 Rights in technical data—facility.
- 952.227-79 Limited rights in proprietary data.
- 952.227-80 Technical data certification.
- 952.227-81 Royalty payments certification.
- 952.227-82 Rights to proposal data.
- 952.227-83 Identification of proprietary data.
- 952.227-84 Notice of right to request patent waiver.
- 952.231-70 Date of incurrence of cost.
- 952.232 Clauses related to contract financing.
- 952.232-1 Payments.
- 952.232-2 Payments under fixed-price research and development contracts.
- 952.232-3 Payments under personal services contracts.
- 952.232-4 Payments under transportation contracts and transportation-related services contracts.
- 952.232-5 Payments under fixed-price construction contracts.
- 952.232-6 Payments under communication service contracts with common carriers.
- 952.232-7 Payments under time-and-materials and labor-hour contracts.
- 952.232-8 Discounts for prompt payment.
- 952.232-10 Payments under fixed-price architect engineer contracts.
- 952.232-70 Payment due dates, invoice requirements and penalties.
- 952.232-71 Payment due dates and invoice requirements.
- 952.232-72 Fixed-price purchase order payment provisions.
- 952.232-73 Payment methods.
- 952.235-70 Key personnel.
- 952.236 Construction and architect-engineer contracts.
- 952.236-70 Administrative terms for architect-engineer contracts.
- 952.236-71 Inspection in architect-engineer contracts.

- 952.236-72 Nonrefundable fee for plans and specifications.
- 952.245 Clauses related to Government property.
- 952.245-2 Government property (fixed-price contracts).
- 952.245-5 Government property (cost-reimbursement, time and material, or labor-hour contracts).
- 952.247-70 Foreign travel.
- 952.249 Clauses related to termination.
- 952.249-70 Termination clause for cost-reimbursement architect-engineer contract.
- 952.250 Clauses related to indemnification of contractors.
- 952.250-70 Nuclear hazards indemnity.
- 952.250-71 Nuclear hazards indemnity—product liability.
- 952.250-72 Indemnity assurance to architect-engineer or supplier prior to operation of a production or utilization facility.

Authority: Section 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### Subpart 952.0—General

##### 952.000 Scope of part.

This part implements FAR Part 52 which sets forth contract clauses for use in connection with the acquisition of personal property and nonpersonal services (including construction), and supplements, as well as modifies, FAR Part 52 by prescribing certain modifications to be made to FAR clauses when used in DOE contracts and specifying certain DOE contract clauses to be used in addition to or in place of such FAR clauses.

##### 952.001 General policy.

It is DOE policy to use the prescribed FAR and DOE contract clauses wherever practicable. Uniformity in the use of contract clauses helps to ensure impartial treatment of all contractors, expedites negotiation and contract review, and facilitates contract administration.

#### Subpart 952.1—Instructions for Using Provisions and Clauses

##### 952.102-1 Incorporation by reference.

(a) Preprinted standard contract clauses (clause sets) and solicitation representations and certifications provisions will be maintained by the Office of Policy for use by DOE contracting activities during the initial Federal Acquisition Regulations System familiarization period. The clause sets contain the FAR and DEAR clauses required for specific contract types. Contracting Activities will be responsible for including necessary additions and alterations in individual

contracts to ascertain that the clauses are current and appropriate to the circumstances of the individual contract. The concept of preprinted clause sets is designed to reduce the review burden on both the Contracting Activities and Department's contractors. Use of the preprinted clause sets reduces the review burden for an individual contract award since once the clause sets have been reviewed and understood for a particular contract type, individual contract reviews can be limited to examination of the alterations and additions used in conjunction with the preprinted clause sets. This practice eliminates the confusion and expense of the Department's contractors which would be caused were each contracting activity to pursue its own approach regarding contract clauses.

(b) At a later date, when the FAR and DEAR clause requirements are familiar to both DOE personnel and the Department's contractors, the Department will consider incorporation by reference. Incorporation by reference is the practice of reducing the bulk of contract documents by listing only the title, regulatory citation, and date of a particular clause rather than its full text. The full text of the clause can be obtained by referring to a copy of the Code of Federal Regulations, Title 48, Chapter 1 for FAR clauses or Title 48, Chapter 9 for DEAR clauses.

#### Subpart 952.2—Text of Provisions and Clauses

##### 952.202 Clauses related to definitions.

##### 952.202-1 Definitions.

(a) The contracting officer shall substitute the following for paragraph (a) of the clause at FAR 52.202-1.

(a) The term "Head of Agency" means the Secretary, Deputy Secretary or Under Secretary of the Department of Energy.

(b) The following shall be added as paragraph (d) except it will be designated paragraph (c) if Alternate I of the clause is used.

(d) The term "DOE" means the Department of Energy.

##### 952.204 Clauses related to administrative matters.

##### 952.204-2 Security requirements.

The following clause shall be included in contracts entered into under section 31 (research assistance) or 41 (ownership and operation of production facilities) of the Atomic Energy Act of 1954, as amended, and in other contracts and subcontracts, which involve or are likely to involve classified information.



## Security (April 1984)

(a) Contractor's duty to safeguard all classified information, special nuclear material, and other DOE property. The contractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding all classified information, and protecting against sabotage, espionage, loss and theft, the classified documents and material in the contractor's possession in connection with the performance of work under this contract. Except as otherwise expressly provided in this contract, the contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter in the possession of the contractor or any person under the contractor's control in connection with performance of this contract. If retention by the Contractor of any classified matter is required after the completion or termination of the contract and such retention is approved by the contracting officer, the contractor will complete a certificate of possession to be furnished to DOE specifying the classified matter to be retained. The certification shall identify the items and types or categories of matter retained, the conditions governing the retention of the matter, and the period of retention, if known. If the retention is approved by the contracting officer, the security provisions of the contract will continue to be applicable to the matter retained. Special nuclear material will not be retained after the completion or termination of the contract.

(b) *Regulations.* The contractor agrees to conform to all security regulations and requirements of DOE.

(c) *Definition of classified information.* The term "classified information" means Restricted Data, Formerly Restricted Data, or National Security Information.

(d) *Definition of restricted data.* The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.

(e) *Definition of formerly restricted data.* The term "Formerly Restricted Data" means all data removed from the Restricted Data category under section 142 d. of the Atomic Energy Act of 1954, as amended.

(f) *Definition of National Security Information.* The term "National Security Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced for or by, or is under the control of the United States Government, that has been determined pursuant to Executive Order 12356 or prior Orders to require protection against unauthorized disclosure, and which is so designated.

(g) *Definition of Special Nuclear Material (SNM).* SNM means: (1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, as amended, has been determined to be special nuclear material,

but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(h) *Security clearance of personnel.* The contractor shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12356, and the DOE's regulations or requirements applicable to the particular level and category of classified information to which access is required.

(i) *Criminal liability.* It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any classified information that may come to the contractor or any person under the contractor's control in connection with work under this contract, may subject the contractor, its agents, employees, or subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2100 et seq.; 18 U.S.C. 793 and 794; and Executive Order 12356).

(j) *Subcontracts and purchase orders.* Except as otherwise authorized in writing by the contracting officer, the contractor shall insert provisions similar to the foregoing in all subcontracts and purchase orders under this contract.

## 952.204-70 Classification.

The following clause shall be included in all contracts which involve classified information:

## Classification (Apr. 1984)

In the performance of the work under this contract, the contractor shall ensure that an Authorized Original Classifier or Derivative Classifier shall assign classifications to all documents, material, and equipment originated or generated under the contract in accordance with classification regulations and guidance furnished to the contractor by the DOE. Every subcontract and purchase order issued hereunder involving the origination or generation of classified documents, material, or equipment shall include a provision to the effect that in the performance of such subcontract or purchase order, the subcontractor or supplier shall ensure that an Authorized Original Classifier or Derivative Classifier shall assign classifications to all such documents, materials, and equipment in accordance with classification regulations and guidance furnished to such subcontractor or supplier by the contractor.

## 952.204-71 Sensitive Foreign nations controls.

In accordance with 904.404(d)(3), the contracting officer shall include the following clause:

## Sensitive Foreign Nations Controls (Apr. 1984)

(a) In connection with any activities in the performance of this contract, the contractor agrees to comply with the "Sensitive Foreign Nations Controls" requirements attached to

this contract, relating to those countries, which may from time to time, be identified to the contractor by written notice as sensitive foreign nations. The contractor shall have the right to terminate its performance under this contract upon at least 60 days' prior written notice to the contracting officer if the contractor determines that it is unable, without substantially interfering with its policies or without adversely affecting its performance to continue performance of the work under this contract as a result of such notification. If the contractor elects to terminate performance, the provisions of this contract regarding termination for the convenience of the Government shall apply.

(b) The provisions of this clause shall be included in any subcontracts.

## 952.204-72 Disclosure of information.

This clause may be used in place of the clauses entitled "Security," 952.204-2, and "Classification," 952.204-70, in contracts with educational institutions for research involving nuclear technology which could but is not expected to produce classified information or restricted data:

## Disclosure of Information (Apr. 1984)

(a) It is mutually expected that the activities under this contract will not involve classified information. It is understood, however, that if in the opinion of either party, this expectation changes prior to the expiration or terminating of all activities under this contract, said party shall notify the other party accordingly in writing without delay. In any event, the contractor shall classify, safeguard, and otherwise act with respect to all classified information in accordance with applicable law and the requirements of DOE, and shall promptly inform DOE in writing if and when classified information becomes involved, or in the mutual judgment of the parties it appears likely that classified information or material may become involved. The contractor shall have the right to terminate performance of the work under this contract and in such event the provisions of this contract respecting termination for the convenience of the Government shall apply.

(b) The contractor shall not permit any individual to have access to classified information except in accordance with the Atomic Energy Act 1954, as amended, Executive Order 12356, and DOE's regulations or requirements.

(c) The term "Restricted Data" as used in this article means all data concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

## 952.204-73 Foreign ownership, control, or influence over contractor (Representation).

As prescribed in 904.7005(a), insert the following provision in all solicitations:



for contracts subject to the provisions of 904.70.

#### Foreign Ownership, Control, or Influence Over Contractor (Apr. 1984)

(a) For purposes of this provision, a foreign interest is defined as any of the following:

(1) A foreign government or foreign government agency;

(2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;

(3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S., which is owned, controlled, or influenced by a foreign government, agency, firm, corporation, or person; or

(4) Any person who is not a U.S. citizen.

(b) Foreign ownership, control, or influence (FOCI) means the situation where the degree of ownership, control, or influence over a contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or significant quantity of special nuclear material as defined in 10 CFR Part 710 may result.

(c) If the offeror/bidder has not previously submitted responses to the following questions to DOE as part of the facility security clearance process, then it shall answer the following questions. Answer each question in either the "yes" or "no" column. If the answer is yes, furnish in detail on a separate sheet of paper all the information requested in parentheses. Copies of information which responds to these questions and which was submitted to other Government agencies may be submitted as responses to these questions if the earlier responses are accurate, complete, and current.

| Question                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Yes | No |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|----|
| 1. Does a foreign interest own or have beneficial ownership in 5% or more of your organization's voting securities?<br>(Identify the percentage of any class of shares or other securities issued which are owned by foreign interests, listed by country. If you answer "Yes" and have received from an investor a copy of Schedule 13D and/or Schedule 13G filed by the investors with the Securities and Exchange Commission, you are to attach a copy of Schedule 13D and/or Schedule 13G.) |     |    |
| 2. Does your organization own 10% or more of any foreign interest?<br>(Furnish the name of the foreign interest, address by country, and the percentage owned. Include name and title of officials of your organization who occupy positions with the foreign interest, if any.)                                                                                                                                                                                                                |     |    |
| 3. Do any foreign interests have management positions such as directors, officers, or executive personnel in your organization?<br>(Furnish full information concerning the identity of the foreign interest and the position he/she holds in your organization.)                                                                                                                                                                                                                               |     |    |
| 4. Does any foreign interest control or influence, or is any foreign interest in a position to control or influence the election, appointment, or tenure of any of your directors, officers, or executive personnel?                                                                                                                                                                                                                                                                            |     |    |

| Question                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Yes | No |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|----|
| (Identify the foreign interest(s) and furnish full details concerning the control or influence.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |     |    |
| 5. Does your organization have any contracts, binding agreements, understandings, or arrangements with a foreign interest(s) that cumulatively represent 10% or more of your organization's gross income?<br>(Furnish the name of the foreign interest, country, nature of agreement or involvement. Agreements include licensing, sales, patent exchange, trade secrets, agency, cartel, partnership, joint venture, proxy, etc. Give overall percentage by country as related to total income and type of services or products in general terms. If you answer "Yes" and have received from the foreign interest a copy of Schedule 13D and/or Schedule 13G filed by the foreign interest with the Securities and Exchange Commission, you are to attach a copy of Schedule 13D and/or Schedule 13G.)                                                                                             |     |    |
| 6. Is your organization indebted to foreign interests?<br>(Furnish the amount of indebtedness as related to the current assets of the organization and identify the creditor. Include specifics as to the type of indebtedness and what, if any, collateral, including voting stock, has been furnished or pledged. If any debentures are convertible, specifics about the indebtedness, collateral, if any, and what will be received after conversion are to be furnished.)                                                                                                                                                                                                                                                                                                                                                                                                                       |     |    |
| 7. Does your organization derive any income from Communist countries included in Country Groups P, Q, W, Y, and Z in Supplement No. 1 in 15 CFR Part 370?<br>(Discuss in detail any income derived from Communist countries, including percentage from each such country as related to total income, and the type of services or products involved.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |    |
| 8. Is 5% or more of any class of your organization's securities held in "nominee shares," in "street names," or in some other method which does not disclose beneficial owner of equitable title?<br>(Identify each foreign institutional investor holding 5 percent or more of the voting stock. Identification should include the name and address of the investor and percentage of stock held. State whether the investor has attempted to, or has, exerted any management control or influence over the appointment of directors, officers, or other key management personnel, and whether such investors have attempted to influence the policies of the corporation. If you have received from the investor a copy of the Schedule 13D and/or Schedule 13G filed by the investor with the Securities and Exchange Commission, you are to attach a copy of Schedule 13D and/or Schedule 13G.) |     |    |
| 9. Does your organization have interlocking directors with foreign interests?<br>(Include identifying data on all such directors. If they have a security clearance, so state. Also indicate the name and address of all other corporations with which they serve in any capacity.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |     |    |
| 10. Are there any citizens of foreign countries employed by, or who may visit, your offices or facilities in a capacity which may permit them to have access to classified information or a significant quantity of special nuclear material?<br>(Provide complete information by identify the individuals and the country of which they are citizens.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |     |    |
| 11. Does your organization have foreign involvement not otherwise covered in your answers to the above questions?<br>(Describe the foreign involvement in detail, including why the involvement would not be reportable in the preceding questions.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |    |

#### Certification

( ) The offeror/bidder certifies that the entries made above are accurate, complete, and current to the best of my knowledge and belief and are made in good faith.

( ) The offeror/bidder certifies that the information requested above has previously been submitted to DOE as required for a facility security clearance and that the information is accurate, complete and current.

Date Certified \_\_\_\_\_  
By \_\_\_\_\_  
Offeror/Bidder \_\_\_\_\_  
Title \_\_\_\_\_  
Address \_\_\_\_\_  
Signature and Date \_\_\_\_\_

(d) Prior to award of a contract under this solicitation, the DOE must determine that award of the contract to the offeror/bidder will not pose an undue risk to the common defense and security as a result of its access to classified information or a significant quantity of special nuclear material in the performance of the contract. In making the determination, the contracting officer may consider a voting trust or other arrangements proposed by the offeror/bidder to mitigate or avoid FOCI. The contracting officer may require the offeror/bidder to submit such additional information as deemed pertinent to this determination.

(e) The offeror/bidder shall require any subcontractors having access to classified information or a significant quantity of special nuclear material to submit the certifications in (c) above directly to the DOE contracting officer.

(f) Information submitted by the offeror/bidder in response to the questions in (c) above is to be used solely for purposes of evaluating foreign ownership, control, or influence and shall be treated by DOE, to the extent permitted by law, as business or financial information submitted in confidence.

#### 952.204-74 Foreign ownership, control, or influence over contractor.

As prescribed in 904.7005(b), insert the following contract clause in new contracts and contract modifications to existing contracts subject to 904.70.

#### Foreign Ownership, Control, or Influence Over Contractor (Apr 1984)

(a) For purposes of this clause, a foreign interest is defined as any of the following:

(1) A foreign government or foreign government agency;

(2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;

(3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S., which is owned, controlled, or influenced by a foreign government, agency, firm, corporation or person; or

(4) Any person who is not a U.S. citizen.

(b) Foreign ownership, control, or influence (FOCI) means the situation where the degree of ownership, control, or influence over a



contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information, special nuclear material as defined in 10 CFR Part 710, may result.

(c) For purposes of this clause, subcontractor means any subcontractor at any tier and the term "contracting officer" shall mean DOE contracting officer. When this clause is included in a subcontract, the term "contractor" shall mean subcontractor and the term "contract" shall mean subcontract.

(d) The contractor shall immediately provide the contracting officer written notice of any changes in the extent and nature of FOCI over the contractor which would affect the answers to the questions presented in DEAR 952.204-73. Further, notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the contracting officer.

(e) In those cases where a contractor has changes involving FOCI, the DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, the contracting officer shall consider proposals made by the contractor to avoid or mitigate foreign influences.

(f) If the contracting officer at any time determines that the contractor is, or is potentially, subject to FOCI, the contractor shall comply with such instructions as the contracting officer shall provide in writing to safeguard any classified information or significant quantity of special nuclear material.

(g) The contractor agrees to insert terms that conform substantially to the language of this clause including this paragraph (g) in all subcontracts under this contract that will require access to classified information or a significant quantity of special nuclear material. Additionally, the contractor shall require such subcontractors to submit a completed certification required in DEAR 952.204-73 prior to award of a subcontract. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the contracting officer.

(h) Information submitted by the contractor or any affected subcontractor as required pursuant to this clause shall be treated by DOE to the extent permitted by law, as business or financial information submitted in confidence to be used solely for purposes of evaluating FOCI.

(i) The requirements of this clause are in addition to the requirement that a contractor obtain and retain the security clearances required by the contract. This clause shall not operate as a limitation on DOE's rights, including its rights to terminate this contract.

(j) The contracting officer may terminate this contract for default either if the contractor fails to meet obligations imposed by this clause, e.g., provide the information required by this clause, comply with the contracting officer's instructions about safeguarding classified information, or make

this clause applicable to subcontractors, or if, in the contracting officer's judgment, the contractor creates an FOCI situation in order to avoid performance or a termination for default. The contracting officer may terminate this contract for convenience if the contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem.

#### **952.208 Clauses related to required sources of supply.**

##### **952.208-7 Tagging of leased vehicles.**

Insert the following clause when leasing commercial vehicles for periods in excess of 60 days.

##### **Tagging of Leased Vehicles (Apr 1984)**

(a) DOE intends to use U.S. Government license tags.

(b) While it is the intention that vehicles leased hereunder shall operate on Federal tags, the DOE reserves the right to utilize State tags if necessary to accomplish its mission. Should State tags be required, the contractor shall furnish the DOE the documentation required by the State to acquire such tags.

##### **952.208-70 Printing.**

Title 44, United States Code, "Public Printing and Documents," establishes policies regarding public printing and documents within the Federal Government. It provides that public printing will be accomplished by the Government Printing Office, its regional offices or authorized departmental printing plants. It provides a limited exemption for contractors. Requirements exceeding that limitation are to be accomplished utilizing Government resources. To facilitate this, contracting officers shall furnish the necessary forms and instructions to contractors, as called for by DOE Order 1340.1, and include the following clause in all contracts:

##### **Printing (Apr 1984)**

The contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single unit, or no more than 25,000 units in the aggregate of multiple units, will not be deemed to be printing. A unit is defined as one sheet, size 8½ by 11 inches one side only, one color. A requirement is defined as a single publication document.

(1) The term "printing" includes the following processes: composition, plate making, presswork, binding, microform publishing, or the end items produced by such processes.

(2) If fulfillment of the contract will necessitate reproduction in excess of the limits set forth above, the contractor shall notify the contracting officer in writing and obtain the contracting officer's approval prior to acquiring on DOE's behalf production, acquisition, and dissemination of printed matter. Such printing must be obtained from the Government Printing Office (GPO), a contract source designated by GPO or a Joint Committee on Printing authorized federal printing plant.

(3) Printing services not obtained in compliance with this guidance will result in the cost of such printing being disallowed.

(4) The Contractor will include in each of his subcontracts hereunder a provision substantially the same as this clause including this paragraph (4).

#### **952.209 Clauses related to contractor's qualifications.**

##### **952.209-70 Organizational conflicts of interest—disclosure or representation.**

Use the following solicitation provision under the circumstances described at 909.570.

##### **Organizational Conflicts of Interest Disclosure or Representation (Apr 1984)**

It is Department of Energy policy to avoid situations which place an offeror in a position where its judgment may be biased because of any past, present, or currently planned interest, financial or otherwise, the offeror may have which relates to the work to be performed pursuant to this solicitation or where the offeror's performance of such work may provide it with an unfair competitive advantage. (As used herein, "offeror" means the proposer or any of its affiliates or proposed consultants or subcontractors of any tier.) Therefore:

(a) The offeror shall provide a statement which describes in a concise manner all relevant facts concerning any past, present or currently planned interest (financial, contractual, organizational, or otherwise) relating to the work to be performed hereunder and bearing on whether the offeror has a possible organizational conflict of interest with respect to (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage. The offeror may also provide relevant facts that show how its organizational structure and/or management systems limit its knowledge of possible organizational conflicts of interest relating to other divisions or sections of the organization and how that structure or system would avoid or mitigate such organizational conflict.

(b) In the absence of any relevant interests referred to above, the offeror shall submit a statement certifying that to its best knowledge and belief no such facts exist relevant to possible organizational conflicts of interest. Proposed consultants and subcontractors are responsible for submitting information and may submit it directly to the contracting officer.



(c) The Department will review the statement submitted and may require additional relevant information from the offeror. All such information, and any other relevant information known to the Department, will be used to determine whether an award to the offeror may create an organizational conflict of interest is found to exist, the Department may (1) impose appropriate conditions which avoid such conflict, (2) disqualify the offeror, or (3) determine that it is otherwise in the best interest of the United States to contract with the offeror by including appropriate conditions mitigating such conflict in the contract awarded.

(d) The refusal to provide the disclosure or representation and any additional information as required shall result in disqualification of the offeror for award. The nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award, or if such nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated for default. The offeror may also be disqualified from subsequent related Department contracts, and be subject to such other remedial action as may be permitted or provided by law or in the resulting contract. The attention of the offeror in complying with this provision is directed to 18 U.S.C. 1001.

(e) Depending on the nature of the contract activities, the offeror may, because of possible organizational conflicts of interest, propose to exclude specific kinds of work from the statement, unless the solicitation specifically prohibits such exclusion. Any such proposed exclusion by an offeror shall be considered by the Department in the evaluation of proposals, and if the Department considers the proposed excluded work to be an essential or integral part of the required work, the proposal may be rejected as unacceptable.

(f) No award shall be made until the disclosure or representation has been evaluated by the Government. Failure to provide the disclosure or representation will be deemed to be a minor informality (FAR 14.405) and the offeror or contractor shall be required to promptly correct the omission.

#### 952.209-71 Organizational conflicts of interest—general.

Insert the following contract clause under the circumstances described at 909.570.

#### Organizational Conflicts of Interest—General (Apr 1984)

(a) The contractor warrants that, to the best of his knowledge and belief, and except as otherwise disclosed, there are no relevant facts which could give rise to organizational conflicts of interest, as defined in 909.570 or that the contractor has disclosed all relevant information.

(b) The contractor agrees that, if after award, an organizational conflict of interest with respect to this contract is discovered, an immediate and full disclosure in writing shall be made to the Contracting Officer which shall include a description of the action which the contractor has taken or proposes to

take to avoid or mitigate such conflicts. The Department may, however, terminate the contract for its convenience if it deems such termination to be in the best interest of the Government.

(c) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the contracting officer, the Government may terminate the contract for default.

(d) The provisions of this clause shall be included in all subcontracts for work to be performed similar to the service provided by the prime contractor, and the terms "contract," "contractor," and "contracting officer" modified appropriately to preserve the Government's rights.

(e) Prior to a contract modification when the statement of work is modified to add new work, the period of performance is significantly increased, or the parties to the contract are changed, the Department will request and the contractor is required to submit either an organizational conflict of interest disclosure or representation or an update of the previously submitted disclosure or representation.

#### 952.209-72 Organizational conflicts of interest—special clause.

Insert the following contract clause under the circumstance described at 909.570.

#### Organizational Conflicts of Interest—Special Clause (Apr 1984)

(a) *Purpose.* The primary purpose of this clause is to aid in ensuring that the contractor (1) is not biased because of its past, present, or currently planned interests (financial, contractual, organizational, or otherwise) which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) *Scope.* The restrictions described herein shall apply to performance or participation by the contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as "contractor") in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity.

(1) *Technical consulting and management support services.*

(i) The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited or unsolicited) which stem directly from the contractor's performance of work under this contract. Furthermore, unless so directed in writing by the contracting officer, the Contractor shall not perform any technical consulting or management support services work under this contract on any of its products or services or the products or services of another firm if the contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for technical consulting and management support services.

(ii) If the contractor under this contract prepares a complete or essentially complete

statement of work or specifications to be used in competitive acquisitions, the contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the contracting officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the contractor from offering or selling its standard commercial items to the Government.

(2) *Access to and use of information.*

(i) If the contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (Pub. L. 93-579), or data which has not been released or otherwise made available to the public, the contractor agrees that without prior written approval of the contracting officer it shall not:

(a) use such information for any private purpose unless the information has been released or otherwise made available to the public; (b) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first; (c) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and (d) release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (Pub. L. 93-579), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The contractor shall have, subject to patent, data, and security provisions of this contract, the right to use technical data it first produces under this requirements of this contract have been met.

(c) *Disclosure after award.* (1) The contractor agrees that if after award it discovers an organizational conflict of interest with respect to this contract, an immediate and full disclosure shall be made in writing to the contracting officer which shall include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts.

The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the contracting officer,



the Department may terminate the contract for default.

(d) **Subcontracts.** (1) The contractor shall include this clause, including this paragraph, in subcontracts of any tier which involve performance or work of the type specified in (b)(1) above or access to information of the type covered in (b)(2) above. The terms "contract", "contractor" and "contracting officer" shall be appropriately modified to preserve the Government's rights.

(2) If a subcontract is to be issued for evaluation services or activities, technical consulting or management support services work as defined at 909.570, the contractor shall obtain for the Department a disclosure statement or representation, in accordance with DOE regulations in effect at the time, from each intended subcontractor or consultant. The contractor shall not enter into any subcontract nor engage any consultant unless the contracting officer shall have first notified the contractor that there is little or no likelihood that an organizational conflict of interest exists or that despite the existence of a conflict of interest the award is in the best interest of the Government.

(e) **Remedies.** For breach of any of the above restrictions or for nondisclosure or misrepresentation of any relevant facts required to be disclosed concerning this contract, the Government may terminate the contract for default, disqualify the contractor for subsequent related contractual efforts and pursue such other remedies as may be permitted by law or this contract.

(f) **Waiver.** Requests for waiver under this clause shall be directed in writing to the contracting officer and shall include a full description of the requested waive and the reasons in support thereof. If it is determined to be in the best interests of the Government, the contracting officer shall grant such a waiver in writing.

(g) **Modifications.** Prior to a contract modification when the statement of work is modified to add new work, the period of performance is significantly increased, or the parties to the contract are changed, the Department will request and the contractor is required to submit either an organizational conflict of interest disclosure or representation or an update of the previously submitted disclosure or representation.

#### **952.212 Clauses related to contract delivery or performance.**

#### **952.212-70 Rated or authorized controlled material orders for energy programs.**

As prescribed in 912.304(a), insert the following provisions in solicitations that will result in the award of a contract eligible for placement of rated orders or authorized controlled material orders for DOE atomic energy programs:

##### **Rated or Authorized Controlled Material Orders (Atomic Energy) (Apr 1984)**

Contracts or purchase orders awarded as a result of this solicitation shall be assigned a /—/ DO-Rating; /—/ DX-rating; or /—/ DMS allotment number in accordance with Defense Priorities System Regulation 1 and Defense Materials System Regulation 1. (Contracting officer check appropriate box or boxes).

**Alternate I:** As prescribed in 912.304(d), insert the following provision in solicitations that may result in a contract eligible for placement of rated orders or authorized controlled material orders for authorized energy programs:

##### **Rated or Authorized Controlled Material Orders (Domestic Energy Supplies) (Apr 1984)**

Contracts or purchase orders awarded as a result of this solicitation may be eligible for priorities and allocations support in accordance with 10 CFR 216 and Section 101(c) of the Defense Production Act of 1950, as amended.

#### **952.212-71 Priorities, allocations, and allotments for energy programs.**

As prescribed in 912.304(b), insert the following clause in orders and contracts that are placed in support of authorized DOE atomic energy programs:

##### **Priorities, Allocations, and Allotments (Atomic Energy) (Apr 1984)**

The Contractor shall follow the provisions of Defense Material System Regulation 1 or Defense Priorities System Regulation 1 (see 15 CFR Parts 330-354) and all other applicable regulations and orders of the DMS/DPS in obtaining controlled materials and other products and materials needed to fill this contract.

**Alternate I:** Certain contracts may be eligible for priorities and allocations support as described in 912.302 if their purpose is to maximize domestic energy supplies. Eligibility is dependent on an executive decision on a case-by-case basis. Guidance is provided by DOE Publication PR-0042, "Priorities and Allocations Support for Energy: Keeping Energy Programs on Schedule," dated August 1980, as it may from time to time be revised. If the purpose of the contract is to maximize domestic energy resources, include the following clause:

##### **Priorities, Allocations, and Allotments—(Domestic Energy Supplies) (Apr 1984)**

(a) This contract may be eligible for priorities and allocations support, as provided for by Section 101(c) of the Defense Production Act of 1950, as amended by the Energy Policy and Conservation Act (Pub. L. 94-163, 42 U.S.C. 6201 *et seq.*) if its purpose is to maximize domestic energy supplies. Eligibility is dependent on an executive decision on a case-by-case basis with the decision being jointly made by the Departments of Commerce and Energy.

(b) DOE Regulations regarding Material Allocation and Priority Performance under Contracts or Orders to Maximize Domestic Energy Supplies can be found at Part 216 of Title 10 of the Code of Federal Regulations (10 CFR Part 216).

(c) Additional guidance is provided by DOE Publication PR-0042, "Priorities and Allocations Support for Energy: Keeping Energy Programs on Schedule," dated August 1980, as it may from time to time be revised. Copies may be obtained by written request to: Department of Energy, Technical Information Center (TIC), Post Office Box 62, Oak Ridge, Tennessee 37830.

#### **952.212-72 [Reserved]**

#### **952.212-73 Cost and schedule control systems criteria.**

Certain DOE projects are of such significance and magnitude that responsible management calls for enhanced visibility of contractor cost and schedule performance as well as more formalized data to document their progress and to aid in decisions regarding their continuation. Any contract with a total estimated cost in excess of \$50 million shall require full implementation of the DOE Cost and Schedule Control Systems Criteria. Selected projects between \$2 million and \$50 million may benefit from modified implementation of such a control system. In those instances where the DOE Cost and Schedule Control System Criteria are to be utilized, the contracting officer shall provide for this by including the "Cost and Schedule Control Systems Criteria for Contract Performance Measurement—Implementation Guide," Office of the Controller Publication CR-0015, in the solicitation and shall include the following clause in the contract:

##### **Cost and Schedule Control Systems (Apr 1984)**

(a) In the performance of this contract, the contractor shall establish, maintain, and use cost and schedule control systems (management control systems) meeting the criteria set forth in the contract and as described in detail in DOE/CR-0015, "Cost and Schedule Control Systems Criteria for Contract Performance Measurement—Implementation Guide," annexed hereto and hereinafter referred to as the "Guide." Prior to acceptance by the contracting officer and within — calendar days after contract award, the contractor shall be prepared to demonstrate systems operation to the Government to verify that the proposed systems meet the designated criteria. As a part of the review procedures, the contractor shall furnish the Government a description of the cost and schedule control systems applicable to this contract in such form and detail as indicated by the Guide, or as required by the contracting officer. The contractor agrees to provide access to all pertinent records, data, and plans as requested by representatives of the Government for the conduct of systems review.

(b) The description of the management control systems accepted by the contracting officer, identified by title and date, shall be referenced in the contract. Such systems shall be maintained and used by the contractor in the performance of this contract.

(c) Contractor changes to the reviewed systems shall be submitted for review and approval as required by the contracting officer. When contracting officer approval is required, the contracting officer shall advise the contractor of the acceptability of such changes within sixty (60) days after receipt



from the contractor. When systems existing at the time of contract award do not comply with the designated criteria, adjustments necessary to assure compliance will be made at no change in contract price or fee.

(d) The contractor agrees to provide access to all pertinent records and data requested by the contracting officer, or duly authorized representative, for the purpose of permitting Government surveillance to insure continuing application of the accepted systems to this contract. Deviations from the systems description identified during contract performance shall be corrected as directed by the contracting officer.

(e) The contractor shall require that each selected subcontractor, as mutually agreed to between the Government and the contractor and as set forth in the schedule of this contract, meet the criteria for cost and schedule control systems as set forth in subcontract and shall incorporate in all such subcontracts adequate provisions for review and surveillance of subcontractor's systems to be carried out by the prime contractor, or by the Government when requested by either the prime or subcontractor.

#### **952.214 Clauses related to formal advertising.**

#### **952.214-27 Price reduction for defective cost or pricing data—modifications—formal advertising.**

As prescribed in 914.201-7(b)(1), when contracting by formal advertising insert the clause at FAR 52.214-27, Price Reduction For Defective Cost or Pricing Data—Modifications—Formal Advertising, in solicitations and contracts unless this requirement is waived pursuant to FAR 14.201-7(b)(2).

#### **952.215 Clauses related to contracting by negotiation.**

#### **952.215-18 Order of precedence.**

Use this clause in place of the clause provided at FAR 52.215-18:

#### **Order of Precedence (Apr 1984)**

In the event of an inconsistency between provisions of this contract, the inconsistency shall be resolved by giving precedence as follows: (a) schedule; (b) contract clauses; or (c) other provisions of the contract, whether incorporated by reference or otherwise.

#### **952.215-22 Price reduction for defective cost or pricing data.**

As prescribed in 915.804-8(a), when contracting by negotiation, include the clause at FAR 52.215-22, Price Reduction for Defective Cost or Pricing Data, in contracts when certified cost or pricing data was obtained.

#### **952.215-23 Price reduction for defective cost or pricing data—modifications.**

As prescribed in 915.804-8(b), insert the clause at FAR 52.215-23, Price Reduction for Defective Cost or Pricing Data—Modifications, in solicitations and contracts when the clause at FAR

52.215-22 has not been included, unless the contractor will otherwise not be required to submit certified cost or pricing data pursuant to 915.804-2(a).

#### **952.215-70 Required subcontractor representations and certifications.**

In accordance with 914.201-5(b) or 915.406-5(b), include the following notice at Section L of the uniform contract format in solicitations which contemplate award of contracts expected to include any of the clauses entitled Small Business and Small Disadvantaged Business Concern Subcontracting Plan, FAR 52.219-9, Organizational Conflicts of Interest-General, 952.209-71 of this chapter, Organizational Conflicts of Interest-Special Clause, 952.209-72 of this chapter, Equal Opportunity, FAR 52.222-26, Clean Air and Water, FAR 52.223-1, Buy America Act-Supplies, FAR 52.225-3, or Buy America Act-Construction Materials, FAR 52.225-5.

#### **Notice—Subcontractor Representations and Certifications**

Bidders or offerors are required to obtain the representations and certifications listed below from subcontractors prior to the award of any subcontract for furnishing supplies or services under the prime contract:

(1) Small Business Concern Representation, FAR 52.219-1, Small Disadvantaged Business Concern Representation, FAR 52.219-2, if the prime contract contains the Small Business and Small Disadvantaged Business Subcontracting Plan clause from FAR 52.219-9;

(2) Organizational Conflicts of Interest Disclosure and Representation, DEAR 952.209-70, if the prime contract contains either of the clauses entitled Organizational Conflicts of Interest-General, DEAR 952.209-71, or Organizational Conflicts of Interest-Special Clause, DEAR 952.209-72;

(3) Certification of Nonsegregated Facilities, FAR 52.222-21, if the prime contract includes the clause entitled Equal Opportunity, FAR 52.222-28;

(4) Previous Contracts and Compliance Reports, FAR 52.222-22, if the prime contract contains the clause entitled Equal Opportunity, FAR 52.222-28;

(5) Clean Air and Water Certification, FAR 52.223-1, if the prime contract contains the clause entitled Clean Air and Water, FAR 52.223-2.

(6) Buy America Act Certification, FAR 52.225-1, if the prime contract contains either of the clauses entitled Buy America Act-Supplies, FAR 52.225-3, Buy America Act-Construction Materials, FAR 52.225-5.

#### **952.216 Clauses related to types of contracts.**

#### **952.216-7 Allowable cost and payment.**

*Alternate I:* If the contract is with a nonprofit organization, other than an educational institution; or a State or local government, modify the clause at FAR 52.216-7 Allowable Cost and Payment by

deleting from paragraph (a) the phrase "Subpart 31.2" and substituting for it "Subpart 31.7."

*Alternate II:* When contracting with a commercial organization modify paragraph (a) of the clause at FAR 52.216-7 by adding the phrase "as supplemented by Subpart 931.2 of the Department of Energy Acquisition Regulations (DEAR)," after the acronym "[FAR]".

#### **952.216-15 Predetermined indirect cost rates.**

*Alternate:* As prescribed in 916.307(j), modify paragraph (c) of the clause at FAR 52.216-15, Predetermined Indirect Cost Rates, by deleting the words "Subpart 31.3" and substituting for them "Subpart 31.6" and insert the clause in solicitations and contracts when a cost-reimbursement research and development contract with a State or local government is contemplated and predetermined indirect cost rates are to be used.

#### **952.217-70 Acquisition of real property.**

Insert the following clause when required by 917.7403(c).

#### **Acquisition of Real Property (Apr 1984)**

(a) Notwithstanding any other provision of the contract, the prior approval of the contracting officer shall be obtained when, in performance of this contract, the contractor acquires or proposes to acquire use of real property by:

(1) Purchase, on the Government's behalf or in the contractor's own name, with title eventually vesting in the Government.

(2) Lease, and the Government assumes liability for, or will otherwise pay for the obligation under the lease as a reimbursable contract cost.

(3) Acquisition of temporary interest through easement, license or permit, and the Government funds the entire cost of the temporary interest.

(b) Justification of and execution of any real property acquisitions shall be in accordance and compliance with directions provided by the contracting officer.

(c) The substance of this clause, including this paragraph (c), shall be included in any subcontract occasioned by this contract under which property described in paragraph (a) of this clause shall be acquired.

#### **952.219 Clauses related to small business.**

#### **952.219-9 Small business and small disadvantaged business subcontracting plan.**

*Alternate:* When the clause at FAR 52.219-9 is used, modify it to substitute the following alternate paragraph (d)(10).

(d)(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports in order to allow the Government to determine the extent of compliance by the offeror with the subcontracting plan, (iii) submit Standard Form (SF) 294 only, (DOE contractors need not submit SF 295) on a quarterly basis as of



the last day of March, June, September and December, and upon contract completion, in accordance with the instructions on the form except the report shall be submitted quarterly rather than semiannually and additionally shall indicate at the remarks block the number and dollar amount of awards made to labor surplus area concerns to the extent such reporting is required by the terms of their contract, and (iv) ensure that its subcontractors agree to submit SF 294 in accordance with the instructions at (iii) above.

**952.223 Clauses related to environment, conservation, and occupational safety.**

**952.223-71 Safety and health (Government-owned or leased facility).**

The clause set forth at 970.5204-2 shall be included in all contracts and subcontracts for, and be made applicable to, work to be performed at a government-owned or leased facility where DOE has elected to assert its statutory authority to establish and enforce occupational safety and health standards applicable to the work conditions of contractor and subcontractor employees, and to the protection of the public health and safety.

**952.223-72 Radiation protection and nuclear criticality.**

The clause set forth herein shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with states under section 274 of the Atomic Energy Act).

**Radiation Protection and Nuclear Criticality (Apr. 1984)**

The contractor shall take all reasonable precautions in the performance of work under this contract to protect the safety and health of employees and of members of the public against the hazards of ionizing radiation and radioactive materials and shall comply with all applicable radiation protection and nuclear criticality safety standards and requirements (including reporting requirements) of DOE. The contractor shall submit a management program and implementation plan to the contracting officer for review and approval within 30 days after the effective date of this contract or modification. In the event that the contractor fails to comply with said standards and requirements of DOE, the contracting officer may, without prejudice to any other legal or

contractual rights of DOE, issue an order stopping all or any part of the work. Thereafter, a start order for resumption of the work may be issued at the discretion of the contracting officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage.

**952.223-73 [Reserved]**

**952.223-74 Nuclear facility safety applicability.**

The clause set forth in 970.5204-26 shall be included in all contracts and subcontracts for, and be made applicable to, work to be performed at or involving the construction, startup, operation, and decommissioning of DOE-owned nuclear facilities deemed to be exempt from nuclear regulatory licensing requirements. Any deviation in substance affecting the meaning, intent, or basic principles of this clause must be referred to the Procurement Executive for approval. Minor changes in wording which may become necessary in negotiations may be approved by the contracting officer after consultation with the General Counsel.

**952.223-75 Preservation of individual occupational radiation exposure records.**

This clause shall be included in all contracts containing the DOE standard clause entitled "Safety and Health" at 952.223-71 or "Radiation and Nuclear Criticality" at 952.223-72 or Nuclear Safety at 952.223-74.

**Preservation of Individual Occupational Radiation Exposure Records (Apr 1984)**

Individual occupational radiation exposure records generated in the performance of work under this contract shall be subject to inspection by DOE and shall be preserved by the contractor until disposal is authorized by DOE or at the option of the contractor delivered to DOE upon completion or termination of the contract. If the contractor exercises the foregoing option, title to such records shall vest in DOE upon delivery.

**952.223-76 [Reserved]**

**952.224-70 Paperwork Reduction Act.**

Insert the following clause if it is anticipated that information collection from 10 or more persons will be necessary under the contract.

**Paperwork Reduction Act (Apr 1984)**

(a) In the event that it subsequently becomes a contractual requirement to collect or record information calling either for answer to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is to be used for statistical compilations of general public interest, the Federal Reports Act will apply to this contract. No plan, questionnaire, interview guide, or other similar device for collecting information (whether repetitive or single-time) may be

used without first obtaining clearance from the Office of Management and Budget (OMB).

(b) The contractor shall request the required OMB clearance from the contracting officer before expending any funds or making public contacts for the collection of data. The authority to expend funds and to proceed with the collection of data shall be in writing by the contracting officer. The contractor must plan at least 90 days for OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the contractor will be considered in accordance with the clause entitled "Excusable Delays," if such clause is applicable. If not, the period of performance may be extended pursuant to this clause if approved by the contracting officer.

**952.227 Provisions and clauses related to patents, technical data and copyrights.**

**952.227-70 [Reserved]**

**952.227-71 Patent rights—small business firms or nonprofit organizations.**

The following clause shall be used in contracts for research, development or demonstration work with small businesses or domestic nonprofit organizations as directed in 927.300(b).

**Patent Rights—Small Business Firms or Nonprofit Organizations (March 1982)**

**(a) Definitions.**

(1) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code (U.S.C.).

(2) "Subject Invention" means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract.

(3) "Practical Application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(4) "Made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(5) "Small Business Firm" means a small business concern as defined at Section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standard for small business concerns involved in Government procurement, contained in 13 CFR 121.3-8, and in subcontracting, contained in 13 CFR 121.3-12, will be used.

(6) "Nonprofit Organization" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a))



or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(7) "Patent Counsel" means the Department of Energy (DOE) patent counsel assisting the DOE contracting activity.

(b) *Allocation of principal rights.* The contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) *Invention disclosure, election of title and filing of patent applications by contractor.*

(1) The contractor will disclose each subject invention to the Patent Counsel within two months after the inventor discloses it in writing to contractor personnel responsible for the administration of patent matters. The disclosure to the Patent Counsel shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete technical detail to convey a clear understanding, to the extent known at the time of the disclosure of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the Patent Counsel, the contractor will promptly notify the Patent Counsel of the acceptance of any manuscript describing the invention or of any on sale or public use planned by the contractor.

(2) The contractor will elect in writing whether or not to retain title to any such invention by notifying the Patent Counsel within twelve months of disclosure to the contractor; provided that in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title terminates sixty days prior to the end of the statutory period.

(3) The contractor will file its initial patent application on an elected invention within two years after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The contractor will file patent applications in additional countries within either ten months of the corresponding initial patent application or six months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to the Patent Counsel, election,

and filing, may, at the discretion of the Patent Counsel be granted.

(d) *Conditions* when the Government may obtain title.

(1) The contractor will convey the DOE, upon written request, title to any subject invention:

(i) If the contractor fails to disclose or elect the subject invention within the times specified in (c) above, or elects not to retain title.

(ii) In those countries in which the contractor fails to file patent applications within the times specified in (c) above; provided, however, that if the contractor has filed a patent application in a country after the times specified in (c) above but prior to its receipt of the written request of the Patent Counsel, the contractor shall continue to retain title in that country; or

(iii) In any country in which the contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in a reexamination or opposition proceeding on, a patent on a subject invention.

(e) *Minimum rights to contractor.*

(1) The contractor will retain a nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title except if the contractor fails to disclose the subject invention within the times specified in (c) above. The contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and includes the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(2) The contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with 10 CFR Part 781 and 41 CFR 101-4. This license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, DOE will furnish the contractor a written notice of its intention to revoke or modify the license, and the contractor will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the contractor) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with 10 CFR Part 781, any decision concerning the revocation or modification of its license.

(f) *Contractor action to protect Government's interest.*

(1) The contractor agrees to execute or to have executed and promptly deliver to the Patent Counsel all instruments necessary to:

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions for which the contractor retains title, and

(ii) Convey title to DOE when requested under (d) above and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the contractor each subject invention made under this contract in order that the contractor can comply with the disclosure provisions of (c) above and to execute all papers necessary to file patent applications on subject inventions. The disclosure format should require, as a minimum, the information requested by (c)(1) above. The contractor shall instruct such employees through the employee agreements or suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to United States or foreign statutory bars.

(3) The contractor will notify the Patent Counsel of any decision not to continue prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than thirty days before the expiration of the response period required by the relevant patent office.

(4) The contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by the Department of Energy. The Government has certain rights in this invention."

(5) The contractor agrees to:

(i) Provide a report prior to the close-out of the contract listing all subject inventions;

(ii) Provide notification of all subcontracts under this contract for experimental, developmental, demonstration, or research work, the identity of the patent rights clause therein, and copy of each subcontract upon request;

(iii) Provide promptly a copy of the patent application, filing date, serial number, patent number and issue date for any subject invention in any country in which the contractor has applied for a patent.

(g) *Subcontracts.*

(1) The contractor will include this clause, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental or research work to be performed by a small business firm or a domestic nonprofit organization. The subcontractor will retain all rights provided for the contractor in this clause, and the contractor will not, as part of the consideration for awarding the subcontract,



obtain rights in the subcontractor's subject inventions.

(2) The contractor will include in all other subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights clause of 41 CFR 9-9.107-5(a) or 9-9.107-6 as appropriate, modified to identify the parties.

(3) In the case of a subcontract at any tier, DOE, the subcontractor, and the contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to those matters covered by this clause.

(h) *Reporting on utilization of subject inventions.* The contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the contractor, and such other data and information as DOE may reasonably specify. The contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this clause. To the extent data or information supplied under this section is considered by the contractor, its licensee or assignee to be privileged and confidential and is so marked, DOE agrees that, to the extent permitted by 35 U.S.C. 202(c)(5), it will not disclose such information to persons outside the Government.

(i) *Preference for United States industry.* Notwithstanding any other provision of this clause, the contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *March-in rights.* The contractor agrees that with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in OMB Circular A-124 to require the contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the contractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that:

(1) Such action is necessary because the contractor or assignee has not taken, or is not

expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by federal regulations and such requirements are not reasonably satisfied by the contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement required by (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Special provisions for contracts with nonprofit organizations.*

If the contractor is a non profit organization, it agrees that:

(1) Rights to a subject invention in the United States may not be assigned without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions and which is not, itself, engaged in or does not hold a substantial interest in other organizations engaged in the manufacture or sale of products or the use of processes that might utilize the invention or be in competition with embodiments of the invention (provided that such assignee will be subject to the same provisions as the contractor);

(2) The contractor may not grant exclusive licenses under United States patents or patent applications in subject inventions to persons other than small business firms for a period in excess of the earlier of:

(i) Five years from first commercial sale or use of the invention; or

(ii) Eight years from the date of the exclusive license excepting that time before regulatory agencies necessary to obtain premarket clearance, unless on a case-by-case basis, DOE approves a longer exclusive license. If exclusive field of use licenses are granted, commercial sale or use in one field of use will not be deemed commercial sale or use as to other fields of use, and a first commercial sale or use with respect to a product of the invention will be deemed to end the exclusive period to different subsequent products covered by the invention;

(3) The contractor will share royalties collected on a subject invention with the inventor; and

(4) The balance of any royalties or income earned by the contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education.

(1) *Communications.* The DOE central point of contact for communications or matters relating to this clause is the Patent Counsel.

## 952.227-72 [Reserved]

## 952.227-73 Additional technical data requirements.

The following clause shall be used in contracts for research, development, or demonstration work and in other contracts as directed in 927.402-3(b).

## Additional Technical Data Requirements (Apr. 1984)

(a) In addition to the technical data specified elsewhere in this contract to be delivered, the contracting officer may at any time during the contract performance or within one year after final payment call for the contractor to deliver any technical data first produced or specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design.

(b) The provisions of the Rights in Technical Data clause included in this contract are applicable to all technical data called for under this Additional Technical Data Requirements clause. Accordingly, nothing contained in this clause shall require the contractor to actually deliver any technical data, the delivery of which is excused by paragraph (e) of the Rights in Technical Data clause.

(c) When technical data are to be delivered under this clause, the contractor will be compensated for appropriate costs for converting such data into the prescribed form for reproduction, and for delivery.

## 952.227-74 [Reserved]

## 952.227-75 Rights in technical data—long form.

As directed by 927.402-3(e), the following clause shall be used in all contracts having as a purpose the conduct of research, development, or demonstration, or in contracts for supplies, or in any other contract where technical data are specified to be delivered in the contract, or where the contract contains the Additional Technical Data Requirements clause at 952.227-73.

## Rights in Technical Data—Long Form (Apr. 1984)

### (a) Definitions.

(1) "Technical data" means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists,



specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

(2) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(iii) Are not already available to the Government without obligation concerning the confidentiality.

(3) "Contract data" means technical data first produced in the performance of the contract in technical data which are specified to be delivered under the contract; technical data that may be called for under the Additional Technical Data Requirements clause of the contract, if any, or technical data actually delivered in connection with the contract.

(4) "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(b) *Allocation of rights.*

(1) The Government shall have:

(i) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data;

(ii) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case, DOE will notify the contractor of the action taken;

(iii) No rights under this contract in any technical data which are not contract data.

(2) The contractor shall have:

(i) The right to withhold proprietary data in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this contract data it first produces in the performance of this contract, provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Contracting Officer.

(3) Nothing contained in this Rights of Technical Data clause shall imply a license to

the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(c) *Copyrighted material.*

(1) The contractor shall not, without prior written authorization of the Patent Counsel, establish a claim to statutory copyright in any contract data first produced in the performance of the contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf a royalty-free, nonexclusive, irrevocable, worldwide license for Governmental purposes to publish, distribute, translate, duplicate exhibit and perform any such data copyrighted by the contractor.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowingly include any material copyrighted by others, without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If such royalty-free license is unavailable and the contractor nevertheless determines that such copyrighted material must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the Contracting Officer to include such copyrighted material in the technical data prior to its delivery.

(d) *Subcontracting.* It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the contractor shall:

(1) Promptly submit written notice to the Contracting Officer setting forth reasons for the subcontractor refusal and other pertinent information which may expedite disposition of the matter; and

(2) Not proceed with the subcontract without the written authorization of the Contracting Officer.

(e) *Withholding of proprietary data.*

Notwithstanding the inclusion of the Additional Technical Data Requirements clause in this contract or any provision of this contract specifying the delivery of technical data, the contractor may withhold proprietary data from delivery, provided that the contractor furnishes in lieu of any such proprietary data so withheld technical data disclosing the source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements ("Form, Fit and Function" data, e.g., specification control drawing, catalog sheets, envelope drawings, etc.), or a general description of such proprietary data where "Form, Fit and Function" data are not applicable. The Government shall acquire no rights to any proprietary data so withheld except that such data shall be subject to the "inspection rights" provisions of paragraph (f), and, if included, the "Limited rights in proprietary data" provisions of paragraph (g)

and the "Contractor licensing" provisions of paragraph (h).

(f) *Inspection rights.* Except as may be otherwise specified in this contract for specific items of proprietary data which are not subject to this paragraph, the Contracting Officer's representatives, at all reasonable times up to three years after final payment under this contract, may inspect at the contractor's facility any proprietary data withheld under paragraph (e) and not furnish under paragraph (g), if this contract includes such paragraph, for the purposes of verifying that such data properly fell within the withholding provision of paragraph (e), or for evaluating work performance.

*Alternate I: Additional paragraph (g), limited rights.* The following paragraph (d) shall be added to the basic clause at 952.227-75 above when it is determined in accordance with 927.402-3(e)(2) that delivery of proprietary data is necessary with limited rights in the Government.

(g) *Limited rights in proprietary data.* Except as may be otherwise specified in this contract as technical data which are not subject to this paragraph, the contractor shall, upon written request from the Contracting Officer at any time prior to three years after final payment under this contract, promptly deliver to the Government any "proprietary data" withheld pursuant to paragraph (e) of the Rights in Technical Data clause of this contract. The following legend and no other is authorized to be affixed on any "proprietary data" delivered pursuant to this provision, provided the "proprietary data" meets the conditions for initial withholding under paragraph (e) of the Rights in Technical Data clause. The Government will thereafter treat the "proprietary data" in accordance with such legend.

#### Limited Rights Legend (Apr 1984)

This technical data contains "proprietary data," furnished under "Contract No. \_\_\_\_\_" with the U.S. Department of Energy (and Purchase Order No. \_\_\_\_\_ if applicable) which may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the contractor, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not further disclosed;

(b) This "proprietary data" may be disclosed to other contractors participating in the Government's program of which this contract is part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "proprietary data" be



retained in confidence and not be further disclosed.

This legend shall be marked on any reproduction of this data in whole or in part.

**Alternate II: Additional paragraph (h), contractor licensing.** The following paragraph (b) shall be added to the basic clause at 952.227-75 above when it is determined in accordance with 927.402-3(e)(3) that the Government should obtain on behalf of third parties and itself limited license rights in and to proprietary contract data.

(h) *Contract licensing.* Except as may be otherwise specified in this contract as technical data not subject to this paragraph, the contractor agrees that upon written application by DOE, it will grant to the Government and responsible third parties, for purpose of practicing a subject of this contract, a nonexclusive license in any contract data which are proprietary data, on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the contractor shall not be obligated to license any such data if the contractor demonstrates to the satisfaction of the Head of the Agency or designee that:

(1) Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this contract;

(2) Such data, in the form of results obtained by their use, have a commercially competitive alternative available or readily introducible from one or more other sources;

(3) Such data, in the form of results obtained by their use, are being supplied by the contractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the contractor or its licensees have taken effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or

(4) Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the contract results.

#### 952.227-76 Rights in data—special works.

The following clause shall be included in contracts having as a principal purpose or task the production of copyrightable works as discussed in 927.402-3(f).

#### Rights in Data—Special Works (Apr. 1984)

(a) The term "Data" as used herein means recorded information regardless of form or characteristic, such as writings, sound recordings, pictorial reproductions, drawings, or other graphic representations, and works of similar nature (whether or not copyrighted) which are specified to be delivered under this contract. The term includes data such as management studies and data produced under support services contracts but does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) All data first produced or composed in the course of or under this contract shall be the sole property of the Government. Except with the prior written permission of the contracting officer, the contractor agrees not to assert any rights at common law or in equity or establish any claim to statutory copyright in such data. The contractor shall not publish or reproduce such data in whole or in part or in any manner of form, or authorize others so to do, without the written consent of the Contracting Officer or until such time as the Government may have released such data to the public.

(c) The contractor hereby grants to or will obtain for the Government a royalty-free, nonexclusive and irrevocable license throughout the world (1) to publish, translate, reproduce, deliver, perform, use, and dispose of, in any manner, any and all data which are not first produced or composed in the performance of this contract but which are incorporated in the work furnished under this contract; and (2) to authorize others so to do.

(d) The contractor shall indemnify and save and hold harmless the Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy, arising out of the publication, translation, reproduction, delivery, performance, use, or disposition of any data furnished under this contract; or (2) based upon any libelous, defamatory, or other unlawful matter contained in such data.

(e) Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

#### 952.227-77 Rights in technical data clause—short form.

As discussed in 927.402-3(g), the following clause may be used in contracts for basic research with educational institutions and in contracts with consultants and in other contracts of a similar nature. The clause shall not be used in any contract where proprietary information of the contractor may be utilized in performance of work under the contract.

#### Rights in Technical Data—Short Form (Apr. 1984)

(a) *Definitions.* The definitions of terms set forth in DEAR 927.401 apply to the extent these terms are used herein.

(b) *Allocation of rights.*

(1) The Government shall have:

(i) Unlimited rights in technical data first produced or specifically used in the performance of this contract;

(ii) The right of the contracting officer or his representative to inspect at all reasonable times up to three years after final payment under this contract all technical data first produced or specifically used in the contract (for which inspection the contractor or its subcontractor shall afford proper facilities to DOE); and

(iii) The right to have any technical data first produced or specifically used in the

performance of this contract delivered to the Government as the contracting officer may from time to time direct during the progress of the work, or in any event as the contracting officer shall direct upon completion or termination of this contract.

(2) The contractor shall have:

The right to use for its private purposes, subject to patent, security or other provisions of this contract, technical data it first produces in the performance of this contract provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the contracting officer.

(c) *Copyrighted material.*

(1) The contractor agrees to, and does hereby grant to the Government, and to its officers, agents, servants and employees acting within the scope of their duties:

(i) A royalty-free, nonexclusive, irrevocable license to reproduce, translate, publish, use, and dispose of and to authorize others to do so, all copyrightable material first produced or composed in the performance of this contract by the contractor, its employees or any individual or concern specifically employed or assigned to originate and prepare such material; and

(ii) A license as aforesaid under any and all copyrighted or copyrightable works not first produced or composed by the contractor in the performance of this contract but which are incorporated in the material furnished under the contract, provided that such license shall be only to the extent the contractor now has, or prior to completion or final settlement of the contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(2) The contractor agrees that it will not knowingly include any material copyrighted by others in any written or copyrightable material furnished or delivered under this contract without a license as provided for in paragraph (c)(1)(ii) hereof, or without the consent of the copyright owner, unless it obtains specific written approval of the contracting officer for the inclusion of such copyrighted material.

#### 952.227-78 Rights in technical data—facility

As discussed in 970.2702 the following clause is to be used in contracts for the operation of Government-owned facilities (GOCO's).

#### Rights in Technical Data—Facility (Apr 1984)

(a) *Definitions.*

(1) "Technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or



demonstration, or engineering work or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein does not include financial reports, cost analyses, and other information incidental to contract administration.

(2) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(iii) Are not already available to the Government without obligation concerning their confidentiality.

(3) "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(b) *Allocation of rights.*

(1) The Government shall have:

(i) Ownership in all technical data first produced in the performance of the contract;

(ii) The right to inspect technical data first produced or specifically used in the performance of the contract at all reasonable times (for which inspection the proper facilities shall be afforded DOE by the contractor and its subcontractors);

(iii) The right to have all technical data first produced or specifically used in the performance of the contract delivered to the Government or otherwise disposed of by the contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this contract, provided that nothing contained in this paragraph shall require the contractor to actually deliver any technical data, the delivery of which is excused by this Rights in Technical Data clause;

(iv) Unlimited rights in technical data specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design; the contractor agrees to leave a copy of such technical data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer; provided, that if such data are proprietary, the rights of the Government in such data

shall be governed solely by the provisions of optional paragraph (e) hereof—"Limited Rights in Proprietary Data."

(v) The right to remove, cancel, correct, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the contractor of the action taken.

(2) The contractor shall have:

(i) The right to withhold its proprietary data in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this contract, technical data it first produces in the performance of this contract, provided the data requirement of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the contracting officer.

(3) Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(c) *Copyrighted material.*

(1) The contractor shall not, without prior written authorization of the Patent Council establish a claim to statutory copyright in any technical data first produced in the performance of this contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a royalty-free, nonexclusive, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the contractor.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If the contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the contracting officer to include such material in the technical data prior to its delivery.

(d) *Subcontracting.*

(1) Unless otherwise directed by the contracting officer, the contractor agrees to use in subcontracts having as a purpose the conduct of research, development, and demonstration work or in subcontracts for

supplies, the contract clause provisions in 48 CFR 952.227-75 in accordance with the policy and procedures of 48 CFR 927.402-1, 927.402-2 and 927.402-3.

(2) It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons for the subcontractor's refusal and other pertinent information which may expedite disposition of the matter; and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

#### 952.227-79 Limited rights in proprietary data.

As discussed in 970.2702(c) the following paragraph may be used as a supplement to the clause at 952.227-78 where it is determined that delivery of proprietary data is necessary with limited rights in the Government.

(e) Except as may be otherwise specified in this contract as technical data which are not subject to this paragraph, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive paid-up license and right to use by or for the Government, any proprietary data of the contractor specifically used in the performance of this contract; provided, however, that to the extent that any proprietary data when furnished or delivered is specifically identified by the contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government, except as provided in the "Limited Rights Legend" set forth below. All such proprietary data shall be marked with the following "Limited Rights Legend":

#### Limits Rights Legend (Apr 1984)

This Technical data contains "proprietary data," furnished under contract No. \_\_\_\_\_ with the U.S. Department of Energy (and purchase order No. \_\_\_\_\_ if applicable) which may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside of the Government or be used for purposes of manufacture without prior permission of the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to other contractors participating in the Government's program of which this contract is a part for information for use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or



(c) This "proprietary data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed.

This legend shall be marked on any reproduction of this data in whole or in part.

#### 952.227-80 Technical data certification.

In solicitations which may involve the acquisition of technical data, obtain the following certification and include the legend at FAR 52.215-12 and, where appropriate, the provision at 952.227-83.

#### Technical Data Certification (Apr 1984)

(a) The offeror certifies that it has not delivered or is not obligated to deliver to the Government under any contract or subcontract the same or substantially the same technical data included in its offer, except as set forth below:

- ( ) none  
( ) Contract No. (and Subcontract No., if applicable)

Agency name and place of delivery \_\_\_\_\_

(b) The work to be performed and the known requirements for technical data as set forth in the solicitation have been reviewed. To the best of my knowledge:

- // There will be no technical data withheld from delivery as being proprietary data.  
// The technical data listed on page \_\_\_\_\_ of the proposal will likely be used in conjunction with the performance of work under the contract and is represented as being proprietary data to be protected from unauthorized use and disclosure and therefore to be withheld from delivery in a report not having a restrictive legend.

#### 952.227-81 Royalty Payments Certification

If the nature of the acquisition suggests that royalty payments may be involved, include the following certification in the solicitation.

#### Royalty Payments (Apr 1984)

In order that DOE may be informed regarding royalty payments to be made by a contractor in connection with any acquisition, construction, or operation where the amount of the royalty payment is reflected in the contract price, or is to be reimbursed by the Government, check one of the following:

- ( ) The Contract price includes no amount representing the payment of royalty by the offeror directly to others in connection with the performance of the contract.  
( ) The contract price includes an amount for royalty payment expected to be made in connection with the proposed award. The Offeror shall set forth below: (1) the amount of each payment, (2) the names of the

licensor, (3) either the patent numbers involved or such other information as will permit identification of the patents and patent applications and the basis on which royalties will be paid.

#### 952.227-82 Rights to proposal data.

Pursuant to 927.7002(d), include this clause in any contract which the decision to make the award included consideration of a technical proposal.

#### Rights to Proposal Data (Apr 1984)

Except for technical data contained on pages \_\_\_\_\_ of the contractor's proposal dated \_\_\_\_\_ which are asserted by the contractor as being proprietary data, it is agreed that, as a condition of the award of this contract, and notwithstanding the provisions of any notice appearing on the proposal, the Government shall have the right to use, duplicate, disclose and have others do so for any purpose whatsoever, the technical data contained in the proposal upon which this contract is based.

#### 952.227-83 Rights in technical data solicitation representation.

Pursuant to 927.7004-1 and 927.7004-2, include this provision, the legend at FAR 52.215-12 and the certification at 952.227-80 in solicitations which may result in contracts for research, development, or demonstration work or contracts for supplies in which delivery of required technical data is contemplated.

#### Rights in Technical Data Solicitation Instruction (Apr 1984)

The section of this solicitation which describes the work to be performed also sets forth DOE's known requirements for technical data. The Additional Technical Data Requirements clause, if included in this solicitation, provides the Government with the option to order additional technical data, the requirements for which are not known at the time of contracting. There is, however, a built-in limitation on the kind of technical data which may be required. This limitation provides that the contractor may withhold delivery of proprietary data. Accordingly, it is necessary that your proposal state that the work to be performed and the known requirements for technical data as set forth in the solicitation have been reviewed, and either state that, to the best of your knowledge, not data will be withheld, or submit a list identifying the proprietary data which, to the best of your knowledge, will likely be used in the contract performance and will be withheld.

#### 952.227-84 Notice of right to request patent waiver.

Pursuant to 927.7005, include this provision in all solicitations which may result in contracts calling for research, development, or demonstration work.

#### Right To Request Patent Waiver (Apr 1984)

Offerors and prospective contractors, in accordance with applicable statutes and the Department of Energy Acquisition Regulation,

have the right to request, in advance of or within 30 days after the effective date of contracting, a waiver of all or any part of the rights of the United States in subject inventions. Small business firms and domestic nonprofit organizations normally will receive the Patent Rights clause of 952.227-71 which permits the contractor to retain title to subject inventions, except in contracts for management or operation of a Government-owned research or production facility and in contracts involving exceptional circumstances or intelligence activities. Therefore small business firms and nonprofit organizations normally need not request a waiver.

#### 952.231-70 Date of incurrence of cost.

In accordance with 931.205-30, insert the following clause when advance understandings have been negotiated regarding costs incurred prior to the contract effective date:

#### Date of Incurrence of Cost (Apr 1984)

The Contractor shall be entitled to reimbursement for costs incurred in an amount not to exceed \$ \_\_\_\_\_ on or after \_\_\_\_\_ which, if incurred after this contract has been entered into, would have been reimbursable under the provisions of this contract.

#### 952.232 Clauses related to contract financing.

##### 952.232-1 Payments.

As prescribed in 932.7107-2(a)(1), replace the word "upon" with "after" in the clause at FAR 52.232-1.

##### 952.232-2 Payments under fixed-price research and development contracts.

As prescribed in 932.7107-2, replace the word "upon" with the word "after" in the clause at FAR 52.232-2.

##### 952.232-3 Payments under personal service contracts.

As prescribed in 932.7107-2 replace the word "upon" with "after" in the clause at FAR 52.232-3.

##### 952.232-4 Payments under transportation contracts and transportation-related services contracts.

As prescribed in 932.7107-2, replace the word "upon" with "after" in the clause at FAR 52.232-4.

##### 952.232-5 Payments under fixed-price construction contracts.

As prescribed in 932.7107-2 modify paragraph (e) of the clause cited at FAR 52.232-5 by replacing the words "upon request" with "after receipt of a proper invoice".

##### 952.232-6 Payments under communication service contracts with common carriers.

As prescribed in 932.7107-2, replace the word "upon" with "after" in the clause at FAR 52.232-6.



**952.232-7 Payments under time-and-materials and labor-hour contracts.**

As prescribed in 932.7107-2, modify the introductory sentence and paragraph (e) of the clause cited at FAR 52.232-7 by replacing the word "upon" with the word "after".

**952.232-8 Discounts for prompt payment.**

As prescribed in 932.7107-2, modify the clause cited at FAR 52.232-8 to substitute the word "proper" for the word "correct" in the seventh line and delete the last sentence and add the following sentence—"For the purpose of computing the discount earned, payment shall be considered to have been made on the date the Government check was dated or an electronic funds transfer payment was made."

**952.232-10 Payments under fixed-price architect-engineer contracts.**

As prescribed in 932.7107-2, modify paragraphs (b) and (c) of the clause cited at FAR 52.232-10 by replacing the words "upon" with "after".

**952.232-70 Payment due dates, invoice requirements and penalties.**

As prescribed in 932.7107(a)(1), insert the following clause in solicitations and contracts containing the clause at FAR 52.232-1, Payments, FAR 52.232-2, Payment under Fixed-Price Research and Development Contracts, or FAR 52.232-4, Payments under Transportation Contracts and Transportation-Related Services Contracts, all as modified by 932.7107-2;

**Payment Due Dates, Invoice Requirements and Penalties (Apr 1984)**

(a) Notwithstanding the payment provisions stated elsewhere in this contract, payment due dates, invoice requirements and penalties for overdue payment, if any, shall be determined under this contract as provided herein.

(b) Payments for complete delivered supplies, services or work accepted under this contract shall be due on the \*Calendar day after the later of:

(1) the date of actual receipt of a proper invoice by the Government office designated in this contract for invoice receipt; or

(2) The date the supplies, services or work were accepted by the Government.

(c) For purposes of determining payment due dates and for no other purpose, the Government agrees to inspect and determine the acceptability of items delivered under the terms of this contract within \*\* calendar days after the date of receipt or completion of work. If actual acceptance occurs later, constructive acceptance will be deemed to occur on the last day of the above stated inspection period.

(d) If a delivered item or completed work is rejected for failure to conform to the technical requirements of the contract, or for damage in transit or otherwise, the provisions of paragraph (c) will apply to the replacement

item(s) delivered or be reapplied upon Contractor correction of the defect(s).

(e) Progress payments, if provided, shall be due on the \* calendar day after the date of receipt of each progress payment request by the Government office designated for invoice receipt.

(f) Proper invoices shall be submitted in an original and \*\*\* copies to the Government office designated in this contract, and shall include the Contractor's name and invoice date; contract or order number; payment terms; other documentation or information as required by the contract; name (where practicable), title, phone number, office name and complete mailing address of the responsible official to whom payment may be made. Proper invoices for completed supplies, services or work shall also include the description, price and quantity of item(s) actually delivered or services rendered; and, if applicable, shipping terms.

(g) For complete delivered supplies, services or work, the Government shall pay an interest penalty when the payment check or electronic funds transfer is dated more than fifteen (15) calendar days after the payment due date as established by the provisions herein provided such delays are not due to contractor failure to provide proper payee designations in accordance with the requirements stated elsewhere in this contract; or a discount is taken after expiration of the discount period and the underpayment is not corrected within fifteen (15) calendar days of the expired period.

(h) Interest penalties due under the provisions of this clause shall be calculated in accordance with the provisions of the Prompt Payment Act (31 U.S.C. 3901 et seq.); based on the interest rate(s) established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611). Claims for failure to pay interest penalties may be filed under Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605). Interest penalties under this clause shall not accrue for more than one year or after the timely filing of a claim for such penalties under the Contract Disputes Act.

(i) Claims concerning disputes, and any interest which may be payable with respect to the period while such dispute is being resolved, shall be subject to the provisions specified in the disputes clause of this contract.

(j) Interest penalties shall not apply when the contractor is notified that an invoice is defective or improper provided the Contractor is notified within fifteen (15) calendar days after actual invoice receipt or acceptance of delivered contract item, whichever is later, that payment is delayed because of a disagreement between the Government and the Contractor concerning contract compliance or amounts invoiced; or the penalty amounts to less than one dollar; nor are they required when payments are made for progress payment purposes, payments are made in advance, or for a period when amounts are withheld temporarily in accordance with the contract. In the event the Government fails to provide notification of a defective invoice within fifteen (15) calendar days, the due date for the corrected invoice will be the normal

payment due date less the difference between the fifteenth (15) calendar day and the day notification was made.

\*Contracting officer to insert appropriate number of days.

\*\*Contracting officer to insert a number of calendar days which constitutes the estimated number of days necessary for inspection, acceptance, and other necessary action.

\*\*\*Contracting officer to insert required number of copies.

**Alternate I:** For solicitations and contracts containing the clause at FAR 52.232-3, Payments under Personal Services Contracts, or FAR 52.232-7, Payments under Time-and-Materials and Labor-Hours Contracts, as modified by 932.7107-2 respectively, insert the basic clause and add the following paragraph (k):

(k) In the event of an overdue payment, interest penalties shall not be applied to payment of cost-reimbursement amounts, if any, claimed pursuant to the reimbursable cost provisions of this contract.

**Alternate II:** For solicitations and contracts containing the clause at FAR 52.232-5, Payments under Fixed-Price Construction Contracts, or FAR 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, as modified by 932.7107-2, respectively, insert the basic clause revised as follows:

(1) Replace paragraph (b) with  
(b) Payments for complete delivered property, services or work accepted under this contract shall be due on the —\* calendar day after the later of the date the property, services or work were accepted by the Government; the date of actual receipt of a proper invoice by the Government office designated in this contract for invoice receipt; or where applicable, the date the contractor's release of claims is received by the contracting officer.

(2) For a construction contract, add the following to revised paragraph (b):

Payment for reimbursement of premiums paid by the contractor for performance and payment bonds shall be due —\* calendar days after the date of initial receipt of a proper invoice in the Government designated office or the date satisfactory evidence of full payment to the surety is received by the contracting officer, whichever is later.

**Alternate III:** For solicitations and contracts containing the clause at FAR 52.232-6, Payment under Communication Service Contracts with Common Carriers, as modified by 932.7107-2, insert the basic clause revised essentially as follows:

(1) Replace paragraph (b) with:

(b) Payments under this contract shall be due on the —\* calendar day after the date of actual receipt of a proper invoice by the Government office designated in this contract for invoice receipt;



(2) Delete paragraphs (c) through (e) and (g) through (j);

(3) Redesignate paragraph (f) as paragraph (c); and

(4) Add the following as paragraph (d):

(d) Overdue payments, if any, are subject to late payment charges established by tariffs or the applicable State Regulatory Commission(s).

#### 952.232-71 Payment due dates and invoice requirements.

As prescribed in 932.7107-1(b) insert the following clause in all cost-reimbursement contract solicitations and awards containing the clause at FAR 52.216-7, Allowable Cost and Payment, or FAR 52.216-13 Allowable Cost and Payment-Facilities:

#### Payment Due Dates and Invoice Requirements (Apr 1984)

(a) Payments pursuant to the provisions of the allowable cost and payment clause of this contract pursuant to the allowable cost and payment provision of this contract shall be due—\* calendar days after the date of actual receipt of a proper invoice or public voucher by the Government office designated in this contract for invoice receipt, provided the amounts claimed are reimbursable in accordance with other terms and conditions of the contract.

(b) Final payment of any balance of allowable costs and that part of the fee, if any, not previously paid as included in the completion invoice or voucher submitted by the contractor shall be due—\* calendar days after the later of the date that invoice or voucher is approved for payment by the contracting officer, or the date all the terms of this contract are complied with by the Contractor.

(c) When discounts for early payments are offered by the contractor, the discount period will be calculated from the date a proper invoice was actually received by the Government office designated for invoice receipt or the date the costs were incurred, whichever is the later.

(d) Payment will be considered to have been made on the date the Government check was dated or an electronic funds transfer payment was made.

(e) Notwithstanding any other directions pursuant to the allowable cost and payment clause of this contract, proper invoices or public vouchers shall be submitted in an original and—\*\* copies to the Government office designated in this contract and shall include the Contractor's name and invoice date; contract number; cost amounts by elements of cost and fee amounts, if any, claimed currently; cumulative amounts of costs by element of cost and fee amounts claimed from inception of the contract through the current period; total estimated contract cost amount, fee amount, total contract amount and fee amount not subject to contract specified withholding, as appropriate; payment terms; other substantiating documentation or information required by the contract; and name (where practicable), title, phone number and complete mailing address of responsible official to whom payment may be made.

\* Contracting officer to insert appropriate number of days.

\*\* Contracting officer to insert the number of copies required.

#### 952.232-72 Fixed-price purchase order payment provisions.

As prescribed in 932.7107-1(c), incorporate the following payment provisions in fixed price purchase orders and, if more than one (1) calendar day is required, specify the appropriate number of calendar days established for Government inspection/acceptance of deliverables:

**Payment due dates**—Unless otherwise provided herein, payments for accepted supplies or services shall be due thirty (30) calendar days after the later of the date of actual receipt of a proper invoice by the Government official designated herein for the receipt of invoices or the date the delivered items are accepted by the Government. For purposes of determining payment due dates and for no other purpose, constructive acceptance shall be deemed to occur on the date of receipt at the specified delivery point. If upon inspection a delivered item is found defective, the provisions of this paragraph will apply to the replacement item(s) or will be reapplied upon correction of the defect.

**Discounts**—In connection with any discount offered for early payment, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of these points, or from the date a proper invoice is received in the office specified by the Government if the latter date is later than the date of delivery. For the purpose of computing the discount earned, payment shall be considered to have been made on the date the Government check was dated.

**Vendor's billing instructions**—Proper invoices shall include the vendor's name and invoice date; order number; description, price and quantity of item(s) actually delivered or services rendered; shipping and payment terms; and name (where practicable), title, phone number, office name and complete mailing address of responsible official to whom payment is to be made.

**Bill of lading number and weight of shipping** will be shown for shipments made on Government bills of lading. Prepaid shipping costs will be indicated as a separate item on the invoice. Where shipping costs exceed \$10.00 (except for parcel post) the billing must be supported by a bill of lading or receipt.

**Interest on overdue payments**—Interest penalties determined in accordance with provisions of the Prompt Payment Act (31 U.S.C. 3901 et seq.) and Office of Management and Budget Circular A-125 shall be paid by the Government when the payment check is dated more than fifteen (15) calendar days after the payment due date as established by the provisions herein, or a discount is taken after the expiration of a discount period and the underpayment is not

corrected within fifteen (15) calendar days of the expired discount period.

#### 952.232-73 Payment methods.

As prescribed in 932.7107-1(d), insert the following clauses in all solicitations and contracts:

#### Payment Methods (Apr 1984)

(a) Payments due for amounts properly invoiced in accordance with the terms and conditions specified elsewhere in the contract shall be made either by Treasury check(s) payable to the contractor or designee or by electronic funds transfer(s) to a financial institution designated by the contractor for that purpose. The method of payment shall be determined by the Government at the time of payment in accordance with applicable Treasury Department requirements.

(b) After award but no later than fourteen (14) days before an invoice or bill is submitted for payment, the contractor shall designate a financial institution for the receipt of electronic funds transfer payments hereunder; and provide the appropriate Government representative (contracting officer or finance official as determined by the Government) with the name of the designated financial institution, financial institution's or correspondent financial institution's 9-digit American Bankers Association identifying number, telegraphic abbreviation of such financial institution, and account number at the designated financial institution to be credit with funds.

(c) In the event the contractor during the performance of this contract elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the information as specified in paragraph (b) above must be received by the appropriate Government representative thirty (30) days prior to the date such change is to become effective.

(d) The document furnishing the information required in paragraphs (b) and (c) above must be dated and contain the signature, title, and telephone number of the contractor official authorized to provide it, as well as the contractor's name and contract number.

(e) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

#### 952.235-70 Key personnel.

In accordance with 935.070, insert this clause.

#### Key Personnel (Apr 1984)

The personnel specified in an attachment to this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be



made by the Contracting Officer. Provided, that the Contracting Officer may ratify in writing such diversion and such ratification shall constitute the consent of the Contracting Officer required by this clause. The attachment to this contract may be amended from time to time during the course of the contract to either add or delete personnel, as appropriate.

#### 952.236 Construction and architect-engineer contracts.

##### 952.236-70 Administrative terms for architect-engineer contracts.

As prescribed at 936.702(a) the following additional terms shall be included in Standard Form 252, Item 6:

(a) *Description of project.* The contracting officer shall include. (As full a description as is feasible should be inserted. If the architect-engineer services are to be furnished for a construction project, describe the facilities involved, including any auxiliary facilities that may be required.)

(b) *Statement of architect-engineer services.* The contractor shall, within the time specified in the contract, or if not specified therein, in the shortest reasonable time, furnish for the construction project the architect-engineer services described below, subject to such further detailed requirements as may be appended to this contract by agreement of the parties.

**Note A.**—This form of contract provides for completion of the architect-engineer services "within the shortest reasonable time." The form may be modified to provide for completion of separable parts of the work at different times.

**Note B.**—When title I, II, or III services are to be furnished, the following language may be used to describe such services. Modifications in the text of the language may be made to omit inappropriate items or, where necessary, to meet particular circumstances.

##### Title I—Preliminary Services

(1) Conduct or arrange for, by subcontract or otherwise as approved by the Contracting Officer, and supervise all necessary topographical and other field surveys, the preparation of maps, and necessary test boring and other surface investigations.

(2) Consult and collaborate with DOE to determine the requirements which will govern the design of the project and to establish architectural and engineering criteria for such design.

(3) Conduct preliminary studies, and prepare preliminary sketches, drawings, layout plans, outline specifications, and reports showing features and characteristics of the design proposed to meet DOE's requirements. If more than three studies, including sketches, drawings, plans, outline specifications, or documents are required because of changes initiated by DOE, an equitable adjustment in the lump-sum compensation will be made in accordance with provisions of the Changes clause.

(4) The drawings, plans, and outline specifications and documents shall be prepared in such form and furnished in such quantity as directed by DOE.

**Note.**—Specific quantities of the drawings, plans, outline specifications, and documents should be indicated here or elsewhere in the contract.

(5) Prepare preliminary estimates of cost and time schedule for (i) completion of the design, working drawings, and specifications, and (ii) construction.

(6) Prepare preliminary estimates of material quantities required for construction.

##### Title II—Design Services

(1) Upon approval by DOE of preliminary plans and estimates, undertake the design of the construction project.

(2) Undertake restudy and redesign work due to minor deviations from the approved preliminary work as may be required by DOE.

(3) Prepare and revise, for the approval of DOE, and furnish complete sets of contract bidding documents, including working drawings, details, and specifications for construction, in such form and quantity and including such provisions as may be required by law or the directions of DOE.

**Note.**—Specific quantities of drawings and specifications should be indicated here or elsewhere in the contract.

(4) Prepare, or when directed by DOE, participate with others in the preparation of a detailed estimate of the cost of construction based on the approved design and working drawings and specifications.

(5) Assist DOE in securing, analyzing, and evaluating construction bids or proposals.

(6) When requested, consult with and advise DOE on any questions which may arise in connection with the architect-engineer services described in this contract.

##### Title III—Supervision of Construction

(1) Furnish and maintain governing lines and benchmarks to provide horizontal and vertical controls to which construction progress may be referred.

(2) Check approved or require revision of, all vendors' shop drawings to assure conformity with the approved design and working drawings and specifications.

(3) Inspect the execution of construction so as to assure adherence to approved working drawings and specifications.

(4) Inspect construction workmanship and materials, and equipment, and report to DOE as to their conformity or nonconformity to the approved working drawings and specifications.

(5) Make or acquire such field or laboratory tests of construction workmanship, materials, and equipment, as DOE may require or approve.

(6) Prepare estimates of reasonable amounts of increase or decrease in contract price and/or contract completion time for contract modification, evaluate proposal submitted by the constructor for such contract adjustment and make recommendations to the Contracting Officer for use in negotiating.

(7) Prepare reports and make recommendations on status of deliveries or materials and equipment as DOE may require or approve.

(8) Prepare monthly and other reports of the progress of construction, as may be

required, and partial, interim, and final estimates and reports of quantities and values of construction work performed, for payment or other purposes.

(9) Furnish — set(s) of reproducible "as-built" records drawings of the type specified by DOE — set(s) of marked-up specifications, showing construction as actually accomplished.

#### 952.236-71 Inspection in Architect-Engineer contracts.

As prescribed at 936.609-3 insert the following clause.

##### Inspection (Apr 1984)

The Government, through any authorized representatives, has the right at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require his subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work.

#### 952.236-72 Nonrefundable fee for plans and specifications.

In accordance with the requirement at 936-202 include the following in solicitations for construction.

##### Nonrefundable Fee for Plans and Specifications (Apr 1984)

A fee of \$ — is required for the plans and specifications referenced in this solicitation. Send check or money order to —. The fee is not refundable. Plans and specifications need not be returned.

#### 952.245 Clauses related to government property.

##### 952.245-2 Government property (fixed-price contracts).

Modify FAR 52.245-2 by adding "and the DOE Acquisition Regulation Subpart 945.5," after the reference to FAR Subpart 45.5 in the first sentence of paragraph (e)(1) and (e)(2) of the clause.

##### 952.245-5 Government property (cost reimbursement, time-and-materials, or labor-hour contracts.)

Modify FAR 52.245-5 by adding "and DOE Acquisition Regulation Subpart 945.5" after the reference to FAR Subpart 45.5 in paragraphs (e)(1) and (e)(2) of the clause.

#### 952.247-70 Foreign travel.

When foreign travel may be required under the contract insert the following clause.



**Foreign Travel (Apr 1984)**

(a) Foreign travel, when charged directly, shall be subject to the prior approval of the contracting officer for each separate trip regardless of whether funds for such travel are contained in an approved budget. Foreign travel is defined as any travel outside of Canada and the United States and its territories and possessions.

(b) Request for approval shall be submitted at least 45 days prior to the planned departure date, be on a Request for Approval of Foreign Travel form, and when applicable, include a notification of proposed soviet-bloc travel.

**952.249 Clauses related to termination.****952.249-70 Termination clause for cost-reimbursement architect-engineer contracts.**

In accordance with the provisions prescribed at 949.505 include the following clause in a cost-reimbursement architect-engineer contract.

**Termination (Apr 1984)**

(a) Notice of termination for default or convenience. The Contracting Officer may at any time terminate performance of the work under this contract in whole or from time to time in part for the default of the architect-engineer or for the convenience of the Government by written notice to the architect-engineer stating the ground for termination. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the architect-engineer. Upon receipt of such notice and except as otherwise directed by the contracting officer, the architect-engineer shall:

(1) Stop work under the contract on the date and to the extent specified in the notice of termination;

(2) Place no further orders or subcontracts for materials, services, or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated; and

(3) Terminate all orders and subcontracts to the extent they relate to the performance of work terminated by the notice of termination.

**(b) Termination for default.**

(1) If the architect-engineer refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof; or fails to complete said work within such time; or if the architect-engineer fails to perform any of the other requirements of this contract, and does not cure such failure within a period of 10 days (or such longer period as the contracting officer may authorize in writing) after receipt of notice from the contracting officer specifying such failure, the contracting officer may terminate for default the architect-engineer's right to proceed with the work as to which there has been delay, provided that the performance of the work shall not be terminated for default because of any delays

in the completion of work due to unforeseeable causes beyond the control and without the fault or negligence of the architect-engineer, including, but not restricted to, acts of God, or the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another architect-engineer in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delay of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the architect-engineer and subarchitect-engineers or suppliers; and if the architect-engineer within ten (10) days from the beginning of any such delay (unless the contracting officer grants a further period of time prior to the date of final settlement of the contract) notifies the contracting officer in writing of the causes of delay. The contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal by the architect-engineer to the head of the agency or his designee in accordance with "Disputes" clause of this contract.

(2) If, after notice of termination of this contract for default under (1) above, it is determined for any reason that the architect-engineer was not in default pursuant to (1), or that the architect-engineer failure to perform or to make progress in performance is due to causes beyond the control and without the fault to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the architect-engineer pursuant to the provisions of this clause relating to excusable delays, the notice of termination shall be deemed to have been issued for the convenience of the Government under this clause, and the rights and obligations to the parties hereto shall in such event be governed accordingly.

(c) *Liability for costs on default.* If performance of the work under this contract is terminated for the default of the architect-engineer, the Government may complete or employ any other person or persons to complete the work, and the architect-engineer shall be liable to the Government for increased costs occasioned the Government by the default.

(d) *Terms of settlement.* Upon the termination of performance of work under this contract, full and complete settlement of all claims of the architect-engineer with respect to the terminated work shall be made as follows:

(1) *Assumption of contractor's obligations.* The Government shall have the right in its decision to assume all obligations, commitments, and claims that the architect-engineer may have theretofore in good faith undertaken or incurred in connection with the terminated work, the cost of which would be allowable in accordance with the provisions of this contract; and the architect-engineer shall, as a condition of receiving the payments mentioned in this article, execute

and deliver all such papers and take all such steps as the contracting officer may require for the purpose of fully vesting in the Government all the rights and benefits of the architect-engineer, related to such obligations, commitments, and claims.

(2) *Payments for allowable costs.* The Government shall treat as allowable costs all expenditures made in accordance with the clause herein entitled "Allowable cost and Payment," not previously so allowed or otherwise credited.

(3) *Payment for termination expense.* If performance of work under the contract is terminated for the convenience of the Government, the Government shall reimburse the architect-engineer for such further expenditures made after the date of termination for the protection of Government property and for such legal and accounting services in connection with settlement as are required or approved by the contracting officer.

(4) *Payments on account of fixed fee.* If performance work under the contract is terminated for the convenience of the Government, the architect-engineer shall be paid that portion of the fixed fee which the work actually completed, so determined by the contracting officer, bears to the entire work under this contract less payments previously made on account of the fee. If performance of the work under the contract is terminated for the default of the architect-engineer, no further payment beyond that amount due on completed work with appropriate fee payment, shall accrue on account of the fixed price.

(5) *Computation of amount due.* In arriving at the amount, if any, due the architect-engineer under this article, there shall be deducted from what would otherwise be due (i) all unliquidated advances and all other unliquidated payments on account theretofore made to the contractor, (ii) any claims of the Government against the contractor in connection with this contract, and (iii) all deductions due under the terms of this contract and not otherwise recovered by or credited to the Government.

(6) *Property accounting and release.* The architect-engineer shall furnish the accounting for Government-owned property required by the clause entitled "Property" and the assignment, closing financial statement, and release required by the clause entitled "Allowable Cost and Payments."

(e) *Rights and remedies of the Government.* The rights and remedies of the Government provided in this article are in addition to any other rights and remedies provided by law or under this contract.

**952.250 Clauses related to indemnification of contractors.****952.250-70 Nuclear hazards indemnity.**

In accordance with the provisions prescribed in Subpart 950.7 include the following clause in applicable contracts.

**Nuclear Hazards Indemnity (Apr 1984)**

(a) This clause is incorporated into this contract pursuant to the authority contained in subsection 170(d) of the Atomic Energy Act



of 1954, as amended (hereinafter called the Act.)

(1) The definitions set out in the Act shall apply to this article.

(2) The term "contract location" means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the contractor is engaged in the performance of contractual activity under this contract.

(3) The term "extraordinary nuclear occurrence" means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in Subpart E of 10 CFR 140.

(b) Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability. DOE may at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability, arising out of or in connection with the contractual activity, provided that the costs of such financial protection will be reimbursed to the contractor by DOE.

(c)(1) To the extent that the contractor and other persons indemnified are not compensated by any financial protection, permitted or required by DOE or the Nuclear Regulatory Commission (NRC), DOE will indemnify the contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (2) of this paragraph (c); and (ii) the reasonable cost of investigating and settling claims and defending suits for damage for such public liability, provided that DOE's liability, excluding such reasonable costs, under all indemnity agreements entered into by DOE under section 170 of the Act, including this contract, shall not exceed \$500 million in the aggregate for each nuclear incident occurring within the United States or \$100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in paragraph (c)(1) of this section is public liability which (i) arises out of or in connection with the contractual activity; and (ii) arises out of results from:

(A) A nuclear incident which takes place at a contract location; or

(B) A nuclear incident which takes place at any other location and arises out of or in the course of the performance of contractual activity under this contract by the contractor's employees, individual consultants, borrowed personnel or other persons for the consequence of whose acts or omissions the contractor is liable, provided that such incident is not covered by any other indemnity agreement entered into by DOE or the NRC pursuant to section 170 of the Act; or

(C) A nuclear incident which arises out of or in the course of transportation of source,

special nuclear, or by-product materials to or from a contract location, provided such incident is not covered by any indemnity agreement entered into by DOE with the transporting carrier, or with a carrier's organization acting for the benefit of the transporting carrier, or with a licensee of NRC, pursuant to section 170 of the Act; or

(D) A nuclear incident which involves items (such as equipment, material, facilities, or design or other data) produced or delivered under this contract, provided such incident is not covered by any other indemnity agreement entered into by DOE or NRC pursuant to section 170 of the Act.

(d) In the event of an extraordinary nuclear occurrence which:

(1) Arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility, or

(2) Arises out of or results from or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility, or

(3) During the course of the contract activity, arises out of or results from the possession, operation, or use by the contractor or a subcontractor of a device utilizing special nuclear material or by-product material, DOE and the contractor on behalf of itself and other persons indemnified, insofar as their interests appear, each agrees to waive:

(i) Any issue or defense as to the conduct of the claimant or fault of persons indemnified, including, but not limited to:

(A) Negligence;

(B) Contributory negligence;

(C) Assumption of risk; or

(D) Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God.

As used herein, "conduct of the claimant" includes conduct of persons through whom the claimant derives its cause of action;

(ii) Any issue or defense as to charitable or governmental immunity;

(iii) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof, but in no event more than 20 years after the date of the nuclear incident. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(e) The waivers set forth in paragraph (d) of this clause:

(1) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(2) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(3) Shall not apply to injury to a claimant who is employed at the site of and in

connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefore are either payable or required to be provided under any workmen's compensation or occupational disease law;

(4) Shall not apply to any claim for punitive or exemplary damages, provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law;

(5) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(6) Shall be effective only with respect to those obligations set forth in this agreement and in insurance policies, contracts or other proof of financial protection; and

(7) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the limit of liability provisions under subsection 170e of the Atomic Energy Act of 1954, as amended, and (ii) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraph (c)(2). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE, copies of all pertinent papers received by the contractor or filed with respect to such actions or claims. When DOE shall determine that the Government will probably be required to make indemnity payments under the provisions of (c) above, DOE shall have the right to, and shall collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right (1) to require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) The indemnity provided by this clause shall not apply to public liability arising out of, or in connection with, any activity that is performed at a licensed facility, and that is covered by a Nuclear Regulatory Commission indemnity agreement authorized by section 170 of the Act.

(h) The obligations of DOE under this clause shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the contractor, or



by the completion, termination or expiration of this contract.

(i) The parties to this contract enter into this clause upon the condition that this clause may be amended at any time by the mutual written agreement of DOE and the contractor, and that such amendment may, by its express terms, provide that it will apply to any nuclear incidents which occur thereafter.

(j) The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the Disputes clause provided, however, that the following provisions of the contract: Clause entitled, Covenant Against Contingent Fees; the clause entitled, Officials Not to Benefit; and the clause entitled, Examination of Records by Comptroller General; and any provisions later added to this contract which under applicable Federal law, including statutes, executive orders and regulations, are required to be included in agreements of the type contained in this article, shall apply to this clause.

**Alternate I:** The following paragraph will be included in for those contracts containing the indemnity clause executed under the general contract authority of DOE.

(k) To the extent that the Contractor is compensated by any financial protection, or is indemnified pursuant to this clause or is effectively relieved of public liability by an order or orders limiting same, pursuant to section 170e of the Atomic Energy of 1954, as amended, the provisions of clause providing General Authority Indemnity, shall not apply.

#### **952.250-71 Nuclear hazards indemnity—product liability.**

Include the following clause as prescribed by the provisions of Subpart 950.70.

#### **Nuclear Hazards Indemnity—Product Liability (Apr. 1984)**

(a) This clause is incorporated into this contract pursuant to the authority contained in section 170d of the Atomic Energy Act of 1954, as amended (hereinafter called the Act).

(1) The definitions set out in the Act shall apply to this article.

(2) The term "product delivered under the contract" means any material, equipment, device, drawing, specification, or technical data made, prepared, or acquired by the contractor in the course of performance of the contract and delivered to DOE or to any other persons as directed or approved by DOE.

(b) Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability. DOE may at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability against which the contractor is indemnified hereunder, provided that the costs of such financial protection will be reimbursed to the contractor by DOE.

(c)(1) To the extent that the contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE or the Nuclear Regulatory Commission, (NRC), DOE will indemnify the contractor, and other persons indemnified, against (i) claims for public liability as described in subparagraph (2) of this paragraph (c); and (ii) the reasonable costs of investigating and settling claims, and defending suits for damages for such public liability, provided that DOE's liability, excluding such reasonable costs, under all indemnity agreements entered into by DOE under section 170 of the Act, including this contract, shall not exceed \$500 million in the aggregate for each nuclear incident occurring within the United States or \$100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in subparagraph (1) of this section is public liability which (i) arises out of, or in connection with, the contractual activity; and (ii) arises out of, or results from, a product delivered under the contract, but does not include liability for a nuclear incident which is covered by any other indemnity agreement entered into by DOE or NRC pursuant to section 170 of the Act.

(d) The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraph (c)(2). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE copies of all pertinent papers received by the contractor or filed with respect to such actions of claims. When DOE shall determine that the Government will probably be required to make indemnity payments under the provisions of (c) above, DOE shall have the right to, and shall collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right, (1) to require the prior approval of DOE for payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(e) The obligations of DOE under this clause shall not be affected by any failure on the part of the contractor to fulfill its obligations under this contract, and shall be unaffected by the death, disability, or termination of existence of the contractor or by the completion, termination, or expiration of this contract.

(f) The parties to this contract enter into this article upon the condition that this clause may be amended at any time by the mutual written agreement of DOE and the contractor and that such amendment may, by its express terms, provide that it will apply to any nuclear incidents which occur thereafter.

(g) The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the Disputes clause, provided, however, that the following provisions of the contract: Clause entitled, Covenant Against Contingent Fees; Clause entitled, Officials Not to Benefit; Clause entitled, Assignment of Claims; and Clause entitled, Examination of Records by Comptroller General; and any provisions later added to this contract which, under applicable Federal law, including statutes, executive orders, and regulations, are required to be included in agreements of this type contained in this clause, shall apply to this clause.

**Alternate I:** The following section will be added for in those contracts containing indemnity agreements executed under the general contract authority of DOE:

(h) To the extent that the contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of public liability by an order or orders limiting same pursuant to section 170e of the Atomic Energy Act of 1954, as amended, the provisions of clause providing General Authority Indemnity, shall not apply.

#### **952.250-72 Indemnity assurance to architect-engineer or supplier prior to operation of a production or utilization facility.**

Include the following clause in accordance with the provisions of Subpart 950.70.

#### **Indemnity Assurance to Architect-Engineer or Supplier Prior to Operation of a Production or Utilization Facility (Apr 1984)**

(a)(1) The definitions set out in the Atomic Energy Act of 1954, as amended (hereinafter called the Act), shall apply to this clause.

(2) The services or supplies furnished under this agreement are intended to be used in connection with the construction and/or operation of a production or utilization facility.

(3) DOE will use its best efforts to include in any contract for the operation of such facility, an agreement based on the then current approved form of indemnity agreement under section 170d of the Atomic Energy Act of 1954, as amended, whereby DOE will indemnify all persons indemnified, including the contractor, against public liability for nuclear incidents arising out of or in connection with contractual activities under the contract for the operation of said facility in accordance with the authority provided in subsection 170d of the Act.

(4)(i) DOE will enter into an indemnity agreement in accordance with the authority provided in subsection 170d of the Act with the contractor, without further consideration from the contractor, at any time all of the following circumstances are present:

(A) The services or supplies furnished under this contract are being used in connection with any activity or situation



which involves a risk of substantial nuclear incident; and

(B) there is not in effect an indemnity agreement as described in subparagraph (3) of this clause; and

(C) DOE's authority to enter into agreements of indemnification under section 170(d) of the Act has not expired or been so amended as to deprive DOE of authority to enter into such an agreement.

(b) In that agreement, DOE will indemnify the contractor and other persons indemnified against public liability arising out of, or in connection with, the contractual activity of this contract.

(c) Such agreement will be based on the then current approved form of section 170d indemnity agreement used in contracts between DOE and its contractors, and shall further include an obligation to indemnify the contractor, and persons indemnified for such public liability arising out of, or resulting from, nuclear incidents occurring between the time when the services or supplies furnished under this contract are used in connection with any activity or situation which involves risk of a substantial nuclear incident and the time when such agreement is executed.

(d) The indemnity provided by DOE under all indemnity agreements entered into by DOE under section 170 of the Act, including this agreement, shall not exceed \$500 million in the aggregate for each nuclear incident, without regard to the number of persons indemnified, excluding the reasonable costs of investigating and settling claims and defending suits for damages, provided, however, that with respect to incidents occurring outside the United States, such aggregate indemnity shall not exceed \$100 million, including such reasonable costs.

## PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

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- 970.7000 Mission-oriented solicitation.

**Authority:** Section 844 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

**970.0000 Scope of part.**

This part provides Departmental requirements and provisions regarding award and administration of management and operating contracts as defined at FAR Subpart 17.6 and Subpart 917.6 of this chapter. Use of a

management and operating contract must be authorized by the Secretary, Deputy or Undersecretary. For administrative convenience, the subparts of this part are arranged in the same numeric sequence as the parts of the FAR. Thus, for example, requirements regarding Small Business are found at 970.19 and guidance regarding Contract Clauses is found at 970.52. To the extent possible the same subpart section and subsection Titles of the FAR are applied in this part 970. There are some difference for convenience. When there is no specific guidance of a FAR part/section or applicability of a FAR part/section to DOE management and operating contracts a subpart or section will not be included.

**970.0001 Renewal of management and operating contracts.**

(a) In accordance with applicable law, rules, or regulations and FAR 17.605, competition of existing management and operating contracts will be sought whenever it appears likely that the Government's position may be meaningfully improved in terms of cost or performance, unless it is determined that to change a contractor would be contrary to the best interest of the Government. Except in those cases where the contract specifically permits the Government to bring in a replacement contractor, it is not practical in most instances to compete a management and operating contract which includes major Government-owned facilities on contractor-owned or leased sites. In such cases, the alternatives would be to extend the contract or to allow the contract to expire and, if the work is to be continued, place all or some part of the work with another contractor at a different site.

(b) The following factors, as a minimum, shall effect whether an existing management and operating contract should be completed.

(1) Overall performance of an incumbent contractor including specific consideration of the contractor's administrative, environmental, safeguards and security, safety, health, site planning, maintenance and construction, facility management, energy conservation program considerations, cost, schedule and technical performance.

(2) Potential impact of change in contractors on programmatic activities.

(3) The likelihood that qualified industrial firms or other organizations will compete for the contract.



**Subpart 970.03—Ethics****970.0304 Contingent fees.**

The policies and requirements of FAR Subpart 3.4 shall be applied to all procurement activities of management and operating contractors.

**Subpart 970.04—Administrative Matters****970.0404 Safeguarding classified information.****970.0404-1 Definitions.**

"Classified Information" means any information or material that is owned by or produced for, or is under the control of the United States Government, and determined pursuant to provisions of Executive Order 12356, April 2, 1982 (47 FR 14874, April 8, 1982), or prior orders, or as authorized under the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure, and is so designated.

"Restricted Data" means data which is defined in section II, of the Atomic Energy Act of 1954, as amended, as "all data concerning: (1) Design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142."

**970.0404-2 General.**

(a) The basis of DOE's security requirements is the Atomic Energy Act of 1954, as amended.

(b) DOE regulations concerning national security information are codified at 10 CFR Part 1045 and Part 710. Supplemental security material is found in the DOE Directives and Orders system. Foreign ownership, control, or influence over contractors as it relates to security and discussed at 904.70 also applies to management and operating contracts Regulations pertaining to the protection of restricted data is found under 10 CFR Part 1016.

(c) Statutory requirements to be observed in connection with the release of Restricted Data to foreign governments are contained in the Atomic Energy Act of 1954, Sections 141 and 144.

(d) Section 148 of the Atomic Energy Act (42 U.S.C. 2168) prohibits the unauthorized dissemination of unclassified nuclear information with respect to the atomic energy defense programs pertaining to:

(1) The design of production facilities or utilization facilities;

(2) Security measures (including security plans, procedures, and equipment) for the physical protection of: (i) Production or utilization facilities, (ii) nuclear material contained in such facilities, or (iii) nuclear materials in transit; or

(3) The design, manufacture, or utilization of any atomic weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act.

**970.0404-3 Responsibilities of contracting officers.**

(a) If access to Restricted Data may be required, during the solicitation process for a management and operating contract security clearances shall be obtained as noted in DOE Order 5631.2

(b) Management and operating contracts which may require the processing or storage of Restricted Data or Special Nuclear Material require application of the provisions of DOE Orders 5634.1; 5635.1; and 5632.2.

**970.0404-4 Contract clauses.**

(a) The security clauses to be used in DOE management and operating contracts are found at 970.5204. They are:

(1) *Security, 970.5204-1.* This clause is required in contracts under section 41 (ownership and operation of production facilities) of the Atomic Energy Act of 1954, as amended.

(2) *Classification, 970.5204-53.* This clause is to be used in all management and operating contracts which involve classified information.

(3) *Sensitive foreign nation controls, 970.5204-34.* This clause is required in all management and operating contracts.

(4) *Foreign ownership, control, or influence, 970.5204-10.* The clause is required in all management and operating contracts.

(b) The clause at 970.5204-4, Disclosure of Information may be used in place of the clauses entitled "Security" and "Classification" in contracts for work that are not likely to produce classified information or restricted data.

(c) Include the clause at 952.204-73 in a solicitation for a management and operating contract.

**970.0407 Record retention requirements.**

The requirements of FAR Subpart 4.7 do not apply to management and operating contractors and cost-reimbursement type subcontracts thereunder. The contract shall include clause at 970.5204-9.

**Subpart 970.08—Required Sources of Supplies and Services****970.0801 Excess personal property.**

The provisions of FAR Subpart 8.1, FPMR 41 CFR 101-43, and DOE-PMR 41 CFR 109-43 apply.

**970.0803 Acquisition of utility services.**

The requirements of FAR Subpart 8.3 shall be applied to management and operating contractors who are authorized to procure utility services.

(a) All utility services (except telecommunications) that are required for Government-owned and contractor-operated facilities shall generally be procured directly by DOE and not by the contractors that manage and operate these facilities for DOE.

(b) However, when it is economically advantageous or otherwise in the best interest of the Government, and subject to the provisions of 970.803-7(b), Heads of Contracting Activities may authorize a contractor that manages or operates a DOE facility to procure utility services on a subcontract basis. When a contractor is authorized to subcontract for utility services under the authority of this paragraph (b), a copy of the authorization, together with a statement of justification, shall be sent to the Project and Facilities Management Office, Headquarters. Heads of Contracting Activities shall require contractors which they authorize to subcontract for utility services to comply with the requirements of 970.803-7, dealing with the prior review of certain proposed acquisitions.

(c) Heads of Contracting Activities shall submit, to the utility element in the Office of Project and Facilities Management for Headquarters' review and approval, proposed contracts for utility services (except telecommunications), including proposed authorizations under applicable GSA area-wide contracts, and proposed memoranda of understanding for consolidated purchase, joint use, or cross-service by DOE with other Government agencies, when one of the circumstances described at FAR 8.307 applies or if the contract term is to exceed one year.

(d) Section 164 of the Atomic Energy Act of 1954 establishes special authorities relative to the acquisition of electric utility services for the Oak Ridge, Paducah, and Portsmouth installations.

**970.0811 Leasing of motor vehicles.**

The provisions of FAR 8.11 and 908.11 apply.



**970.0870 Strategic and critical materials.**

Management and operating contractors who use strategic and critical materials shall fulfill their requirements in accordance with 908.70.

**970.0871 Procurement of special items.**

The following items are to be procured by management and operating contractors in accordance with the provisions of the DEAR as shown.

| Item                                                                   | DEAR                    |
|------------------------------------------------------------------------|-------------------------|
| (a) Motor vehicles                                                     | 908.7101.               |
| (b) Aircraft                                                           | 908.7102.               |
| (c) Office machines                                                    | 908.7103.               |
| (d) Office furniture and furnishings                                   | 908.7104.               |
| (e) Filing cabinets                                                    | 908.7105.               |
| (f) Security cabinets                                                  | 908.7106.               |
| (g) Alcohol                                                            | 908.7107.               |
| (h) Helium                                                             | 908.7108.               |
| (i) Fuels and packaged petroleum products                              | 908.7109.               |
| (j) Coal                                                               | 908.7110.               |
| (k) Arms and ammunition                                                | 908.7111.               |
| (l) Materials handling equipment replacement standards.                | 908.7112.               |
| (m) Calibration services                                               | 908.7113.               |
| (n) Wiretapping and eavesdropping equipment.                           | 908.7114.               |
| (o) Government forms                                                   | 908.7115.               |
| (p) Electronic data processing tapes                                   | 908.7116.               |
| (q) Rental of post office boxes                                        | 908.7118.               |
| (r) Precious metals                                                    | 908.7121(b).            |
| (s) Heavy water                                                        | 908.7121(a).            |
| (t) Lithium                                                            | 908.7121(c).            |
| (u) Products made in Federal penal and correctional institutions.      | FPMR 41 CFR 101-26.702. |
| (v) Products and services of the blind and other severely handicapped. | FPMR 41 CFR 101-26.701. |

**970.0872 Purchase or lease determinations.**

The guidelines in FPMR 41 CFR 101-25.5 for making purchase or lease determinations shall be applied to management and operating contractor acquisitions of all types of equipment. These guidelines shall be used in making lease-versus-purchase determinations at time of original acquisition, when lease renewals are being considered, or at other times as circumstances warrant.

**Subpart 970.09—Contractor Qualifications****970.0902 Qualified products.**

(a) Heads of Contracting Activities may authorize use of procedures in FAR Subpart 9.2 by contractors.

(b) Qualified products lists (QPL) shall be distributed to all management and operating contractors.

**970.0905 Organizational conflicts of interest.**

(a) All management and operating contractors shall contain an appropriate organizational conflict of interest clause. The disclosure or representation requirement of 909.5706 and an appropriate clause such as those found at 952.209-71 and 952.209-72 shall be included in solicitations and resulting

contracts. The contracting officer shall consider provisions which assure appropriate restraints on intercorporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates, including personnel access to the facility, technical transfer of information from the facility, and the availability from the facility of other advantages flowing from performance of the contract. The subcontractors and consultants of management and operating contractors should be, to the extent feasible, made subject to the requirements of this subpart as if they were performing the work as prime contractors to the Department.

(b) FAR Subpart 9.5 and 909.570 of this chapter shall apply to procurements by management and operating contractors.

**Subpart 970.10—Specifications, Standards and Other Statement of Work Descriptions****970.1001 General.**

Department of Energy management and operation contracts provide for the operation, maintenance, or support, on behalf of the Department, Government-owned or controlled research, development, special production or testing facilities established wholly for or principally devoted to one or more major programs of the Department.

**970.1002 Statement of work.**

(a) While it is not feasible to set forth standard language which would apply to every contract situation, language must be designed for inclusion in a management and operating contract to describe clearly the work being undertaken; the controls, as appropriate, to be exercised by DOE over the performance of that work; and the relationship contemplated between the parties.

(b) The language shall also include the following with respect to subcontracting performance of the work described pursuant to (a) above: "The contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this clause".

(c) In management and operating contracts when the contractor is expected to perform no Davis-Bacon work with his own forces, the special clause in 970.5204-38 shall be included in the language.

(d) The provisions required above shall be set forth in a Statement of work clause to be included in the contract.

**Subpart 970.15—Contracting by Negotiation****970.1508 Price negotiation.**

(a) Management and operating contract prices (fee) and DOE obligations to support contract performance shall be governed by:

(1) The level of activity authorized and the amount of funds appropriated for DOE approved programs by specific program legislation;

(2) Congressional budget and reporting limitations;

(3) The amount of funds apportioned to DOE;

(4) The amount of obligational authority allotted to program officials and Approved Funding Program limitations; and

(5) The amount of funds actually available to the DOE operating activity as determined in accordance with applicable financial regulations and directives.

(b) Funds shall be obligated and made available by contract provision or modification after the funds become available for obligation for payment to support performance of DOE approved projects, tasks, work authorizations, or services.

(c) Management and operating contracts shall contain appropriate provisions to limit contractor expenditures to the overall amount of funds available and obligated. The clause at 970.5204-15 shall be used for this purpose.

**970.1508-1 Cost or pricing data.**

(a) The certification requirements of FAR 15.804-2, are not applied to DOE cost-reimbursement management and operating contracts.

(b) Management and operating contractors and their subcontractors shall be required to:

(1) Obtain certified cost or pricing data prior to the:

(i) Award of a negotiated subcontract at any tier when the subcontract price is expected to exceed \$500,000; or

(ii) Modification of any subcontract when the modification is expected to exceed \$500,000, unless unrelated and separately priced changes, for which certified cost of pricing data would not otherwise be required, are included.

(2) Incorporate appropriate contract provisions that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of submission of subcontractor defective cost or pricing data, at any tier.

(3) The exemptions to certified cost or pricing data identified by FAR 15.804-3



shall also apply in implementing the above cost/pricing data requirements.

(c) the clause at 970.5204-24 shall be included in subcontracts under management and operating contracts as described therein.

**970.1509 Fees for management and operating contracts.**

**970.1509-1 Fee policy.**

(a) DOE management and operating contractors, except educational institutions, may be paid a fee. The fee for a management and operating contract shall be an amount commensurate with the difficulty of the work and the level of required skills, demonstrated excellence in performance, and where applicable, an amount which recognizes contractor contributions or utilizations of their own facilities or other investment capital.

(b) Fee objectives and amounts are to be determined for each contract. Standard fees or across the board agreements will not be used or made. Due to the nature of funding management and operating contracts, it is anticipated that fees shall be established in accordance with the funding cycle; however, a longer period may be used, particularly for production efforts.

(c) Fee amounts payable on contracts for administration, management, operation, and on-site support of Government-owned facilities shall be established in accordance with this part. Amounts payable shall not exceed maximum amounts derived from the appropriate fee schedule established for this purpose. Request to pay fees in excess of the maximum will be sent to the Procurement Executive, for review and approval.

(d) Maximum fees for those management and operating contracts that provide support services shall be determined using the schedule(s) most closely related to the service(s) to be performed. This may be either the production and/or R&D schedules (in some cases this could be both schedules) or the maximum fee schedules for construction or construction management cited in 915.971. If architect-engineer services are involved, the weighted guidelines, profit-fee technique cited in 915.970 shall be applied.

(e) When a contract subject to this part requires a contractor to use its own facilities or equipment, or other resources to make its own cost investment for contract performance; e.g., when there is no letter-of-credit financing, consideration will be given to approval of fee amounts based on

assigning weights to appropriate fee factors. The weighted guidelines factors developed in 915.970 may be applied for this purpose. However maximum fees as are discussed in 970.1509-1(c) and (d) shall not be exceeded without the Procurement Executive approval.

**970.1509-2 Special considerations—educational institutions.**

(a) DOE policy is generally not to pay fees for management and operating contracts with educational institutions.

(b) Notwithstanding paragraph (a) of this section it may be, under special circumstances, permissible to reimburse or pay a management allowance to any educational institution provided such allowance can be justified and has the approval of the Head of the Contracting Activity.

**970.1509-3 Special consideration—nonprofit organizations (other than educational institutions).**

(a) Unless there is reason to do otherwise, it is the general policy of DOE to pay fees for a management and operating contract with a nonprofit organization; however, it is a matter of negotiation whether a fee will be paid in a given case.

(b) In computing the amounts to be paid, the tax status of the nonprofit organization should be considered. It is difficult to establish the degree to which the fee contributes to an organization's overall net profit since the fee compensates for certain unallowable costs and certain general and administrative expenses. It should be assumed, however, there is an element of profit in the fees paid under management and operating contracts.

(c) In order to assure consideration of the tax benefits of nonprofit organizations the maximum payable fixed fee cited in the fee schedules of this subpart should be reduced by at least 25%. However, depending upon the circumstances and with appropriate justification, fees may be paid between this reduced amount and the fee amount established by the fee schedule.

**970.1509-4 Considerations and techniques for determining fees.**

(a) The intent of the fee policy stated in 970.1509-1 reflects recognition that a fee is remuneration to contractors for the entrepreneurial function of organizing and managing resources, the use of contractor resources (including capital resources), and the assumption of risk that all incurred costs (operating and capital) may not be reimbursable.

(b) Use of a purely cost-based structured approach for determining fee objectives and amounts for typical DOE management and operating contracts is

inappropriate considering the limited level of contractor cost, capital goods, and operating capital outlays for performance of such contracts. Instead of being solely cost-based, the desirable approach calls for a structure that allows judgmental evaluation and consideration of such significant factors, as outlined below, and the selection of and assignment of appropriate fee values therefor:

(1) Management risk relating to performance, including: (i) The quality and diversity of principal work tasks required to do the job, (ii) the labor intensity of the job, (iii) the special control problems, and (iv) the advance planning, forecasting and other such requirements;

(2) The presence or absence of financial risk, including the type and terms of the contract;

(3) The relative difficulty of work, including consideration of technical and administrative knowledge, skill, experience and clarity of technical specifications;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, including the extent to which the contractor contributes plant, equipment, computers, or working capital (labor, etc.);

(5) Duration of project;

(6) Size and operation (number of locations, plants, differing operation, etc.);

(7) Influence of alternative investment opportunities available to the contractor (i.e., the extent to which undertaking a task for the Government displaces a contractor's opportunity to make a profit with the same staff and equipment in some other field of activity).

(8) The relationship of a proposed fee to fees being paid for similar work;

(9) The extent to which the activity contemplated is fundamentally a service being furnished to the Government or is an activity in which the contractor has substantial independent interest, a factor especially pertinent to research work which is closely allied to a contractor's own program and to operations which involve furnishing research facilities which would otherwise not be available because of their large cost;

(10) Benefits which may accrue to the contractor from gaining experience and knowledge of how to do something, from establishing or enhancing a reputation, or from being enabled to hold or expand a staff whose loyalties are primarily to the contractor; and

(11) Other special considerations, including support of Government



programs such as those relating to small and minority business in subcontracting, energy conservation, etc.

(c) The fee objective and amount for a particular negotiation is established by judgmental considerations of the above factors, assigning fee values as deemed appropriate for each factor, and totaling the resulting amounts.

(d) In recognition of the complexities of this fee determination process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, the fee schedules in 970.1509-5 set forth the maximum amounts of fee that contracting activities are allowed to award for a particular transaction without obtaining prior approval of the Procurement Executive. In addition the fee amount established in accordance with 970.1509-4 (a), (b) and (c) shall not be exceeded without prior approval of the Procurement Executive. To facilitate application of the schedules to a contract, the payable fee amounts thereunder are related to the total expected level of cost expenditures under the contract which is defined as the fee base.

#### § 970.1509-5 Limitations.

(a) Fee schedules representing the maximum allowable fee to be paid under operating and management contracts have been established for the following management and operating contract tasks or efforts.

- (1) Production/Manufacturing and
- (2) Research and Development

(b) The applicable schedules and maximum fees are:

#### PRODUCTION EFFORTS

| Fee base          | Fee       | Fee (per-cent) | Increment (per-cent) |
|-------------------|-----------|----------------|----------------------|
| Up to \$1 million |           | 7.00           | 7.00                 |
| 1,000,000         | \$70,000  | 7.00           | 8.05                 |
| 3,000,000         | 191,000   | 6.37           | 5.25                 |
| 5,000,000         | 296,000   | 5.92           | 4.18                 |
| 10,000,000        | 505,000   | 5.05           | 3.50                 |
| 15,000,000        | 680,000   | 4.53           | 3.30                 |
| 25,000,000        | 1,010,000 | 4.04           | 2.86                 |
| 40,000,000        | 1,439,000 | 3.60           | 2.41                 |
| 60,000,000        | 1,921,000 | 3.20           | 2.07                 |
| 80,000,000        | 2,335,000 | 2.92           | 1.50                 |
| 100,000,000       | 2,635,000 | 2.64           | 1.10                 |
| 150,000,000       | 3,185,000 | 2.12           | .60                  |
| 200,000,000       | 3,485,000 | 1.74           | .50                  |
| 300,000,000       | 3,985,000 | 1.33           | .40                  |
| 400,000,000       | 4,385,000 | 1.10           | .30                  |
| 500,000,000       | 4,685,000 | .94            |                      |
| Over 500M         | 4,685,000 | 1+.30          |                      |

<sup>1</sup> Excess.

#### RESEARCH AND DEVELOPMENT EFFORTS

| Fee base    | Fee       | Fee (per-cent) | Increment (per-cent) |
|-------------|-----------|----------------|----------------------|
| \$25,000    | \$2,500   | 10.00          | 9.74                 |
| 50,000      | 4,938     | 9.87           | 8.97                 |
| 100,000     | 9,420     | 9.42           | 8.22                 |
| 200,000     | 17,640    | 8.82           | 7.64                 |
| 400,000     | 32,920    | 8.23           | 7.28                 |
| 600,000     | 47,480    | 7.91           | 6.92                 |
| 800,000     | 61,320    | 7.67           | 6.69                 |
| 1,000,000   | 74,700    | 7.47           | 6.38                 |
| 3,000,000   | 202,300   | 6.74           | 6.11                 |
| 5,000,000   | 324,500   | 6.49           | 5.53                 |
| 10,000,000  | 601,000   | 6.01           | 4.82                 |
| 15,000,000  | 842,000   | 5.61           | 4.15                 |
| 25,000,000  | 1,257,000 | 5.03           | 3.60                 |
| 40,000,000  | 1,797,000 | 4.49           | 3.10                 |
| 60,000,000  | 2,417,000 | 4.03           | 2.40                 |
| 80,000,000  | 2,887,000 | 3.62           | 1.88                 |
| 100,000,000 | 3,273,000 | 3.27           | 1.12                 |
| 150,000,000 | 3,893,000 | 2.56           | .65                  |
| 200,000,000 | 4,158,000 | 2.08           | .55                  |
| 300,000,000 | 4,708,000 | 1.57           | .45                  |
| 400,000,000 | 5,158,000 | 1.29           | .35                  |
| 500,000,000 | 5,508,000 | 1.10           |                      |
| Over 500M   | 5,580,000 | 1+.35          |                      |

<sup>1</sup> Excess.

#### 970.1509-6 Fee base.

(a) The fee base is an estimate of necessary allowable costs to which a fee factor has been applied to determine the maximum fee allowance. It represents the cost of the production or R&D work to be performed, exclusive of the cost of source and special nuclear materials; estimated costs of land, buildings and facilities whether to be leased, purchased or constructed; depreciation of Government facilities; and any estimate of effort for which a separate fee is to be negotiated.

(b) The fee base, in addition to the above adjustments, shall exclude:

(1) Any part of the following types of costs which are of such magnitude or nature as to distort the technical and management effort actually required of the contractor:

(i) Estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract;

(ii) Estimated cost or price of subcontracts and other major contractor procurements; and

(iii) Other similar costs.

(2) Special equipment as defined in 970.1509-7.

(3) Estimated cost of Government-furnished materials, services and equipment;

(4) All estimates of costs not directly incurred by or reimbursed to the operating contractor;

(5) Estimates of home office or corporate general and administrative expenses that shall be reimbursed through the operating contract;

(6) Estimates of any independent research and development cost or bid and proposal expenses that may be approved under the operating contract.

(c) In calculating the fee base for application of the production schedule, the estimated cost of research and development work and of process development work which goes beyond normal technical support required to ensure continuity of operation shall be excluded. The maximum fee for such R&D and process development work is calculated separately, starting at the beginning of the R&D schedule.

(d) The schedules in this part are not intended to reflect compensation for unusual architect-engineer or construction services provided by the management and operating contractor. Such services are normally covered by special agreements based on the policies applying to architect-engineer or construction contracts. Fees paid for such services shall be in addition to the operating fees and should be calculated using the provisions of 915.9 relating to architect-engineer or construction fees.

(e) The fee schedules provide the maximum fees payable within the authority of the Head of Contracting Activity. There may be times however, when the fee schedule does not reflect an adequate compensation to the contractor (such as the use of its own facilities and capital). Proposals to compensate a contractor in excess of the maximum fee schedules shall be submitted to the Procurement Executive. Requests should contain documentation and state specifically why the contractor is entitled to additional fees. (See also, 970.1509-1(c)).

#### 970.1509-7 Special equipment purchases.

(a) Special equipment is sometimes procured in conjunction with management and operating contracts. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment and use the schedule in 915.971-5(f).

(b) In determining appropriate fees, factors such as complexity of equipment, ratio of procurement transactions to volume of equipment to be purchased and completeness of services should be considered. Where possible, the reasonableness of the fees should be checked by their relationship to actual costs of comparable procurement services.

(c) The maximum allowable fee for such services shall not exceed the fee schedule set forth in 915.971-5(f) for such services as performed by construction contractors. The fee is based on the estimated price of the equipment being purchased.

(d) For purposes of this part, special equipment is equipment for which the



purchase price is of such a magnitude compared to the cost of installation as to distort the amount of technical direction and management effort required of the contractor. Generally, special equipment is considered to be a capital-asset-type of equipment (typically equipment costing more than \$1,000 and having a service life of more than two years) for which the cost of installation and handling (including unloading, hauling and warehousing) is 5%, or less, of the purchase price of the equipment. However, the determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved in each project. This category of equipment would generally include:

(1) Major items of prefabricated process or research equipment.

(2) Major items of preassembled equipment such as packaged boilers, generators, machine tools, and large electrical equipment. In some cases, it would also include special apparatus or devices such as reactor vessels and reactor charging machines.

#### 970.1509-6 Special considerations—award fee.

(a) When a management and operating contract is to be awarded on an award-fee basis, several special considerations are appropriate.

(b) In management and operating contracts, the base fee portion of the fee objective should not normally exceed 50% of the otherwise applicable fixed fee. However, the base amount may range from 0 to 50% of the fixed fee amount. In the event 50% is exceeded, appropriate documentation shall be entered into the contract file. In no event shall the base fee exceed 60% of the fixed fee amount.

(c) The base fee plus the amount included in the award fee pool should normally not exceed the fixed fee (as subjectively determined or as developed from the fee schedule) by more than 50%. However, in the event that the base fee is to be less than 50% of the fixed fee, the maximum potential award fee may be increased proportionately with the decreases in base fee amounts.

(d) The following maximum potential award fees shall apply in award fee contracts: (percent is stated as percent of fee schedule amounts).

| Base fee (percent) | Award fee (percent) | Maximum total (percent) |
|--------------------|---------------------|-------------------------|
| 50                 | 100                 | 150                     |
| 40                 | 120                 | 160                     |
| 30                 | 140                 | 170                     |
| 20                 | 160                 | 180                     |
| 10                 | 180                 | 190                     |

| Base fee (percent) | Award fee (percent) | Maximum total (percent) |
|--------------------|---------------------|-------------------------|
| 0                  | 200                 | 200                     |

(e) Prior approval of the Procurement Executive, is required for total fee (based plus award fee pool) exceeding the guidelines in paragraph (d), above. Additionally, in the event use of the award fee guidelines in (d), above, result in total fees which exceed or are expected to exceed the statutory limitations imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b), prior approval of the Procurement Executive shall be obtained.

#### Subpart 970.19—Small Business and Small Disadvantaged Business Concerns

##### 970.1901 General.

(a) The policies and procedures in the following FAR sections shall be applied to the acquisition activities of management and operating contractors.

19.301, 19.302, 19.502-2, 19.502-3, 19.508(b), 19.508(c), 19.508(d)

(b) Protests received by management and operating contractors regarding small business status or questions concerning small disadvantaged business shall be referred to the Small Business Administration through the DOE contracting officer.

(c) Procurements of \$10,000 or less awarded through small purchase procedures shall be reserved exclusively for small business where there is a reasonable expectation that bids will be obtained from two or more responsible small business concerns that are competitive with market prices, quality and delivery.

(d) Acquisition by management and operating contractor of construction estimated to cost \$3 million or less, including new construction, and repair and alteration of structures, shall be required to be set aside on a class basis for small business concerns. When, in the judgment of the contractor, a particular acquisition falling within these dollar limits is determined to be unsuitable for a small business set-aside, notification to SBA shall be made through the DOE contracting officer. Unless SBA appeals the decision, the contractor shall proceed to process the acquisition on an unrestricted basis. Small business set-aside preferences should be considered on a case-by-case basis, for acquisition of construction in excess of \$3 million favoring the preferential participation of small business, whenever appropriate.

(e) Initiation of set-asides by contractors shall be made on a unilateral basis.

(f) Contracting activities shall require management and operating contractors to prepare quarterly reports on small business, small disadvantaged business, women-owned small business and contracts placed in labor surplus areas.

(g) To expand participation of small and small disadvantaged business sources, management and operating contractors shall publicize proposed actions of \$100,000 and above in accordance with FAR subpart 5.2. This procedure will be followed unless approval by the contracting officer to waive the requirements of this provision is obtained.

(h) The clause at FAR 52.219-9 as modified by 952.219-9 shall be included in management and operating contracts.

#### Subpart 970.20—Labor Surplus Area Concerns

##### 970.2001 General.

(a) Management and operating contractors shall be authorized to employ total labor surplus area (LSA) set-asides where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible LSA concerns so as to ensure that awards will be made at reasonable prices. The priorities set forth in FAR 19.504 shall be utilized in determining the type of set-aside to be employed.

(b) Protests received or questions raised by contractors regarding LSA status shall be handled with the Department of Labor through the DOE contracting officer.

(c) LSA set-aside acquisitions awarded by management and operating contractors shall be reported quarterly in accordance with "A Guide to Preparation of DOE Quarterly Procurement and Financial Assistance Reports."

(d) Initiation of set-asides by management and operating contractors shall be on a unilateral basis.

#### Subpart 970.22—Application of Labor Policies

##### 970.2201 Basic labor policies.

(a) Contracting officers shall in appropriate circumstances, follow the guidance in FAR subpart 22.1 except as provided below in award and management of management and operating contracts.

(b) The extent of Government ownership of the nation's energy plant and materials, and the overriding concerns of national defense and



security, impose special conditions on personnel and labor relations in the energy program, namely, continuity of vital operations at DOE installations must be assured; DOE must retain absolute authority on all questions of security; DOE reviews labor expenses under management and operating contracts as a part of its responsibility for assuring judicious expenditure of public funds. It is the intent of DOE, that personnel and labor policies throughout the energy program should reflect the best experience of American industry in aiming to achieve the type of stable labor-management relations essential to the proper development of the energy program. The following enunciates the principles upon which the DOE policy is based:

(1) *Employment standards.* (i) Management and operating contractors are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract work and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, or national origin. Contractors shall be required to take affirmative action to achieve these objectives.

(ii) The job qualifications and suitability of prospective employees should be established by the contractor prior to employment by careful personnel investigations. Such personnel investigations should include, as appropriate: a credit check; verification of high school degree/diploma or degree/diploma granted by an institution of higher learning within the last 5 years; contacts with listed personal references; contacts with listed employers for the past 3 years (excluding employment of less than 60 days duration, part-time employments, and craft/union employments); and local law enforcement checks when such checks are not prohibited by state or local law, statute, or regulation, and when the individual had resided in the jurisdiction where the contractor is located. Where a security clearance will be required, the applicant's job qualifications and suitability must be established before a request is made to DOE for a security clearance. When an applicant is being hired specifically for a position which shall require a DOE security clearance, the applicant shall not be placed in that position prior to the security clearance being granted by the DOE unless an exception has been obtained from the Head of the Contracting Activity or designee.

(iii) The contractor is responsible for maintaining satisfactory standards for employee qualifications, performance, conduct, and business ethics under its own personnel policies.

(2) *Security.* On all matters of security at its installations, DOE retains absolute authority and neither the security rules nor their administration are matters for collective bargaining between management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible, DOE will consult with representatives of management and labor in formulating security rules and regulations that affect the collective bargaining process.

(3) *Wages, salaries, and employee benefits.* (i) Wages, salaries, and employee benefits shall be administered in a manner designated to adapt normal industry or university practices and conditions to the contract work and to provide for appropriate review by DOE. Area practices, valid patterns, and well-established commercial or academic practices of the contractors, as appropriate, form the criteria for the establishment and adjustment of compensation schedules.

(ii) The aspects of wages, hours, and working conditions which are the substance of collective bargaining in normal organized industries will be left to the orderly processes of negotiation and agreement between DOE contractor managements and employee representatives with maximum possible freedom from Government interference.

(4) *Employee relations.* The handling of employee relations on contract work, including such matters as the conduct and discipline of the work force and the handling of employee grievances, is part of the normal management responsibility of the contractor.

(5) *Collective bargaining.* (i) DOE review of collective bargaining practices will be premised on the view that management's trusteeship for the operation of the Government facilities includes the duty to adopt practices which are fundamental to the friendly adjustment of disputes, and which experience has shown promote orderly collective bargaining relationships. Practices inconsistent with this view may be objected to, if not found to be otherwise clearly warranted.

(ii) In line with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at Government-owned energy installations should provide that grievances and disputes involving the interpretation or

application of the agreement will be settled without resorting to strike, lockout, or other interruption to normal operations. For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations for the term of the agreement.

(iii) DOE expects its management and operating contractors and the unions representing contractor employees to cooperate fully with the Federal Mediation and Conciliation Service.

(6) *Personnel training.* DOE encourages and supports personnel training programs aimed at improving work efficiency or developing needed skills which are not otherwise obtainable.

(7) *Working conditions.* Accident, fire, health, and occupational hazards associated with DOE activities will be held to a practical minimum level and controlled in the interest of maintenance of health and prevention of accidents. To this end, contractors shall be required to maintain comprehensive continuous preventive and protective programs appropriate to the particular activities throughout all operations subject to DOE control. Appropriate financial protection in case of occupational disability must be provided employees on DOE projects.

(c) Title to payroll and associated records under certain contracts for the management and operation of DOE facilities, and for necessary miscellaneous construction incidental to the function of these facilities, shall vest in the Government. Such records are to be disposed of in accordance with DOE directions. For such contracts, the Solicitor of Labor has granted a tolerance from the Department of Labor Regulations to omit from the prescribed labor clauses the requirement for the retention of payrolls and associated records for a period of three years after completion of the contract. Under this tolerance, the records retention requirements for all labor clauses in the contract and the Fair Labor Standards Act is satisfied by disposal of such records in accordance with DOE directives.

#### 970.2202 Convict labor.

The provisions of FAR Subpart 22.2 shall apply to procurement by management and operating contractors.



**970.2203 Contract Work Hours and Safety Standards Act (other than construction contracts).**

The requirements of FAR Subpart 22.3 shall apply to procurements by management and operating contractors to the same extent and under the same conditions such requirements apply to direct DOE procurements. Paragraph (c) of the clause in FAR 52.222-4 should be revised to provide for the withholding of moneys from the subcontractor by the contractor as directed by the contracting officer.

**970.2204 Labor standards for contracts involving construction.**

The requirements of FAR Subpart 22.4 apply to subcontracts involving construction awarded by DOE management and operating contractors to the same extent that they would if the subcontract had been directly awarded by DOE. Subpart 922.4 provides guidance, including examples of work situations, to assist in determining the applicability of these standards.

**970.2206 Walsh-Healey Public Contracts Act.**

(a) The requirements of FAR Subpart 22.6 and this section shall apply to procurements by management and operating contractors to the same extent and under the same conditions such requirements apply to direct DOE procurements.

(b) Because DOE has safety and health standards compatible with those of 41 CFR Part 50-204, the Department of Labor has agreed to accept DOE's program for inspection and evaluation of compliance, in lieu of establishing its own program of inspection and evaluation to the extent the Walsh-Healey safety and health standards are applicable to operations conducted for DOE at Government-owned and/or controlled sites and facilities.

**970.2208 Equal employment opportunity.**

The equal employment opportunity provisions of FAR Subpart 22.8 and Subpart 922.8 of this chapter, including E.O. 11246 and 41 CFR Part 60, are applicable to DOE management and operating contracts and to subcontracts awarded by DOE management and operating contractors as a result of the management or operating contracts. The DOE contracting officer shall furnish any needed assistance to assure that the management or operating contractor is familiar with these requirements and that its purchasing system extends these requirements to subcontracts.

**970.2210 Service Contract Act.**

(a) The Service Contract Act of 1965 is not applicable to contracts for the

management and operation of DOE facilities. However, subcontracts awarded by contractors operating and managing DOE facilities are subject to the Act to the same extent and under the same conditions as contracts awarded directly by DOE, under which the contractor is acting on the Government's behalf.

(b) Subcontracts awarded by contractors operating and managing DOE facilities shall include the applicable clause in FAR 22.10 with such modifications as would otherwise be appropriate had this clause been included in the prime contract.

**970.2213 Special disabled and Vietnam Era Veterans.**

The provisions of FAR Subpart 22.13 shall apply to procurements by management and operating contractors.

**970.2214 Employment of the handicapped.**

The provisions of FAR Subpart 22.14 shall apply to procurement by management and operating contractors.

**970.2270 Unemployment compensation.**

(a) Each state has its own unemployment compensation system to provide payments to workers who become unemployed involuntarily and through no fault of their own. Funds are provided for unemployment compensation benefits through a payroll tax on employers. Most DOE contractors are subject to the unemployment compensation tax laws of the states in which they are located. It is the policy to assure, both in the negotiation and administration of cost-reimbursement type contracts, that economical and practical arrangements are made and practiced with respect to unemployment compensation.

(b) *Contract exempt from state laws.* (1) Some contractors are exempt from state unemployment compensation laws, usually on grounds that they are nonprofit organizations or subdivisions of State governments. Most states, however, permit such employers to elect unemployment compensation coverage on a voluntary basis. Under such circumstances, all existing or prospective cost-reimbursement contractors shall be encouraged to provide unemployment compensation coverage or equivalent substitutes.

(2) It is also DOE policy that, prior to the award or extension of a management and operating contract, exempt contractors or prospective contractors shall be required to submit to the contracting officer a statement that they will either elect coverage or provide equivalent substitutes for

unemployment compensation, or in the alternative, submit evidence that it is impractical to do so. If any exempt contractor or prospective contractor submits that it is impractical to elect coverage or to provide an equivalent substitute, appropriate Headquarters Labor Relations staff shall review that position prior to recommending an award or extension of the contract. If there are substantial reasons for not electing coverage or for not providing equivalent substitutes, a contract may be awarded or extended. Headquarters staff review and recommendation shall be based on such factors as:

(i) The specific provisions of the unemployment compensation law of the State;

(ii) The extent to which the establishment of special conditions on DOE work may have an adverse effect on the contractor's general policies and operating costs in its private operations;

(iii) The numerical relationship between the contractor's private work force and its employees performing only work for DOE;

(iv) The contractor's record with respect to work force stability and the general outlook with respect to future work force stability;

(v) In a replacement contractor situation, whether or not the prior contractor had coverage or suitable substitutes; and

(vi) The particular labor relations implications involved.

**970.2271 Workers' compensation insurance.**

(a) *Policies and Requirements.* (1) *Workers' compensation insurance protects employers against liability imposed by workers' compensation laws for injury or death to employees arising out of, or in the course of, their employment.* This type of insurance is required by state laws unless employers have acceptable programs of self-insurance.

(2) *Special requirements.* Certain workers' compensation laws contain provisions which result in limiting the protection afforded persons subject to such laws. The policy with respect to these limitations as they affect persons employed by, management and operating contractors is set forth below:

(i) *Elective provisions.* Some worker's compensation laws permit an employer to elect not to be subject to its provisions. It is DOE policy to require these contractors to be subject to workers' compensation laws in jurisdictions permitting election.

(ii) *Statutory immunity.* Under the provisions of some workers'



compensation laws, certain types of employers; e.g., nonprofit educational institutions, are relieved from liability. If a contractor has a statutory option to accept liability, it is DOE policy to require the contractor to do so.

(iii) *Limited medical benefits.* Some workers' compensation laws limit the liability of the employer for medical care to a maximum dollar amount or to a specified period of time. In such cases, a contractor's workers' compensation insurance policy should contain a standard extrastatutory medical coverage endorsement.

(iv) *Limits on occupational disease coverage; and employers' liability.* Some workers' compensation laws do not provide coverage for all occupational diseases. In such situations, a contractor's workers' compensation insurance policy should contain voluntary coverage for all occupational diseases.

(3) *Contractor "employees' benefit plan"—self-insurers.* The policies and requirements set forth in paragraph (2) apply where management and operating contractors purchase workers' compensation insurance. With respect to self-insured contractors, the objectives specified in paragraph (a)(2) also shall be met through primary or excess workers' compensation and employers' liability insurance policy(ies) or an approved combination thereof. "Employees' benefit plans" which were established in prior years may be continued to contrast termination at existing benefit levels.

(b) *Assignment of responsibilities.* (1) Headquarters' Labor Relations and other officials and Heads of Contracting Activities, consistent with their delegations of responsibility, shall assure management and operating contractors are consistent with the policies and requirements of (a), above.

(2) In discharging assigned responsibility, Heads of Contracting Activities shall:

(i) Periodically review workers' compensation insurance programs of management and operating contractors in the light of applicable workers' compensation statutes to assure conformance with the requirements of (a), above;

(ii) Evaluate the adequacy of coverage of "self-insured" workers' compensation programs;

(iii) Provide arrangements for the administration of any existing "employees' benefit plans until such plans" are terminated; and

(iv) Submit to the Office of Industrial Relations, Headquarters, all proposals for the modification of existing "employees' benefit plans."

(3) The Office of Industrial Relations, Headquarters, is responsible for approving management and operating contractor "employees' benefit plans."

#### **970.2272 Conduct of employees and consultants of DOE management and operating contractors.**

(a) *Scope of subsection.* This subsection establishes the policies for maintaining satisfactory standards of conduct on the part of employees and consultants employed on DOE contract work by its management and operating contractors. Contracts with colleges and universities, which have adopted conflict-of-interest policies consistent with ACE-AAUP standards and do not involve the operation of Government-owned facilities on Government-owned or Government-leased land, are governed by the "Policy of the Federal Council for Science and Technology Relating to Conflicts of Interest by Staff Members of Colleges and Universities" (adopted March 29, 1966), and are not subject to this subsection.

(b) *Applicability.* (1) These policies are applicable to DOE management and operating contractors to the extent that their contracts with DOE contain provisions making this subsection applicable; or instructions have been issued under appropriate provisions of their contracts with DOE directing compliance with this subpart.

(2) The contract clause contained in 970.5204-12 requiring the contractor to establish such procedures as are necessary to effectively implement the provisions of this subsection, subject to the approval of the Contracting Officer, shall be included in all new DOE management and operating contracts.

(3) The contract clause contained in 970.5204-27(a) concerning necessary approvals to be obtained by contractor employees before performing consultant or similar services for another DOE contractor shall be included in:

(i) All new DOE management and operating contracts except those identified in paragraph (b)(4) below; and

(ii) Major modifications (involving change in scope or other significant substantive changes) or extensions of existing contracts within the foregoing category.

(4) The contract clause contained in 970.5204-27(b) concerning necessary approvals to be obtained by contractor employees before performing consultant or similar services for another DOE contractor, or in the energy field for another organization, shall be included in:

(i) All new DOE management and operating contracts for research or operations of DOE program work where

a substantial portion of the land or buildings used for such research or in such operations is owned or controlled by the Government; and

(ii) Major modifications (involving change in scope or other significant substantive changes) or extensions of existing contracts within the foregoing category.

(5) Exceptions to the requirements of paragraphs (b)(2), (3), and (4) will be permitted only with the approval of the Procurement Executive.

(c) *Gratuities.* A management and operating contractor or its employees or consultants shall not, under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract. Reference should be made to the provisions of 41 U.S.C. 51-54.

(d) *Use of privileged information.* Employees and consultants of a management and operating contractor shall not use for personal gain or make other improper use of privileged information which is acquired in connection with their employment on contract work. In this connection, the term "Privileged information" includes but is not limited to, unpublished information relating to technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action; possible new sites for DOE program operations; and knowledge of selections of contractors or subcontractors in advance of official announcement.

(e) *Outside employment of contractor employees.* Employees of a management and operating contractor are entitled to the same rights and privileges with respect to outside employment as other citizens. Therefore, there is no general prohibition against employees having outside employment. However, no employee of a contractor performing work on a full-time basis under a DOE management and operating contract may engage in employment outside official hours of duty or while on leave if such employment will:

(1) In any manner interfere with the proper and effective performance of the duties of the position;

(2) Appear to create a conflict-of-interest situation, or

(3) Appear to subject DOE or the contractor to public criticism or embarrassment.



**(f) Information statement concerning consultant or other employment service.**

If a consultant or other outside employment service of the employee involves the use of information in the area of the employee's contract employment, the contractor will be responsible for requiring that the employee file with the contractor, an information statement containing such information concerning the outside employment as the contractor may prescribe. As a minimum, the information statement shall include a description of any patent agreements that may be involved and the following acknowledgement:

I acknowledge that I have read and am familiar with the published policy of the DOE contained in:

(a) Subpart 970.2273 "Conduct of employees and consultants of DOE management and operating contractors and

(b) DOE publication entitled, "Reporting Results of Scientific and Technical Work Funded by DOE," which states in part that significant new results produced in DOE-funded scientific and technical work agree not to withhold or delay reporting information acquired through my employment with \_\_\_\_\_ in favor of \_\_\_\_\_ with whom I have made or am contemplating making a consulting agreement. I have also read and am familiar with the requirements of my employer's contract with DOE relating to patents. To the best of my knowledge or belief, the activities to be performed under this consulting agreement will not conflict with the policy set forth in 970.5204-27, the patent provisions of my employer's contract with DOE, or with the responsibility of my employer to report fully and promptly to DOE all significant research and development information. If in the course of my activities under this consulting agreement, it appears that such a conflict may arise, I will promptly notify and consult with my primary employer \_\_\_\_\_ concerning such possible conflict.

(g) *Incompatibility between regular duties and private interests.* Employees and consultants of a management and operating contractor shall not be permitted to make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's or consultant's personal concern in the matter may be incompatible with the interest of the Government. For example: (1) An employee or consultant of a contractor will not negotiate, or influence the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest; and (2) an employee or consultant of a contractor will not be assigned the preparation of an evaluation for DOE or for any DOE contractor of some technical aspect of the work of another organization with

which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest. The contractor shall be responsible for informing employees and consultants that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor.

**970.2273 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.**

(a) Particular work items falling within one or more of the following criteria normally will be classified as noncovered by the Davis-Bacon Act.

(1) Individual work items estimated to cost \$2,000 or less. The total dollar amount of the operating contract is not a factor to be considered and bears no relation to individual work items classified as construction, alteration and/or repair, including painting and decorating. However, no item of work, the cost of which is estimated to be in excess of \$2,000, shall be artificially divided into portions less than \$2,000 for the purpose of avoiding the application of the Act.

(2) Work and services that are a part of operational and maintenance activities or which, being very closely and directly involved therewith, are more in the nature of operational activities than construction, alteration, and/or repair work. This includes work and services which would involve a material risk to continuity of operations, to life or property, or to DOE operating requirements, if performed by persons other than the operating contractor's regular production and maintenance forces. However, any decision that contracts or work items are noncovered for these reasons must be made by the Head of the Contracting Activity and the authority to make such a decision cannot be redelegated.

(3) Assembly, modification, setup, installation, replacement, removal, rearrangement, connection, testing, adjustment, and calibration of machinery and equipment. It should be noted, however, that these activities are covered if they are part of or would be a logical part of the construction of a facility, or if construction type work, other than defined as "incidental" in 922.403-71(c) is involved.

(4) Experimental development of equipment, processes, or devices

including assembly, fitting, installation, testing, reworking, and disassembly. This refers to equipment, processes and devices which are assembled for the purpose of conducting a test or experiment. The design may be only conceptual in character, and professional personnel responsible for the experiment participate in the assembly. Specifically excluded from the category of experimental development are buildings and building utility services—as distinguished from temporary connections thereto. Also specifically excluded from this category is equipment to be used for continuous testing, e.g., a machine to be continuously used for testing the tensile strength of structural members. (See 922.403-7302 (g) and (h)).

(5) Experimental work in connection with peaceful uses of nuclear energy. This refers to equipment, processes and devices which are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment is such that professional personnel responsible for the test or experiment and/or data to be derived therefrom necessarily must participate in the assembly and interconnections. Specifically excluded from experimental work are buildings, building utility services, structural changes, drilling, tunneling, excavation, and back-filling work which can be performed according to customary drawings and specifications, and utility services of modifications to utility services—as distinguished from temporary connections thereto. Work in this category may be performed in mines or in other locations specifically constructed for tests or experiments. (See 922.403-7302 (g) and (h)).

(6) Emergency work to combat the effects of fire, flood, earthquake, equipment failure, accident or other casualties, and to restart the operational activity following the casualty. Work which is not directly related to restarting the activity or which involves rebuilding or replacement of structure or structural components or equipment is excluded from this category. (See 922.403-7302(g) and (h)).

(7) Decontamination, including washing, scrubbing, and scraping to remove contamination; removal of contaminated soil or other material; and painting or other resurfacing, provided that such painting or resurfacing is an integral part of the decontamination activity and performed by the employees of the contractors performing the decontamination.



(8) Burial of contaminated soil waste or contained liquid; however, initial preparatory work readying the burial ground for use (for example, any grading or excavating that is a part of initial site preparation, fencing, drilling wells for continued monitoring of contamination, construction of guard or other office space) is covered. Likewise, work subsequent to burial which involves the placement of concrete or other like activity is covered.

(b) The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside Davis-Bacon Act coverage, since it may be necessary to separate out work which should be classified as covered. Therefore, Heads of Contracting Activities shall establish and maintain controls for the careful scrutiny of proposed work assignments under such a contract to assure that:

(1) Contractors whose contracts do not contemplate the performance of covered work with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Davis-Bacon Act. If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Davis-Bacon Act.

(2) Where covered work is performed by a contractor whose contract contains provisions required by the Davis-Bacon Act, such work is performed as required by law and the contract. After such contractor has been informed, as provided in paragraph (b)(3) of this section, that certain work is covered work, the Head of the Contracting Activity's responsibility to assure compliance is the same as it would be if the work were being performed under a separate construction contract.

(3) Controls provided for above include consideration by the Head of the Contracting Activity and the contractor, before work is begun or contracted out, of the relation of the Davis-Bacon Act to (i) the annual programming of work, (ii) the contractor's work orders, and (iii) work contracted out in excess of \$2,000. The Head of the Contracting Activity may, if he concludes that it is consistent with DOE's responsibilities as described in this section, prescribe from time to time classes of work as to which applicability or nonapplicability of the Davis-Bacon Act is clear, for which he will require no further DOE determination on coverage in advance of the work. For all work, controls to be established by the Head of the Contracting Activity should provide for notification to the contractor before

work is begun as to whether such work is covered.

The Head of the Contracting Activity is responsible for submitting to the Wage and Hours Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, all DOE requests for project area or installation wage determinations, or individual determinations, or extensions or modification thereto. Requests for such determinations shall be made on Standard Form 308, at least 30 calendar days before they are required for use in advertising for bids or requests for proposals.

(c) *Experimental installations.* Within DOE programs, a variety of experiments are conducted involving materials, fuels, coolants, processes equipment. Certain types of situations where tests and experiments have sometimes presented coverage questions are described below.

(1) *Set-ups of device and/or processes.* The proving out of investigative findings and theories of a scientific and technical nature may require the set-up of various devices and/or processes at an early, pre-prototype stage of development. These may range from laboratory bench size to much larger set-ups. As a rule, these set-ups are made within established facilities (normally laboratories); required utility connections are made to services provided as a part of the basic facilities; and the activity as a whole falls within the functional purpose of the facility. Such set-ups are generally not covered. However, the erection of structures which are public works is covered if construction type work, other than an "incidental amount" as defined in 922.403-71(c) is involved. Preparatory work for the set-up requiring structural changes or modifications of basic utility services—as distinguished from connections thereto—is covered. Following are illustrations of noncovered set-ups of devices and/or processes:

(i) Assembly of piping and equipment within existing "hot cell" facilities for proving out a conceptual design of a chemical processing unit;

(ii) Assembly of equipment, including adaptation and modification thereof, in existing "hot cell" facilities to prove out a conceptual design for remotely controlled machining equipment;

(iii) Assembly of the first graphite pile in a stadium at Stagg Field in Chicago;

(iv) Assembly of materials and equipment for particular aspects of the direct current thermonuclear experiments to explore feasibility and to study other ramifications of the concept of high energy injection and to collect data thereon.

(2) *Loops.* Many experiments are carried on in equipment assemblies called loops in which liquids or gases are circulated under monitored and controlled conditions. For purposes of determining Davis-Bacon coverage, loops may be classed as loop facilities or as loop set-ups. Both of these classes of loops can include in-reactor loops and out-of-reactor loops. In differentiating between clearly identified loop set-ups and loop facilities, an area exists in which there have been some questions of coverage, such as certain loops at the Material Test Reactor and at Engineering Test Reactor and the Idaho National Engineering Laboratory site. Upon clarification of this area, further illustrations will be added. In the meantime, the differentiation between loop set-ups and loop facilities must be made on a case-by-case basis, taking into account the total criteria set forth in this subpart.

(i) *Loop set-ups.* The assembly, erection, modification, and disassembly of a loop set-up is noncovered. A noncontroversial example of a loop set-up is one which is assembled in a laboratory, e.g., Oak Ridge National Laboratory, Argonne National Laboratory, or Lawrence Livermore National Laboratory, for a particular test and thereafter disassembled. However, preparatory work for a loop set-up requiring structural changes or modifications of basic utility services—as distinguished from connections thereto—is covered, as are material and equipment that are installed for a loop set-up which is a permanent part of the facility or which is used for a succession of experimental programs.

(ii) *Loop facilities.* A loop facility differs from a loop set-up in that it is of a more permanent character. It is usually, but not always, of greater size. It normally involves the building or modification of a structure. Sometimes it is installed as a part of construction of the facility. It may be designed for use in a succession of experimental programs over a longer period of time. Examples of loop facilities are the in-reactor "K" loops at Hanford and the large Aircraft Nuclear Propulsion loop at the Idaho National Engineering Laboratory site. The on-site assembly and erection of such loop facilities are covered. However, once a loop facility is completed and becomes operational, the criteria set forth above for operational and maintenance activities apply.

(3) *Reactor component experiments.* Other experiments are carried on by insertion of experimental components within reactor systems without the use of a loop assembly. An example of reactor facilities erected for such experimental purposes are the special power excursion test reactors (SPETRs) at the National Reactor Test Site which are designed for studying reactor behavior and performance characteristics of certain reactor components. Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding to permit work on the reactor to proceed following a short period of power interruption, and buildings as needed to house the reactor and its auxiliary



equipment. The erection and on-site assembly of such a reactor facility is covered, but the components whose characteristics are under study are excluded from coverage. To illustrate, one of the SPETRs planned for studies of nuclear reactor safety is designed to accommodate various internal fuel and control assemblies. The internal structure of the pressure vessel is designed so that cores of different shapes and sizes may be placed in the vessel for investigation, or the entire internal structure may be easily removed and replaced by a structure which will accept a different core design. Similarly, the control rod assembly is arranged to provide for flexibility in the removal of instrument leads and experimental assemblies from within the core.

(4) *Tests or experiments in peaceful uses of nuclear energy.* These tests or experiments are varied in nature and some are only in a planning stage. They consist of one or more nuclear or nonnuclear detonations for the purposes of acquiring data. The data can include seismic effects, radiation effects, amount of heat generated, amount of material moved and so forth. Some of these tests are conducted in existing mines, while others are conducted in facilities specifically constructed for the tests or experiments. In general, all work which can be performed in accordance with customary drawings and specifications, as well as other work in connection with preparation of facilities is treated as covered work. Such work includes tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear device to be detonated, and the instrumentation and connection between such material or device and the instrumentation are treated as noncovered work.

(5) *Tests or experiments in military uses of nuclear energy.* As in 922.403-7302(h)(4), these tests or experiments can be varied in nature. However, under this category it is intended to include only detonation of nonnuclear material or nuclear devices. The material or devices can be detonated either underground, at ground level, or above the ground. These tests or experiments have been conducted in, on, or in connection with facilities specifically constructed for such tests or experiments. As in tests or experiments in peaceful uses of nuclear energy, all work which can be performed in accord with customary drawings and specifications, as well as other work in connection with preparation of facilities are treated as covered work. Such work includes building towers or similar structures, tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear devices and instrumentation are treated as noncovered work.

(d) *Construction site contiguous to an established manufacturing facility.* As DOE-owned property sometimes embraces several thousand acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a

period of years, and established manufacturing activities may be regularly carried on at one site at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly, and reconditioning of components and equipment which in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is noncovered, the installation of any such manufactured items on a construction job is covered.

#### **Subpart 970.23—Environmental, Conservation, and Occupational Safety Programs**

##### **970.2303 Hazardous materials identification and material safety.**

###### **970.2303-1 General.**

(a) The Department of Energy regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The Department also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

(b) The inclusion of environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in consultation with appropriate environmental, safety and health program management personnel.

###### **970.2303-2 Clauses**

(a) When work under management and operating contracts and subcontracts thereunder is to be performed at a facility where DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 970.5204-2 shall be used in such contract or subcontract and made applicable to the work if conditions (a)(1) through (3), are satisfied:

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(b) The clause set forth in 952.223-72 shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and

subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with states under section 274 of the Atomic Energy Act).

(c) The clause set forth at 970.5204-26 shall be included in all contracts and subcontracts for, and be made applicable to, work to be performed at or involving the construction, startup, operation, and decommissioning of DOE-owned nuclear facilities deemed to be exempt from Nuclear Regulatory Commission licensing requirements. Any deviation in substance affecting the meaning, intent, or basic principles of this clause must be referred to the Procurement Executive, for approval.

(d) The clause at 970.5204-41 shall be included in all contracts containing the DOE standard clause entitled "Safety and Health" at 970.5204-2 or "Radiation and Nuclear Criticality" at 952.223-72 or Nuclear Safety at 970.5204-26.

#### **Subpart 970.25—Foreign Acquisitions**

##### **970.2501 Buy American Act.**

Management and operating contractors are required, through the contract clauses prescribed at 970.5203-3 and 970.5204-3, to comply with the provisions of the Buy American Act. The list at FAR 25.108(d) lists excepted articles, materials, and supplies which have been determined to be unavailable in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

#### **Subpart 970.27—Patents, Data, and Copyrights**

##### **970.2701 General.**

(a) The provisions of 41 CFR 9-9.1 remain in effect for the management and operation of Government-owned research or production facilities.

(b) A management and operating contractor's obligations for protection of information and data received from DOE and other contractors or subcontractors, and for the contractor's private use of contract data first produced in the performance of the contract, are set forth in subparagraph (b)(2) of each Rights in Technical Data clause in 952.227. This subparagraph provides that the contractor may, subject to patent, security, or other provisions of the contract, use for its private purposes, contract data it first produces in the performance of the contract, provided that the contractor has met its data requirements (e.g., delivery of data in the form of progress



or status reports specified to be delivered) as of the date of private use of such data. It is not necessary that a "Final Report" be submitted in order to privately use data if all required progress and interim reports and other technical data than due have been delivered. Paragraph (b)(2) further provides that technical or other data received by the contractor in the performance of the contract must be held in confidence by the contractor in accordance with restrictions accompanying the data.

(c) Contractors should be aware that technical information which is reported to DOE by DOE contractors may be disseminated by DOE to others, subject to the restrictions included in the "Rights to Technical Data" clause.

(d) Employees of contractors operating DOE facilities may not be used to assist in the preparation of a proposal or bid for the performance of private commercial services similar or related to those being performed under the DOE contract unless such employee has been separated, with DOE approval, from performance of work under the DOE contract for such period as the Head of the Contracting Activity or designee shall direct consistent with the purpose of this section.

(e) Contractors operating DOE facilities and performing services as a part of their contract work for other Government agencies or private organizations should not be permitted to utilize information which is furnished by such customers for their own private activities unless it is generally available to others, or unless the customer authorizes such use.

#### 970.2702 Procedures.

(a) *General.* It is essential that DOE maintain continuity in its programs which are implemented by contracts for the operation of Government-owned facilities. Contract data first produced or specifically used in the performance of such contracts must be considered as integral to and remaining with the facility or plant after termination of such contracts and thus available to DOE and its future contractors for the continued use of the facility or plant. However, it is recognized that these contracts by their nature cannot always be subject to one set of prescribed contract provisions which will always apply. Accordingly, the Rights in Technical Data-Facility clause set forth in 952.227-78 is to be used as a basic or minimal clause which may be modified or expanded with the concurrence of patent counsel to meet particular contract situations.

Whenever a contract has as a purpose the operation of a Government-owned

research or production facility, the clause set forth at 952.227-78 shall normally be included in the contract. Inasmuch as this clause secures to the Government ownership, access to, and, if requested, delivery of all technical data first produced in the performance of the contract and access to and delivery of technical data which are specifically used in the performance of the contract, there is no need to include the Additional Technical Data Requirements Clause of 952.227-73.

(b) *Subcontracting.* Unless otherwise directed by the contracting officer, the contractor shall be required to follow the policy and procedures of 927.402-1, 927.402-2, and 927.402-3 and shall employ the provisions of the Additional Technical Data Requirements Clause of 952.227-73 and the Rights in Technical Data (Long Form) clause of 952.227-75, where appropriate, except in subcontracts for the design of special production plants or facilities or specially designed equipment for facilities or plants, in which instances contractors shall include the provisions of the Rights in Technical Data—Facility Clause of 952.227-78.

(c) *Optional clause—Limited rights in proprietary data.* In contracts where it is determined that delivery of proprietary data is necessary with limited rights in the Government, the Rights in Technical Data clause of this section shall be supplemented by the additional paragraph (e), set forth in 952.227-79. Paragraph (e) provides that technical data may be specified in the contract as being excluded from the delivery requirements thereof. Alternatively, paragraph (e) may be limited or made applicable to only those classes of proprietary data determined as being necessary for delivery with limited rights. In addition, when furnishing proprietary data with the limited rights legend, paragraphs (a), (b) and (c) thereunder may be modified as follows. When proprietary data is to be furnished only for evaluation, paragraph (a) of the limited rights legend shall be used, and paragraphs (b) and (c), if otherwise inapplicable, may be deleted. When there is a programmatic requirement that proprietary data be disclosed to other DOE contractors only for information or use in connection with work performed under their contracts, paragraph (b) of the limited rights legend shall be used, and paragraphs (a) and (c) may be deleted if otherwise inapplicable. In either of the foregoing examples, the contractor may, if it can show the possibility of a conflict of interest because of disclosure of such data to certain contractors or evaluators, exclude contractors or

evaluators from paragraphs (a) or (b). If the data is required solely for emergency repair or overhaul, paragraph (c) of the limited rights legend shall be retained, and paragraphs (a) and (b) may, unless otherwise applicable, be deleted. In the event that it is determined that all of the paragraphs (a), (b) and (c) of the limited rights legend are to be deleted, the word "none" shall be inserted in the legend after the colon (:).

(d) For contracts involving access to certain categories of DOE-owned restricted data, as set forth in 10 CFR Part 725, see 927.402-1(h).

#### Subpart 970.28—Bonds and Insurance

##### 970.2800 Scope.

Policies and procedures of FAR 28, shall be applied to procurements by management and operating contractors, except that the provisions of FAR 28.1 shall be applied only to construction subcontracts.

##### 970.2801 Performance bonds.

(a) *Construction subcontracts.* A performance bond on Standard Form 25 (modified to name the contractor as well as the United States of America as obligees) shall be required for all fixed price and unit price construction subcontracts in excess of \$25,000 and sub-subcontracts under cost-reimbursement type subcontracts. The penal amounts are set forth in FAR 28.102-2.

(b) *Other than construction subcontracts.* (1) Situations which may warrant requiring a performance bond are listed in FAR 28.103-2(a). Other such situations are:

(i) Where doubt exists as to the financial or technical ability of all possible suppliers.

(ii) Where the contractor's talent is overly concentrated in a few key personnel whose illness or departure could seriously impair the contractor's ability to perform the proposed work.

(iii) Where other commitments of the contractors might delay performance.

(iv) Where performance of the proposed work might disrupt other operations of the contractor and impair its overall efficiency; or

(v) Where the item being manufactured is a component for another article and is required by a particular date in order to avoid delay in delivery of the end product.

##### 970.2803 Payment bonds.

(a) *Construction subcontracts.* A management and operating contractor shall be required to seek from the subcontracts, a payment bond on Standard Form 25A modified to name



the operating contractor (as well as the United States of America as obligees) required for all fixed-price and unit-price construction subcontracts in excess of \$25,000. The management and operating contractor shall be required to include such a requirement in its cost reimbursement subcontract to apply to subcontracting in excess of \$25,000. The penal amounts shall be set forth in FAR 28.102-2.

(b) *Other than construction subcontracts.* The contracting officer may make a determination that it is in the best interest of the Government on an individual subcontract to require payment bonds in connection with other than construction work, subject to the approval of Head of the Contracting Activity. In the case of either advertised or negotiated procurement, wherever the contracting officer has reason to believe that work under a proposed action might be delayed because of the concern of the subcontractor or supplier over the credit standing of the management and operating contractor, they should consider the advisability of requiring a payment bond.

#### 970.2804 Execution and administration of bonds.

(a) *Bid bonds.* Prior to award of a construction subcontract, the contracting officer or, the contractor with contracting officer approval, shall obtain review of the bid bond furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety and adequacy of the bond.

(b) *Performance and payment bonds.* Prior to award of a construction subcontract, the contracting officer or the contractor with the contracting officer's approval, shall obtain review of the performance and payment bonds furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety and adequacy of the bonds.

(c) *Clauses.* The contract clause pertaining to bonds is set forth in 970.5204-32.

#### 970.2805 Corporate co-sureties.

More than one corporate surety may be accepted as surety upon recognizance, stipulation, bond, or undertaking in connection with either construction or other contracts, provided that in no case will the liability of any such co-surety exceed the maximum penal sum in which the corporate surety is qualified to any one obligation. On bonds covering contracts other than construction contracts, where the amount of the bond is greater than the limitation of the corporate surety, the latter may reinsure with a

corporation on the acceptable list of corporate sureties having the required underwriting capacity. Reinsurance agreements are not acceptable in connection with construction contracts. Corporate co-sureties need not obligate themselves for the full amount of the bond. Each corporate surety may, by setting forth the limit of its liability in the bond as a definite and specified sum, limit such liability. The co-sureties must, however, bind themselves "jointly and severally" for the purpose of allowing a joint action or actions against any or all of them.

#### 970.2870 Indemnification.

(a) DOE Policies provide for indemnification of DOE management and operating contractors against public liability for a nuclear incident arising out of or in connection with operation of production or utilization facilities, and work which entails the risk of public liability for a substantial nuclear incident.

(b) Details of these policies are discussed at 970.70 Indemnification of DOE contractors.

(c) Section 170d of the Atomic Energy Act of 1954, as amended, authorizes DOE "to enter into agreements of indemnification with its management and operating contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident."

(d) Heads of Contracting Activities are authorized to negotiate statutory indemnity agreements with management and operating contractors following the procedures at 970.70. They may enter into a statutory indemnity agreement whenever it has been determined that a contractor that is engaged in activities involving the risk of public liability for a substantial nuclear incident.

(e) The contract clause contained in 970.5204-6 shall be incorporated in management and operating contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work. The contract clause contained in 970.5204-7 shall be incorporated in management and operating contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability for a substantial nuclear incident caused by a product delivered to or for DOE under the contract where such product is expected to be used in

connection with a facility or device not covered by a statutory indemnity agreement.

(f) A DOE contractor with whom a statutory indemnity agreement has been executed in the form contained in 970.5204-6 may include in any of its subcontracts and purchase orders a representation that the work under the prime contract is covered by a statutory indemnity agreement with the DOE, and that this indemnity covers all persons who may be liable for public liability for any nuclear incident arising out of or in connection with the activity under the prime contract. A suggested form of "representation" that may be provided to the contractor follows:

#### Statutory Indemnity

The contractor represents that there is included in its prime contract with DOE an indemnity agreement, entered into by DOE under the authority of section 170 of the Atomic Energy Act of 1954, as amended by Public Law 95-256 (the "Price-Anderson Act"), a copy of which may be obtained from the contractor (or is attached hereto); that, under said agreement, DOE has agreed to indemnify the contractor and other persons indemnified, including the subcontractor, against claims for public liability (as defined in said Act) arising out of or in connection with the contractual activity; that the indemnity applies to covered nuclear incidents which (1) take place at a "contract location" (which term, as defined in the indemnity agreement, does not include the location of the subcontractor's plant and facilities); or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a "contract location"; or (3) involve items produced or delivered under the prime contract. The obligation of DOE to indemnify is subject to the conditions stated in the indemnity agreement.

(g) DOE shall not approve the inclusion, in the subcontracts and purchase orders of an indemnified management and operating contractor, of any provision whereby the management and operating contractor indemnifies the subcontractor or supplier against public liability for a nuclear incident because any such liability will be covered by the statutory indemnity agreement of the prime contractor.

(h) Management and operating contractors with whom statutory indemnity agreements under the authority of section 170d of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents, except (1) that DOE contractors now covered by insurance



against such liability, with the approval of the DOE, may continue to carry such insurance; and (2) with the approval of the Office of Industrial Relations, contractors engaged in the operation of DOE facilities may be required or permitted to furnish financial protection in an amount not to exceed \$1 million.

#### Subpart 970.29—Taxes

##### 970.2901 Exemptions from Federal excise taxes.

(a) The exemption respecting taxes on communication services or facilities has been held to extend to such services when furnished to DOE management and operating contractors who pay for such services or facilities from advances made to them by DOE under their contracts.

(b) Where it is considered that a request for an additional exemption in the performance of a management and operating contract would be justified, a recommendation that such a request be made should be forwarded to the Controller.

(c) Where tax exemption certificates are required in connection with the foregoing taxes, the Head of the Contracting Activity will supply standard Government forms (SF 1094, U.S. Tax Exemption Certificate) on request.

##### 970.2902 State and local taxes.

It is DOE policy to secure those immunities or exemptions from state and local taxes to which it is entitled under the Federal Constitution or state laws. In carrying out this policy, Heads of Contracting Activities shall:

(a) Take all necessary steps to preclude payment of any taxes for which any of the foregoing immunities or exemptions are available. Advice of Counsel should be sought as to the availability of such immunities or exemptions;

(b) Acquire directly and furnish to contractors as Government furnished property, equipment, material, or services when, in the opinion of the Head of the Contracting Activity:

(1) Such direct acquisition will result in substantial savings to the Government, taking into consideration any additional administrative costs;

(2) Such direct acquisition will not have a substantial adverse effect on the relationship between DOE and its contractor; and

(3) Such direct acquisition will not have a substantial adverse effect on the DOE program or schedules.

##### 970.2903 Contract clauses.

(a) Contracting officers shall include an appropriate clause in management

and operating contracts and require a similar inclusion in cost-type subcontracts where the higher-tier contracts and subcontracts are cost-type which will require the contractor to take certain actions with regard to nonpayment, payment, protest, or other treatment of specific taxes. Such a clause is included in 970.5204-23.

(b) Contracting officers should assure that tax matters are appropriately treated in their review and approval of management and operating contractor's procurement system and in their review and approval of individual subcontracts by such contractor. An appropriate tax clause shall be required for inclusion in all fixed-price purchase orders and subcontracts and should contain provisions covering all tax matters which may require special consideration.

#### Subpart 970.30—Cost Accounting Standards

##### 970.3001 General.

###### 970.3001-1 Applicability.

The provisions of FAR Part 30 shall be followed for management and operating contracts.

###### 970.3001-2 Limitations.

Cost of money as an element of the cost of facilities capital (CAS 414) and as an element of the cost of capital assets under construction (CAS 417) is not recognized as an allowable cost under contracts subject to 970 (See 970.3102-10).

#### Subpart 970.31—Contract Costs Principles and Procedures

##### 970.3100 Scope and applicability of subpart.

The cost principles, procedures and general policy for the determination of reimbursable costs applicable to the administration of management and operating contracts are set for in this subpart. The terms "reimbursement" and "reimbursable" are used interchangeably in relation to "allowable costs" as a matter of editorial convenience. No "reimbursement" is actually involved in those situations where the cost-type contractor makes payments for "allowable cost" from Government funds advanced to him by the DOE.

###### 970.3100-1 Definitions.

"Off-site work" is contract required work (under a contract covered by FAR Subpart 17.6) performed in contractor-owned facilities, such as a central or branch office.

"On-site work" (under a contract covered by FAR Subpart 17.6) is work performed at the Government-site.

"Direct costs" of a management and operating contract are defined as follows:

(a) With respect to on-site work, "direct costs" technically include all performance costs; that is, such costs are identified specifically for, or account of, the contract. However, in some circumstances it may be desirable or necessary because of the requirements of the contract to distinguish between direct and indirect types of costs.

"Direct costs," when the foregoing circumstances apply, are those which are identified as having been incurred specifically for, or on account of a designated cost objective, such as a particular product (or groups of similar products), work order, job, project, program or contract. Materials, labors or expenses which relate specifically and solely to the manufacture of a particular product or to the performance of a distinct job or work are broad examples of direct costs. Direct costs are not limited to items incorporated in an end product.

(b) With respect to "off-site" work, "direct costs" are as defined in FAR 31.202 and discussed in other sections of this subpart.

"Indirect costs" of a management and operating contract are defined as follows:

(a) With respect to "on-site" work, when it is desirable or necessary to distinguish them from direct costs, "indirect costs" are those items of material, labor, and expenses not directly identified with a single final cost accumulation point, but identified with applicability to two or more objectives or with at least one intermediate cost objective.

(b) With respect to "off-site" work, "indirect cost" are as defined in FAR 31.203 and discussed in other sections of this subpart.

###### 970.3100-2 Responsibilities.

(a) The Procurement Executive is responsible for developing and revising the policy and procedures for the determination of allowable costs reimbursable under a management and operating contract, and for seeing that they are properly coordinated with other Headquarters' offices having joint interests.

(b) The Head of the Contracting Activity is responsible for following the policy, principles and standards set forth herein in establishing the compensation provisions of contracts and subcontracts and for submission of



deviations for Headquarters consideration.

#### 970.3100-3 Deviation.

Deviations from the policy and principles set forth in this subpart shall not be made unless such action is authorized by the Procurement Executive, on the basis of a written justification stating clearly the special circumstances involved. Where appropriate, any approved deviation shall be reflected in the compensation provisions of the contract.

#### 970.3101 General policy.

The cost policies of the DOE regarding management and operating contracting are as discussed in this section:

##### 970.3101-1 Actual cost basis.

(a) DOE shall reimburse its contractors for costs incurred in the performance of a management and operating contract in accordance with its terms and the provisions of this subpart. Such costs are those allowable costs provided for in the contract to the extent that they are necessary or incident, and either directly attributable or equitably allocable to the work under the contract. This broad expression of the DOE's cost-reimbursement policy is further developed and elaborated upon throughout this subpart.

(b) DOE uses retrospective or after-the-fact determination, usually called the actual cost basis, to establish the amount reimbursable. This general policy precludes the use of predetermined fixed percentage rates except for provisional payments.

(c) When a fixed compensation for any otherwise allowable cost is separately negotiated, the items of such costs covered by the fixed amount shall be identified with maximum clarity and set forth in an appropriate appendices to the contract as an amount otherwise excludable from other reimbursable costs (this is done in order to distinguish between those allowable costs subject to reimbursement and those costs which are covered by the negotiated fixed amount).

##### 970.3101-2 Direct and indirect costs.

(a) Direct costs identified specifically with a management and operating contract are direct cost of performing that contract and are to be charged directly thereto. All costs specifically identified with other final cost objectives of the management and operating contractor are direct cost of those cost objectives and are not to be charged to the contract directly or indirectly. For reasons of practicality, any direct cost of minor dollar amount

may be treated as an indirect cost if the accounting treatment—

(1) Is consistently applied; and  
(2) Produces substantially the same results as treating the cost as a direct cost.

(b) Indirect cost are not subject to treatment as a direct cost and thus directly chargeable to a contract. After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated from an appropriate indirect cost accumulation account. The following principles and procedures shall apply to indirect costs to the extent that they are incurred under management and operating contracts.

(1) Indirect costs to the extent required to be or otherwise incurred in the accounting system of the operating contractor shall be accumulated by logical cost groupings with due consideration of the reasons for incurring such costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the cost objectives to which it is to be allocated. Generally, overhead and general and administrative (G&A) expenses are separately grouped. Similarly, the particular case may require subdivision of these groupings; e.g., building occupancy costs might be separable from those of personnel administration within a specific overhead group such as manufacturing overhead. This necessitates selecting a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the cost objectives. The number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(2) Once an appropriate base for distributing indirect costs has been accepted, it shall not be fragmented by removing individual elements. For example, when a cost input base is used for the distribution of G&A costs, all items that would properly be part of the costs input base, whether allowable or unallowable, shall be included in the base and bear their pro rata share of G&A costs.

(3) The method of allocating indirect costs shall be in accordance with generally accepted accounting principles which are consistently applied.

(4) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for distribution to work performed in that period.

##### 970.3101-3 General basis for reimbursement of costs.

(a) The total reimbursable cost of a DOE management and operating contract is the sum of the allowable direct costs necessary or incident to the performance of the contract, plus any properly allocable portion of allowable indirect costs, (including corporate or home office G&A expense, or branch office indirect expenses), if any, less applicable income and other credits. In determining allowability and reimbursability of costs, the following shall be considered:

(1) Reasonableness, including the exercise of prudent business judgment;

(2) Allocability of a cost to management and operating contract. A cost is allocable if it is assignable or chargeable for work and performance of the contract in accordance with the relative benefits received or other equitable relationship;

(3) Application of generally accepted accounting principles and practices appropriate to identifying and measuring costs of performing the contract in accordance with this subpart;

(4) All exclusions of and limitations of types and amounts of items of cost set forth in the contract;

(5) Approvals by the contracting officer required under the contract terms; and

(6) Cost accounting standards if applicable.

##### 970.3101-4 Cost determination based on audit.

(a) The amount reimbursable under management and operating contracts shall be determined in accordance with the principles set forth in this subpart and in accordance with the terms of the respective contract on the basis of audit. In the event that the contractual terms differ, or are inconsistent with (see 970.3100-3 for approval of deviations) the principles stated herein, the contractual terms control. It is expected however, contractual terms to be based on the principles therein. The audit may be performed directly by DOE (or by the cognizant Federal agency pursuant to arrangements made by the DOE). Contracting officers shall assure that management and operating contractors assume the responsibility for audit of subcontractors (and provide for the audit of lower tier subcontractors by the subcontractor immediately preceding in the contractual chain) except as noted in this paragraph. Exceptions may be made to this general principle of subcontractors being audited by the next higher-tier contractor, where the



latter, interrelated with the subcontractor involved, does not have the necessary audit facilities, or for other reasons, is not in a position to perform the subcontract audit in a manner satisfactory to the DOE. In the event of such exception, the subcontract audit responsibility shall rest with the successively higher-tier contractor (or ultimately DOE), but responsibility for determining the costs reimbursable to the subcontractor remains with the next higher-tier contractor on the basis of such audit.

(b) Where the amount of cost-type work to be performed for the DOE in a particular facility is less than that being performed at the same facility for other Federal agencies, arrangements may be made to have the cognizant agency perform the audit of the subcontract in support of DOE. These arrangements shall be made administratively between DOE and the other agency involved, and wherever possible, shall provide for the cognizant agency to audit against the DOE cost principles. In no case, however, shall the arrangements preclude determination by the DOE contracting officer of the allowable and unallowable costs in accordance with 970.5204-13 and 970.5204-14. Steps appropriate in the light of the magnitude and nature of the costs shall be taken by the contracting officer to ascertain that the audit results properly reflect the application of DOE cost principles (particularly as to types and amounts of items of cost including incidence, allocability, and equitable distribution thereof).

#### 970.3101-5 Contractor's system of accounting.

(a) Careful DOE study of a management and operating contractor's usual accounting procedures shall be made prior to arriving at an understanding with the contractor as to the accounting system to be employed by the contractor during the period of contract performance.

(b) A contractor's customary accounting practices are usually accepted for management and operating contracts if they conform to generally accepted accounting principles, produce equitable results, are consistently applied, are not in conflict with the provisions of this subpart, are conducive to accurate costing of the contract work, and produce reports required by the DOE.

#### 970.3101-6 Advance understandings on particular cost items.

(a) It is important that agreement between DOE and its management and operating contractors be reached in

advance of the incurrence of costs in categories where reasonableness as to amounts or allocability to the management and operating contract are difficult to determine in order to avoid possible subsequent disallowance or dispute. Any such agreement should be incorporated in the contract. But the absence of such agreement on any element of cost will not, in itself, serve to make the element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important are:

- (1) Deferred maintenance costs;
- (2) Precontract costs;
- (3) Professional or technical counseling services;
- (4) Reconversion costs;
- (5) Research and development costs;
- (6) Royalties;
- (7) Selling and distribution costs;
- (8) Unemployment insurance experience ratings; and
- (9) Employee compensation, including amounts of money or percentage of payment authorized to be expended annually for groups of employees for all types of wage and salary increases, travel, relocation expenses and other personnel costs.

(b) DOE generally utilizes two basic methods of achieving and recording understandings with contractors as to the allowability of employee compensation, travel, relocation, and other personnel costs: (1) Negotiation of a personnel appendix to the contract, which sets forth the policies, programs, and schedules which are accepted as the basis for determining the allowability of costs; or (2) reviewing and reaching agreements on established policies, programs, and schedules (and any changes thereto during the contract term) applicable to contractor's private operations which are acceptable for contract work and which will be consistently followed throughout the contractor's organization. A personnel appendix to the contract setting forth advance understandings covering compensation for personal services shall be utilized in management and operating contracts (as defined in FAR 17.601) when one or more of the following circumstances exist: when policies, programs, and schedules are established specifically for contract work; when the contractor's work is predominantly or exclusively made up of negotiated Government contract work; when contract work is so different from the organization's private work that existing established policies, programs, and schedules cannot reasonably be extended to and consistently applied on contract work; or, when established policies, programs, and schedules

proposed for contract work are not sufficiently definitive to permit a clear advance mutual understanding of allowable costs and to provide a basis for audit. The Head of the Contracting Activity is authorized to select the alternative method of achieving and recording advance understanding that they find most appropriate, after considering the facts of the particular contract situation. As used in this paragraph:

(c) With regard to the costs at (a)(9) above:

(1) Compensation for personal services includes wages and salaries, bonuses and incentives, premium payments, pay for time not worked, and supplementary compensation and benefits, such as pension and retirement, group insurance, severance pay plans, and other forms of compensation covered by 970.3102-2.

(2) Employee travel costs include transportation expenses incurred while on official business, within the U.S. or outside the U.S. as necessary. Travel of executive officers is covered in 970.3102-17. Contractor travel policies must be acceptable to the Department, and result in reasonable cost necessary for contract performance. To avoid disputes and to clearly state the treatment that applies to travel cost, advance understandings should be reached with the management and operating contractor. They should be sufficiently definitive to evidence the contractor's responsibility to minimize costs consistent with contract performance. The allowability to certain travel costs, such as air travel, are specifically limited by Department policy. For example, the added cost of first class air travel is prohibited as a reimbursable cost, except under stringent conditions, which must be justified in writing. Contractually enforceable understandings concerning the allowability and reimbursement of other potentially significant travel costs (such as the use of Government-furnished automobiles or Government-contract provided rental automobiles) should be reached with the contractor. A reasonable basis for such understandings is the Federal travel policy applicable to Government and directly paid contractor employees.

(3) Other personnel costs include:

(i) Morale, health, welfare, food service and dormitory costs covered in 970.3102-5;

(ii) Training and education costs covered in 970.5204-13 and 970.5204-14;

(iii) Relocation costs for relocating employees as discussed in 970.3102-16;



and special or mass personnel movement covered in 970.3102-2(i).

#### 970.3102 Application of cost principles.

The incurred costs of performing management and operating contracts shall be reimbursed to the extent they are reasonable, allocable, and determined to be allowable under the provisions of this subpart and the terms of the contract. The DOE principles on allowability of selected items or classification of cost or situations expected to be associated with the performance of contract work as stated in this section.

#### 970.3102-1 General and administrative expenses.

(a) For on-site work, the DOE considers that its fee allowance for management and operating contracts provides for the recognition of appropriate compensation for home or corporate office general and administrative expenses incurred in the general management of the contractor's business as a whole.

(b) The above policy is intended to preclude the payment of general and administrative expenses merely because they are incurred or accounted for at or by a contractor's home or corporate office and not the operating site. The DOE recognizes some benefit of such cost to the DOE program. The basis of recognition through fee allowance is associated with the difficulty of determining and assessing the dollar value of such expenses that might be applicable to or have benefit to a management and operating contract. Conventional allocation techniques; i.e., total operating costs, labor dollars or hours, etc., are generally not considered appropriate because they normally distribute such expenses over a base representative of contractor investment (in terms of its own resources, including labor, material, overhead, etc.). Contractor investments and home office contributions are minimal under DOE's operating and management contracts in as much as they are totally financed and supported by DOE advance payments under the letter-of-credit method and by DOE's provision of government-owned and project-exclusive facilities, property, and other needed resources.

(c) Notwithstanding the concept in (a) above, it is recognized that from time to time the fee amounts established for a management and operating contract, to meet the purpose cited in 970.1509-1 and consideration of the factors in 970.1509-4, may be considered insufficient to adequately recognize a contractor's general and administrative expenses incurred in general management and

administration of the contractor's business as a whole and which appear to have a directly benefiting relationship to the DOE program. Such recognitions may be the basis of requesting fee amounts in excess of the limitations set forth in 970.1509-5 or alternatively, in any particular case, the contractor may be compensated on the basis of cost in accordance with 970.3101-1 if the Head of the Contracting Activity or other approving contract official authorizes or approves the procedure and a fair and reasonable amount can be agreed upon. Such amount shall normally be in addition to the applicable fee amounts.

(d) The DOE allows company general and administrative expenses under off-site architect-engineer, supply and research contracts with commercial contractors performing the work in their own facilities. Contractor's general and administrative expenses, may, however, be included for reimbursement under such DOE off-site architect-engineer, supply and research contracts, only to the extent that they are established, after careful examination, to be allowable in nature and properly allocable to the work. Work performed in a contractor's own facilities under a management and operating or construction contract may likewise be allowed to bear the properly allocable portion of allowable company general and administrative expense.

#### § 970.3102-2 Compensation for personal services.

(a) *General.* Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided for severance pay costs in paragraph (b)(4)(i) below and for pension cost in paragraph (b)(1) below). It includes, but is not limited to, salaries; wages; directors' and executive committee members' fees; bonuses (including stock bonuses); incentive awards; employee stock options, stock appreciation rights, and stock ownership plans; employee insurance; fringe benefits; contributions to pension, annuity, and management employee incentive compensation plans; and allowances for off-site pay, incentive pay, location allowances, hardship pay, severance pay, and cost of living differential.

(b) *Allowability.* Reimbursable costs for compensation for personal services are to be set forth in a personnel appendix in the contract as discussed at 970.3101-6. This personnel appendix

shall be negotiated using the principles and policies of this 970.3102-2, and other pertinent parts of the DEAR. However, costs that are unallowable pursuant to other paragraphs of 970.3102 or contract terms shall not be allowable under this 970.3102-2 on the basis they constitute compensation for personnel services. Costs of compensation for personal services are reimbursable to the extent that:

(1) The compensation is for personal services work performed by the employee in the current year and must not represent a retroactive adjustment of prior year's salaries or wages (but see 970.3102 (i), (j), (l), (m), and (n));

(2) The compensation in total is reasonable for the work performed; however, specific restrictions on individual compensation elements must be observed where they are prescribed;

(3) The compensation is based upon and conforms to the terms and conditions of the contractor's established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment;

(4) Any approvals prescribed by this 970.3102-2 are obtained. No assumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor—

(i) Has not notified the cognizant contracting officer of the changes either before their implementation, or within a reasonable period after their implementation, and

(ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.

(5) Costs that are unallowable under the contract terms or other paragraphs of this 970.3102 shall not be allowable under this 970.3102-2 solely on the basis that they constitute compensation for personal services.

(c) *Reasonableness.* Subject to 970.3102-2(d) of this section compensation for personal services will be considered reasonable if the total compensation conforms generally to compensation paid by other firms of the same size, in the same industry, or in the same geographic area for similar services or work performed. This does not preclude the Government from challenging the reasonableness of an individual element of compensation where costs are excessive in comparison with compensation paid by other firms of the same size, same industry, or in the same geographic area for similar services. In administering this principle,



it is recognized that not every compensation case need be subjected in detail to the above tests. The tests need be applied only when a general review reveals amounts or types of compensation that appear unreasonable or unjustified. In questionable cases, the contractor has responsibility to support the reasonableness of compensation in relation to the effort performed. Compensation costs under certain conditions give rise to the need for special consideration. Among such conditions are the following:

(1) Compensation to (i) owners of closely held corporations, partners, sole proprietors, or members of their immediate families, or (ii) persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise. Determination should be made that salaries are reasonable for the personal services rendered rather than being a distribution of profits. Compensation in lieu of salary for services rendered by partners and sole proprietors will be allowed to the extent that it is reasonable and does not constitute a distribution of profits. For closely held corporations, compensation costs covered by this subparagraph shall not be recognized in amounts exceeding those costs that are deductible as compensation under the Internal Revenue Code and its regulations.

(2) Any change in a contractor's compensation policy that results in a substantial increase in the contractor's level of compensation, particularly when it was concurrent with an increase in the ratio of Government contracts to other business, or any change in the treatment of allowability of specific types of compensation due to changes in the treatment of allowability of specific types of compensation due to changes in Government policy. No presumption of reasonableness will exist where major revisions of existing compensation plans or new plans are introduced by the contractor; and the contractor—

(i) Has not notified the cognizant contracting officer of the change either before their implementation or within a reasonable period after their implementation; and

(ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the reasonableness of the changes.

(3) The contractor's business is such that its compensation levels are not subject to the restraints that normally occur in the conduct of competitive business.

(4) The contractor incurs costs for compensation in excess of the amounts

which are deductible under the Internal Revenue Code and its regulations.

(d) *DOE Review and approval of compensation paid individual employees.* In determining the reasonableness of compensation, the compensation of each individual contractor employee normally need not be subjected to review and approval. Generally, the compensation paid individual employees should be left to the judgment of contractors subject to the limitations of DOE-approved compensation policies, programs, classification systems, and schedules, and amounts of money authorized for wage and salary increases for groups of employees. However, all compensation due an individual of \$50,000 or more shall require the contracting officer's or designee's review and approval. In addition, it will often be necessary that employee compensation be subjected to review and approval on an individual basis at a level below \$50,000, when the contracting officer finds it appropriate for the particular situation. The contract shall specifically provide for the approval by the contracting officer of the cost of compensating an individual contractor employee above the level determined by the contracting officer, if a total of 50 percent or more of such compensation is reimbursed under DOE cost-type contracts. For purposes of determining the level for individual review and approval, total compensation as used in this paragraph includes only the employee's salary and bonus or incentive compensation. As in the case of other personnel and compensation costs, it is intended that contracting officer review and approval of individual compensation normally will be prior to incurrence of costs.

(e) *Labor-management agreements.* Notwithstanding any other DOE requirements, costs of compensation are not allowable to the extent that they result from provisions of labor-management agreements that, as applied to work in performing Government contracts, are determined to be unreasonable because they are either unwarranted by the character and circumstances of the work or discriminatory against the Government. The application of the provisions of a labor-management agreement designed to apply to a given set of circumstances and conditions of employment (e.g., work involving extremely hazardous activities or work not requiring recurrent use of overtime) is unwarranted when applied to a Government contract involving significantly different circumstances and conditions of employment (e.g., work involving less hazardous activities or work continually

requiring use of overtime). It is discriminatory against the Government if it results in employee compensation (in whatever form or name) in excess of that being paid for similar non-Government work under comparable circumstances. Disallowance of costs will not be made under this paragraph (e) unless—

(1) The contractor has been permitted an opportunity to justify the costs; and

(2) Due consideration has been given to whether unusual conditions pertain to Government contract work, imposing burdens, hardships, or hazards on the contractor's employees, for which compensation that might otherwise appear unreasonable is required to attract and hold necessary personnel.

(f) *Salaries and wages.* Salaries and wages for current services include gross compensation paid to employees in the form of cash, stock (see paragraph (h)(2) below regarding valuation), products, or services, and are allowable.

(g) *Domestic and foreign differential pay.* (1) When personal services are performed in a foreign country, compensation may also include a differential that may properly consider all expenses associated with foreign employment such as housing, cost of living adjustments, transportation, bonuses, additional Federal, state, local or foreign income taxes resulting from foreign assignment, and other related expenses.

(h) *Bonuses and incentive compensation.* Incentive compensation and cash bonuses based on production, cost reduction or efficient performance, suggestion awards, and safety awards are to be treated as allowable, to the extent that the contractor's overall compensation plan is determined to be reasonable and such costs are paid or accrued, pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payment (see 970.3101-6). In determining reasonableness, it will be necessary to take into account, not only bonuses and incentive compensation payments charged directly to the contract, but also payments charged indirectly to the contract through overhead. Bonuses, awards, and incentive compensation, when any of them are deferred, are to be treated as allowable to the extent provided in paragraph (m) of this section.

(1) Bonuses and incentive compensation paid to employees other than those whose pay is directly



reimbursed will not be made allowable in on-site construction and management and operating contracts, where home office general and administrative expense is unallowable.

(2) When the costs of bonuses and incentive compensation are paid in the stock of the contractor or of an affiliate, the following additional restrictions apply:

(i) Valuation placed on the stock shall be the fair market value on the measurement date (i.e., the first date the number of shares awarded is known) determined upon the most objective basis available; and

(ii) Accruals for the cost of stock before issuing the stock to the employees shall be subject to adjustment according to the possibilities that the employees will not receive the stock and that their interest in the accruals will be forfeited.

(3) When the bonus and incentive compensation payments are deferred, the costs are subject to the requirements of subparagraph (h)(1) above and of paragraph (m) below.

(i) *Severance pay.* (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated. Payments for early retirement incentive plans are covered in paragraph (l)(6) below.

(2) Severance pay to be allowable must meet the general allowability criteria in paragraph (i)(2)(i) below, and, depending upon whether the severance is normal or abnormal, criteria in paragraph (i)(2)(ii) for normal severance pay or paragraph (i)(2)(iii) for abnormal severance pay also apply.

(i) Severance pay is allowable only to the extent that, in each case, it is required by (A) law, (B) employer-employee agreement, (C) established policy that constitutes, in effect, an implied agreement on the contractor's part, or (D) circumstances of the particular employment. Payments made in the event of employment with a replacement contractor where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor are not severance pay and are unallowable. Severance payments, or amounts paid in lieu thereof, are not allowable when paid to employees in addition to early or normal retirement payments.

(ii) Actual normal turnover severance payments shall be allocated to all work

performed in the contractor's plant, or where the contractor provides for accrual of pay for normal severances, that method will be acceptable if the amount of the accrual is reasonable in light of payments actually made for normal severances over a representative past period and if amounts accrued are allocated to all work performed at the facility.

(iii) Abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis.

(3) Subject to paragraph (a) of this section, the following standards apply in determining allowability of costs for severance pay plans of management and operating contractors:

(i) Payments should be made only upon involuntary termination by reduction in force (RIF) of an employee which results in a permanent separation from the employment of the contractor. However, payments may also be made upon voluntary separation of an employee within a RIF grouping, but not otherwise scheduled for termination, which thereby eliminates the need for terminating another employee involuntarily.

(ii) Payments should be not provided for in the event of temporary layoffs; employment or offer of employment with a replacement contractor (employer) where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment; early or normal retirement; or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor. Contractor employees should not have the option of refusing employment to receive severance pay.

(j) *Backpay.*—(1) *Backpay resulting from violations of Federal labor laws or the Civil Rights Act of 1964.* Backpay may result from a negotiated settlement, order, or court decree that resolves a violation of Federal labor laws or the Civil Rights Act of 1964. Such backpay falls into two categories: one requiring the contractor to pay employees additional compensation for work performed for which they were underpaid, and the other resulting from other violations, such as when the employee was improperly discharged, discriminated against, or other circumstances for which the backpay

was not additional compensation for work performed. Backpay resulting from underpaid work is compensation for the work performed and is allowable. All other backpay resulting from willful violation of Federal labor laws or the Civil Rights Act of 1964 is unallowable.

(2) *Other backpay.* Backpay may also result from payments to union employees (union and non-union) for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiations. Such backpay is allowable. Backpay to nonunion employee based upon results of union agreement negotiations is allowable only if (i) a formal agreement or understanding exists between management and the employees concerning these payments, or (ii) an established policy or practice exists and is followed by the contractor so consistently as to imply, in effect, an agreement to make such payment.

(k) *Stock options, stock appreciation rights, and phantom stock plans.* (1) The cost of stock options awarded to employees to purchase stock of the contractor or of an affiliate will be treated as deferred compensation and must comply with the requirements of paragraph (m) below and with the allowability criteria contained in paragraph (k)(2) below. The allowable cost of stock appreciation rights, whether offered separately or combined with stock options, will be determined in the same manner as stock options.

(2) The allowable costs of stock options and stock appreciation rights will be limited to the difference between the option price or stock-appreciation-right price and the market price of the stock on the measurement date (i.e., the first date on which both the number of shares and the option or stock-appreciation-right price are known). Accordingly, when the option or stock-appreciation-right price is equal to or greater than the market price on the measurement date, then no costs are allowed for contract costing purposes.

(3) In phantom-stock-type plans, contractors assign or attribute contingent shares of stock to employees as if the employees own the stock, even though the employees neither purchase the stock nor receive title to it. Under these plans, an employee's account may be increased by the equivalent of dividends issued and any appreciation in the market price of the stock over the price of the stock on the measurement date (i.e., the first date the number of shares awarded is known). Such increases in employee accounts for



dividend equivalents and market price appreciation are unallowable.

(1) *Pension costs.* (1) A pension plan is a deferred compensation plan that is established and maintained by one or more employers to provide systematically for paying benefits to plan participants after their retirement, provided that the benefits are paid for life or are payable for life at the option of the employee. Additional benefits such as permanent and total disability and death payments and survivorship payments to beneficiaries of deceased employees may be treated as pension costs, provided the benefits are an integral part of the pension plan and meet all the criteria pertaining to pension costs.

(2) Pension plans are normally segregated into two types of plans: defined benefit or defined contribution pension plans. Except as provided by other DOE directives, the cost of all defined benefit pension plans shall be measured, allocated, and accounted for in compliance with the provisions of CAS 412, Composition and Measurement of Pension Costs, and CAS 413, Adjustment and Allocation of Pension Cost. The costs of all defined contribution pension plans shall be measured, allocated, and accounted for in accordance with the provisions of CAS 412. Pension costs are allowable subject to directives issued by the Office of Labor Relations, Headquarters, the referenced standards and the cost limitations and exclusions set forth below in this subparagraph and in paragraphs (1)(3), (4), (5), (6), and (7) below.

(i) To be allowable in the current year, pension costs must be funded by the time set for filing the Federal income tax return or any extension thereof. Pension costs assigned to the current year, but not funded by the tax return time, shall not be allowable in any subsequent year.

(ii) Pension payments must be reasonable in amount and be paid pursuant to (A) an agreement entered into in good faith between the contractor and employees before the work or services are performed and (B) the terms and conditions of the established plan. The cost of changes in pension plans which are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future are not allowable.

(iii) Except as provided for early retirement benefits in subparagraph (1)(6) below, one-time-only pension supplements not available to all participants of the basic plan are not allowable as pension costs unless the

supplemental benefits represent a separate pension plan and the benefits are payable for life at the option of the employee.

(iv) Increases in payments to previously retired plan participants covering cost-of-living adjustments are allowable if paid in accordance with a policy or practice consistently followed.

(3) *Defined benefit pension plans.* This subparagraph covers pension plans in which the benefits to be paid or the basis for determining such benefits are established in advance and the contributions are intended to provide the stated benefits. The cost limitations and exclusions pertaining to defined benefit plans are as follows:

(i) Normal costs of pension plans not funded in the year incurred, and all other components of pension costs (see CAS 412.40(a)(1)) assignable to the current accounting period but not funded during it, shall not be allowable in subsequent years (except that a payment made to a fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year). However, any part of a pension cost that is computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of the Employee's Retirement Income Security Act of 1974 (ERISA) (see CAS 412.50(c)(3)), will be allowable in those future accounting periods in which the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding occurred in the year the costs would have been assigned except for the waiver.

(ii) Any amount paid or funded before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in those years. The interest earned on such premature funding, based on the valuation rate of return, may be excluded from future years' computations of pension costs in accordance with CAS 412.50(a)(7).

(iii) Increased pension costs caused by delay in funding beyond 30 days after each quarter of the year to which they are assignable are unallowable. If a composite rate is used for allocating pension costs between the segments of a company and if, because of differences in the timing of the funding by the segments, an inequity exists, allowable pension costs for each segment will be limited to that particular segment's calculation of pension costs as provided for in CAS 413.50(c)(5). Determination of unallowable costs shall be made in

accordance with the actuarial method used in calculating pension costs.

(iv) Allowability of the cost of indemnifying the Pension Benefit Guaranty Corporation (PBGC) under ERISA section 4062 or 4064 arising from terminating an employee deferred compensation plan will be considered on a case-by-case basis; provided that if insurance was required by the PBGC under ERISA section 4023, it was so obtained and the indemnification payment is not recoverable under the insurance. Consideration under the foregoing circumstances will be primarily for the purpose of appraising the extent to which the indemnification payment is allocable to Government work. If a beneficial or other equitable relationship exists, the Government will participate in the indemnification payment to the extent of its fair share.

(4) *Defined contribution pension plans.* This subparagraph covers those pension plans in which the contributions to be made are established in advance and the level of benefits is determined by the contributions made. It also covers profit sharing, savings plans, and other such plans provided the plans fall within the definition of a pension plan in paragraph (1)(1) above.

(i) The pension cost assignable to a cost accounting period is the net contribution required to be made for that period after taking into account dividends and other credits, where applicable. However, any portion of pension cost computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of ERISA (see CAS 412.50(c)(3)) will be allowable in those future accounting periods when the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding been made in the year the costs would have been assigned except for the waiver.

(ii) Any amount paid or funded to the trust before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in such years.

(iii) The provisions of paragraph (1)(3)(vi) above concerning payments to PBGC apply to defined contribution plans.

(5) *Pension plans using pay-as-you-go methods.* A pension plan using pay-as-you-go methods is a plan in which the contractor recognizes pension cost only when benefits are paid to retired employees or their beneficiaries. Regardless of whether the payment of pension benefits contribution can or



cannot be compelled, allowable costs for these types of plans shall not exceed an amount computed as follows:

(i) Compute, by using an actuarial cost method, the plan's actuarial liability for benefits earned by plan participants. This entire liability is always unfunded for a pay-as-you-go plan.

(ii) Compute a level amount which, including an interest equivalent, would amortize the unfunded actuarial liability over a period of no less than 10 or more than 40 years from the inception of the liability.

(iii) Compute, by using an actuarial cost method, a normal cost for the period.

(iv) The sum of paragraphs (i)(5) (i), (ii), and (iii) of this subsection represents the amount of pension costs assignable to the current period. This amount, however, is limited to the amount paid in the year.

(v) For purposes of determining contract cost where a pay-as-you-go plan is initiated as either a supplemental plan or an additional but separate plan to a basic funded plan, the plans will be treated as one plan; e.g., the actuarial cost method, past service amortization period, etc., of the basic plan will be used on the supplemental or additional pay-as-you-go plan in determining the proper costs assignable to the current period. Any costs in excess of those determined by using the actuarial cost method and assumptions of the basic plan are unallowable. However, where assumption for salary progressions, mortality rates of the participants, and so forth are significantly different, the assumptions used for the basic and supplemental plan may be different.

(vi) The requirements of paragraphs (i)(3)(i) through (iv) above are also applicable to pay-as-you-go plans.

(6) *Early retirement incentive plans.* An early retirement incentive plan is a plan under which employees receive a bonus or incentive, over and above the requirement of the basic pension plan, to retire early. These plans normally are not applicable to all participants of the basic plan and do not represent life income settlements, and as such would not qualify as pension costs. However, for contract costing purposes, early retirement incentive payments are allowable subject to pension criteria contained in paragraphs (i)(3)(i) through (iv) provided—

(i) The costs are accounted for and allocated in accordance with the contractor's system of accounting for pension costs (see paragraph (i)(5)(v) above for supplemental pension benefits);

(ii) The payments are made in accordance with the terms and conditions of the contractor's plan;

(iii) The plan is applied only to active employees. The cost of extending the plan to employees who retired or were terminated before the adoption of the plan is unallowable; and

(vi) The total of the incentive payments to any employee may not exceed the amount of the employee's annual salary for the previous fiscal year before the employee's retirement.

(7) *Employee stock ownership plans (ESOP).* (i) An ESOP is an individual stock bonus plan designed specifically to invest in the stock of the employer corporation. The contractor's contributions to an Employee Stock Ownership Trust (ESOT) may be in the form of cash, stock, or property. Costs of ESOP's are allowable subject to the following conditions:

(A) Contributions by the contractor in any one year may not exceed 15 percent (25 percent when a money purchase plan is included) of salaries and wages of employees participating in the plan in any particular year.

(B) The contribution rate (ratio of contribution to salaries and wages of participating employees) may not exceed the last approved contribution rate except when approved by the contracting officer based upon justification provided by the contractor. When no contribution was made in the previous year for an existing ESOP, or when a new ESOP is first established, and the contractor proposes to make a contribution in the current year, the contribution rate shall be subject to the contracting officer's approval.

(C) When a plan or agreement exists wherein the liability for the contribution can be compelled for a specific year, the expense associated with that liability is assignable only to that period. Any portion of the contribution not funded by the time set for filing of the Federal income tax return for that year or any extension thereof shall not be allowable in subsequent years.

(D) When a plan or agreement exists wherein the liability for the contribution cannot be compelled, the amount contributed for any year is assignable to that year provided the amount is funded by the time set for filing of the Federal income tax return for that year.

(E) When the contribution is in the form of stock, the value of the stock contribution shall be limited to the fair market value of the stock on the date that title is effectively transferred to the trust. Cash contributions shall be allowable only when the contractor furnishes evidence satisfactory to the contracting officer demonstrating that

stock purchases by the ESOT are or will be at a fair market price; e.g., makes arrangements with the trust permitting the contracting officer to examine purchases of stock by the trust to determine that prices paid are at fair market value. When excessive prices are paid, the amount of the excess will be credited to the same indirect cost pools that were charged for the ESOP contributions in the year in which the stock purchase occurs. However, when the trust purchases the stock with borrowed funds which will be repaid over a period of years by cash contributions from the contractor to the trust, the excess price over fair market value shall be credited to the indirect cost pools pro rata over the period of years during which the contractor contributes the cash used by the trust to repay the loan. When the fair market value of unissued stock or stock of a closely held corporation is not readily determinable, the valuation will be made on a case-by-case basis taking into consideration the guidelines for valuation used by the IRS.

(ii) Amounts contributed to an ESOP arising from either (A) an additional investment tax credit (see 1975 Tax Reduction Act-TRASOP's); or (B) a payroll-based tax credit (see Economic Recovery Tax Act of 1981) are unallowable.

(iii) The requirements of paragraphs (i)(3)(ii) above are applicable to Employee Stock Ownership Plans.

(m) *Deferred compensation.* (1) Deferred compensation is an award given by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of receipt of compensation by the employee. Deferred compensation does not include the amount of year-end accruals for salaries, wages, or bonuses that are paid within a reasonable period of time after the end of a cost accounting period. Subject to 970.3102-2(a), deferred awards are allowable when they are based on current or future services. Awards made in periods subsequent to the period when the work being remunerated was performed are not allowable.

(2) The costs of deferred awards shall be measured, allocated, and accounted for in compliance with the provisions of CAS 415, Accounting for the Cost of Deferred Compensation.

(3) Deferred compensation payments to employees under awards made before the effective date of CAS 415 are allowable to the extent they would have



been allowable under prior acquisition regulations.

(n) *Fringe benefits.* Fringe benefits are allowances and services provided by the contractor to its employees, as compensation, in addition to regular wages and salaries. Subject to the determination that total compensation is reasonable in accordance with this 970.3102-2, costs of fringe benefits such as pay for vacations, holidays, sick leave, military leave, employee insurance, pension, retirement plans, and supplemental unemployment benefit plans are to be treated as allowable, provided such fringe benefits meet the following conditions:

(1) The benefits contribute to the performance of contract work and are appropriate for reimbursement from public funds;

(2) Such benefit plans as exist in the contractor's private operations that are inconsistent with DOE published requirements are appropriately modified or disallowed;

(3) Employee benefit plans especially established to meet the particular needs of the contract are in conformity with published DOE policy and standards;

(4) Appropriate controls under the contract are established to assure that employees on contract work are treated no more or no less favorably than employees in the contractor's private operation, except to the extent that paragraphs (n)(2) and (3) of this section apply;

(5) To the fullest extent possible, definite limitations or terminal points are established for each of the various benefit plans, so that DOE's full liability with respect thereto is established under the contract; and

(6) DOE has access to all information necessary to complete understanding of the means of computing or determining the cost of the benefits afforded contract employees and their dependents under the benefit plans.

(o) *Training and education expenses.* See 970.5204-13 and 970.5204-14.

#### § 970.3102-3 Cost of money.

Cost of money as an element of the (a) cost of facilities capital (CAS 414) and (b) cost of capital assets under construction (CAS 417) is not an allowable cost under DOE management and operating contracts. Under the provisions of CAS 414 and CAS 417, cost of money is an imputed cost applicable to contractor owned and financed tangible capital assets employed in contract performance or being constructed, fabricated, or developed for ultimate employment in contract performance. Cost of money is not applicable to DOE management and

operating contracts since the Government provides for assets used, or under construction for use in performance of its contracts (such as through Government furnished or contractor-acquired Government property contract provisions and/or through granting cash advances, including letters-of-credit.)

#### § 970.3102-4 Depreciation.

(a) Depreciation is allowable subject to the following:

(1) The charge represents normal depreciation on a contractor's plant and equipment used in performance of management and operating work.

(2) The charge to current operations is a distribution of the cost of acquisition of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset, in a systematic and logical manner.

(3) Any generally accepted accounting method consistently applied to assets concerned having the approval of the Internal Revenue Service for Federal income tax purposes, if subject to the Internal Revenue Code of 1954, as amended, may be used including:

(i) The straight-line method;

(ii) The declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (a)(3)(i) of this section;

(iii) The sum-of-the-years digits method;

(iv) Any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the use of the property and including the current year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used, had such allowances been computed under the method described in paragraph (a)(3)(ii) of this section.

(4) If a nonprofit or tax-exempt organization, the method shall be such that it could have had the approval of the Internal Revenue Service, had the organization been subject to the Internal Revenue Code of 1954, as amended.

(5) The contractor must use the same approved method of depreciation for costing its contract work as for costing its other work at the same facility.

(6) The method of depreciation shall produce equitable and reasonable results.

(b) Depreciation of the following is allowable:

(1) Idle or excess facilities (machinery and equipment), other than reasonable standby facilities;

(2) Assets fully amortized or depreciated on the contractor's books;

(3) Unrealized appreciation of values of assets; and

(4) Accelerated amortization under Certificates of Necessity or other system in excess of normal depreciation, as computed under paragraph (a) of this section.

(c) In entering into contracts involving the use of "special facilities" under section 161 of the Atomic Energy Act of 1954, as amended (section 7 of Public Law 85-681 approved Aug. 19, 1958), the percentage of the total cost of such special facilities devoted to contract performance and chargeable to the DOE should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such facilities.

#### 970.3102-5 Employee morale, health, welfare, food service, and dormitory costs.

(a) Employee morale, health, and welfare activities are those services or benefits provided by the contractor to its employees to improve working conditions, employer-employee relations, employee morale, and employee performance. These activities include such items as house or employee publications, health or first-aid clinics, recreation, employee counseling services and, for the purpose of this section, food service and dormitory costs. However, these activities do not include, and should be differentiated from compensation for personal services as defined in 970.3102-2. Food and dormitory services include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities or site of the contract work.

(b) Except as limited by paragraph (c) of this section, the aggregate of costs incurred on account of all activities mentioned in paragraph (a) of this section, less income generated by all such activities, is allowable to the extent that the net aggregate cost of all such activities, as well as the net cost of each individual activity, is reasonable and allocable to the contract work. Additionally, advance understandings with respect to the costs mentioned in paragraph (a) of this section are to be reached prior to the incurrence of these costs as required in 970.3101-6.

(c) Losses from the operation of food or dormitory services may be included as costs incurred under paragraph (b) of this section, only if the contractor's objective is to operate such services at least on a break-even basis. Losses



sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to accomplishment of the above objective, are not allowable, except in those instances where the contractor can demonstrate that unusual circumstances exist, such that, even with efficient management, operation of the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Typical examples of such unusual circumstances are: (1) Where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or (2) where it is necessary to operate a facility at a lower volume than the facility could economically support. Cost of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(d) In those situations where the contractor has an arrangement authorizing an employee association to provide or operate a service such as vending machines in the contractor's plant, and retain the profits derived therefrom, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (e) of this section).

(e) Contributions by the contractor to an employee organization, including funds set over from vending machines receipts or similar sources, may be included as cost incurred under paragraph (b) of this section, only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable, if incurred by the contractor directly.

#### **970.3102-6 Facilities (plant and equipment).**

(a) *Use of Government-owned facilities.* If the Government furnishes to the contractor, or the contractor acquires at Government expense, Government-owned equipment with which to do all or a significant amount of the work under the DOE contract, on which equipment the Government is bearing the expenses of depreciation, maintenance, insurance, and taxes, appropriate procedures must be established to avoid apportioning to DOE work performed with DOE-owned equipment, a share of the expenses of depreciation, maintenance, insurance and taxes on the contractor's equipment

not used to perform such work. If the Government-owned equipment is placed in a segregated area, that area should be accounted for as a separate department. If the Government-owned equipment is not placed at the separate area, other steps must be taken to avoid what would amount to a double equipment burden on work performed with the Government-owned facilities. Such work shall be so accounted for as to be relieved of charges for expenses related to contractor's equipment not used in its performance.

(b) *Contractor's costs covering plant and equipment.* Charges relating to contractor-owned plant and equipment shall be restricted to the applicable costs, such as depreciation, maintenance, insurance, and taxes, and shall not be on a rental basis. (Compensation in excess of costs is covered by the fixed fee.) Rentals of plant or equipment owned by third parties are normally allowable, if the rates are reasonable in the light of the type, value, condition of the property involved, and option and other provisions of the lease agreement. However, where the plant and equipment used by the contractor is rented by the contractor under a sale and lease-back agreement, only the normal costs (such as depreciation, maintenance, insurance, and taxes) that would have been incurred if the contractor had retained title to the facilities, should be allowed. Allowances for plant and equipment rented under agreements that are not arms-length transactions should be similarly restrictive.

#### **970.3102-7 Lobbying costs.**

(a) Lobbying is defined as any activity or communication that is intended or designed (1) to directly influence members of the U.S. Congress or state and local legislatures, their staffs, or the staffs of committees of these bodies to favor or oppose pending, proposed, or existing legislation, appropriations, or other official actions of these bodies, their members, or their committees, or (2) to engage in any campaign to directly encourage others to do so. Except as provided in paragraph (c) below, lobbying includes, but is not limited to, appearances before any legislative committee or subcommittee and written or oral communications, including face-to-face decisions or conferences, telephone conversations, paid advertisements, and the sending of telegrams or letters.

(b) The costs of lobbying, including the applicable portion of the salaries and fees to those individuals engaged in lobbying efforts on behalf of a

contractor, whether or not the individuals are registered as lobbyists under any applicable law, are unallowable.

(c) Legislative liaison activities, such as attendance at committee hearings and gathering information regarding pending legislation, are not lobbying and are allowable. In addition, written or oral communications, appearances before legislative committees and subcommittees, and meetings with legislative representatives are allowable legislative liaison activities when such efforts are undertaken in conjunction with a legislative public hearing or meeting in response to a public notice, or a specific invitation or request from a legislative source, and the notice, invitation, or request from a legislative source, and the notice, invitation, or request is documented. However, for the costs to be allowable, the contractor shall maintain and make available to the Government records and documentation sufficient to identify the costs and clearly establish the nature and purpose of the legislative liaison activity to which the costs relate.

#### **970.3102-8 Membership in trade, business and professional organizations.**

(a) The costs of memberships in trade, business and technical organizations are unallowable, except as approved by the contracting officer.

(b) In considering approval of membership dues, the contracting officer shall:

(1) Ensure that dues payments to an organization are clearly justified and provide necessary and specific agency benefit;

(2) Do not constitute payments for, or in support of partisan and political activity; and,

(3) Are solely for purposes of enhancing trade, business, or technical knowledge necessary for, and related to, performance of DOE contracts.

#### **970.3102-9 Outside technical and professional consultants.**

Technical and professional consultants, as used here, refer to private individuals acting in their own behalf, who make their services available on a fee or per diem basis. It does not refer to employees of firms acting in the firm's behalf whose services may be made available by the firm on, for example, a fixed rate basis. Consultant arrangements may permit bringing to contract work, the services of outstanding specialists who would not be available on a full-time basis, or whose employment on a full-time basis would not be economically feasible.



Costs of such outside consultant services are normally allowable (however, see 970.4204-13 and 970.5204-14 regarding compensation of an individual who is employed by another contractor and concurrently performing work on a full-time annual basis under a DOE cost-type contract), provided that the services are essential to, and will make a material contribution to, the performance of contract work; the services may be performed more economically or more successfully by a consultant than by the contractor's regular personnel; the fee or per diem charged is reasonable; and, when approved by the contracting officer. If the cost of such services is charged directly to the DOE contract, the cost of like items properly chargeable only to other work of the contractor must be eliminated from indirect costs allocable to the DOE contract (see 970.3101-2).

**970.3102-10 Overtime, shift, and holiday premiums.**

(a) Overtime, shift, and holiday premiums are allowable only to the extent provided in the contract or approved by the contracting officer. The amount of such premiums charged to a management and operating contract shall be equitable in relation to the amount of such costs charged to other work currently performed in the contractor's plant and the factors which necessitate incurrence of the costs. When the necessity for overtime, shift, and holiday work arises from inadequacy of the contractor's plant or department to perform its total workload on a purely straight-time basis, inclusions in overhead for apportionment to all work of the plant or department, as the case may be, appears appropriate. When particular work, DOE or other, is being specially expedited to a point that its fair share of the contractor's purely straight-time efforts on a single-shift basis will not get the particular job completed within the time desired, direct charging of the related premiums appears appropriate.

(b) When premiums for overtime, shift, and holiday work are charged direct to the work concerned, if the operating overhead of the plant or related department is distributed on the basis of direct labor (cost or hours), the premiums should be excluded from the direct labor base for purposes of overhead distribution. That is, the direct labor base should be, as appropriate, direct labor straight-time cost or direct labor hours actually worked. While the premiums for authorized overtime, shift, and holiday work are acceptable as reimbursable costs, it is generally recognized that direct labor hours

worked on an overtime, shift, or holiday basis should participate in indirect costs to the same extent as hours worked on a straight-time basis.

**970.3102-11 Page charges in scientific journals.**

It is a policy of the DOE to permit DOE contractors to budget for and pay page charges for scientific journal publication, as a necessary part of research costs, in all cases where:

(a) The research papers report work supported by the Government.

(b) The charges are levied impartially on all research papers published by the journal, whether by non-Government or by Government authors.

(c) Payment of such charges is in no sense a condition for acceptance of manuscripts by the journal.

(d) The journals involved are not operated for profit.

(e) The author does not receive an emolument from the journal for the research paper.

**970.3102-12 Plant reconversion costs.**

Plant reconversion costs are those incurred in the restoration of the contractor's facilities to approximately the same condition existing immediately prior to the commencement of the contract work, fair wear and tear excepted.

**970.3102-13 Precontract costs.**

Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of the contract, where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after effective the date of the contract. They do not include costs of preparing bids or of participation in the negotiation. The allowability of precontract costs is dependent upon appropriate coverage in the contract.

**970.3102-14 Preparatory and make-ready costs.**

Since indirect costs are usually apportioned to individual jobs wholly or substantially on the basis of the direct labor applied to the particular job, a contract will absorb no overhead by apportionment prior to the inception of the actual performance of direct work on the contract. The effort of the contractor's overhead organization in preparing for one job and in getting it underway, will thus be absorbed by jobs previously commenced and still being performed; later, the job, which in its initial stages of preparation and make-

ready was relieved of expenses that were actually applicable to it, will partially absorb, through their apportionment as overhead, similar costs equally applicable in fact to other, subsequently undertaken jobs. This procedure is in accordance with generally accepted accounting practices and normally is reasonably equitable in its results. The initial advantages and subsequent disadvantages to the individual contract that result from consistent application of the procedure tend to offset each other and balance out. It is quite appropriate, however, to employ the direct charge method in connection with overhead costs in preparing for actual performance by segregating such preparatory and make-ready costs and identifying them specifically with the contract to which the effort actually pertains. However, if preparatory and make ready costs are charged direct to a DOE contract, care must be taken, as performance of the DOE contract work proceeds toward completion, to segregate subsequent indirect expenses similarly applicable to the preparation for, and commencement of, other jobs and to account for them as direct charges to those other jobs.

**970.3102-15 Procurement: subcontracts and contractor-controlled sources.**

(a) *Subcontracts.* Award and management policies for subcontracts placed under operating contracts when necessary to the performance of the required services and work efforts of the management and operating contractor are set forth in 970.44. The cost of performing such subcontracts shall be allowable under the DOE contract when (1) the award/approval is otherwise in accord with the contract terms and conditions and the provisions of 970.44 and (2) the reimbursement of subcontractor costs of the management and operating contractor is in accordance with the provisions of the DOE cost principles set forth in FAR 31, as appropriate to the type of subcontractor being selected; i.e., commercial, educational, state/local government, or nonprofit organization.

(b) *Procurement or transfer from contractor-controlled sources* (See 970.4404). Allowance for all equipment, materials, supplies, and services which are sold or transferred between any division, subsidiary, or affiliate of a management and operating contractor under a common control shall be on the basis of cost incurred in accordance with the terms of the contract; except, when it is the established practice of the transferring organization to price inter-organization transfers of equipment.



materials, supplies, and services at other than cost for commercial work of the contractor or any division, subsidiary, or affiliate of the contractor under a common control, allowance may be at a price when:

(1) It is based on an "established catalog or market price of commercial items sold in substantial quantities to the general public" in accordance with FAR 15.8 or

(2) It is the result of "adequate price competition" in accordance with FAR 15.8 and is the price at which an award was made to the affiliated organization, after obtaining quotations of an equal basis from such organization and one or more outside sources which normally produce the item or its equivalent in significant quantity, provided that in either case:

(i) The price is not in excess of the transferor's current sales price to its most favored customer (including any division, subsidiary, or affiliate of the contractor under a common control) for a like quantity under comparable conditions, and

(ii) The price is not determined to be unreasonable by the contracting officer, provided, however, that if the price is determined unreasonable, such determination must be supported by an enumeration of facts on which it is based and approved at a level above the contracting officer. The price determined in accordance with paragraph (a) of this section should be adjusted, when appropriate, to reflect the quantities being procured and may be adjusted upward or downward to reflect the actual cost of any modifications necessary because of contract requirements.

#### 970.3102-16 Relocation costs.

(a) Relocation costs are costs incident to the permanent change of duty assignment (for an indefinite period or for a stated period of not less than 12 months) of an existing employee or upon recruitment of a new employee. The following types of costs are allowable as noted, subject to provisions of paragraphs (b), (c), and (d) below.

(1) Costs of travel of the employee and members of his/her immediate family and transportation of household and personal effects to the new location.

(2) Costs of finding a new home, such as advance trips by employees and spouses to locate living quarters, and temporary lodging during the transition periods, not exceeding separate cumulative totals of 60 days for employees and 45 days for spouses and dependents, including advance trip time.

(3) Closing costs (i.e., brokerage fees, legal fees, appraisal fees, points, finance

charges, etc.) incident to the disposition of actual residence owned by the employee when notified of transfer; Provided that closing costs when added to the continuing costs described in (a)(6) below shall not exceed 14% of the sales price of the property sold.

(4) Other necessary and reasonable miscellaneous expenses incident to relocation, such as disconnection and connecting household appliances; automobile registration; drivers license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

(5) Costs incident to the acquisition of a home in a new location, except that these costs will not be allowable for existing employees or newly recruited employees who prior to the relocation were not homeowners and the total costs shall not exceed 5% of the purchase price of the new home.

(6) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing up expenses), utilities, taxes, property insurance, mortgage interest, etc., after settlement date or lease date of new permanent residence; Provided that when added to the closing costs described in (a)(3) above, the costs shall not exceed 14% of the sales price of the property sold.

(7) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who prior to the relocation were not homeowners, and the total payments are limited to an amount determined as follows:

(i) Difference between the mortgage interest rates of the old and new residence times the current balance of the old mortgage times 3 years; and

(ii) When mortgage differential payments are made on a lump sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized shall be proportionately adjusted to reflect payments only for the actual time of the relocation.

(8) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable differential payment may not exceed the actual rental costs for the new home, less the fair market rent for the vacated home times 3 years.

(9) Cost of canceling an unexpired lease.

(b) The costs described in (a) above must also meet the following criteria to be considered allowable.

(1) The move is for the benefit of the Government.

(2) Reimbursement must be in accordance with an established policy or practice and program that is consistently followed and is designed to motivate employees to relocate promptly and economically.

(3) Amounts to be reimbursed do not exceed the employee's actual expenses, except that for miscellaneous costs of the type discussed in (a)(4), a flat amount, not to exceed \$1,000, may be paid in lieu of actual costs.

(c) The following types of costs are not allowable:

(1) Loss on sale of a home.

(2) Continuing mortgage principle payments on residence being sold.

(3) Cost incident to the acquisition of a home in a new location as follows:

(i) Real estate brokers fees and commissions;

(ii) Costs of litigation;

(iii) Real and personal property insurance against damage or loss of property;

(iv) Mortgage life insurance;

(v) Owner's title policy insurance when such insurance was not previously carried by the employees on the old residence (however, costs of a mortgage title policy is allowable) and;

(vi) Property taxes and operating or maintenance costs.

(4) Payments for employee's income taxes of FICA (social security taxes) incident to reimbursed relocation costs.

(5) Costs incident to furnishing equity or nonequity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.

(d) If relocation costs for an employee have been allowed and the employee resigns within 12 months for reasons within the employee's control, it is expected the contractor shall refund or credit the relocation costs to the Government.

(e) Contractor payments to an independent relocation assistance firm handling acquisitions and sales of houses of transferred employees are allowable in amounts which otherwise represent payment for itemized cost which are allowable in accordance with the provisions of this section.

#### 970.3102-17 Travel costs.

(a) *Air travel.* It is the policy of the DOE to require the use of the lessor of the lowest available discount fare which serves the missions purpose or other less than first-class air accommodations



for all cost-reimbursed travel, except when less than first-class accommodations are not reasonably available to meet necessary mission requirements. For example, less than first-class accommodations are considered not reasonably available where less than first-class accommodations would:

- (1) Require circuitous routing.
- (2) Require travel during unreasonable hours.
- (3) Greatly increase the duration of the flight.
- (4) Result in additional costs which would offset the transportation savings; or
- (5) Offer accommodations which are not reasonably adequate for the medical needs of the traveler.

The difference in cost between first-class air accommodations and less than first-class accommodations (such as discount fares or other less than first class accommodations) is an unallowable cost, except as provided for in this section.

(b) *Government-owned or commercial rental vehicles.* Commercial rental automobile costs in excess of the cost of a Government-furnished automobile or, when a Government-furnished automobile is not available, the cost of a Government-contract rental automobile available under a GSA Federal Supply Schedule contract, is unallowable unless:

- (1) A Government-furnished or a Government contract rental automobile is not reasonably available to the traveler, or
- (2) The traveler's use and the cost of a commercial rental automobile are justified and authorized as more advantageous to the Government.

#### 970.3102-18 Special funds in the construction industry.

Costs of special "funds," financed by employer contributions, in the construction industry for such purposes as methods and materials research, public and industry relations, market development, disaster relief, etc., are unallowable, except as specifically authorized by the contracting officer and provided for in the contract.

#### 970.3102 Contract clauses.

The appropriate cost principles clause at 970.5204-13 or 970.5204-14 shall be included in a management and operating contract.

### Subpart 970.32—Contract Financing

#### 970.3201 General.

It is the policy of the DOE to finance management and operating contracts

through advance payments and use of Special Bank Accounts. Appropriate procedures for properly managing and controlling funds for obligation and expenditure under a management and operating contract are maintained by the Office of Controller.

#### 970.3202 Advance payments.

(a) The Head of the Contracting Activity, shall authorize advance payments without interest; and approve the findings, determinations and the contract terms and conditions concerning advance payments in accordance with the procedures set forth in FAR Subpart 32.4, Advance Payments, as amended by Subpart 932.4.

(b) Advance payments shall be made under a letter-of-credit arrangement for deposit in a special bank account.

(c) Prior to providing any advance payments, the contracting officer shall enter into an agreement with the contractor and a financial institution, regarding a special bank account where the advanced funds are to be deposited by the Government. Such agreement shall (1) provide that DOE shall retain title to the unexpended balance of funds in the special bank account including revenues if any, deposited by the contractor; and that such title shall be superior to any claim or lien of the bank of deposit and (2) incorporate as necessary or appropriate, additional financial provisions required by Treasury or Departmental financial regulations.

(d) Deviations from these specified requirements cited in paragraph (c) above shall be considered a deviation requiring approval of the Head of the Contracting Activity.

(e) Letter-of-Credit arrangements shall be prepared in accordance with FAR 32.406, Letters of Credit, and shall be coordinated between the procurement and finance organizations.

#### 970.3270 Clauses.

The clauses at 970.5204-18 shall be included in management and operating contracts when advances of funds are to be placed in a special bank account. They may be appropriately modified to incorporate any additional provisions that may be required by governing financial regulations of the Treasury Department or the Department.

#### 970.3271 Special bank account agreement.

**Note.**—The following agreement shall be used with special bank accounts in accordance with 970.3202(c).

Agreement entered into this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, between the United States of America (hereinafter called the Government) represented herein by the Department of

Energy (hereinafter called the "DOE"), and \_\_\_\_\_ (hereinafter called the "Contractor," a corporation under the laws of the State of \_\_\_\_\_, and \_\_\_\_\_, (hereinafter called the "Bank," a banking corporation under the laws of \_\_\_\_\_, located at \_\_\_\_\_.

#### Recitals

(a) On the date of \_\_\_\_\_, 19\_\_\_\_, DOE and the Contractor entered into Contract(s) No. \_\_\_\_\_, or a supplemental agreement thereto, providing for the making of advances of Government funds to the contractor a copy of such advance provisions has been furnished to the Bank.

(b) DOE requires that amounts advanced to the Contractor under said contract or supplemental agreement be deposited in a Special Bank Account or accounts with a bank designated by the Treasury Department as depository and financial agent of the Government (Section 10 of the Act of June 11, 1942, 56 Stat. 356; 12 U.S.C. 265), separate from any of the Contractor's general or other funds; and, the Bank being such a bank, the parties are agreeable to so depositing said amounts with the Bank.

(c) This Special Bank Account shall be designated "\_\_\_\_\_" (Name of Contractor), \_\_\_\_\_ (Contract Number), Department of Energy Special Bank Account."

#### Covenants

In consideration of the foregoing, and for other good and valuable considerations, it is agreed that:

(1) The Government shall have title to the credit balance in said account to secure the return of all advances made to the contractor, which title shall be superior to any lien or claim of the Bank or others with respect to such account.

(2) The Bank will be bound by the provisions of said contract or contracts relating to the deposit and withdrawal of funds in the above Special Bank Account, but shall not be responsible for the application of funds properly withdrawn from said account. After receipt by the Bank of written directions from the Contracting Officer, or from the duly authorized representative of the Contracting Officer, the Bank shall act thereon and shall be under no liability to any party hereto for any action taken in accordance with the said written directions.

(3) The Government, or its authorized representatives, shall have access to the books and records maintained by the Bank with respect to such Special Bank Account at all reasonable times and for all reasonable purposes, including, without limitation, the inspection or copying of such books and records and any and all memoranda, checks, correspondence, or documents pertaining thereto. Except as agreed upon by the Government and the Bank, all books and records pertaining to the Special Bank Account in the possession of the Bank relating to the Special Bank Account agreement shall be preserved by the Bank for a period of three (3) years after final payment under the contract to which the Special Bank Account agreement pertains or otherwise disposed of in such manners as may be agreed upon by the Government and the Bank.



(4) In the event of the services of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special Bank Account, the Bank will promptly notify the Head of Contracting Activity, DOE.

In witness whereof the parties hereto have caused this Agreement to be executed, as of the day and year first above written.

(Signatures and Official Titles)

## Subpart 970.36—Construction and A-E Contracts

### 970.3600 Scope of subpart.

This subpart sets forth contracting procedures applicable to construction work performed by management and operating contractors and their subcontractors. Provisions of FAR Part 36 and Part 936 of this chapter also apply.

### 970.3601 Government estimates.

A Government estimate of costs shall be prepared for all construction work to be subcontracted under operating and management contracts. The services of an architect-engineer, management and operating contractor, or construction contractor shall be used as appropriate in the preparation of Government estimates.

### 970.3602 Specifications.

Management and operating contractors are required to comply with the DOE publication entitled "Design Criteria," in preparing specifications for construction work.

### 970.3603 Labor standards.

The provisions of FAR Subpart 22.4 and Subpart 922.4 of this chapter shall be followed in determining whether a management and operating contractor's procurement actions involve work covered under the Davis-Bacon Act.

### 970.3604 Agreement for rental of third-party owned construction equipment.

When construction work under a management and operating contract requires the rental of construction equipment from a third party, the DOE agreement outlined at 936.7302 shall be used.

### 970.3605 Davis-Bacon Act.

Subcontracts subject to the Davis-Bacon Act under management and operating contracts shall include the applicable clauses and shall be modified to delete references to a prime contract subject to the Davis-Bacon Act.

### 970.3606 Special construction clause for operating contracts.

The clause in 970.5204-38 shall be used in management and operating

contracts when the contractor will not perform covered work with its own forces but may procure construction by subcontract.

### 970.3607 Architect-engineer/construction services.

Combinations in or subcontracts for architect-engineer and construction services, which may result in self-inspection of construction work, tend to prevent a contractor from rendering unbiased decisions, or create difficulties in segregating costs between contracts, and should be avoided. However, it is recognized that sometimes it is advantageous under carefully circumscribed conditions for a management and operating contractor to obligate a single firm to perform both architect-engineer and construction management services which may include performance of a segment of the construction work with the contractor's own forces. Unless otherwise authorized by the Procurement Executive, the following combinations of subcontracts shall not be awarded by a management and operating contractor to the same firm or to affiliated companies:

(a) Both a cost-reimbursable contract and fixed-price contract if the performance of any portion of the work under either the cost-type or fixed-price contract will be performed on different projects concurrently and in the same general locations. This restriction applies to contracts for construction services, architect-engineer services, or construction and architect-engineer services.

(b) A fixed-price contract or contracts, for both architect-engineer and construction services on the same construction project, or a cost-type contract for architect-engineer services and a fixed-price contract for construction services on the same construction project. If a firm is to be responsible under such contractual arrangements for both design and construction services, title III architect-engineer services shall be performed by another organization selected by DOE.

(c) A cost-type contract for both architect-engineer and construction services on the same construction project (engineer-constructor contract). If this contractual arrangement is used, the contract shall provide for performance of the title III architect-engineer services by contractor's engineering personnel who are not responsible to the contractor's construction personnel, or the title III services shall be performed by another organization selected by DOE.

### 970.3608 Inspection.

(a) Inspection services may be performed by the architect-engineer responsible for the design. Inspection services may not be procured from a fixed-price construction contractor with respect to its own work. Under cost-reimbursement type subcontracts where the construction contractor and architect-engineer contractor are the same, some degree of self-inspection may be permitted, but shall not constitute final inspection and acceptance by the Government.

(b) When one contractor is to inspect the work of another, the inspecting contractor will be given written instructions defining its responsibilities and stating that it is not authorized to modify the terms and conditions of the contract, direct additional work, waive any requirements of the contract, or settle any claims or dispute. Copies of the instructions will be given to the contractor who is to be inspected, with a request to acknowledge receipt on one copy and return it to the contracting officer. In this manner, both contractors are on notice as to the authority and limitations on the authority of the inspecting contractor.

## Subpart 970.44—Contractor procurement

### 970.4401 General.

Contracting activities of management and operating contractors shall be governed by contract requirements. The Federal Acquisition Regulation generally is not directly applicable. There are, however, requirements of certain Federal Laws, Executive Orders and regulations including Federal Acquisition Regulations which pertain to and are applicable to procurements by management operating contractors. These requirements, together with implementing DOE Acquisition Regulations which apply to management and operating contractor procurements are identified in this subpart and other subparts of 970.

### 970.4402 Responsibility of contracting officers.

Contracting officers are responsible for assuring that procurement by management and operating contractors conforms to contract requirements and provides effective and timely support to agency programs. In carrying out this responsibility, contracting officers shall:

(a) Assure that management and operating contracts include those provisions required by law or regulations, and such other provisions as are appropriate to implement DOE



policies and requirements; (b) review contractor procurement systems including implementation of policies as required by 970.4403 and in accordance with the provisions of their contracts; (c) review individual procurement actions of certain types or above stated dollar level; and (d) make periodic appraisals of the contractor's management of the procurement function in accordance with criteria established by the Procurement Executive.

#### 970.4403 Policies.

The following policies shall apply to the procurement practices of management and operating contractors. Within these policies it is expected that procurement systems and methods will vary according to the types and kinds of procurement to be made, the needs of the particular programs, and the experience, methods, and practices of the particular contractor.

(a) Procurement systems and methods used to support DOE management and operating contract work should be well defined, consistently applied, and follow good business practices appropriate for the requirement and amount of procurement involved.

(b) Procurement should be effected in the manner most advantageous to the Government—price, quality, and other factors considered. In order to assure this objective and the award of subcontracts on an impartial basis, procurement (from other than Government sources) shall be effected by methods calculated to assure such full and free competition as is consistent with securing the required supplies and services. Generally, procurement actions are carried out through one of the following methods:

(1) *Firm-Price Competitive offers or quotations and award.* The competitive offer or quotation and award method of procurement, which normally assures the greatest degree of fair and open competition, generally involves the following basic steps and objectives:

(i) Preparation of a solicitation document setting forth contract terms and conditions and describing the requirement clearly, accurately, and completely, avoiding unnecessarily restrictive specifications or requirements.

(ii) Publicizing such solicitations by distribution to a reasonable number of prospective offerors and by such other means as may be appropriate, in sufficient time to permit the preparation and submission of offers before the time set for receipt of offers. This time shall be uniform for all.

(iii) Handling solicitations in a manner which provides fair and equal treatment for all prospective contractors.

(iv) Making an award to the prospective contractor whose offer, in response to the solicitation, will be most advantageous to the Government, price and other factors considered. However, if upon evaluation, it is determined to be in the best interest of the Government to enter into negotiations with prospective contractors before award, such negotiations should be conducted in accordance with (b)(2) below with respect to according fair and equal treatment to prospective contractors.

(2) *Negotiation.* Procurement by this method normally should be conducted by competitive negotiations through the solicitation and evaluation of proposals, from an adequate number of qualified sources to assure effective competition, consistent with securing the required supplies or services. Negotiated procurement involves advance planning, description of procurement and delivery requirements, and consideration of the effect these requirements may have on prices and competition. Requests for proposals should describe the property or services required as completely as possible; allow sufficient time for submission of proposals; and establish a closing date for receipt of proposals. Proposals should be handled in a manner which provides fair and equal treatment to all prospective offerors.

(c) Price or cost analyses shall be performed in accordance with the requirements of FAR Subpart 15.8 and Subpart 915.8 of this chapter. Profit and fee and negotiation objectives shall be consistent with guidance in FAR Subpart 15.9 and Subpart 915.9 of this chapter. Allowable cost shall be determined in accordance with the cost principles of FAR Part 31 appropriate for the type of organization to which the subcontract is awarded.

(d) Supplies and services normally should be procured through the use of specifications standards, or purchase descriptions which clearly and accurately describe the supplies or services to be procured. If such specifications, standards, or purchase descriptions are not available and it is impractical and uneconomical to prepare them, "brand name or equal" descriptions may be used, provided the particular physical functions or other characteristics of the brand name item which are deemed essential are clearly identified and described.

(e) The need for access authorizations to classified information shall not be a limiting factor in obtaining competition except where time will not permit

securing additional access authorizations.

(f) Awards shall be made only to responsible, responsive, prospective contractors. Proposed awards to firms or individuals on the GSA Consolidated List of Debarred, Suspended, and Ineligible Contractors or the DOE Consolidated List of Debarred, Suspended, Ineligible, and Voluntarily Excluded Awardees shall be submitted to DOE for approval.

(g) Selection of the type of contract to be used should be based on consideration of the nature of the supplies and services required and other circumstances surrounding the procurement. The cost-plus-a-percentage-of-cost system of contracting shall not be used in any event.

(h) Small purchases should be made by methods designed to (1) obtain fair and reasonable prices, (2) reduce administrative costs of making such purchases to the minimum required to establish the propriety of placing the order at the price paid with the supplier concerned, and (3) improve opportunities for small and minority business concerns within the local trade area to obtain a fair proportion of purchases.

#### 970.4404 Procurement from contractor-controlled sources.

(a) When a management and operating contractor maintains a separate procurement function to support performance of work in DOE facilities on DOE sites, procurement from contractor-controlled sources (any division, subsidiary, or affiliate of the contractor under a common control) may be treated in the same manner as procurement from other sources provided the procurement is made:

(1) Under the same terms and conditions as would apply if the purchase were from a third party;

(2) In accordance with policies and procedures particularly designed to permit fair and open competition which have been approved by the contracting officer; and

(3) In a manner which results in legally enforceable terms and conditions.

(b) Subcontracts for performance of contract work itself (as distinguished from procurement of supplies and services needed in connection with the performance of work) require DOE authorization which may involve an adjustment of the contractor's fixed fee. If the contractor seeks authorization to have some part of the contract work performed by a contractor-controlled source, and the contractor's



performance of that work was a factor in the negotiated fixed fee, DOE approval would normally require (1) that the contractor-controlled source perform such work on a basis without profit, (2) an equitable downward adjustment to the contractor's (i.e., the contracting component's) fixed fee.

(c) Determination on cost of money allowance as prescribed in at FAR 31.205-10 shall be treated as follows:

(1) When a procurement from a contractor-controlled source with the provisions and conditions of (a) (1), (2), and (3) of this section, the contractor-controlled source may include cost of money as an allowable element of the costs of its goods or services provided to the contractor: *provided* (i) the procurement is based on cost as set forth in 970.3102-15 and (ii) the cost of money amount is computed in accordance with FAR 31.205-10 and related procedures (see 930.70).

(2) When a procurement from a contractor-controlled source is authorized in accordance with 970.4408 of this section, cost of money shall not be considered an allowable element of the cost of the contractor-controlled source procurement.

#### 970.4405 Procedures for handling mistakes under management and operating contractor procurement.

(a) Heads of Contracting Activities may authorize the withdrawal of offers and the correction of mistakes in contracts awarded by contractors in accordance with this section.

(1) Contractors may permit the withdrawal of offers upon a showing of clear and convincing evidence of the alleged mistake.

(2) Contractors may correct obvious clerical errors in offers disclosed prior to award, regardless of amount.

(3) Except as provided in paragraph (a)(4) of this section, contractors may correct other mistakes in bids and contracts as provided in this section.

(4) The Head of the Contracting Activity approval shall be required for:

(i) Any corrections of mistakes which would cause the proposed contract price (A) to exceed that of the second low offer, or (B) to displace one or more lower acceptable offers;

(ii) Any corrections of mistakes in offers, other than obvious clerical errors, in procurement actions which require DOE approval;

(iii) Any correction of mistakes which exceed \$10,000 disclosed after award; and

(iv) Any rescission of a contract.

(b) Corrections of mistakes are authorized under paragraph (a) (3) and (4) of this section when:

(1) There is clear and convincing evidence to support both the assertion of a mistake and the amount thereof;

(2) The mistake was made in good faith;

(3) The mistake is of such a nature that correction thereof is justified by consideration of fair dealings; and

(4) The mistake is of the type that would be corrected under the contractor's private procurement practices, or with respect to mistakes in excess of \$10,000, or which require approval of the Head of the Contracting Activity, a determination is made that relief would be granted under applicable Federal law.

(c) The authority of this section may not be used to make a offer responsive.

(d) Where rescission is an appropriate remedy, the Head of the Contracting Activity may authorize a modification in a specific amount, or approve revisions in other terms and conditions, in lieu of rescission.

(e) Where a contract is executed or work is continued after assertion of a mistake, the alleged mistake may be considered on its merits as of the time it was asserted, provided the contract was executed or the work continued pursuant to an understanding that such action did not constitute a waiver of any rights.

(f) Corrections of mistakes or other remedial actions taken pursuant to this section shall be documented by a written statement setting forth the circumstances and basis for such action and shall be made a part of the procurement file.

(g) When correction of mistakes or other relief cannot be granted under the criteria of this section, the Head of the Contracting Activity may deny the request or forward the file to the Procurement Executive with recommendation for action.

#### 970.4406 [Reserved]

#### 970.4407 Review and approval.

(a) Heads of contracting activities shall require management and operating contractors to obtain the approval of the contracting officer before entering into any subcontracts or purchase orders within the following categories:

(1) *Specified contract types.* Approval shall be required before entering into cost reimbursement, labor-hour, and time-and-materials type subcontracts in excess of \$500.

(2) *Specified dollar amounts.* Approval shall be required before entering into subcontracts or purchase orders that:

(i) Except as provided in paragraph (b) (1) and (2) of this section, exceed the following amounts:

(A) Construction and A-E, \$10,000;

(B) R&D, \$10,000; and

(C) All others, \$25,000.

(ii) Exceed any lesser dollar limits established at the discretion of Heads of Contracting Activities, taking into consideration such factors as the nature of work under each contract, the estimated cost of work under the contract, the contractor's procurement organization, other controls exercised over the contractor's procurement operations, and policies with respect to approvals established by Headquarters or field offices.

(3) *Contracts entered into under section 41 of the Atomic Energy Act of 1954 relating to the operation of nuclear production facilities.* Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41 of the Atomic Energy Act of 1954, as amended.

(4) *Specified materials, equipment, or services.* Heads of Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchase from contractor-controlled sources or the procurement of specific items, or classes of items which by the terms of the contract may require DOE approval.

(b) The following exceptions shall apply to the provisions of paragraph (a) above.

(1) In the event application of any of the dollar amount limitations established in paragraphs (a)(1) and (2) above would impair the DOE program or the field office or would be impracticable under the circumstances, or such higher levels would be in the Government's best interest, the Head of a Contracting Activity may, upon making such determination, establish a dollar amount in \$100,000 subject to advance notification limitations set forth in 970.4408. Requests to establish dollar levels in excess of \$100,000 shall be submitted to the Procurement Executive for approval and contain the applicable information required in 970.4408. Advance notification required in 970.44-8 shall be applicable to all such higher levels established.

(2) When a review has been made of the contractor's procurement system and the contractor's procurement system has been approved, the Head of the Contracting Activity may raise the dollar limitations in paragraph (a)(1) and (2) above as follows (subject to advance notification): To the lower of (A) limits established by the performing activity,



or (B) the amount of the Head of the Contracting Activities delegated authority, provided approval has been obtained as required.

(c) Heads of Contracting Activities may, up to the limits of their delegated authority, give oral approval (or approval by telephone or teletype) to any subcontract or purchase order requiring DOE approval in instances of compelling or unusual urgency, such as circumstances under which a DOE program would be seriously hampered or delayed if supplies or services are not obtained by a certain date and time does not permit the obtaining or formal approval. Such emergency approvals shall be confirmed in writing.

(d) Management and operating contractors shall be required to justify procurements in writing, setting forth the information and data used in determining that the procurements are in the best interest of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the procurement.

(e) Contracting officers shall assure that the contractors establish and maintain procurement files which contain those documents essential to present an accurate and adequate record of the transaction.

(f) Field offices will establish files for the review and approval of contractor procurement actions, including among other necessary documentation, an appraisal of the proposed action and a copy of suggestions, deficiencies, or improvements forwarded to the contractor.

#### 970.4408 Advance notification.

(a) This provision only applies to former AEC functions now being performed by DOE pursuant to section 602(d)(13) of the Federal Property and Administrative Services Act of 1949, as amended. The limitation in section 304(b) of that act concerning advance notification is not applicable, provided the contractors procurement methods and systems have been reviewed and approved, except that advance notification shall be required for all proposed contracts or solicitations where the procurement is:

- (1) Noncompetitive and over \$25,000
- (2) A intracompany transfer or payment over \$10,000;
- (3) Will result in direct reimbursement of costs over \$500.
- (4) For consulting work over \$10,000.
- (b) The advance notice shall contain, as a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of anticipated competition, or justification

for a noncompetitive procurement. The contracting officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

#### 970.4409 Nuclear material transfers.

(a) Management and operating contractors, in preparing contracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall be required to assure that each such contract or agreement contains a:

- (1) Description of the material to be transferred;
  - (2) Provision specifying the method by which the quantities are to be measured and reported;
  - (3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;
  - (4) Provision providing for the use of an umpire to settle unresolved differences in the analytical samples; and
  - (5) Provision specifying in detail which part shall bear the costs of resolving a difference and what constitutes such costs.
- (b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

#### Subpart 970.46—Quality Assurance

##### 970.4601 General.

Contract provisions relating to inspection and acceptance as included, in subcontracts and purchase orders by management and operating contractors, should provide no less protection for the Government than are provided by the contract articles in prime contracts.

#### Subpart 970.49—Termination of Contracts

##### 970.4901 General principles.

- (a) All management and operating contracts, regardless of whether they are for production, research and development, or services, shall contain appropriate termination provisions.
- (b) Subcontracts and purchase orders awarded by the management and operating contractor are required to include termination and settlement requirements of FAR Part 49.

##### § 970.4902 Termination clause.

The clause at 970.5204-45 shall be inserted into management and operating contracts.

#### Subpart 970.51—Use of Government Sources by Contractors

##### 970.5101 Use of Government supply sources.

(a) Management and operating contractors should meet their acquisition requirements from Government sources of supply, when these sources are made available to them and if it is economically advantageous or otherwise in the best interest of the Government.

(b) Contracting officers may authorize management and operating contractors and their subcontractors with cost-reimbursement type subcontracts, where all higher-tier subcontracts are cost-reimbursement types, to acquire materials and services directly from such Government sources of supply in accordance with the requirements of this subpart or the consent of agencies involved.

(c) Materials, supplies, and equipment procured from Government sources of supply under the procedures described herein must be used exclusively in connection with management and operating contract work, except as otherwise authorized by Heads of Contracting Activities.

(d) Many supply facilities and contracts of the Department of Defense are made available to DOE and its management and operating contractors. Accordingly:

(1) Requisitions or purchase orders shall be submitted directly to these sources, unless otherwise specified. Field offices will be notified by the Procurement Executive, or designee, when such contracts and facilities are made available. Inquiries in connection with these sources may be directed to the Procurement Executive.

(2) Contractor requisitions submitted to Defense Logistics Centers should include the following statement: "The consignee of the supplies and materials requisitioned herein is acting in behalf of and as agent for the Department of Energy with respect to the expenditure of Government funds." Orders submitted directly to DOD contractors shall be accompanied by an authorization substantially similar to that in FAR 51.103.

(e) Contracting officers, when reviewing the procurement systems and methods of contractors that have been authorized to use Government sources of supply, shall assure that provision is made for documenting the justification of procurements from commercial sources of items available from Government sources of supply.



(f) Direct procurement by DOE, rather than by a management and operating contractor, shall be required where deemed necessary by the Head of the Contracting Activity in order to carry out special requirements of appropriation acts or other applicable laws relating to particular items.

(g) The Procurement Executive, shall be informed of instances in which Government sources of supply are not used because of the quality of the items available or when a Federal Supply Schedule contractor refuses to honor an order.

#### 970.5102 Use of interagency motor pool vehicles and related services.

The provisions of FAR subpart 51.2, FPMR 41 CFR 101-39, and DOE-PMR 41 CFR 109-39 apply.

#### Subpart 970.52—Contract Clauses for Management and Operating Contracts

##### 970.5201 General policy.

Many of the clauses set forth in subparts of FAR Part 52 and Part 952 of this Chapter apply to management and operating contracts. The clauses in this subpart are to be used in addition to or in place of the FAR or the DEAR counterpart contract clauses where appropriate. Further modifications and notes to certain FAR clauses are also prescribed, in addition to those set forth in Part 952.

##### 970.5202 Deviations.

Deviations from the standard contract clauses and modifications to FAR clauses set forth herein, as well as from the standard contract clauses prescribed in FAR Part 52 and Part 952 of this Chapter, shall be made only in accordance with the deviation procedures of Subpart 901.4. Minor changes in wording which may become necessary in the course of negotiations are not considered deviations, provided Counsel determines that the change is not prohibited by statute, executive order, or administrative regulation and does not alter the meaning, intent, or basic principles expressed in these clauses.

##### 970.5203 Modifications and notes to FAR clauses.

##### 970.5203-1 Covenant against contingent fees.

See FAR 52.203-5.

*Note.*—Modify this clause by adding the following paragraph:

"(c) Subcontracts and purchase orders. Unless otherwise authorized by the Contracting Officer in writing, the contractor shall cause provisions similar to the foregoing to be inserted in all

subcontracts and purchase orders entered into under this contract."

##### 970.5203-2 Examination of records by Comptroller General.

See FAR 52.215-1.

*Note.*—The following paragraph (e) should be included in management and operating contracts when the clause at FAR 52.215-1 is required. It may be omitted only with the approval of the Procurement Executive, upon a specific determination, based on consultation with the Office of the Controller and the Office of the General Counsel, that nothing in the contract purports to preclude an audit by the General Accounting Office of any transaction thereunder.

(e) Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

##### 970.5203-3 Buy American Act.

See FAR 52.225-3.

*Note.*—Substitute "used" for "delivered" in paragraph (b).

##### 970.5204 Clauses to be used in addition to or in place of the contract clauses set forth in FAR 52 and DEAR 952.

##### 970.5204-1 Security.

Use the clauses at 952.204-2, Security and 952.204-70, Classification.

##### 970.5204-2 Safety and health (Government-owned or leased).

Safety and Health (Government Owned or Leased) (Apr 1984)

The contractor shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the public and shall comply with all applicable safety and health regulations and requirements (including reporting requirements) of DOE. The contracting officer shall notify the contractor, in writing, of any noncompliance with the provisions of the clause and the corrective action to be taken. After receipt of such notice, the contractor shall immediately take corrective action. The contractor shall submit a management program and implementation plan to the contracting officer for review and approval within 30 days after the date of award of this contract. In the event that the contractor fails to comply with said regulations or requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work; thereafter, a start order for resumption of the work may be issued at the discretion of the contracting officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of, or in connection with, such work stoppage.

##### 970.5204-3 Buy American Act—Construction materials.

Include the clause at FAR 52.225-5 when the contract contains construction.

##### 970.5204-4 [Reserved]

##### 970.5204-5 Disclosure of information.

Clause located at 952.204-72 use as prescribed at 970.0404-4.

##### 970.5204-6 Nuclear hazards indemnity.

See 952.250-70

##### 970.5204-7 Nuclear hazards indemnity—product liability.

See 952.250-71

##### 970.5204-8 Indemnity assurance to architect-engineer or supplier prior to operation of a production or utilization facility.

See 952.250-72

##### 970.5204-9 Accounts, records, and inspection.

Accounts, Records, and Inspection (Apr. 1984)

(a) *Accounts.* The contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting all allowable costs incurred, revenues or other applicable credits, fixed-fee accruals, and the receipt, use, and disposition of all Government property coming into the possession of the contractor under this contract. The system of accounts employed by the contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

*Note.*—If the contract includes the clause for "Price Reduction for Defective Cost or Pricing Data" set forth at FAR 52.215-22, paragraph (a) above should be modified by adding the words "or anticipated to be incurred" after the words "allowable costs incurred."

(b) *Inspection and audit of accounts and records.* All books of account and records relating to this contract shall be subject to inspection and audit by DOE at all reasonable times, before and during the period of retention provided for in (d) below, and the contractor shall afford DOE proper facilities for such inspection and audit.

(c) *Audit of subcontractors' records.* The contractor also agrees, with respect to any subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the contracting officer.

(d) *Disposition of records.* Except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, and other data evidencing costs allowable, revenues, and other applicable credits under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the



progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as provided in this contract, all other records in the possession of the contractor relating to this contract shall be preserved by the contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the contractor.

(e) *Reports.* The contractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this contract as the contracting officer may from time to time require.

(f) *Inspections.* The DOE shall have the right to inspect the work and activities of the contractor under this contract at such time in such manner as it shall deem appropriate.

(g) *Subcontracts.* The contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through this paragraph (g) of this clause in all subcontracts (including fixed-price of unit-piece subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

**Note.**—If the prime contract contains a "Defective Cost or Pricing Data" clause, this paragraph (g) shall be modified by adding the following:

The contractor further agrees to include an audit clause, the substance of which is the "Audit" clause set forth at FAR 52.215-22, in each subcontract which does not include provisions similar to those in paragraph (a) through this paragraph (g) of this clause, but which contains a "defective cost or pricing data" clause.

(h) *Internal audit.* The contractor agrees to conduct an internal audit and examination satisfactory to DOE of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this contract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the contracting officer.

**Note.**—This paragraph (h) shall be included in (a) all cost-type contracts (or subcontracts) involving an estimated cost exceeding \$5 million and expected to run more than 2 years, and (b) any other cost-type contract (or subcontract) where deemed advisable by the Head of the Contracting Activity and when the contractor (or subcontractor) already has an established internal audit organization.

#### 970.5204-10 Foreign ownership, control, or influence over contractors (FOCI).

(a) Insert the clause at 952.204-73 in a solicitation for a management and operating contract.

(b) Insert the clause at 925.204-74 in management and operating contracts as prescribed at 970.0404-4.

#### 970.5204-11 Changes.

##### Changes (Apr 1984)

(a) *Changes and adjustment of fee.* The contracting officer may at any time and without notice to the sureties, if any, issue written directions within the general scope of this contract requiring additional work or directing the omission of, or variation in, work covered by this contract. If any such direction results in a material change in the amount or character of the work described in the "Statement of Work," an equitable adjustment of the fee, if any, shall be made in accordance with the agreement of the parties and the contract shall be modified in writing accordingly. Any claim by the contractor for an adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the contractor of the notification of change; provided, however, that the contracting officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause entitled "Disputes."

(b) *Work to continue.* Nothing contained in this clause shall excuse the contractor from proceeding with the prosecution of the work in accordance with the requirements of any direction hereunder.

#### 970.5204-12 Contractor's organization.

##### Contractor's Organization (Apr 1984)

(a) *Organization chart.* As promptly as possible after the execution of this Contract, the contractor shall furnish to the contracting officer a chart showing the names, duties, and organization of key personnel to be employed in connection with the work, and shall furnish from time to time supplementary information reflecting changes therein.

(b) *Supervising representative of contractor.* Unless otherwise directed by the contracting officer, a competent full-time resident supervisory representative of the contractor satisfactory to the contracting officer shall be in charge of the work at the site at all times. This also applies to off-site work.

(c) *Control of employees.* The contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to his employees as may be necessary. In the event the contractor fails to remove any employee from the contract work whom DOE deems incompetent, careless, or insubordinate, or whose continued employment on the work is deemed by DOE to be contrary to the public interest, the Government reserves the right to require the contractor to remove the employee.

**Note.**—In contracts identified in 970.2273, the following paragraph shall be substituted for (c) above:

(c) The contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such

disciplinary action with respect to its employees as may be necessary. The contractor shall establish such standards and procedures as are necessary to implement effectively the provisions set forth in 970.2273, and such standards and procedures shall be subject to the approval of the contracting officer.

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

##### Allowable Costs and Fixed-Fee (Apr 1984) (CPFF Management and Operating Contracts)

(a) *Compensation for contractor's services.* Payment for the allowable costs as hereinafter defined, and of the fixed-fee, if any, as hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract.

(b) *Fixed-fee.* The fixed-fee payable to the contractor for the performance of the work under this contract is \$—. There shall be no adjustment in the amount of the contractor's fixed-fee by reason of differences between any estimate of cost for performance of the work under this contract and the actual costs for performance of that work.

**Note.**—This provision to this paragraph may be appropriately changed to cover situations where the fee is for a period of time or different fees are allowed for various phases of the work.

(c) *Allowable costs.* The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on: (1) Reasonableness, including the exercise of prudent business judgment; (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work; and (3) recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not simply either that it is allowable or that it is unallowable.

(d) *Items of allowable cost.* Subject to the other provisions of this clause, the following items of cost of work done under this contract shall be allowable to the extent indicated:

(1) Bonds and insurance, including self-insurance, as provided in the clause entitled "Required Bonds and Insurance—Exclusive of Government Property."

(2) Communication costs, including telephone services, local and long-distance calls, telegrams, cablegrams, postage, and similar items.

(3) Consulting services (including legal and accounting), and related expenses, as



approved by the contracting officer, except as made unallowable by paragraphs (e)(16) and (e)(20).

(4) Litigation expenses, including reasonable Counsel fees, incurred in accordance with the clause of this contract entitled "Litigation and Claims."

(5) Losses and expenses (including settlements made with the consent of the contracting officer) sustained by the contractor in the performance of this contract and certified in writing by the contracting officer to be reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials, supplies, and equipment, including freight transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use and disposition thereof, subject to approvals required under other provisions of this contract.

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the contracting officer, and preparation of invention disclosures, reports and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with any "Patent Rights" clause of this contract.

(8) Personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth in detail personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the contracting officer. It is further understood and agreed that the contractor will advise DOE of any proposed changes in any matters covered by said policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of an amendment to this contract for the purpose of effectuating any such changes in, or additions to, said personnel appendix as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the contracting officer or his representative. Types of personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees, provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee at an annual rate of \$ — or more, when it is proposed that a total of 50

percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary, bonus, and incentive compensation payments;

(ii) Legally required contributions to old-age and survivors' insurance, unemployment compensation plans, and workmen's compensation plans, (whether or not covered by insurance); voluntary or agree-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign travel, which requires specific approval by the contracting officer on a case-by-case basis); incidental subsistence and other allowances of contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards; employee counseling services, health or first-aid clinics; house or employee publications;

(v) Personnel training (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the Contracting Officer on a case-by-case basis); including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work;

(vi) Recruitment of personnel (including help-wanted advertisement), including service of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the contractor for employment interviews; and

(vii) Net cost of operating plant-site cafeteria, dining rooms, and canteens attributable to the performance of the contract.

**Note.**—In appropriate circumstances, the lead sentence in subparagraph (d)(8) may be changed to read as follows:

"Personnel costs and related expenses incurred in accordance with established policies, programs, and schedules, and any changes thereto during the contract term, applicable to the contractor's private operations and consistently followed throughout his organization, as approved by the contracting officer, such as".

(9) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities to the extent directed or approved by the contracting officer.

(10) Subcontracts and purchase orders, including procurements from contractor-controlled sources, subject to approvals required by other provisions of this contract.

(11) Subscriptions to trade, business, technical, and professional periodicals, as approved by the contracting officer.

(12) Taxes, fees, and charges levied by public agencies which the contractor is

required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(13) Utility services, including electricity, gas, water, and sewerage.

(14) Indemnification of the Pension Benefit Guaranty Corporation, pursuant to the Employee Retirement Income Security Act of 1974, in accordance with FAR 31.205-6(j)(3)(iv).

(15) Establishment and maintenance of bank accounts in connection with the work hereunder, including, but not limited to, service charges, the cost of disbursing cash, necessary guards, facilities and arrangements for cashing checks may be provided without expense to the employees, subject to the approval of the contracting officer.

**Note.**—The following additional examples apply when the contractor performs construction.

(16) Camp operations, to the extent approved by the contracting officer.

(17) Maintenance, inspection, repair, replacement, and transportation of construction plant and equipment to the extent not covered by rentals or insurance and as provided in rental agreements approved by the contracting officer.

(18) Rental for (i) construction plant and equipment rented by the contractor from others at rates and under written agreements approved by the contracting officer, and (ii) construction plant and equipment owned and furnished by the contractor under this contract.

(e) *Items of unallowable costs.* The following items of costs are unallowable under this contract to the extent indicated:

(1) Advertising, except (i) help-wanted advertising, and (ii) other advertising (such as costs of participation in exhibits) approved by the contracting officer as clearly in furtherance of work performed under the contract.

(2) Bad debts (including expenses of collection) and provisions for bad debts arising out of other business of the contractor.

(3) Proposal expenses and costs of proposals.

(4) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the contractor and employee prior to the rendering of the services or an established plan consistently followed by the contract or (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(5) Central and branch office expenses of the contractor, except as specifically set forth in the contract.

(6) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(7) Contingency reserves, provisions for.



(8) Contributions and donations.

(9) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Code of 1954, as amended, including the straight-line declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight line method), or sum-of-the-years digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life.

(10) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profit.

(11) Entertainment costs, except the costs of such recreational activities for on-site employees as may be approved by the contracting officer or provided for elsewhere in this contract.

(12) Fines and penalties, including assessed interest, resulting from violations of, or failure of, the contractor to comply with Federal, state, or local laws or regulations, except when incurred in accordance with the written approval of the contracting officer or as a result of compliance with the provisions of this contract.

(13) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the contractor from others.

(14) Insurance (including any provisions of a self-insurance reserve) on any person where the contractor under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss of or damage to Government property as defined in Clause \_\_\_\_\_.

(15) Interest, however represented (except interest incurred in compliance with the clause entitled "State and local taxes"), bond discounts and expenses, and costs of financing and refinancing operations.

(16) Legal, accounting, and consulting services and related costs incurred in connection with the preparation and issuance of stock, rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions of proposed actions of the United States, and prosecution or defense of patent infringement litigation.

(17) Losses (including litigation expenses, Counsel fees, and settlements) on, or arising from the sale, exchange, or abandonment of capital assets, including investments; losses on other contracts, including the contractor's contributed portion under cost-sharing contracts; losses in connection with price reductions to and discount purchases by employees and other from any source; and losses where such losses or expenses:

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

(ii) Result from willful misconduct or lack of good faith on the part of any of the contractor's directors, corporate officers, or a

supervising representative of the contractor, as defined in Clause \_\_\_\_\_ of this contract.

(iii) Represent liabilities to third persons from which the contractor has expressly accepted responsibility under other terms of this contract.

(18) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment), other than reasonable standby facilities.

**Note.**—May be omitted when no contractor-owned equipment is being utilized in the performance of the contract.

(19) Membership in trade, business, and professional organizations, except as approved by the contracting officer.

(20) Precontract costs, except as expressly made allowable under the provisions in this contract.

(21) Research and development costs, unless specifically provided for elsewhere in this contract.

(22) Selling cost, except to the extent they are determined to be reasonable and to be allocable to the contract. Allocability of selling costs to the contract will be determined in the light of reasonable benefit to the agency program arising from such activities as technical, consulting, demonstration, and other services performed for such purposes as applying or adapting the contractor's product for agency use.

(23) Storage of records pertaining to this contract after completion of operations under this contract, irrespective of contractual or statutory requirement for the preservation of records.

(24) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including listing of securities on exchanges, taxes which are paid contrary to the clause entitled "State and local taxes," federal taxes on net income and excess profits, special assessments on land which represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(25) Travel expenses of the officers, proprietors, executives, administrative heads and other employees of the contractor's central office or branch office organizations concerned with the general management, supervision, and conduct of the contractor's business as a whole, except to the extent that particular travel is in connection with the contract and approved by the contracting officer.

(26) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organizational and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedure of DOE applicable to the borrowing of such an individual from another cost-type contractor.

(27) First-class air travel in excess of the cost of less than first-class air

accommodations, except when less than first-class accommodations are not reasonably available to meet necessary mission requirements, such as where less than first-class accommodations would:

(i) Require circuitous routing,

(ii) Require travel during unreasonable hours,

(iii) Greatly increase the duration of the flight,

(iv) Result in additional costs which would offset the transportation savings, or

(v) Offer accommodations which are not reasonably adequate for the medical needs of the traveler.

(28) Special construction industry "funds" financed by employer contributions for such purposes as methods and materials research, public and industry relations, market development, and disaster relief, except as specifically provided elsewhere in this contract.

(29) Late premium payment charges related to employee deferred compensation plan insurance.

(30) Facilities capital cost of money: (CAS 414 and CAS 417).

(31) Lobbying cost.

(32) Commercial automobile rental expenses unless approved by the Contracting Officer.

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

##### Allowable Costs and Fixed-Fee (Support Contracts) (Apr 1984)

(a) *Compensation for contractor's services.* Payment for the allowable cost as hereinafter defined, and of the fixed-fee, if any, as hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract.

(b) *Fixed-fee.* The fixed-fee payable to the contractor for the performance of the work under this contract is \$ \_\_\_\_\_. There shall be no adjustment in the amount of the contractor's fixed-fee by reason of differences between any estimate of cost for performance of the work under this contract and the actual cost for performance of that work.

**Note:** This provision to this paragraph may appropriately be changed to cover situations where the fee is for a period of time, or different fees are allowed for various phases of the work.

(c) *Allowable cost.* The allowable costs for performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor, are applicable and properly chargeable, either as directly incident or as allocable through appropriate distribution or apportionment, to the performance of the contract work in accordance with its terms, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on (1) reasonableness, including the exercise of prudent business judgment, (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work, and (3) recognition of all exclusions and limitations set forth in this clause or



elsewhere in this contract as to types or amounts of items of costs. Allowable cost shall not include costs of any item described as unallowable in paragraph (e) of this clause, except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.

(d) *Items of allowable cost.* Subject to the other provisions of this clause, the following items of cost of work under this contract shall be allowable to the extent indicated:

(1) Bonds and insurance (including self-insurance) as provided in the clause entitled "Required bonds and insurance—exclusive of Government property."

(2) Communication costs, including telephone services, local and long-distance telephone calls, telegrams, cablegrams, radiograms, postage, and similar items.

(3) Consulting services (including legal and accounting) and related expenses, as approved by the contracting officer, except as made unallowable by paragraph (e)(14) and (e)(23).

(4) Litigation expenses, including reasonable Counsel fees, incurred in accordance with the clause of this contract entitled "Litigation and Claims."

(5) Losses and expenses (including settlements made with the consent of the contracting officer) sustained by the contractor in performance of this contract and certified in writing by the Contracting Officer to be just and reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials and supplies (including those withdrawn from common stores costed in accordance with any generally recognized method that is consistently applied by the contractor and productive of equitable results).

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the contracting officer; and preparation of invention disclosures, reports, and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with the Patent Rights clause of this contract.

(8) Personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth, in detail, personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the contracting officer. It is further understood and agreed that the contractor will advise DOE of any proposed changes in any matters covered by said policies, practices, or plans which relate to this item of costs, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of an amendment to this contract for the purpose of effectuating and such changes in, or additions to, said personnel appendix, as may be

agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the contracting officer or his representative. Examples of personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees, provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee at an annual rate of \$\_\_\_\_\_ (See 970.3102-2) or more, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary and bonus and incentive compensation payments.

(ii) Legally required contributions to old-age and survivor's insurance, unemployment, compensation plans, and workmen's compensation plans (whether or not covered by insurance); voluntary or agreed-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign-travel, which requires specific approval by the contracting officer on a case-by-case basis); incidental subsistence and other allowances of contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects, and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc., programs, including incentive or suggestion awards, employee counseling services, health or first-aid clinics, and house or employee publications;

(v) Personnel training (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the contracting officer on a case-by-case basis) including services of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the contractor for employment interviews; and

(vi) Recruitment of personnel (including help-wanted advertisement) including services of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the contractor for employment interviews; and

(vii) Net cost of operating plant-site cafeterias, dining rooms, and canteens attributable to the performance of the contract.

*Note.—In appropriate circumstances that lead sentence in subparagraph (d)(8) may be changed to read as follows:*

Personnel costs and related expenses incurred in accordance with established policies, programs, and schedules, and any changes thereto during the contract term, applicable to the contractor's private operations and consistently followed throughout its organization, as approved by the contracting officer, such as:

(9) Rentals and leases of land, buildings, and equipment owned by third parties where such items are used in the performance of the contract, except that such rentals and leases directly chargeable to the contract shall be subject to approval by the contracting officer.

(10) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property to the extent directed or approved by the contracting officer.

(11) Repairs, maintenance, and inspection of contractor owned property used in connection with the performance of this contract, including reasonable standby facilities, which are due to ordinary wear and tear from use and the action of the elements, provided such maintenance and repairs keep the property in efficient operating condition and do not add to its permanent value or appreciably prolong its intended useful life; and major repair (including replacement) to such property, as directed or approved by the contracting officer when charged directly to the contract.

(12) Special tooling, including jigs, dies, fixtures, molds, patterns, designs and drawings, tools, and equipment of a specialized nature generally useful to the contractor only in the performance of this contract.

*Note.—Itemize any additional special equipment which may be appropriate, such as loops, mockups, experimental setups, etc.*

(13) Subcontracts, purchase orders, and procurement from contractor-controlled sources, subject to approvals required by other provisions of this contract.

(14) Subscriptions to trade, business, technical, and professional periodicals, as approved by the Contracting Officer when charged directly to the contract.

(15) Taxes, fees, and charges levied by public agencies which the contractor is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(16) Utility services, including electricity, gas, water, steam, and sewerage.

(17) Indemnification of the Pension Benefit Guaranty Corporation pursuant to the Employee Retirement Income Security Act of 1974, in accordance with FAR 31.205-6(j).

(e) *Items of unallowable costs.* The following examples of items of costs are unallowable under this contract to the extent indicated:

(1) Advertising, except (i) help-wanted advertising, and (ii) other advertising (such as costs of participation in exhibits) approved by the Contracting Officer as clearly in furtherance of work performed of this contract.

(2) Bad debts (including expenses of collection) and provisions for bad debts not



arising out of the performance of this contract.

(3) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the contractor and employee prior to the rendering of the services or an established plan consistently followed by the contractor (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(4) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(5) Contingency reserves, provisions for (except provisions for reserves under a self-insurance program to the extent that the type, coverage, rates, and premiums would be allowable if commercial insurance were purchased to cover the same risk, as approved by the contracting officer).

(6) Contributions and donations.

(7) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Service under the Internal Revenue Code of 1954, as amended, including the straight-line declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight-line method) or sum-of-the-years-digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life. Amortization or depreciation of unrealized appreciation of values of assets or of assets fully amortized or depreciated on the contractors books of account is unallowable.

(8) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profits.

(9) Entertainment costs, except the costs of such recreational activities for on-site employees as may be approved by the contracting officer or provided for elsewhere in this contract.

(10) Fines and penalties, including assessed interest, resulting from violations of, or failure of, the contractor to comply with the Federal, state, or local laws, or regulations, except when incurred in accordance with written approval of the contracting officer or as a result of compliance with the provisions of this contract.

(11) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of the DOE applicable to transfers of such property to the contractor from others.

(12) Insurance (including and provision of a self-insurance reserve) on any person where the contractor under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss or damage to Government property.

(13) Interest, however represented (excepted interest incurred in compliance

with the clause entitled "State and Local Taxes), bond discounts and expenses, and costs of financing and refinancing operations.

(14) Legal, accounting, and consulting services, and related costs incurred in connection with the preparation of prospectuses, preparation and issuance of stock rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions or proposed actions of the United States, and prosecution or defense of patent infringement litigation.

(15) Losses, including litigation expenses, Counsel fees, and settlement on, or arising from the sale, exchange, or abandonment of capital assets, including investments; losses on other contracts, including the contractor's contributed portion under cost-sharing contracts; losses in connection with price reduction to and discount purchases by employees and others from any sources; and losses where such losses or expenses:

(i) Are compensated for by insurance or otherwise, or which would have been compensated by insurance required by law or by written direction of the contracting officer, but which the contractor failed to procure or maintain through its own fault or negligence, or which could have been covered by permissible insurance in keeping with ordinary business practice, but which the contractor failed to secure or maintain;

(ii) Result from willful misconduct or lack of good faith on the part of any of the contractor's directors, corporate officers, or a supervising representative of the contractor.

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

(16) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment) other than reasonable standby facilities.

(17) Membership in trade, business, and professional organizations except as approved by the contracting officer.

(18) Precontract costs, except as expressly made allowable under other provisions in this contract.

(19) Reconversion, alteration, restoration, or rehabilitation of the contractor's facilities, except as expressly provided elsewhere in this contract.

(20) Selling costs, except to the extent they are determined to be reasonable and to be allocable to the contract. Allocability of selling costs to the contract will be determined in the light of reasonable benefit to the agency program arising from such purposes as applying or adapting the contractor's product for agency use.

(21) Storage or records pertaining to this contract after completion of operations under this contract irrespective of contract or statutory requirement for the preservation of records.

(22) Taxes, fees, and charges in connection with financing, refinancing or refunding operations, including the listing of securities on exchanges; taxes which are paid contrary to the clause entitled "State and local taxes;" Federal taxes on net income and excess profits; special assessments on land which

represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to section 4971 or section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(23) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organization and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment thereto is required pursuant to the provisions of this contract or procedures of the DOE applicable to the borrowing of such an individual from another cost-type contractor.

(24) First-class air travel in excess of the cost of less than first-class air accommodations, except when less than first-class accommodations are not reasonably available to meet necessary mission requirements, such as, where less than first-class accommodations would:

(i) Require circuitous routing,  
(ii) Require travel during unreasonable hours,  
(iii) Greatly increase the duration of the flight,  
(iv) Result in additional costs which would offset the transportation savings, or  
(v) Offer accommodations which are not reasonably adequate for the medical needs for the traveler.

(25) Late premium payment charges related to employee deferred compensation plan insurance, in accordance with FAR 31.205-6(j).

(26) Research and development costs, unless specifically provided for elsewhere in this contract.

(27) Bidding expenses and costs of proposals.

(28) Facilities capital cost of money (CAS-414 and CAS-417).

(29) Lobbying costs.

(30) Commercial automobile rental costs unless approved by the contracting officer.

## 970.5204-15 Obligation of funds.

### Obligation of Funds (Apr 1984)

(a) *Obligation of funds.* The amount presently obligated by the Government with respect to this contract is ——— dollars (\$——). Such amount may be increased unilaterally by DOE by written notice to the contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification of this contract). Estimated revenues and receipts from others for work and services to be performed under this contract are not included in this amount ——— obligated with respect to this contract. Such revenues and receipts, to the extent actually received by the contractor shall be available and used for the payment of allowable costs as provided in the article entitled "Payments and Advances." Nothing in this paragraph (a) is to be construed as authorizing the contractor to exceed limitations stated in financial plans



established by DOE and furnished to the contractor from time to time under this contract.

(b) *Limitation on payment by the Government.* Except as otherwise provided in this contract and except for costs which may be incurred by the contractor pursuant to the article entitled "Termination," or costs of claims allowable under the contract occurring after completion or termination and not released by the contractor at the time of financial settlement of the contract is in accordance with the article entitled "Payments and Advances," payment by the Government under this contract on account of allowable costs shall not, in the aggregate, exceed the amount obligated with respect to this contract, less the contractor's fixed fee. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of (1) revenues and receipts deposited to the Government's account as provided in the article entitled "Payments and Advances," and (2) other funds with DOE may legally use for such purpose, provided DOE will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available.

(c) *Notices—Contractor excused from further performance.* The contractor shall notify DOE in writing whenever the unexpended balance of funds (including revenues and receipts) available under paragraph (a) above, plus the contractor's best estimate of revenues and receipts to be received during the — day period hereinafter specified, is in the contractor's best judgment sufficient to continue contract operations at the programmed rate for only — days and to cover the contractor's unpaid fixed fee, and outstanding commitments and liabilities on account of costs allowable under the contract at the end of such period. Whenever the unexpended balance of funds (including revenues and receipts) available under paragraph (a) above, less the amount of the contractor's fixed fee then earned but not paid, is in the contractor's best judgment either sufficient only to liquidate outstanding commitments and liabilities on account of costs allowable under this contract or is equal to zero, the contractor shall immediately notify DOE and shall make no further commitments or expenditures (except to liquidate existing commitments and liabilities), and, unless the parties otherwise agree, the contractor shall be excused from further performance (except such performance as may become necessary in connection with termination by the Government) and the performance of all work hereunder will be deemed to have been terminated for the convenience of the Government in accordance with the provisions of the article entitled "Termination."

(d) *Financial plans; cost and commitment limitations.* In addition to the limitations provided for elsewhere in this contract, DOE may, through financial plans or other directives issued to the contractor, establish controls on the costs to be incurred and commitments to be made in the performance

of the contract work. Such plans and instruction may be amended or supplemented from time to time by DOE. The contractor hereby agrees to comply with the specific limitations (ceilings) on costs and commitments set forth in such plans and directives, to use its best efforts to comply with other requirements of such plans and directive, and to promptly notify DOE in writing, whenever it has reason to believe the authorized financial levels of costs and commitments will be exceeded or substantially underrun.

*Note.—This paragraph (d) may be omitted in contracts which expressly or otherwise provided a contractual basis for equivalent controls in a separate article.*

(e) *Government's right to terminate not affected.* The giving of any notice under this article shall not be construed to waive or impair any right of the Government to terminate the contract under the provisions of the article entitled "Termination."

#### 970.5204-16 Payments and advances.

##### Payments and Advances (Apr 1984)

(a) *Installments of fixed-fee.* Ninety percent (90%) of the fixed-fee shall become due and payable in periodic installments in amounts based on the proportion of the work then completed, as determined by the contracting officer, and the balance upon completion and acceptance of all work under this contract.

*Note.—Where a separate fixed-fee is provided for a separate item of work, this subparagraph should be modified to permit payment of the entire fixed-fee upon completion of that item.*

(b) *Payments on Account of Allowable Costs.* The contracting officer and the contractor shall agree as to the extent to which payment for allowable costs or payments for other items specifically approved in writing by the contracting officer shall be made from advances of Government funds. When pension contributions are paid by the contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from costs for payment purposes until such costs are paid. If pension contribution are paid on a quarterly or more frequent basis, accrual therefor may be included in costs for payment purposes, provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from cost for payment purposes until payment has been made.

(c) *Special bank account—use.* All advances of Government funds shall be withdrawn pursuant to a letter of credit in favor of the bank or, in the option of the Government, shall be made by check payable to the contractor, and shall be deposited only in the Special Bank Account referred to in the Agreement for Special Bank Account, which is attached hereto and incorporated into this contract as an appendix. The contractor shall likewise deposit in the Special Bank Account any other revenues received by the contractor in connection with the work under this contract. No part of the funds in the Special Bank Account shall be (1) mingled with any funds of the contractor or (2) used

for a purpose other than that of making payments for costs allowable under this contract or payments for other items specifically approved in writing by the contracting officer. If the contracting officer shall at any time determine that the balance on such bank account exceeds the contractor's current needs, the contractor shall promptly make such disposition of the excess as the contracting officer may direct.

(d) *Title to funds advanced.* Title to the unexpended balance of any funds advanced and of any bank account established pursuant to this clause shall remain in the Government and be superior to any claim or lien of the bank of deposit or others. It is understood that an advance to the contractor hereunder is not a loan to the contractor, and will not require the payment of interest by the contractor, and that the contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.

*Note.—The following paragraph (e) shall be included in management and operating contracts with integrated contractors.*

(e) *Review and approval of costs incurred.* The contractor shall prepare and submit annually as of September 30, a voucher for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the voucher, and DOE, after audit and appropriate adjustment, will approve such voucher. This approval by DOE will constitute an acknowledgment by DOE that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the contractor in accordance with DOE accounting policies, but will not relieve the contractor of responsibility for DOE's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to DOE.

*Note.—It should be omitted in contracts with nonintegrated contractors.*

(f) *Financial settlement.* The Government shall promptly pay to the contractor the unpaid balance of allowable costs and fixed fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after (1) compliance by the contractor with DOE's patent clearance requirements, and (2) the furnishing by the contractor of:

(i) An assignment of the contractor's rights to any refunds, rebates, allowances, accounts receivable, or other credits applicable to allowable costs under the contract;

(ii) A closing financial statement;

(iii) The accounting for Government-owned property required by the clause entitled "Property;" and

(iv) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract subject only to the following exceptions:

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible to exact statement by the contractor;



(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the contractor to third parties arising out of the performance of this contract; provided that such claims are not known to the contractor on the date of the execution of the release; and provided further that the contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) Claims for reimbursement of costs (other than expenses of the contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the contractor under the provisions of this contract relating to patents. In arriving at the amount due the contractor under this clause, there shall be deducted, any claim which the Government may have against the contractor in connection with this contract, and deductions due under the terms of this contract, and not otherwise recovered by or credited to the Government. The unliquidated balance of the Special Bank Account may be applied to the amount due and any balance shall be returned to the Government forthwith.

(g) *Claims.* Claims for credit against funds advanced for payment shall be accompanied by such supporting documents and justification as the contracting officer shall prescribe.

(h) *Discounts.* The contractor shall take and afford the Government the advantage of all known and available cash and trade discounts, rebates, allowances, credits, salvage, and commissions unless the contracting officer finds that action is not in the best interest of the Government.

(i) *Revenues.* All revenues other than the contractor's fixed fee or fees, if any, accruing to the contractor in connection with the work under this contract shall be Government property and shall be deposited in the Special Bank Account to be available for payment of allowable cost under this contract.

(j) *Direct payment of charges.* The Government reserves the right, upon ten days written notice from the contracting officer to the contractor, to pay directly to the persons concerned, all amounts due which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the contractor therefor.

#### 970.5204-17 [Reserved]

#### 970.5204-18 [Reserved]

#### 970.5204-19 Printing clause for management and operating contracts.

##### Printing (Apr 1984)

(a) To the extent that duplicating or printing services may be required in the performance of this contract, the Contractor shall provide or secure such services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and DOE Directives relative thereto.

(b) The term "Printing" includes the following processes: composition, platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.

(c) Printing services not obtained in compliance with this guidance shall result in the cost of such printing being disallowed.

(d) In all subcontracts hereunder which require printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations), the Contractor shall include a provision substantially the same as this clause.

#### 970.5204-20 [Reserved]

#### 970.5204-21 Property.

##### Property (Apr 1984)

(a) *Furnishing of Government property.* The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(b) *Title to property.* Except as otherwise provided by the contracting officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The contractor shall make such disposition of rejected items as the contracting officer shall direct. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon (1) issuance for use of such property in the performance of this contract, or (2) commencement of processing or use of such property in the performance of this contract, or (3) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personally by reason of affixation to any realty.

(c) *Identification.* To the extent directed by the contracting officer, the contractor shall identify Government property coming into the contractor's possession or custody, by marking and segregating in such a way, satisfactory to the contracting officer, as shall indicate its ownership by the Government.

(d) *Disposition.* The contractor shall make such disposition of Government property which has come into the possession or custody of the contractor or under this contract as the contracting officer may direct

during the progress of the work or upon completion or termination of this contract. The contractor may, upon such terms and conditions as the contracting officer may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the Contracting Officer and the contractor as the fair value thereof. The amount received by the contractor as the result of any disposition, or the agreed fair value of any such property acquired by the contractor, shall be applied in reduction of cost allowable under this contract or shall be otherwise credited to account to the Government, as the contracting officer may direct. Upon completion of the work or the termination of this contract, the contractor shall render an accounting, as prescribed by the contracting officer, of all government property which had come into the possession or custody of the contractor under this contract.

(e) *Protection of government property—Classified Materials.* The contractor shall take all reasonable precautions, as directed by the contracting officer, or in the absence of such direction in accordance with sound industrial practice, to safeguard and protect government property in the contractor's possession or custody. Special measures shall be taken by the contractor in the protection of and accounting for any classified or special materials involved in the performance of this contract, in accordance with the regulations and requirements of DOE.

(f) *Risk of loss of government property.* The contractor shall be not liable for loss or destruction of or damage to government property in the contractor's possession unless such loss, destruction or damage results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel, or unless such loss, destruction or damage results from a failure on the part of the contractor's managerial personnel to take all reasonable steps to comply with any appropriate written directive of the contracting officer to safeguard such property under paragraph (e) hereof. The term "contractor's managerial personnel" as used herein means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of (1) all or substantially all of the contractor's business; or (2) all or substantially all of the contractor's operation at any one plant or separate location at which this contract is being performed; or (3) a separate and complete major industrial operation in connection with the performance of this contract; or (4) a separate and complete major construction, alteration or repair operation in connection with performance of this contract.

(g) *Steps to be taken in event of loss.* Upon the happening of any loss or destruction of or damage to government property in the possession or custody of the contractor, the contractor shall immediately inform the contracting officer of the occasion and extent thereof, shall take all reasonable steps to protect the property remaining, and shall repair or replace the lost, destroyed, or



damaged property, if and as directed by the contracting officer, but shall take no action prejudicial to the right of the Government to recover therefor and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

(h) *Government property for Government use only.* Government property shall be used only for the performance of this contract.

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

#### 970.5204-22 Contractor procurement.

##### Contractor Procurement (Apr. 1984)

(a) DOE reserves the right at any time to require that the contractor submit for approval any or all procurements under this contract. The contractor shall not procure any item whose purchase is expressly prohibited by the written direction of DOE and shall use such special and directed procurement sources as may be expressly required by DOE. The contractor shall provide information concerning procurement methods, practices, and procedures used or proposed to be used and shall use methods, practices, and procedures which are acceptable to DOE. Procurement arrangements under this contract shall not relieve the contractor of any obligation under this contract (including, among other things, the obligation to properly supervise administer, and coordinate the work of subcontractors) and shall be in such form and contain such provisions as are required by this contract or as DOE may prescribe.

(b) In addition to, and without derogation of any rights under paragraph (a) of this clause and any other provision in this contract the contractor shall require subcontractors to furnish cost or pricing data, and shall include in such subcontracts the appropriate clause set forth in 970.5204-24 except as otherwise directed or approved by DOE.

(c) Procurement or transfer of equipment, materials, supplies, or services from a contractor-controlled source (any division or other organizational component of the prime contractor, exclusive of the contracting component, and any subsidiary or affiliate of the contractor under a common control) shall be considered a procurement for the purposes of this clause.

(d) Proposed awards to firms or individuals on either the GSA Consolidated List of Debarred, Suspended, and Ineligible Contractors or the DOE Consolidated List of Debarred, Suspended, Ineligible, and Voluntarily Excluded Awardees shall be forwarded to DOE for approval notwithstanding any prior procurement system approval.

*Note A.—When appropriate, the words, "if required by the contracting officer," may be inserted in the sentence of paragraph (a) after the word "shall."*

*Note B.—When appropriate, the words, "shall be made in the name of the contractor, shall not bind nor purport to bind the Government" may be inserted in the fourth sentence.*

#### 970.5204-23 Taxes

##### State and Local Taxes (Apr 1984)

(a) The contractor agrees to notify the contracting officer of any State or local tax, fee, or charge levied or purported to be levied on or collected from the contractor with respect to the contract work, any transaction thereunder, or property in the custody or control of the contractor and constituting an allowable item of cost if due and payable, but which the contractor has reason to believe, or the contracting officer has advised the contractor, is or may be inapplicable or invalid; and the contractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the Contracting Officer. Any State or local tax, fee, or charge paid with the approval of the contracting officer or on the basis of advice from the contracting officer that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

*\*Requirement for notice may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.*

(b) The contractor agrees to take such action as may be required or approved by the contracting officer to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the contracting officer to seek recovery of any payments made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the Government to join with the contractor in any proceedings for the recovery thereof or to sue for recovery in the name of the contractor. If the contracting officer directs the contractor to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the contractor for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the article entitled "Litigation and Claims" shall apply and the costs and expenses incurred by the contractor shall be allowable items of costs, as provided in this contract, together with the amount of any judgment rendered against the contractor.

(c) The Government shall hold the contractor harmless from penalties and interest incurred through compliance with this clause. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government.

#### 970.5204-24 Subcontractor cost or pricing data.

##### Subcontractor Cost or Pricing Data (Apr 1984)

(a) The following clause shall be inserted in all subcontracts where such subcontracts are over \$500,000 and any modification over \$500,000 to such subcontracts, even though the original amount of the subcontract is \$500,000 or less:

##### Certified Cost or Pricing Data (Apr 1984)

(1) The subcontractor shall require under the situations described in (2) below, unless exempted under the exceptions set forth in (3) below, each sub-subcontractor under this subcontract to submit cost or pricing data and to certify that, to the best of his knowledge and belief, such cost or pricing data are accurate, complete and current.

(2) Except as provided in (3) below, certified cost or pricing data shall be submitted prior to (i) the award of each sub-subcontract, the price of which is expected to exceed \$500,000, and (ii) the negotiation of the price of each change or modification to a sub-subcontract under this subcontract for which the price adjustment is expected to exceed \$500,000.

(3) Certified cost or pricing data need not be furnished pursuant to this paragraph (a) where (i) the subcontractor has not been required to furnish cost or pricing data; or (ii) the price adjustment is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or the prices are set by law or regulation; and the subcontractor states in writing the basis for applying this exception.

(4) In submitting the cost or pricing data, the sub-subcontractor shall use the form of certificate set forth in paragraph (b) below and shall certify that the data are accurate, complete, and current. Such certificate and data (actual or identified, as provided in the certificate prescribed below) shall be submitted by sub-subcontractors to the next higher-tier sub-subcontractor or the subcontractor, as applicable, for retention.

(b) The certificates required by this clause shall be in the form set forth below.

##### Subcontractor's Certificate of Current Cost or Pricing Data

This is to certify that, to the best of my knowledge and belief, cost or pricing data submitted in writing, or specifically identified in writing if actual submission of the data is impracticable (see FAR 15.804-6(d)), to the contractor in support of \_\_\_\_\_ are accurate, complete, and current as of \_\_\_\_\_.

Firm \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_  
Date of execution\*\*\* \_\_\_\_\_

\*Identify the proposal, quotation, request for price adjustment, or other submission involved.

\*\*Insert the day, month, and year when price negotiations were concluded and price agreement was reached.

\*\*\*Insert the day, month, and year of signing, which should be as close as



practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(c) For purposes of verifying that certified cost or pricing data submitted in conjunction with the negotiation of this subcontract change or other modification involving an amount in excess of \$500,000 were accurate, complete, and current, DOE shall, until the expiration of 3 years from the date of final payment under this subcontract, have the right to examine those books, records, documents, papers, and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(d) If the original price of this subcontract exceeds \$500,000 or the price of any change or other modification to this subcontract is expected to exceed \$500,000, the subcontractor agrees to furnish the contractor certified cost or pricing data, using the certificate set forth in paragraph (b) above, unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(e) The requirement for submission of certified cost or pricing data with respect to any change or other modification does not apply to any sub-subcontract change or other modification, at any tier, where the subcontract is firm fixed-price or fixed-price with escalation unless such change or other modification result from a change or modification to the subcontract, nor does it apply to a sub-subcontract change or modification, at any tier, where the subcontract is not firm fixed-price or fixed-price with escalation unless the price for such change or other modification becomes reimbursable under the subcontract.

(f) The subcontractor agrees to insert paragraph (c) without change and the substance of paragraphs (a), (b), (d), (e), and (f) of this clause in each sub-subcontract hereunder in excess of \$500,000 and in each sub-subcontract of \$500,000 or less, at the time of making a change or other modification thereto in excess of \$500,000.

(g) If the prime contractor determines that any price, including profit or fee, negotiated in connection with this subcontract or any cost reimbursable under this subcontract was increased by any significant sums because the subcontractor, or any sub-subcontractor pursuant to this clause or any sub-

subcontract clause herein required, furnished incomplete or inaccurate cost or pricing data or data not current as certified in the subcontractor's certificate of current cost or pricing data, then such price or cost shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

(h) Failure of the contractor and the subcontractor to agree on any of the matters in paragraph (g) above shall be a dispute concerning a question of fact subject to the Disputes provisions of this subcontract.

**Note.**—Since the subcontract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain sub-subcontracts, it is expected that the subcontractor may wish to include a clause in each such sub-subcontract requiring the sub-subcontractor to appropriately indemnify the subcontractor. It is also expected that any sub-subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by its lower-tier sub-subcontractors.

(i) This clause may also be used for subcontracts of \$500,000 or less for which a certificate of cost or pricing data is obtained and, if so used, the \$500,000 amount stated in the clause should be appropriately modified.

(j) The Head of a Contracting Activity, for contracts estimated to be within the limits of delegated authority, may, without power of redelegation, approve the waiver cited in FAR 15.804-3(i).

#### 970.5204-25 Workmanship and Materials.

##### Workmanship and materials (Apr 1984)

(a) *Grade of workmanship and materials.* Unless otherwise directed by the contracting officer or expressly provided for by specifications issued under this contract:

(1) All workmanship shall be first class; and

(2) All articles, equipment and materials incorporated in the work are to be:

(i) New and of the most suitable grade of their respective kinds for the purpose;

(ii) In accordance with any applicable drawings and specifications; and

(iii) Installed to the satisfaction and with the approval of the contracting officer.

Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality.

(b) *Samples and test results.* If the contracting officer so requires, the contractor shall submit for approval samples of or test results on any materials proposed to be incorporated in the work before making any commitment for the purchase of such materials.

#### 970.5104-26 Nuclear facility safety.

In accordance with the provisions at 970.2303 insert the clause below in management and operating contracts.

##### Nuclear Safety (Apr 1984)

(a) The activities under this contract include the operation of nuclear facilities. The contractor recognizes that such operation involves the risk of a nuclear incident which, while the chances are remote, could adversely affect the public health and safety as well as the environment. Therefore, the contractor will exercise a degree of care commensurate with the risk involved.

(b) The contractor shall comply with all applicable regulations of DOE concerning nuclear safety and with those requirements (including reporting requirements and instructions) of DOE concerning nuclear safety of which it is notified in writing by the contracting officer.

(c) Prior to the initial startup of any nuclear facility under this contract and prior to any subsequent startup following a change which represents a significant deviation from the procedures, equipment, or analyses described in the safety analysis reports or other hazards summary reports for that facility, the contractor shall:

(i) Prepare a safety analysis report and detailed plans and procedures designed to assure the safe operations and maintenance of the facility in accordance with applicable DOE regulations and directives. For nuclear reactors and critical facilities, technical specifications shall also be provided.

(2) Establish nuclear safety control procedures to be used within the contractor's organization to insure competent independent review and internal approval of the safety analysis report and the detailed plans and procedures specified in (1) above.

(3) Submit to the contracting officer for his approval such procedures relating to nuclear safety as may be designated by him.

(4) Carry out a program of initial training and periodic requalification designed to assure that all personnel who will be engaged in nuclear operations or maintenance understand the approved plans and procedures for nuclear safety and are qualified to perform their assigned functions; and

(5) Obtain the approval of the contracting officer prior to start-up of the facility.

(d) In the operation and maintenance of any nuclear facility under this contract, the contractor shall:

(1) Use all reasonable efforts to assure that all operational and maintenance activities are performed by qualified and adequately trained personnel, and except as otherwise agreed in writing, are conducted under the supervision of personnel who are qualified and authorized to evaluate any emergency condition and take prompt effective action with respect thereto.

(2) Operate the facility within the technical specifications or operational safety requirements which are approved by the contracting officer.

(3) Follow strictly the procedures relating to nuclear safety approved by the contracting officer in (c)(3) above, and submit to the



contracting officer for his approval, any proposed changes in such procedures.

(4) Establish an auditable, well-defined, internal safety review and inspection system approved by the contracting officer (including review and inspection reports by competent technical personnel) that will: (i) Provide frequent and periodic checks of facility performance and of the qualifications and training of operating and maintenance personnel, and (ii) provide for investigation of any unusual or unpredicted conditions that might affect safe operation.

(5) Report promptly to the contracting officer any change in the physical condition of the facility or its operating characteristics that might, in the judgment of the contractor, affect the safe operation of the facility.

(6) Terminate operations at the facility immediately whenever so instructed by the contracting officer, or whenever, in the judgment of the contractor, the risk of a nuclear incident endangering persons or property warrants such action.

(7) Prepare, in cooperation with other services and facilities available at the site and with the approval of the contracting officer, a plan for minimizing the effects of a nuclear incident upon the health and safety of all persons of the site; participate as directed in the integration of the contractor's and contracting officer's emergency plans with the responsible state and local government's emergency plans for protection of the public off-site; instruct its personnel as to their participation in such plans and any personal risk to such personnel that may be involved; and participate in such practice exercises as may be desirable to assure the effectiveness of such plans.

(8) At an appropriate time as determined by the contracting officer, prepare and submit to the contracting officer for his approval, shutdown, decommissioning, decontamination and property management plans leading to orderly and safe program disposition of the nuclear facility and any associated nuclear wastes or other hazardous material.

(9) In the event that the contractor fails to comply with said standards and requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work; thereafter a start order for resumption of the work may be issued at the discretion of the contracting officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage.

#### **970.5204-27 Consultant or other comparable employment services of contractor employees.**

(a) The following clause shall be included in all cost-reimbursement type contracts identified in 970.2273(b)(3).

#### **Consultant or Other Comparable Employment Services (Apr 1984)**

The contractor shall require all employees who are employed full-time (an individual who performs work under the cost-type contract on a full-time annual basis) or part-time (50 percent or more of regular annual

compensation received under terms of a contract with DOE) on the contract work to disclose to the contractor all consultant or other comparable employment services which the employees propose to undertake for others. The contractor shall transmit to the contracting officer all information obtained from such disclosures. The contractor will require any employee who will be employed full-time on the contract to agree, as a condition of his participation in such work, that he will not perform consultant or other comparable employment services for another DOE contractor under its contract with DOE, except with the prior approval of the contractor.

(b) The following clause shall be included in all contracts identified in 970.2273(b)(4).

#### **Consultant or Other Comparable Employment Services (Apr 1984)**

The contractor shall require all employees who are employed full-time (an individual who performs work under the cost-type contract on a full-time annual basis) or part-time (50 percent or more of regular annual compensation received under terms of a contract with DOE) on the contract work to disclose to the contractor all consultant or other comparable employment services which the employees propose to undertake for others. The contractor shall transmit to the contracting officer all information obtained from such disclosures. The contractor will require any employee who will be employed full-time on the contract work to agree, as a condition of his participation in such work, that he will not perform consultant or other comparable employment services for another DOE contractor in the same or related energy field or another organization except with the prior approval of the contractor. If the contractor believes, with respect to any employee who is employed full-time on the contract work, that any proposed consultant or other comparable employment service for an organization in the atomic energy field other than a DOE cost-type contractor may involve:

(1) A rate of remuneration significantly in excess of the employee's regular rate of remuneration; (2) a significant question concerning possible conflict with DOE's policies regarding conduct of employees of DOE's contractors; (3) the contractor's responsibility to report fully and promptly to DOE all significant research and development information; or (4) the patent provisions of the contractor's contract with DOE, the contractor shall obtain the prior approval of the contracting officer for such consultant or other comparable employment service.

#### **970.5204-28 Assignment.**

##### **Assignment (Apr 1984)**

Neither this contract nor any interest therein nor claim thereunder shall be assigned or transferred by the contractor except as expressly authorized in writing by the contracting officer.

#### **970.5204-29 Permits or licenses.**

##### **Permits or Licenses (Apr 1984)**

Except as otherwise directed by the contracting officer, the contractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the work under this contract is performed.

#### **970.5204-30 Notice of labor disputes.**

##### **Notice of Labor Disputes (Apr 1984)**

Whenever an actual or potential labor dispute is delaying or threatening the performance of the work, the contractor shall immediately notify the contracting officer in writing. Such notice shall include all relevant information concerning the dispute and its background.

#### **970.5204-31 Litigation and claims.**

##### **Litigation and Claims (Apr 1984)**

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

(b) *Defense and settlement of claims.* The contractor shall give the contracting officer immediate notice in writing (1) of any action, including any proceeding before an administrative agency, filed against the contractor arising out of the performance of this contract, and (2) of any claim against the contractor, the cost and expense of which is allowable under the clause entitled "Allowable Costs and Fixed-Fee." Except as otherwise directed by the contracting officer, in writing, the contractor shall furnish immediately to the contracting officer copies of all pertinent papers received by the contractor with respect to such action of claim. To the extent not in conflict with any applicable policy of insurance, the contractor may with the contracting officer's approval, settle any such action or claim, shall effect at the contracting officer's request an assignment and subrogation in favor of the Government or all of the contractor's rights and claims (except those against the Government) arising out of such action or claim against the contractor, and if required by the contracting officer, shall authorize representatives of the Government to settle or defend any such action or claim and to represent the contractor in, or to take charge of, any action. If the settlement or defense of an action or claim against the contractor is undertaken by the Government, the contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the contractor is not covered by a policy of insurance, the contractor shall, with the approval of the contracting officer, proceed with the defense of the action in good faith and in such event the defense of the action



shall be at the expense of the Government, provided, however, that the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the contracting officer, but which the contractor failed to secure or maintain through its own fault or negligence.

**970.5204-32 Required bonds and insurance—exclusive of Government property (cost-type contracts).**

**Required Bonds and Insurance—Exclusive of Government Property (Cost-Type Contracts) (Apr 1984)**

The contractor shall procure and maintain such bonds and insurance as are required by law or by the written direction of the contracting officer. The terms and conditions of any such bonds and insurance shall conform to the directions of the contracting officer. In view of the provisions of the article entitled "Property" the contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of or damage to Government-owned property.

**970.5204-33 Priorities, allocations, and allotments.**

(a) The following clause shall be used in management and operating contracts for military and atomic energy production and directly related activity, where the programs have been authorized pursuant to the Atomic Energy Act of 1954, as amended.

**Priorities, Allocations, and Allotments (Apr 1984)**

The contractor shall follow the rules, regulations, and procedures of the Defense Priorities System and the Defense Materials System, Regulation I, and all other applicable regulations and orders of the International Trade Administration, Department of Commerce, in obtaining controlled materials and other products and materials needed for contract performance.

(b) Management and operating contracts may be eligible for priorities and allocations support if their purpose maximizes domestic energy supplies. Eligibility is dependent on an executive decision on a case-by-case basis. Guidance is provided by DOE Publication PR-0042, "Priorities and Allocations Support for Energy: Keeping Energy Programs on Schedule," dated August 1980, as it may from time to time be revised. If the purpose of the contract is to maximize domestic energy resources, include the following clause:

**Priorities, Allocations, and Allotments—Special Clause (Apr 1984)**

This contract may be eligible for priorities and allocations support, as provided for by Section 101(c) of the Defense Production Act of 1950, as amended by the Energy Policy and Conservation Act (Pub. L. 94-163, 42 U.S.C. 6201 *et seq.*) if its purpose is to maximize domestic energy supplies. Eligibility is

dependent on an executive decision on a case by case basis with the decision being jointly made by the Departments of Commerce and Energy.

DOE regulations regarding material allocation and priority performance under contracts or orders to maximize domestic energy supplies can be found at Part 216 of Title 10 of the Code of Federal Regulations (10 CFR Part 216).

Additional guidance is provided by DOE Publication PR-0042, "Priorities and Allocations Support for Energy: Keeping Energy Programs on Schedule," dated August 1980, as it may from time to time be revised. Copies may be obtained by written request to: Department of Energy, Technical Information Center (TIC), Post Office Box 62, Oak Ridge, Tennessee 37830.

**970.5204-34 Sensitive foreign nations control.**

See 952.204-71

**970.5204-35 Controls in the national interest (unclassified contracts with educational institutions).**

**Controls in the National Interest (Apr 1984)**

The contractor agrees to comply with the requirements of DOE specified in Attachment \_\_\_\_\_ to this contract, and to such other DOE requirements of the same general nature as the parties may agree to from time to time; these requirements relate to unclassified work, and they shall not be construed to limit or affect in any way the contractor's obligation to conform to all security regulations and requirements of DOE pertaining to classified work.

**970.5204-36 Organizational conflicts of interest (contracts with universities where DOE has major investments in facilities but does not own or lease the land).**

**Organizational Conflicts of Interest (Apr 1984)**

The parties agree that the university has adopted policies and procedures, designed to avoid conflict-of-interest situations, which are in substantial conformance with the Joint Statement of the Council of American Association of University Professors and the American Council on Education of December 1964, entitled, "On Preventing Conflicts of Interest in Government-Sponsored Research at Universities," which policies and procedures will be applied in connection with this contract.

**970.5204-37 Statement of work (management and operating contracts).**

See 970.10

**970.5204-38 Special Clause for procurement of construction.**

In accordance with 970.2274 the following clause shall be used in operating and management contracts when the contractor is to perform no Davis-Bacon work with his own forces but may procure construction by subcontract:

**Government Facility Subcontract Approval (Apr 1984)**

Upon request of the contracting officer and acceptance thereof by the contractor, the contractor shall procure, by subcontract, the construction of new facilities or the alteration or repair of Government-owned facilities at the plant. Any subcontract entered into under this paragraph shall be subject to the written approval of the contracting officer and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, on a public building or public work.

**970.5204-39 [Reserved]**

**970.5204-40 [Reserved]**

**970.5204-41 Preservation of individual occupational radiation exposure records.**

See 952.223-75

**970.5204-42 Key personnel.**

**Key personnel (Apr 1984)**

It having been determined that the employees whose names appear (below or in Appendix \_\_\_\_\_), or persons approved by the contracting officer as persons of substantially equal abilities and qualifications, are necessary for the successful performance of this contract, the contractor agrees to assign such employees or persons to the performance of the work under this contract and shall not reassign or remove any of them without the consent of the contracting officer. Whenever, for any reason, one or more of the aforementioned employees is unavailable for assignment for work under the contract, the contractor shall, with the approval of the contracting officer, replace such employee with an employee of substantially equal abilities and qualifications.

**970.5204-43 Other Government contractors.**

**Other Government Contractors (Apr 1984)**

The Government may undertake or award contracts for work or services. The contractor agrees to fully cooperate with such other contractors and Government employees and carefully fit its own work to such other work as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

**970.5204-44 [Reserved]**

**970.5204-45 Termination.**

The following clause is suggested for use in management and operating contracts:

**Termination (Apr 1984)**

(a) This contract shall continue until \_\_\_\_\_ unless sooner terminated in accordance with the provisions which follow:  
(1) The performance of work under this contract may be terminated by the Government in whole, or from time to time in



part, (i) whenever the contractor shall default in performance, and shall fail to cure the fault or failure within such period as the contracting officer may allow after receipt from the contracting officer or a notice specifying the fault or failure, or (ii) whenever, for any reason, the contracting officer shall determine any such termination is for the best interest of the Government. Termination of the work hereunder shall be effected by delivery of a notice of termination specifying whether termination is for default of the contractor or for the convenience of the Government, the extent to which performance of work under the contract shall be terminated, and the date upon which such termination shall become effective. Any such termination shall be without prejudice to any claim which either party may have against the other. If, after notice of termination under the provisions of (a)(1)(i) above, it is determined for any reason that the contractor was not in default, such notice of default shall be deemed to have been issued pursuant to (a)(1)(ii) above, and the rights and obligations of the parties hereto shall in such event be governed accordingly.

(2) Upon receipt of notice of termination, in accordance with (1) above, the contractor shall, to the extent directed in writing by the contracting officer, discontinue the terminated work and the placing of orders for materials, facilities, supplies, and services in connection therewith, and shall proceed, if, and to the extent required by the contracting officer, to cancel promptly and settle with the approval of the contracting officer, existing orders, subcontracts, and commitments insofar as such orders, subcontracts, and commitments pertain to this contract.

(b) Upon the termination of this contract, full and complete settlement of all claims of the contractor and of DOE arising out of this contract shall be made as follows:

(1) The Government shall have the right in its discretion to assume sole responsibility for any or all obligations, commitments, and claims that the contractor may have undertaken or incurred, the cost of which are allowable in accordance with the provisions of this contract; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and; take all such steps as the contracting officer may require for the purpose of fully vesting in the Government any rights and benefits the contractor may have under or in connection with such obligations, commitments, or claims.

(2) The Government shall treat as allowable costs all expenditures made in accordance with and allowable under the clause entitled "Allowable Costs and Fixed Fee," not previously so allowed or otherwise credited for work performed prior to the effective date of termination, together with expenditures as may be incurred for a reasonable time thereafter with the approval of, or as directed by, the contracting officer.

(3) The Government shall treat as allowable costs, to the extent not included in (b)(2) above, the costs of settling and paying claims arising out of the termination of work under orders, subcontracts, and commitments as provided in (a)(2) above.

(4) The Government shall treat as allowable costs the reasonable costs of

settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the termination of the contract and for the termination and settlement of orders and subcontracts thereunder, together with such further expenditures made by the contractor after the date of termination for the protection or disposition of Government property as are approved or required by the contracting officer; provided, however, that if the termination is for default of the contractor, there shall not be included any amount for preparation of the contractor's settlement proposal.

(5) If performance of work under this contract is terminated in whole by the Government, the fixed fee of the contractor shall be prorated to and including the effective date of such termination. In addition, if the termination is for the convenience of the Government, the contractor shall be paid a fixed fee in an amount to be agreed upon as compensation for its services in closing out the work under this contract after the effective date of such termination. The additional fixed fee is to be negotiated as soon as practicable after service of notice of termination, shall take into account the estimate of the cost of the services and managerial effort to be rendered under this clause after the effective date of termination, and shall be provided for in a supplement or amendment to this contract prior to final settlement hereunder. Pending agreement as to the amount of such fee, the contractor shall diligently proceed with the performance of the services required under this clause. No additional fee will be paid if the contract is terminated due to the default of the contractor. In the event of a partial termination by the Government, an equitable adjustment shall be made in the fixed fee if such termination results in a material decrease in the level of the contractor's management effort. Any failure to agree on the right to or the amount of any adjustment shall be deemed a dispute within the purview of the clause hereof entitled "Disputes."

(6) The obligation of the Government to make any of the payments required by this clause or any other provisions of this contract shall be subject to any unsettled claims in connection with this contract which the Government may have against the contractor.

(c) Prior to final settlement, the contractor shall furnish a release as required in the clause entitled "Payments and Advances" and account for Government-owned property as may be required by the contracting officer; provided, however, that unless the contracting officer requires an inventory, the maintenance and disposition of the records of Government-owned property in accordance with the clause entitled "Accounts, Records and Inspection" shall be accepted by the contracting officer as full compliance with all requirements of this contract pertaining to an accounting for such property.

#### 970.5204-48 [Reserved]

#### 970.5204-50 Cost and schedule control systems.

See 952.212-73.

#### 970.5204-51 [Reserved]

#### 970.5204-52 Foreign Travel.

See 952.247-70.

### Subpart 970.70—Use of DOE Facilities for Work for Others

#### 970.7000 Mission-oriented solicitation.

Contractors shall be required to promptly advise the DOE contracting officer of any advance notices of, or solicitations for, requirements which would logically involve DOE facilities or resources operated or managed by the contractor, received from other agencies pursuant to FAR 34.005. Management and operating contracts shall provide that the contractor shall not respond or otherwise propose to participate in response to the requirements of such solicitations unless the contractor shall have first obtained the written approval of the DOE manager of the field activity having cognizance over the contract. Such approval shall not be given except in compliance with DOE directives and with the concurrence of the appropriate Senior Program Official.

### PART 971—HEADQUARTER'S REVIEW AND APPROVAL OF CONTRACT ACTIONS

Sec.

#### 971.000 Scope of part.

#### Subpart 971.1—Headquarters Review and Notification Requirements

##### 971.100 Scope of subpart.

##### 971.101 Requirements—general.

##### 971.102 Requirement—long-term contracts.

##### 971.103 Documentation submittals.

#### Subpart 971.2—Contracting Activity Review Requirements

##### 971.200 Scope of subpart.

##### 971.201 Requirements.

##### 971.202 Responsibilities.

##### 971.203 Review functions.

#### Subpart 971.3—Procurement Management Systems Reviews

##### 971.300 Scope of subpart.

##### 971.301 Review of procurement management systems.

Authority: Sec. 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254); and sec. 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

#### 971.000 Scope of part.

This part sets forth the administrative requirements for review and approval of certain solicitations and contract awards and a notification of Headquarters procurement system reviews.



**Subpart 971.1—Headquarters Review and Notification Requirements****971.100 Scope of subpart.**

This subpart establishes a requirement for Headquarters review of certain solicitations and contract awards made by DOE contracting activities.

**971.101 Requirements—general.**

Solicitations and contract awards which are in excess of authority delegated to Heads of Contracting Activities, likely to provoke unusual public interest, or of a new or unusual nature shall be submitted to the Procurement Executive or designee for appropriate review and approval. Contract actions are those actions relating to the letting of contracts, subcontracts, agreements with other governmental agencies, and subsequent modifications, extensions, and settlements of terminations thereof. Questions of contract policy or procedure which arise in the course of negotiation and administration of such contract actions shall be submitted for advance Headquarters review and approval.

**971.102 Requirement—long-term contracts.**

Heads of Contracting Activities shall notify the Controller, with a copy to the Procurement Executive, or any intent to utilize the long-term contract authority provided by subsection U, section 161 of the Atomic Energy Act of 1954, as amended by Pub. L. 85-681 (72 Stat. 633). Such advance notice should be provided at an early stage of planning on any such proposed contract action.

**971.103 Documentation submittals.**

(a) When contract awards require review and/or approval by Headquarters, (See 971.101) the following documentation is to be submitted to the Business Clearance Division, Headquarters, at the times set forth below:

(1) *Prior to negotiations.* Prior to the start of formal negotiations concerning contract awards the following documents are required for review:

(i) Five copies of the prenegotiation plan and draft contract (six copies in the case of operating and on-site service

contracts which contain a personnel appendix).

(ii) One copy of the determinations and findings, as required by FAR 15.302.

(iii) If applicable, one copy of the justification for noncompetitive procurement (JNCP) or justification for acceptance of unsolicited proposals (JNCP) should be provided.

(iv) One copy of documentation (including audits and technical evaluation of costs) to support a pricing action.

(2) *After completing negotiation.* If there were significant departures from the objectives of the prenegotiation plan, or new and significant issues were developed which were not addressed in the prenegotiation plan, one copy of the post negotiation summary shall be submitted for Headquarters' review and approval. In the event all of the prenegotiation objectives were substantially met, one information copy is to be submitted.

(b) When solicitations require review and approval by Headquarters, two copies of the solicitation shall be submitted to the Business Clearance Division, Headquarters, in sufficient time prior to the planned release to allow a comprehensive review.

(c) The following information should also be provided with the documentation submitted to Headquarters:

(1) Name and telephone number of the cognizant Headquarters program official.

(2) The supporting documentation should include a copy of the local independent review, if any, conducted in accordance with 971.102.

**Subpart 971.2—Contracting Activity Review Requirements****971.200 Scope of subpart.**

This subpart sets forth the administrative requirement for an independent Contracting Activity review of contracts to be awarded by that activity and subcontracts to be awarded by a prime or operating and management contract under a cost-reimbursement contract.

**971.201 Requirements.**

Prime contracts and subcontracts under cost-reimbursement contracts shall be reviewed, based on dollar

thresholds to be established by Heads of Contracting Activities.

**971.202 Responsibilities.**

Each Head of Contracting Activity shall establish procedures, providing for an independent review by that activity prior to award of proposed contract and subcontract actions and to review termination settlements.

**971.203 Review functions.**

Responsibility for conducting the independent review of contract and subcontract actions shall be assigned to a contract review board or where it is impracticable to establish a contract review board, under appropriate alternate independent review procedures. The mode of conduct of the review is not prescribed herein in order to permit discretionary judgment in determining the depth to which significant areas are examined. The results of the review shall be documented showing the scope and extent of the review and written recommendations submitted to Heads of Contracting Activities (or to such other approving officials as may be appropriate) on each proposed contract or subcontract action reviewed. In the event the approving official departs from the recommendation of the review board, the basis for such action shall be appropriately documented in the files.

**Subpart 971.3—Procurement Management System Reviews****971.300 Scope of subpart.**

This subpart advises Contracting Activities of the Headquarters responsibility for oversight and review of Procurement Systems by contracting activities.

**971.301 Review of procurement management systems.**

The Procurement Executive is responsible for establishing and maintaining a program for the review of DOE procurement management systems. Review will be conducted in accordance with the procedures prescribed for that program. A review schedule will be published and maintained. Each contracting activity will be notified at least 60 days in advance of its review.

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# 48 CFR Ch. 4 Acquisition Regulation; Interim Rule

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Wednesday  
March 28, 1984

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## Part III

### Department of Agriculture

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48 CFR Ch. 4

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Acquisition Regulation; Interim Rule



## DEPARTMENT OF AGRICULTURE

## 48 CFR Ch. 4

## Acquisition Regulation

**AGENCY:** Office of Operations, Department of Agriculture.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Department of Agriculture is issuing an interim rule to implement and supplement the new Federal Acquisition Regulation (FAR). The FAR, which becomes effective on April 1, 1984, simplifies the Federal procurement process by creating a single, uniform regulation for all agencies.

This interim rule, the Agriculture Acquisition Regulation (AGAR), prescribes policies and procedures that implement and supplement the FAR. On the effective date, the AGAR will replace the Agriculture Procurement Regulations, 41 CFR Chapter 4. Although superseded by the AGAR, the existing procurement regulations remain in effect in Title 41 for contracts entered into, and solicitations issued (including any resultant contracts), before the effective date of this acquisition regulation.

**DATES:** This interim rule, except for 410.004 (see paragraph E of Supplementary Information), becomes effective April 1, 1984. Written comments must be received on or before May 15, 1984.

**ADDRESS:** Comments should be sent to: USDA, Procurement Division, Office of Operations, Room 1575-South Building, Washington, D.C. 20250.

**FOR FURTHER INFORMATION CONTACT:** Larry Schreier, 202-447-8924.

**SUPPLEMENTARY INFORMATION:****Procedural Requirements***A. Administrative Procedure Act*

This rule relates to agency contracting. As such, pursuant to the provisions of 5 U.S.C. 553(a), it is exempt from the notice and comment requirements set forth in 5 U.S.C. 553 (b) and (c). Nevertheless, the Secretary of Agriculture, in a Policy Statement issued on July 24, 1971, committed the Department to observing the aforementioned public participation requirements in contract related rule-making, unless such observance is for good cause found to be impracticable, unnecessary, or contrary to the public interest.

Because of the need to have the AGAR in place on April 1, 1984, the effective date of the FAR, time constraints make it impracticable to

seek public participation before adopting the AGAR. Therefore, the requirements of 5 U.S.C. 553 (b) and (c) are not here applicable.

*B. Office of Federal Procurement Policy Letter No. 83-2*

Due to the aforementioned time constraints it is impracticable to solicit and consider the views of interested parties prior to adopting this regulation. Therefore, in accordance with OFPP Letter 83-2, the AGAR is being issued as an interim rule and will not be issued in its final form until the views of all interested parties have been considered. The time for comments and the location to which they should be addressed is set forth elsewhere in this preamble.

*C. Executive Order 12291*

David A. Stockman, Director of the Office of Management and Budget, has exempted procurement regulations from the requirements of a regulatory impact analysis and review required by Executive Order 12291 in a memorandum dated December 15, 1983, to Don Sowle, Administrator, Office of Procurement Policy and Christopher DeMuth, Administrator, Information and Regulatory Affairs.

*D. Regulatory Flexibility Act*

Consistent with the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is herein certified that this rule does not have a significant economic impact on a substantial number of small entities because the rule contains few changes in current acquisition regulations. To the extent changes are made to current regulations, they are designed to foster and promote participation of small entities in the Department's procurement program (5 U.S.C. 605(b)).

*E. Paperwork Reduction Act*

The information collection requirement contained in 48 CFR Part 410 will be submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until it has been approved by the Office of Management and Budget. Comments on the information collection requirements should be submitted to Andy Velez-Rivera, Desk Officer, Office of Management and Budget, Office of Information and Regulatory Affairs, Room 3001, 725 Jackson Place, Washington, D.C. 20503, as well as to the Departmental address listed above.

**List of Subjects in 48 CFR Chapter 4**

Government procurement, Department of Agriculture Acquisition Regulation.

For the reasons set out in this preamble, an interim Chapter 4 is added to Title 48 of the Code of Federal Regulations as set forth below.

Issued in Washington, D.C. on March 16, 1984.

Frank Gearde, Jr.,

Director, Office of Operations.

**CHAPTER 4—DEPARTMENT OF AGRICULTURE****SUBCHAPTER A—GENERAL**

- Part 401—Agriculture Acquisition Regulation System
- Part 402—Definitions of Words and Terms
- Part 403—Improper Business Practices and Personal Conflicts of Interest
- Part 404—Administrative Matters
- Part 405—Publicizing Contract Actions
- Part 406—[Reserved]

**SUBCHAPTER B—ACQUISITION PLANNING**

- Part 407—Acquisition Planning
- Part 408—Required Sources of Supplies and Services
- Part 409—Contractor Qualifications
- Part 410—Specifications, Standards, and Other Purchase Descriptions
- Part 411—[Reserved]
- Part 412—[Reserved]

**SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES**

- Part 413—Small Purchase and Other Simplified Purchase Procedures
- Part 414—Formal Advertising
- Part 415—Contracting by Negotiation
- Part 416—Types of Contracts
- Part 417—Special Contracting Methods
- Part 418—[Reserved]

**SUBCHAPTER D—SOCIOECONOMIC PROGRAMS**

- Part 419—Small Business and Small Disadvantaged Business Concerns
- Part 420—Labor Surplus Area Concerns
- Part 421—[Reserved]
- Part 422—Application of Labor Laws to Government Acquisitions
- Part 423—Environment, Conservation, and Occupational Safety
- Part 424—Protection of Privacy and Freedom of Information
- Part 425—Foreign Acquisition
- Part 426—[Reserved]

**SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS**

- Part 427—[Reserved]
- Part 428—Bonds and Insurance
- Part 429—[Reserved]
- Part 430—Cost Accounting Standards
- Part 431—[Reserved]
- Part 432—Contract Financing
- Part 433—Disputes and Appeals

**SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING**

- Part 434—Major System Acquisition
- Part 435—Research and Development Contracting
- Part 436—Construction and Architect-Engineer Contracts



Part 437—Service Contracting  
 Part 438—[Reserved]  
 Part 439—Management, Acquisition, and Use  
 of Information Resources  
 Part 440—[Reserved]  
 Part 441—[Reserved]

#### SUBCHAPTER G—CONTRACT MANAGEMENT

Part 442—Contract Administration  
 Part 443—[Reserved]  
 Part 444—[Reserved]  
 Part 445—Government Property  
 Part 446—Quality Assurance  
 Part 447—[Reserved]  
 Part 448—Value Engineering  
 Part 449—Termination of Contracts  
 Part 450—Extraordinary Contractual Actions  
 Part 451—[Reserved]

#### SUBCHAPTER H—CLAUSES AND FORMS

Part 452—Solicitation Provisions and  
 Contract Clauses  
 Part 453—Forms

#### SUBCHAPTER A—GENERAL

### PART 401—AGRICULTURE ACQUISITION REGULATION SYSTEM

401.000 Scope of Part.

#### Subpart 401.1—Purpose, Authority, Issuance

401.101 Purpose.  
 401.102 Authority.  
 401.103 Applicability.  
 401.103-70 Exclusions.  
 401.104 Issuance.  
 401.104-1 Publication and Code  
 arrangement.  
 401.104-2 Arrangement of regulations.  
 401.104-3 Copies.

#### Subpart 401.2—Administration

401.201 Maintenance of the FAR.  
 401.201-1 The two councils.

#### Subpart 401.3—Agency Acquisition Regulations

401.301 Policy.  
 401.303 Codification and public  
 participation.  
 401.304 Agency control and compliance  
 procedures.  
 401.370 Departmental directives.

#### Subpart 401.4—Deviations From the FAR and AGAR

401.402 Policy.  
 401.403 Individual deviations.  
 401.404 Class deviations.

#### Subpart 401.6—Contracting Authority and Responsibilities

401.601 General.  
 401.602-1 Authority.  
 401.603 Selection, appointment, and  
 termination of appointment.  
 401.603-1 General.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### 401.000 Scope of part.

This part presents introductory information about the Department of Agriculture's Acquisition Regulation, subsequently referred to as the AGAR.

The AGAR is an integral part of the Federal Acquisition Regulations System and implements or supplements the Federal Acquisition Regulation (FAR).

#### Subpart 401.1—Purpose, Authority, Issuance

##### 401.101 Purpose.

(a) This subpart establishes Chapter 4, the Department of Agriculture Acquisition Regulation (AGAR), within Title 48 of the Code of Federal Regulations. The AGAR provides for the codification and publication of uniform policies and procedures for acquisitions by contracting activities within the Department.

(b) The purpose of the AGAR is to implement the Federal Acquisition Regulation (FAR), where further implementation is needed, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR. The AGAR is not by itself a complete document, as it must be used in conjunction with the FAR.

##### 401.102 Authority.

The AGAR and amendments thereto are issued under 5 U.S.C. 301 and 40 U.S.C. 486(c). Pursuant to 7 CFR 2.76 the Director, Office of Operations, has the delegated authority to promulgate Departmental acquisition regulations.

##### 401.103 Applicability.

The FAR and AGAR apply to all Department of Agriculture (USDA) acquisitions of supplies and services (including construction) which obligate appropriated funds, unless otherwise specified in this regulation or excepted by law. For acquisitions using nonappropriated funds, these regulations shall be used as guides to the maximum extent feasible and consistent with efficient program operations.

##### 401.103-70 Exclusions.

Certain USDA policies and procedures which come within the scope of this chapter may be excluded from the AGAR under appropriately justified circumstances, such as:

- Subject matter which bears a security classification (See FAR 4.402).
- Subject matter which is effective for a period less than 6 months.
- Subject matter which is instituted on an experimental basis for a reasonable period.

##### 401.104 Issuance.

##### 401.104-1 Publication and code arrangement.

(a) The AGAR is issued in the Code of Federal Regulations as Chapter 4 of

Title 48, Federal Acquisition Regulations System, to implement and supplement Chapter 1 which constitutes the FAR. Parts 400 through 499 have been assigned to USDA by the Office of the Federal Register.

(b) The AGAR and its subsequent changes are published in: (1) Daily issues of the Federal Register, (2) cumulative form in the Code of the Federal Regulations, and (3) looseleaf form for distribution within the Department.

##### 401.104-2 Arrangement of regulations.

(a) General. The AGAR is divided into the same subchapters, parts, subparts, sections, and subsections as the FAR. However, when the FAR coverage is adequate by itself, there will be no AGAR counterpart. AGAR coverage parallels the FAR in format, arrangement, and numbering system.

(b) Numbering. The AGAR numbering system conforms to the FAR. The first digit, "4", represents the chapter number assigned to USDA, followed by a 2-digit part number, and then a decimal point. Numbers after the decimal point represent respectively the subpart, section (two digits) and subsection separated from the former by a dash. For example, the AGAR implementation of FAR 1.104 is shown as 401.104, and of FAR 15.804-3 as 415.80-3. Subdivisions at the section and subsection level are indicated by parenthetical alphanumerics in accordance with the FAR scheme. However, the designations of subdivisions in the AGAR do not necessarily correspond with subdivisions in the FAR.

##### 401.104-3 Copies.

Copies of the AGAR published in the Federal Register or Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Requests should reference Chapter 4 of Title 48 CFR.

#### Subpart 401.2—Administration

##### 401.201 Maintenance of the FAR.

##### 401.201-1 The two councils.

(a) The Department is represented on the Civilian Agency Acquisition Council by a Policy Team member of the Procurement Division, Office of Operations.

(b) The Procurement Division will coordinate proposed FAR revisions with interested contracting activities and serve as the point of contact for interpreting regulations or receiving



FAR revisions advocated by contracting activities.

### Subpart 401.3—Agency Acquisition Regulations

#### 401.301 Policy.

(a) The Director, Office of Operations, subject to the authorities in 401.102 and FAR 1.301(c)(3), shall issue and publish in the *Federal Register*, as may be required, Departmental regulations to implement and supplement the FAR, that together with the FAR, constitute Department-wide policies, procedures, solicitation provisions, and contract clauses governing the contracting process or otherwise controlling the relationship between the Department (including any of its contracting activities) and contractors or prospective contractors.

(b) Each designated Head of a Contracting Activity (HCA) is authorized to issue or authorize the issuance of internal guidance at any organizational level, which does not directly affect contractors or prospective contractors. Internal guidance will not be published in the *Federal Register*. HCA's shall ensure that the guidance, procedures, or instructions issued:

- (1) Are consistent with the policies and procedures contained in this regulation;
- (2) Follow the format, arrangement, and numbering system of this regulation to the extent practicable;
- (3) Contain no material which duplicates, paraphrases, or is inconsistent with this regulation; and
- (4) Are numbered and identified by use of alphabetical suffixes to the chapter number as follows:

- 4A Agricultural Marketing Service.
- 4B Agricultural Research Service.
- 4C Agricultural Stabilization and Conservation Service.
- 4D Farmers Home Administration.
- 4E [Reserved].
- 4F Foreign Agricultural Service.
- 4G Forest Service.
- 4H Rural Electrification Administration.
- 4I Soil Conservation Service.
- 4J Economics Management Staff.
- 4K Food and Nutrition Service.
- 4L Animal and Plant Health Inspection Service.
- 4M Federal Crop Insurance Corporation.
- 4N Office of Operations, Procurement Division (Procurement Operations).
- 4O [Reserved].
- 4P Office of International Cooperation and Development.
- 4R Office of the Inspector General.

#### 401.303 Codification and public participation.

(a) The AGAR is codified as Chapter 4 Title 48 of the Code of Federal Regulations.

(b) Section 553(a)(2) of the Administrative Procedures Act, 5 U.S.C. 553, provides an exception from the standard public rulemaking procedures to the extent that the rule involves a matter related to agency management or personnel or to public property, loans, grants, benefits or contracts. OFPP Policy Letter 83-2 requires rulemaking for substantive acquisition rules but allows discretion in the matter for other than significant issues meeting the stated criteria. Accordingly, AGAR has been promulgated and may be revised from time to time in accordance with the rulemaking procedures of the Administrative Procedures Act and OFPP Policy Letter 83-2. This procedure for significant subject matter generally involves issuing a notice of proposed rulemaking inviting public comment, review and analysis of comments received, and publication of a final rule. The final rule includes a discussion of the public comments received and describes any changes made as a result of the comments.

#### 401.304 Agency control and compliance procedures.

(a) The AGAR System is under the direct oversight and control of the Director, Office of Operations, who is responsible for review and issuance of all Department-wide acquisition regulations published in the *Federal Register* to assure compliance with FAR Part 1.

(b) The Director, Office of Operations, is also responsible for review and issuance of unpublished, Department-wide internal guidance under the AGAR System.

(c) HCA's are responsible for establishment and implementation of formal procedures for oversight and control of all unpublished internal guidance issued to implement FAR or AGAR requirements. These procedures shall be subject to the review and approval by the Director, Office of Operations, and shall include:

- (1) Provisions for centralized issuance of all guidance and instructions using a directives system;
- (2) Methods for periodic review and updating of all issuances;
- (3) Distribution processes which assure timely receipt by all affected contracting offices; and
- (4) Provisions for maintaining compliance with FAR 1.304.

(d) The Director, Office of Operations, is responsible for evaluating coverage under the AGAR System to determine applicability to other agencies and for recommending coverage to the FAR Secretariat for inclusion in the FAR.

(e) Recommendations for revision of existing FAR coverage or new FAR coverage shall be submitted by the HCA to the Director, Office of Operations, for further action.

#### 401.370 Departmental directives.

Subject to the policies of FAR 1.3, the Department from time to time may issue internal directives of the following types to establish procedures, standards, guidance, or methods of performing duties, functions, or operations.

(a) *Departmental Regulations (DR)*. Permanent directives signed by the Director, Office of Operations, to issue policies, authorities, and operating instructions.

(b) *Departmental Notices (DN)*. Temporary directives signed by the Director, Office of Operations, to communicate policy or procedure which require immediate dissemination.

(c) *Secretary's Memoranda*. Temporary directives signed by the Secretary which establish major policy concerning missions and programs of the Department, direct initial or implementing action on these programs, or redirect or change policy or action in these areas.

### Subpart 401.4—Deviations From the FAR and AGAR

#### 401.402 Policy.

(a) Requests for authority to deviate from the provisions of the FAR or the AGAR shall be submitted in writing as far in advance as the exigencies of the situation will permit. Each request for deviation shall contain the following:

(1) A statement of the deviation desired, including identification of the specific paragraph number(s) of the FAR or AGAR;

(2) The reason why the deviation is considered necessary or would be in the best interest of the Government;

(3) If applicable, the name of the contractor and identification of the contract affected;

(4) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(5) A description of the intended effect of the deviation;

(6) A statement of the period of time for which the deviation is needed; and

(7) Any pertinent background information which will contribute to a full understanding of the desired deviation.

#### 401.403 Individual deviations.

In individual cases, deviations from either the FAR or the AGAR will be authorized only when essential to effect



a necessary acquisition or where special circumstances make such deviations clearly in the best interest of the Government. Except for cost principles, HCA's may approve individual deviations from the AGAR, after coordinating with the General Counsel and the Director, Office of Operations. No deviations from the FAR or AGAR may be authorized at the contracting office level. A copy of each deviation and its supporting documentation shall be provided to the Director, Office of Operations. Deviations involving cost principles contained in FAR Part 31 and Part 431, or any FAR deviation, shall not be made unless such action is authorized by the Director, Office of Operations, after consultation with the Office of General Counsel and any other appropriate office, on the basis of a written justification stating clearly the special circumstances involved.

#### 401.404 Class deviations.

Where deviations from the FAR or AGAR are considered necessary for classes of contracts, requests for authority to deviate shall be submitted in writing to the Director, Office of Operations, who will, after obtaining appropriate concurrences from other officials (e.g., General Counsel, and such other parties of interest), consider the submission, and in the case of FAR deviations, consider the submission jointly with the Chairperson of the Civilian Agency Acquisition Council. Where circumstances preclude obtaining prior concurrence of the Chairperson of the Civilian Agency Acquisition Council, the Procurement Executive may authorize the deviation and subsequently inform the Chairperson of the Civilian Agency Acquisition Council of the deviation including the circumstances under which it was required.

#### Subpart 401.6—Contracting Authority and Responsibilities

##### 401.601 General.

(a) The authority and responsibility vested in the Secretary to manage the Department's acquisition function is delegated through the Assistant Secretary for Administration to the Director, Office of Operations, who is the USDA Procurement Executive, pursuant to 7 CFR 2.76(a) (1) and (10). This broad authority includes, but is not limited to, the following responsibilities:

- (1) Prescribing and publishing Departmental acquisition policies, regulations, and procedures.
- (2) Taking any necessary actions consistent with policies, regulations, and procedures with respect to purchases,

contracts, leases, and other transactions.

(3) Designating contracting officers.

(4) Establishing clear lines of contracting authority.

(5) Evaluating and monitoring the performance of the Department's acquisition system.

(6) Managing and enhancing career development of the contracting work force.

(7) Participating in the development of Government-wide acquisition policies, regulations, and standards and determining specific areas where Government-wide performance standards should be established and applied.

(8) Determining areas of Department-unique standards and developing unique Department-wide standards.

(9) Acting as the advocate for competition.

(10) Certifying to the Secretary that the acquisition system meets approved standards.

(b) The Director, Office of Operations, may delegate contracting authority to the Heads of Contracting Activities (HCA's) and the responsibility to manage their acquisition function. Delegations of authority for automatic data processing (ADP) equipment, services and related supplies are limited in accordance with Part 439.

(c) HCA's may redelegate contracting authority, without the power of redelegation, only to qualified contracting officers as prescribed in 401.603. Contracts may be entered into and signed only by the Agency Head, HCA's and appointed contracting officers.

##### 401.602-1 Authority.

Information on the limits of contracting officers' authority shall be maintained by the HCA's as required by FAR 1.602-1. This information shall be readily available to the public and is subject to review by the Director, Office of Operations.

##### 401.603 Selection, appointment, and termination of appointment.

##### 401.603-1 General.

HCA's are authorized by the Director, Office of Operations, to select and appoint contracting officers and terminate their appointment as prescribed in FAR 1.603.

#### PART 402—DEFINITIONS OF WORDS AND TERMS

##### 402.000 Scope of part.

##### 402.001 Definitions.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

##### 402.000 Scope of part.

As used throughout this regulation, the following words and terms are used as defined in this subpart unless the context in which they are used clearly requires a different meaning, or a different definition is prescribed for a particular part or portion of a part.

##### 402.001 Definitions.

"Agency Head" or "Head of the Agency" means the Secretary of Agriculture, Deputy Secretary, and the Assistant Secretary for Administration.

"Contracting Activity" means the Office of Operations and other USDA organizations having delegated acquisition contracting authority. A contracting activity's authority and responsibility to manage its acquisition contracting function and those of other organizations for which it provides administrative support are established by a written delegation from the Director, Office of Operations.

"Head of the Contracting Activity" (HCA) means the official who has overall responsibility for managing the contracting activity, i.e., Chief, Forest Service; Administrator, Agricultural Marketing Services; etc. Each HCA may designate one individual from the contracting activity to act as the HCA and perform the delegated contract management functions for the contracting activity.

"Procurement Executive" means the agency official appointed as such by the Head of the Agency pursuant to Executive Order 12352. The Director, Office of Operations, has been designated as the USDA Procurement Executive.

#### PART 403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

##### Subpart 403.2—Contractor Gratuities to Government Personnel

403.203 Reporting suspected violation of the gratuities clause.

403.204 Treatment of violations.

##### Subpart 403.3—Reports of identical bids and suspected antitrust violations

403.302 Reporting identical bids.

403.303 Reporting suspected antitrust violations.

##### Subpart 403.4—Contingent fees

403.408 Evaluation of the SF-119.

403.408-1 Responsibilities.

403.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

##### Subpart 403.5—Other Improper Business Practices

403.502 Subcontractor kickbacks.



**Subpart 403.6—Contracts with Government Employees or Organizations Owned or Controlled by Them****403.602 Exceptions.**

**403.603 Responsibilities of the contracting officer.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 403.2—Contractor Gratuities to Government Personnel****403.203 Reporting suspected violation of the gratuities clause.**

A suspected violation of the contract clause, FAR 52.203-3, Gratuities, shall be reported immediately to the cognizant contracting officer in writing, stating the circumstances surrounding the incident(s), and date(s) and names of all parties involved. The contracting officer shall review the report for completeness, add any additional information deemed necessary and a recommendation for action, and submit the report to the HCA.

**403.204 Treatment of violations.**

The HCA shall review the report and consult with the Offices of General Counsel and Inspector General, as appropriate, to determine whether further action should be pursued. If it is found that the facts and circumstances warrant further action, the HCA shall give the contractor formal, written notice which summarizes the reported violation and affords the contractor the opportunity to make a written or oral response within a reasonable, specified period after receipt of the notice. The notice shall be sent by certified mail with return receipt requested. Oral presentations shall follow the procedures outlined in FAR 3.204(b). The HCA shall furnish copies of any adverse determination to the contracting officer and the Department Debarring Officer for their subsequent considerations under FAR 3.204(c) (1) and (2), respectively.

**Subpart 403.3—Reports of Identical Bids and Suspected Antitrust Violations****403.302 Reporting identical bids.**

Executive Order 12430 dated July 6, 1983, revoked the requirement of Executive Order 10936 dated April 24, 1961, to submit reports to the Attorney General regarding identical bids.

**403.303 Reporting suspect antitrust violations.**

Contracting officers shall report the circumstances of suspected violations of antitrust laws to their respective HCA's. HCA's shall refer the reports directly to the Attorney General as stated in FAR

3.303(e), and send a copy of each to the Director, Office of Operations.

**Subpart 403.4—Contingent Fees****403.408 Evaluation of the SF-119.****403.408-1 Responsibilities.**

The review required by FAR 3.408-1(b) shall be performed at a level higher than the contracting officer.

**403.409 Misrepresentations or violations of the Covenant Against Contingent Fees.**

(a) A suspected misrepresentation or violation of the Covenant Against Contingent Fees shall be documented in writing by the contracting officer and reported immediately to the HCA. The HCA shall determine if a violation has occurred and take action in accordance with FAR 3.409(b).

(b) If the HCA decides to refer the case to the Department of Justice, it should be referred directly with a copy of the report and referral submitted to the Director, Office of Operations.

**Subpart 403.5—Other Improper Business Practices****403.502 Subcontractor kickbacks.**

Each suspected violation of the Anti-Kickback Act (41 U.S.C. 51-54) shall be documented in writing by the contracting officer and reported immediately to the HCA. The HCA, after consultation with the Office of General Counsel and referral to the Office of Inspector General, as appropriate, shall refer the suspected violation to the Department of Justice, with a copy of the report and referral submitted to the Director, Office of Operations.

**Subpart 403.6—Contracts With Government Employees or Organizations Owned or Controlled by Them****403.602 Exceptions.**

The HCA is authorized to except a contract from the policy in FAR 3.601.

**403.603 Responsibilities of the contracting officer.**

The contracting officer, when requesting authorization under 403.602, shall prepare a written determination and findings for the signature of the HCA. The determination shall document compliance with FAR 3.603 specifying the compelling reason(s) for award, and be placed in the contract file.

**PART 404—ADMINISTRATIVE MATTERS****Subpart 404.4—Safeguarding Classified Information Within Industry****404.402 General.**

**404.403 Responsibilities of contracting officers.**

**Subpart 404.6—Contract Reporting****404.601 Federal Procurement Data System.****Subpart 404.8—Contract Files****404.805 Disposal of contract files.****404.870 Document numbering system.****404.870-1 Purchase order/delivery order numbering system.****404.870-2 Contract numbering system.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 404.4—Safeguarding Classified Information Within Industry****404.402 General.**

(a) Based on an agreement with the Department of Defense, USDA is covered by the Defense Industrial Security Program (DISP). Accordingly, all contracting activities will conduct classified acquisitions as required by the DISP.

(b) Detailed information on DISP requirements is maintained by the Chief, Security and Employee Relations Staff, Office of Personnel, Washington, D.C. 20250.

**404.403 Responsibilities of contracting officers.**

When a proposed solicitation is likely to require access to information classified by USDA, the contracting officer shall consult with the Chief, Security and Employee Relations Staff, Office of Personnel, regarding the procedures that must be followed.

**Subpart 404.6—Contract Reporting****404.601 Federal Procurement Data System.**

(a) The Procurement Division, Office of Operations, manages an automated procurement reporting system for USDA. This system provides the Federal Procurement Data System with all required contracting information.

(b) Contracting activities shall report all contract actions into the USDA Procurement Reporting System in accordance with the regulations and notices of the 5010 classification series in the Departmental Directives System.

(c) Questions about the USDA Procurement Reporting System should be directed to the Procurement Division, Office of Operations, Washington, D.C. 20250.

**Subpart 404.8—Contract Files****404.805 Disposal of contract files.**

Contracting activities shall comply with their organizational file plans and disposition guides with respect to procedures for handling, storing, and disposing of contract files and other



acquisition related documents. Contracting activity file plans and disposition guides shall not include provisions that permit contract files to be destroyed before the times indicated in FAR 4.805.

#### 404.870 Document numbering system.

The Department has prescribed a standardized numbering system for acquisition documents.

#### 404.870-1 Purchase order/delivery order numbering system.

USDA purchasing activities shall number their purchase/delivery orders in accordance with NFC Procedures Manual, "Purchase Orders," Title II, Section 5.1.

#### 404.870-2 Contract numbering system.

Contracting offices shall assign an 8 to 12-digit number to all contracts. Contract numbers will be divided into four data elements and formatted as follows:

| (1)              | (2)             | (3)         | (4)         |
|------------------|-----------------|-------------|-------------|
| Transaction code | Ordering office | Fiscal year | Control No. |
| XX               | XXXX            | X           | X to XXXXX  |

(a) *Transaction Code.* This two-position code identifies the contract as being one of the following types:

- (1) Code 50—construction contract;
- (2) Code 51—[Reserved]
- (3) Code 52—tree planting/thinning contract;
- (4) Code 53—service contract;
- (5) Code 54—supply contract;
- (6) Code 55—aircraft rental (for firefighting purposes only) contract;
- (7) Code 56—personal equipment rental (rental of vehicular equipment for firefighting purposes only) contract;
- (8) Code 57—real property rental contract.

(b) *Ordering Office.* This four-position alpha-numeric code corresponds to the last four characters of the contracting office's GSA assigned FEDSTRIP requisitioner number.

(c) *Fiscal Year.* This one-position code corresponds to the last digit of the fiscal year in which the contract becomes effective.

(d) *Control Number.* This up-to-five position code (from one to five characters may be used) will be assigned by the contracting office. While contracts will generally be numbered consecutively (1 through 99999), contracting offices may assign codes in any manner of their choosing. Codes may not be repeated, however, unless one of the preceding data elements (transaction code, ordering office, or fiscal year) changes. Alpha, as well as

numeric, characters may be used in any one or more of the five positions.

### PART 405—PUBLICIZING CONTRACT ACTIONS

#### Subpart 405.4 Release of Information

405.404-1 Release procedures.

#### Subpart 405.5—Paid Advertisements

405.502 Authority.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 405.4—Release of Information

405.404-1 Release procedures.

(a) The HCA's may release long-range acquisition estimates if the information meets the requirements of FAR 5.404-1.

(b) Classified information shall not be released without the approval of the Chief, Security and Employee Relations Staff, Office of Personnel.

#### Subpart 405.5—Paid Advertisements

405.502 Authority.

HCA's are authorized to order the publication of an advertisement in newspapers. HCA's may redelegate this authority by regulation, order, or memorandum to subordinates within the contracting activity.

### PART 406—[RESERVED]

#### Subchapter B—Acquisition Planning

### PART 407—ACQUISITION PLANNING

#### Subpart 407.1—Acquisition Plans

407.102 Policy.

407.170 Advance acquisition plans.

#### Subpart 407.3—Contractor Versus Government Performance

407.302 General.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 407.1—Acquisition Plans

407.102 Policy.

Each HCA shall develop an acquisition planning system in compliance with the requirements of FAR Subpart 7.1 for complex/high dollar acquisitions. The HCA should establish the criteria for requiring formal written plans and determine the dollar thresholds for use in each contracting activity that will ensure application of the principles of this section in FAR Subpart 7.1.

407.170 Advance acquisition plans.

Each HCA shall implement an advance acquisition planning system in accordance with procedures in Departmental Regulation (5000 series).

### Subpart 407.3—Contractor Versus Government Performance

407.302 General.

The requirements of FAR Subpart 7.3 and OMB Circular A-76 are implemented by Departmental Regulation 2170-1.

### PART 408—REQUIRED SOURCES OF SUPPLIES AND SERVICES

#### Subpart 408.8—Acquisition of Printing and Related Supplies

408.802 Policy.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 408.8—Acquisition of Printing and Related Supplies

408.802 Policy.

(a) The Office of Governmental and Public Affairs (OGPA) has been designated as the Department's liaison with the Joint Committee on Printing (JCP) and the Public Printer, Government Printing Office, on all matters related to printing.

(b) Departmental organizations and offices with publication programs have designated a publication liaison officer who is authorized to coordinate appropriate printing and publication matters with OGPA.

(c) Prior to contracting for any of the items defined in FAR 8.801, the contracting officer shall coordinate with the publications liaison officer and obtain required approvals.

### PART 409—CONTRACTOR QUALIFICATIONS

#### Subpart 409.4—Debarment, Suspension and Ineligibility

409.403 Definitions.

409.404 Consolidated list of debarred, suspended, and ineligible contractors.

409.405 Effect of listing.

409.405-1 Continuation of current contracts.

409.405-2 Restrictions on subcontracting.

409.406 Debarment.

409.406-3 Procedures.

409.407 Suspension.

409.407-3 Procedures.

409.470 Appeals.

#### Subpart 409.5—Organizational Conflict of Interest

409.503 Waiver.

409.507 Procedures.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 409.4—Debarment, Suspension and Ineligibility

409.403 Definitions.

"Debarment official." The Director, Office of Operations, is designated as the debarment official (Department Debarment Officer) pursuant to the



Secretary's delegations of authority in 7 CFR 2.25 and 2.76. However, for contracts awarded under the School Lunch and Surplus Removal Program (42 U.S.C. 1755 and 7 U.S.C. 612C), the Department Debarbing Officer has delegated debarbing authority to the Agricultural Marketing Service.

#### 409.404 Consolidated List of Debarred, Suspended, and Ineligible Contractors.

(a) The Department Debarbing Officer is the department's single point of contact with GSA for debarment and suspension actions taken under this subpart. The debarbing officer in the Agricultural Marketing Service shall notify the Department Debarbing Officer of each debarment and suspension action by promptly submitting a copy of the debarment or suspension notice and any later changes to the debarment or suspension status. The Department Debarbing Officer will forward a copy of each notice to GSA for inclusion in the Government-wide consolidated list.

(b) The Chief, Procurement Division, Office of Operations, is responsible for arranging bulk distribution of the consolidated list to contracting activities under the USDA Automated Mailing List. Contracting activities must make their own internal distribution.

#### 409.405 Effect of listing.

Compelling reasons are considered to be present where failure to contract with the debarred or suspended contractor would seriously harm the agency's programs and prevent accomplishment of mission requirements. The Director, Office of Operations, is authorized to make the determinations under FAR 9.405. Requests for such determinations shall be submitted through the HCA to the Director, Office of Operations.

#### 409.405-1 Continuation of current contracts.

The HCA is authorized to make the determinations under FAR 9.405-1.

#### 409.405-2 Restrictions on subcontracting.

The HCA is authorized to approve subcontracts with debarred or suspended subcontractors under FAR 9.405-2.

#### 409.406 Debarment.

##### 409.406-3 Procedures.

(a) *Investigation and referral.* When a contracting officer becomes aware of possible irregularities or any information which may be sufficient cause for debarment, the case shall be immediately referred through the HCA to the debarbing official. The case must be accompanied by a complete

statement of the facts (including a copy of any criminal indictments, if applicable) along with a recommendation for action. Where the statement of facts indicates the irregularities to be possible criminal offenses, or for any other reason further investigation is considered necessary, the matter shall be referred to the HCA who should consult with the Office of Inspector General to determine if further investigation is required prior to referring to the debarbing official.

(b) *Decision-making process.* If, after reviewing the recommendations and consulting with the Office of Inspector General and Office of the General Counsel, as appropriate, the debarbing official determines debarment is justified, the debarbing official shall initiate the proposed debarment in accordance with FAR 9.406-3(c) and notify the HCA of the action taken.

(c) *Fact-finding proceedings.* For actions listed under FAR 9.406-3(b)(2), the contractor shall be given the opportunity to appear at an informal hearing. The hearing should be held at a location and time that is convenient to the parties concerned, if at all possible. The contractor and any specifically named affiliates may be represented by counsel or any duly authorized representative. Witnesses may be called by either party. The proceedings shall be conducted expeditiously and in such a manner that each party will have an opportunity to present all information considered pertinent to the proposed debarment. The contractor shall be provided a copy of a transcript of the proceedings under the conditions established in FAR 9.406-3(b)(2)(ii).

#### 409.407 Suspension.

##### 409.407-3 Procedures.

(a) *Investigation and referral.* When a contracting officer becomes aware of possible irregularities or any information which may be sufficient cause for suspension, the case shall be immediately referred through the HCA to the debarbing official. The case must be accompanied by a complete statement of the facts along with a recommendation for action. Where the statement of facts indicates the irregularities to be possible criminal offenses, or for any other reason further investigation is considered necessary, the matter shall be referred to the HCA who should consult with the Office of Inspector General to determine if further investigation is required prior to referring to the debarbing official.

(b) *Decision-making process.* If, after reviewing the recommendations and consulting with the Office of Inspector

General and Office of the General Counsel, as appropriate, the debarbing official determines suspension is justified, the debarbing official shall initiate the proposed suspension in accordance with FAR 9.407-3(c) and notify the HCA of the action taken.

(c) *Fact-finding proceedings.* For actions listed under FAR 9.407-3(b)(2), the contractor shall be given the opportunity to appear at an informal hearing, similar in nature to the hearing for debarments as discussed in 409.406-3(c).

#### 409.470 Appeals.

A debarred or suspended contractor may appeal the debarbing officer's decision by mailing or otherwise furnishing a written notice within 90 days from the date of the decision to the U.S. Department of Agriculture Board of Contract Appeals, Washington, D.C. 20250. A copy of the notice of appeal shall be furnished to the debarbing officer from whose decision the appeal is taken. Appeals under Subpart 409.4 shall be governed by the rules and procedures of the U.S. Department of Agriculture Board of Contract Appeals set forth in 7 CFR, Part 24.

#### Subpart 409.5—Organizational Conflicts of Interest

##### 409.503 Waiver.

(a) The Director, Office of Operations, is authorized to waive any general rule or procedure in FAR 9.5 when in the Government's interest.

(b) Requests for waiver shall be made by the HCA. Each request shall include:

(1) The general rule or procedure proposed to be waived;

(2) An analysis of the potential conflict, including the benefits and detriments to the Government and prospective contractors;

(3) A discussion of why the conflict cannot be avoided, neutralized, or mitigated; and

(4) Advice of counsel obtained under FAR 9.504(b).

##### 409.507 Procedures.

(a) The Director, Office of Operations, is authorized to make the final decision under FAR 9.507(c)(4) when a prospective contractor disagrees with the decision by the HCA.

(b) Referrals shall be made by the HCA and include:

(1) A copy of the prospective contractor's request; and

(2) The initial decision made under FAR 9.507(a), along with the supporting documentation.



**PART 410—SPECIFICATIONS, STANDARDS, AND OTHER PURCHASE DESCRIPTIONS**

410.004 Selecting specifications or descriptions for use.

410.007 Deviations.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**410.004 Selecting specifications or descriptions for use.**

(a) The determination required by FAR 10.004(b)(2) shall be prepared in writing, signed and dated by the initiating office and accompany the purchase requisition.

(b) Brand name or equal.

(1) A "brand name product" is a commercial product described by its brand name, make, model number, catalog designation or other description by which it is regularly offered for sale in the commercial marketplace.

(2) A "Brand Name, or Equal" purchase description shall include the following type information to clearly identify the specific item named by brand(s):

(i) Identification of the item by generic description.

(ii) Make, model number, catalog designation, or other description, and identification of the commercial catalog where it is listed.

(iii) Name of manufacturer, producer, or distributor of the item and complete address.

(3) All salient characteristics of the "brand name product or products" which have been determined by the initiating office to be essential to the Government's minimum requirements shall be clearly identified and included in the purchase description under the heading, "Salient Characteristics."

(4) The following or similar language shall be included in every solicitation seeking offers on a "brand name, or equal" basis to allow offerors the opportunity to clearly identify the "equal" item being offered, and how that item meets the salient characteristics requirements of the Government:

(i) Offerors proposing to furnish an "equal" product, in accordance with the "Brand Name, or Equal" provision of this solicitation, shall provide the following information for the offered product:

Item Number: \_\_\_\_\_  
 Manufacturer's Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Product Name (if any): \_\_\_\_\_  
 Product Make, Model or Catalog Description: \_\_\_\_\_

Offerors shall also be responsible for submitting all additional information on the above product necessary for the Government to determine whether the

product offered meets the salient characteristics of the "brand name" as listed in the solicitation.

(5) In addition, the provision at 452.210-70, Brand Name or Equal, shall be inserted in solicitations where "brand name or equal" purchase descriptions are used.

**410.007 Deviations.**

HCA's are designated to authorize deviations as required by FAR 10.007 and are responsible for accomplishing the actions required by FAR 10.007. Copies of the applicable documents shall be provided to the Director, Office of Operations.

**PART 411—[Reserved]****PART 412—[Reserved]****SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES****PART 413—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES****Subpart 413.5—Purchase Orders**

413.505 Purchase order and related forms.

413.505-2 Agency order forms in lieu of Optional Forms 347 and 348.

413.505-70 AD-744, Purchase Order-Invoice-Voucher.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 413.5—Purchase Orders**

413.505 Purchase order and related forms.

413.505-2 Agency order forms in lieu of Optional Forms 347 and 348.

Form AD-838, Purchase Order, is prescribed for use by USDA in lieu of Optional Forms 347 and 348.

413.505-70 AD-744, Purchase Order-Invoice-Voucher.

(a) *Prescribed form.* Form AD-744, Purchase Order-Invoice-Voucher, is prescribed for use by USDA in lieu of Standard Form 44.

(b) *Restrictions on use.* Form AD-744 shall not be used for any of the following:

(1) Purchases involving future delivery of the items purchased.

(2) As a confirming purchase order.

(3) As an order under a Blanket Purchase Agreement.

(4) Purchases from GSA or other Government agencies.

(5) Purchases for which the vendor is paid in cash or as a receipt for such purchases.

(6) Purchases which may be accomplished normally through an inprest fund transaction.

(c) *Accountability controls.* Form AD-744 shall be controlled and accounted

for in accordance with the procedures established by the USDA National Finance Center.

**PART 414—FORMAL ADVERTISING****Subpart 414.2—Solicitation of Bids**

414.205 Solicitation mailing lists

414.205-1 Establishment of lists.

**Subpart 414.4—Opening of Bids and Award of Contract**

414.406 Mistakes in bids.

414.406-3 Other mistakes disclosed before award.

414.406-4 Mistakes after award.

414.407 Award.

414.407-8 Protests against award.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 414.2—Solicitation of Bids**

414.205 Solicitation mailing lists.

414.205-1 Establishment of lists.

(a) Contracting offices shall notify all prospective bidders who submit Bidder's Mailing List Applications (SF-129) that they either have been added to the solicitation mailing list or do not meet the criteria for placement on the list.

(b) The issuance of a solicitation within 60 days may be considered appropriate notification.

**Subpart 414.4—Opening of Bids and Award of Contract**

414.406 Mistakes in bids.

414.406-3 Other mistakes disclosed before award.

(a) Contracting offices shall send all cases of mistakes in bid described in FAR 14.406-3 (a), (b), and (d) through their HCA to the Director, Office of Operations, for an administrative determination. The Director, Office of Operations, shall submit all determinations to the Assistant General Counsel, Research and Operations Division, for approval.

(b) The HCA shall make the determination described in FAR 14.406-3(c). An HCA may redelegate this authority to a level no lower than the contracting officer. Each proposed determination is subject to the approval of the Assistant General Counsel, Research and Operations Division, or the appropriate Regional Attorney or Attorney-in-Charge, whoever routinely provides legal services for the contracting office.

(c) Doubtful cases that are to be submitted to the General Accounting Office for advance decision shall be submitted through the Director, Office of Operations.



**414.406-4 Mistakes after award.**

If a mistake in bid is disclosed after award, the contracting officer shall make a final determination in accordance with the provisions of FAR 14.406-4 (b) and (c) and shall coordinate each proposed determination with the Assistant General Counsel, Research and Operations Division, or the Regional Attorney-in-Charge, whoever routinely provides legal services to the contracting office. Such coordination shall, at a minimum, consist of the contracting officer providing the proposed determination and the case file to the appropriate legal officer for comment.

**414.407 Award.****414.407-8 Protests against award.**

(a) *General.* (1) When a protest has been filed with the contracting officer, the written final decision to the protestor required by FAR 14.407-8(a)(1) shall include a paragraph substantially as follows: This decision shall be final and conclusive unless a further written notice of protest is filed with the General Accounting Office in accordance with the Bid Protest Procedures of the General Accounting Office (4 CFR Part 21).

(2) The Director, Office of Operations, is responsible for coordinating the handling of bid protests lodged with the General Accounting Office (GAO) against contracts awarded by contracting activities. The Director, Office of Operations, may authorize individual contracting activities to coordinate their bid protests directly with the GAO when it will best serve to expedite the processing time.

(3) To ensure proper resolution of bid protests, the Office of Operations and the Office of the General Counsel will provide assistance to contracting activities upon request by the contracting officer.

(b) *Notice of protest.* Upon being advised by the GAO of receipt of a protest, the Chief, Procurement Division, Office of Operations, shall inform the appropriate HCA who will promptly notify the contracting officer. Based on this advance notification, the contracting officer shall begin compiling the information necessary to prepare a report responsive to the protest. Upon receiving a copy of the protest and GAO's request for an administrative report, the Chief, Procurement Division, Office of Operations, shall promptly forward it to the appropriate contracting activity for preparation of the written report by the contracting officer.

(c) *Submission of report.* (1) Bid protests shall be handled on a priority

basis. Within 25 working days after notification by the Office of Operations that a protest has been filed with the GAO, the contracting officer shall prepare a report responsive to the protest and submit it directly to the GAO. The contracting officer shall furnish copies of the report, and any subsequent submissions, to the protester and other interested parties and advise the GAO accordingly. A copy of the letter transmitting the report to the GAO shall be furnished to the Chief, Procurement Division, Office of Operations.

(2) If the contracting officer is unable to submit a timely response, the GAO shall be notified, in writing or by phone, of the delay and the expected date of submission. The Chief, Procurement Division, Office of Operations, shall be notified accordingly.

(3) The report and any additional information requested by the GAO concerning the protest should be addressed to: General Counsel, Attn: Bid Protest Unit, General Accounting Office, Washington, D.C. 20548. The report shall be appropriately titled and dated and shall include the documents and statements required by FAR 14.407-8(a)(2).

(d) *Protests before award.* If a protest before award has been lodged with the GAO and the contracting officer determines in writing that it is necessary to make award under any of the circumstances, in FAR 14.407-8(b)(4), the determination must be approved by the HCA prior to contract award.

(e) *Protests after award.* Protests received after award shall be handled in accordance with paragraphs (b) and (c) above.

**PART 415—CONTRACTING BY NEGOTIATION****Subpart 415.3—Determinations and Findings To Justify Negotiations**

415.307 Signatory authority.

**Subpart 415.4—Solicitation and Receipt of Proposals and Quotations**

415.405 Solicitations for information or planning purposes.

415.408 Issuing solicitations.

415.411 Receipt of proposals and quotations.

**Subpart 415.5—Unsolicited Proposals**

415.504 Advance guidelines.

415.506 Agency procedures.

**Subpart 415.6—Source Selection**

415.607 Disclosure of mistakes before award.

415.612 Formal source selection.

**Subpart 415.8—Price Negotiation**

415.804 Cost or pricing data.

415.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

**Subpart 415.9—Profit**

415.902 Policy.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 415.3—Determinations and Findings To Justify Negotiation****415.307 Signatory Authority.**

(a) Those individual and class determinations and findings requiring agency head signature shall be submitted to the Director, Office of Operations, for review and referral to the Assistant Secretary for Administration for approval.

(b) The HCA is authorized to make determinations and findings under FAR 15.214 to permit negotiation after advertising.

(c) The HCA is authorized to make determinations to use the authority of FAR 15.211 to negotiate when not more than \$25,000 will be obligated. Determinations and findings for obligations estimated to exceed \$25,000 shall be forwarded to the Director, Office of Operations, for review and referral to the Assistant Secretary for Administration for approval.

**Subpart 415.4—Solicitation and Receipt of Proposals and Quotations****415.405 Solicitations for information or planning purposes.**

The written determination justifying use of a solicitation for information or planning purposes required by FAR 15.405-1 shall be approved by the HCA prior to release of the solicitation.

**415.408 Issuing solicitations.**

Solicitations involving classified information shall be issued as prescribed in Subpart 404.4.

**415.411 Receipt of proposals and quotations.**

Classified proposals and quotations shall be handled as prescribed in Subpart 404.4.

**Subpart 415.5—Unsolicited Proposals****415.504 Advance guidelines.**

HCA's are responsible for establishing advance guidelines as required by FAR 15.504 in accordance with contracting activities' missions and programs.

**415.506 Agency procedures.**

HCA's are responsible for establishing the procedures for control of unsolicited proposals required by FAR 15.506(a) and



for designating the contact point required by FAR 15.506(b).

#### Subpart 415.6—Source Selection

##### 415.607 Disclosure of mistakes before award.

The HCA with the concurrence of the Office of General Counsel is authorized to make the determination permitting proposal correction as required by FAR 15.607(c)(3).

##### 415.612 Formal source selection.

(a) The HCA shall determine when a formal source selection process will be used and establish procedures for implementing the requirements of FAR 15.612.

(b) The HCA shall be the formal selection official for all negotiated contracts over \$500,000.

(c) A copy of the established procedures shall be forwarded to the Director, Office of Operations.

#### Subpart 415.8—Price Negotiation

##### 415.804 Cost or pricing data.

##### 415.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

The HCA is authorized to waive the requirement for submission of certified cost or pricing data as allowed by FAR 15.804-3(i).

#### Subpart 415.9—Profit

##### 415.902 Policy.

(a) USDA will use a structured approach to determine the profit or fee prenegotiation objective in acquisition actions that require cost analysis based on the profit analysis factors in FAR 15.905.

(b) The following types of acquisitions are exempt from the requirements of the structured approach, but the contracting officer shall comply with FAR 15.905-1 when analyzing profit for these contracts or actions:

(1) All actions which do not require cost analysis;

(2) Architect-engineer contracts;

(3) Construction contracts;

(4) Contracts primarily requiring delivery of material supplied by subcontractors;

(5) Termination settlements;

(6) Cost-plus-award-fee contracts; and

(7) Other professional services.

(c) In developing a profit or fee objective, the contracting officer shall comply with the requirements in FAR 15.903.

(d) When profit analysis is required, any amount proposed by the prospective contractor for the cost of money for facilities capital allowable under FAR

31.205-10 shall be deducted from the prenegotiation cost base objective before calculating the profit objective.

(e) The HCA is responsible for establishing procedures to ensure compliance with this subpart.

#### PART 416—TYPES OF CONTRACTS

##### Subpart 416.2—Fixed-Price Contracts

416.203 Fixed-price contracts with economic price adjustment.

416.203-4 Contract clauses.

##### Subpart 416.3—Cost-Reimbursement Contracts

416.301 General.

416.301-3 Limitations.

416.306 Cost-plus-fixed-fee contracts.

##### Subpart 416.4—Incentive Contracts

416.403 Fixed-price incentive contracts.

416.404 Cost-reimbursement-incentive contracts.

416.404-1 Cost-plus-incentive-fee contracts.

416.404-2 Cost-plus-award-fee contracts.

##### Subpart 416.6—Time-and-Materials, Labor-Hour, and Letter Contracts

416.603 Letter contracts.

416.603-2 Application.

##### Subpart 416.7—Agreements

416.702 Basic agreements.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

##### Subpart 416.2—Fixed-Price Contracts

416.203 Fixed-price contracts with economic price adjustment.

416.203-4 Contract clauses.

An economic price adjustment clause based on cost indexes of labor or material may be used under the conditions listed in FAR 16.203-4(d) after approval by the Director, Office of Operations, and consultation with the Office of the General Counsel.

##### Subpart 416.3—Cost-Reimbursement Contracts

416.301 General.

416.301-3 Limitations.

(a) Determinations and findings authorizing the use of a cost-reimbursement type contract as described in FAR 16.302 through 16.306 shall be signed by the contracting officer after compliance with the limitations in FAR 16.301-3 and 16.404, as appropriate.

(b) Prepare determination and findings substantially in accordance with the following format:

##### Determination and Findings

Authority to Use Cost Reimbursement-Type Contract

I hereby find that:

(1) The [contracting activity name] proposes to contract with [name of proposed

contractor] for [describe work, service, or product] (identify program or project). The estimated cost is (\$—) (if contract is CPFF type, insert, "plus a fixed fee of (\$—), which is — percent of the estimated cost of fee").

(2) [Set forth facts and circumstances that show why it is impracticable to secure property or services of the kind or quantity required without the use of the proposed type of contract or why the proposed method of contracting is likely to be less costly than other methods.]

I hereby determine that:

On the basis of the above findings it is impracticable to secure the property or services of the kind or quality required without the use of (cost, cost-sharing, or cost-plus-a-fixed-fee) type of contract, or the (cost, cost-sharing, or cost-plus-a-fixed-fee) method of contracting is likely to be less costly than other methods.

Date:

(Signature)

##### 416.306 Cost-plus-a-fixed-fee contracts.

The determinations and findings establishing the basis for application of the statutory fee limitation (see FAR 16.306(c)(2) and 15.903(d)) shall be signed by the contracting officer and may be combined with the determination and findings prescribed in FAR 16.301-3.

##### Subpart 416.4—Incentive Contracts

416.403 Fixed-price incentive contracts.

Determinations and findings authorizing the use of a fixed-price incentive contract as described in FAR 16.403-1 through 16.403-2 shall be signed by the contracting officer after compliance with the limitations in FAR 16.403(c), 16.403-1(c) and 16.403-2(c), as appropriate.

416.404 Cost-reimbursement-incentive contracts.

416.404-1 Cost-plus-incentive-fee contracts.

In accordance with 416.301-3, determinations and findings authorizing the use of a cost-plus-incentive-fee contract under FAR 16.404-1 shall be signed by the contracting officer after compliance with the limitations in FAR 16.404-1(c).

416.404-2 Cost-plus-award-fee contracts.

In accordance with 416.301-3, determinations and findings authorizing the use of a cost-plus-award-fee contract under FAR 16.404-2 shall be signed by the contracting officer after compliance with the limitations in FAR 16.404-2(c).



**Subpart 416.6—Time-and-Materials, Labor-Hour, and Letter Contracts****416.603 Letter contracts.****416.603-2 Application.**

The HCA is authorized to extend the period for definitization of a letter contract required by FAR 16.603-2(c) in extreme cases where it is determined in writing that such action is in the best interest of the Government.

**Subpart 416.7—Agreements****416.702 Basic Agreements.**

Promptly after execution by the Government, HCA's shall furnish copies of basic agreements negotiated with contractors in accordance with FAR 16.702 to the Director, Office of Operations.

**PART 417—SPECIAL CONTRACTING METHODS****Subpart 417.2—Options****417.203 Solicitations.****417.206 Evaluation.****Subpart 417.4—Leader Company Contracting****417.402 Limitations.****Subpart 417.5—Interagency Acquisitions Under the Economy Act****417.502 General.****Subpart 417.6—Management and Operating Contracts****417.602 Policy.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 417.2—Options****417.203 Solicitations.**

The HCA shall authorize the use of option quantities in excess of the 50 percent limitation stated in FAR 17.203(g)(2).

**417.206 Evaluation.**

The HCA shall make the written determination required by FAR 17.206(a).

**Subpart 417.4—Leader Company Contracting****417.402 Limitations.**

The HCA shall authorize the use of leader company contracting procedures in FAR Subpart 17.4.

**Subpart 417.5—Interagency Acquisitions Under the Economy Act****417.502 General.**

The HCA shall make the determination required by FAR 17.502.

**Subpart 417.6—Management and Operating Contracts****417.602 Policy.**

(a) The Assistant Secretary for Administration shall make the determination to enter into or renew any management and operating contracts as prescribed in FAR 17.602(a).

(b) Written determinations shall be prepared for the Assistant Secretary's signature and submitted by the HCA to the Director, Office of Operations, for action. The determination shall be submitted prior to solicitation for the requirement and shall:

(1) Reference the statutory authority for awarding a management and operating contract;

(2) Discuss the relationship between the requirement and the limitations in FAR 17.603;

(3) Include a copy of the solicitation document including evaluation criteria;

(4) If non-competitive acquisition is proposed, include a copy of the justification.

(c) The HCA shall be responsible for conducting the reviews required by FAR 17.602(c).

**PART 418—[RESERVED]****SUBCHAPTER D—SOCIOECONOMIC PROGRAMS****PART 419—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS****Subpart 419.2—Policies.****419.201 General Policy.****419.201-70 Office of Small and Disadvantaged Business Utilization (OSDBU).****419.201-71 OSDBU coordinators.****419.201-72 Goals.****419.201-73 Reports.****419.202 Specific policies.****419.202-70 Specific policies relating to small businesses.****419.202-71 Specific policies relating to minority, disadvantaged, and women-owned businesses.****Subpart 419.5—Set-Asides for Small Business****419.506 Withdrawing or modifying set-asides.****Subpart 419.6—Certificates of Competency and Determinations of Eligibility****419.602 Procedures.****419.602-1 Referral.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 419.2—Policies****419.201 General policy.****419.201-70 Office of Small and Disadvantaged Business Utilization (OSDBU).**

The Office of Small and Disadvantaged Business Utilization shall develop policy, procedures and guidelines for the effective administration of the Department's small and disadvantaged business procurement preference program to include minority and women-owned businesses. OSDBU shall also evaluate contracting activity accomplishments, objectives and procedures with respect to these programs, and recommend corrective actions for program improvement. The HCA's and Departmental staff office directors whose programs generate requirements for contract actions shall administer the Department's procurement preference program within their organizations. This responsibility may be delegated to ensure program effectiveness.

**419.201-71 OSDBU coordinators.**

HCA's shall designate an OSDBU Coordinator in each contracting office. In addition, Departmental staff office directors whose programs generate contracts shall designate an OSDBU Coordinator. OSDBU Coordinators shall take positive actions which will maximize contracting opportunities for small businesses, including minority and women-owned businesses. The amount of time required for the performance of functions concerning this program shall be directly related to the number and dollar value of contract awards made in each office. In addition to their regular assigned duties, it is anticipated that about 20 percent of their time should be spent as OSDBU Coordinators. Supervisors of OSDBU Coordinators are encouraged to provide time for the coordinators to perform this important function. The duties and responsibilities of the OSDBU Coordinators shall include, but not be limited to, the following:

(a) Review each proposed acquisition expected to exceed \$25,000 prior to its solicitation. The Coordinator shall:

(1) Recommend section 8(a) action and identify potential contractors, or

(2) Identify available minority and women-owned businesses to be solicited by competitive procedures. Coordinators shall document the contract file with recommendations made and actions taken.

(b) Participate in goal-setting procedures and planning activities as described in 419.201-72.



(c) Ensure that the subcontracting clause entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns," as prescribed in FAR 19.708, is included in applicable solicitations. The coordinator shall participate in the review of those contracts which require the successful offeror to submit written plans for the utilization of small and small disadvantaged businesses as subcontractors.

(d) Ensure that small purchases (under \$25,000) are reserved exclusively for small businesses, including minority and women-owned businesses as prescribed by FAR 13.105 and 19.508. This policy shall be implemented unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased.

(e) Maintain comprehensive source listings of small, minority and women-owned businesses and utilize SBA's Procurement Automated Source System (PASS) and the National Minority Purchasing Council's Vendor Information Service to build and maintain these listings. Ensure that all small, minority and women-owned businesses seeking to do business are informed of the bid and proposal submission requirements, and of financial, management and technical assistance programs offered by SBA and the Minority Business Development Agency. Ensure that these firms, upon request, are directed to appropriate program and project personnel.

(f) Upon written request, provide small, minority and women-owned businesses the bidders mailing lists of individuals receiving solicitations which will contain the subcontracting clause entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns." These lists may be limited to those supplies or services of major interest to the requesting firms.

(g) Develop a program of contacts with local, small, minority, and women-owned trade, business, and professional associations and organizations and Indian tribal councils to apprise them of the Department's program needs and recurring contract requirements.

(h) Actively participate in the programs and activities of the local Minority Business Opportunity Committees (MBOC) and assist the Minority Business Development Centers (MBDC), where applicable. Become aware of and participate in locally sponsored workshops, conferences, trade fairs, etc., which are held to apprise small, minority and women-

owned firms about current and projected contracting opportunities.

(i) Periodically meet with program managers to discuss the section 8(a), small, minority and women-owned business programs and the impact which their requirements can have to achieve progress. Explore the feasibility of breaking large complex requirements into smaller lots suitable for participation by small, minority and women-owned firms. Encourage program managers to meet with these firms so that their capabilities can be demonstrated.

(j) Establish internal operating procedures which implement the requirements of the regulations as set forth in this Part 419. Compile data and prepare all reports pertaining to the small, minority and women-owned business activities. Ensure that these reports are accurate, complete and up-to-date.

#### 419.201-72 Goals.

(a) The Department is required by Pub. L. 95-507, Section 221, Executive Order 12138 (May 18, 1979) and Executive Order 12073 (August 16, 1978) to establish fiscal year goals for the procurement preference programs. Goals shall be reviewed and approved by the Director, Office of Small and Disadvantaged Business Utilization (OSDBU). HCA's and staff office directors whose programs generate contract requirements shall submit to the Director, OSDBU, the following data no later than August 1 of each fiscal year:

(1) An estimate of the total dollar amount of all prime contracts regardless of dollar value to be awarded during the fiscal year, including awards to non-profit organizations, educational institutions, all transportation services and real property leases. Do not include foreign military sales, contracts to be awarded and performed entirely outside the United States and Federal Supply Schedule orders;

(2) An estimate of the total dollar value of all prime contracts having a value of \$25,000 or more to be awarded during the fiscal year, including contracts to non-profit organizations, educational institutions, all transportation services and real property leases. Do not include foreign military sales, contracts to be awarded and performed entirely outside the United States and Federal Supply Schedule orders;

(3) A goal for prime contract awards valued at \$25,000 or more to be made to small business concerns during the fiscal year, expressed in dollars and as a

percentage of paragraph (a)(2) of this section;

(4) A goal for prime contract awards to be made to the Small Business Administration under the authority of Section 8(a) of the Small Business Act, as amended, expressed in dollars and as a percentage of paragraph (a)(1) of this section;

(5) A goal for prime contract awards valued at \$25,000 or more to be made to small business concerns owned and controlled by socially and economically disadvantaged individuals, expressed in dollars and as a percentage of paragraph (a)(2) of this section;

(6) A goal for prime contract awards to be made to small business concerns owned and controlled by women, expressed in dollars and as a percentage of paragraph (a)(1) of this section;

(7) A goal for prime contract awards to business concerns in Labor Surplus Areas (LSA) on the basis of set-asides, expressed in dollars and as a percentage of paragraph (a)(1) of this section. (This includes all categories of LSA set-asides authorized by Pub. L. 96-302);

(8) An estimate of the total dollar amount of subcontracts to be awarded by "reporting prime contractors" (as identified in Standard Form 295) during the fiscal year;

(9) A goal for subcontracts to be awarded by prime contractors to small business concerns, expressed in dollars and as a percentage of paragraph (a)(8) of this section; and

(10) A goal for subcontracts to be awarded by prime contractors to small business concerns owned and controlled by socially and economically disadvantaged individuals, expressed in dollars and as a percentage of paragraph (a)(8) of this section.

(b) The information developed in paragraph (a) shall include a detailed written presentation of the method used to establish the estimates and goals submitted pursuant to paragraphs (a) (1) through (10) of this section, along with copies of the historical, empirical data upon which the estimates and goals are based. Information about the types, kinds and amounts of goods and services brought and the numbers and types of contracts involved in the estimates submitted pursuant to paragraphs (a) (3) through (10) of this section is required. This information is needed to realistically evaluate the estimates and the goals related thereto. In establishing subcontracting goals, identification and justification should be provided for each class of contracts and the projected total value thereof determined to have little or no subcontract possibilities. Similarly, in



establishing goals for prime contract awards to small or small disadvantaged firms, contracts which have no potential for award to such firms, including the projected value thereof, should be identified.

(c) All goals are expressed in terms of dollars and percentages. However, if there is any significant variance, up or down, from the estimates in paragraph (a) (1) or (2) of this section, upon which the goals are established, the percentage goal is the controlling factor and will be used to measure actual attainment.

(d) Section 221 of Pub. L. 95-507 reserves all small purchases with certain exceptions for small business and requires that goals be established for awards over \$25,000 to small and small disadvantaged business. Thus, the goals under paragraphs (a) (3) and (5) of this section do not include awards under \$25,000.

#### 419.201-73 Reports.

(a) The Director, OSDDBU, shall be responsible for submitting reports concerning the Department's progress and achievements in the procurement preference program. Data for these reports shall be obtained from the USDA Procurement Reporting System (UPRS). Subcontracting data, however, cannot be retrieved from UPRS and shall be reported in accordance with paragraph (b) of this section.

(b) Contracting activities shall collect, summarize, and submit subcontracting data elements to the Director, OSDDBU. The data are to be reported quarterly for other than commercial products and annually for commercial products for contract awards in excess of \$500,000 (\$1 million for construction). Reports shall be submitted each quarter in the format of the Standard Form 295. An additional data form will be required in the fourth quarter for the annual report on commercial products. To ensure accurate and timely reporting, contracting activities shall perform the following:

(1) Submit the SF-295 on a contractor-by-contractor basis 30 calendar days following the end of the first, second, and third quarters and 45 days following the end of the fourth quarter.

(2) Edit all forms (data) prior to their submission. Forms must be completed in all fields of the "Cumulative Commitments" and "Subcontract Goal Achievement." OSDDBU will not assume that a blank field is a zero. Forms not fully completed will be returned. Contracting officers should communicate with the prime contractor's representative to ensure that consistent, accurate and timely data are submitted.

(3) In the "Cumulative Commitment" block, many contractors are reporting each quarter only those awards occurring in that quarter. OSDDBU will return quarterly reports on which the awards reported are less than those submitted on the previous quarter of the same fiscal year. Totals must add up to exactly 100 percent. The sum of line 9 must be the sum only of lines 9a and 9b. All dollar figures should be in whole numbers and not in thousands.

(4) In the "Subcontract Goal Achievement" block, the column headed "No. of Contracts" must reflect the number of contracts and subcontracts valued over \$500,000 (\$1 million for construction) which have subcontracting plans and goals. Delete the three zeros (000) in the "\$ Value of Subcontracts" column. The percentage of actual goal achievement reported on line 12b must always be 100 percent or higher and on line 12c must always be lower than 100 percent. The same applies for lines 13b and 13c.

(5) Items in lines 12 and 13 do not apply to company-wide annual subcontracting plans for commercial products. Accomplishments for these type plans are reported in line 14. The information reported must summarize all Federal contracts for commercial products performed during the year and the share of the total attributable to USDA from which contracts for such commercial products were received.

(c) Explanatory comments concerning shortfalls in meeting procurement preference program goals established in accordance with 419.201-72 shall be submitted to the Director, OSDDBU. Reports may be submitted in a narrative format and shall contain appropriate justifications for the goal shortfall(s). Achievements shall be based upon official AD-760 and SF-281 data as recorded in UPRS. Reports shall be submitted no later than November 20 of each fiscal year.

#### 419.202 Specific policies.

##### 419.202-70 Specific policies relating to small businesses.

OSDBU Coordinators shall take positive actions to ensure maximum participation of small business concerns in proposed acquisitions. These actions shall include:

(1) Developing a plan of operation to increase the share of contracts awarded to small business and LSA concerns;

(2) Reviewing the types and classes of items and services to be purchased to determine the applicability of small business and LSA set-aside priorities prescribed in 419.504(a);

(3) Developing adequate small business and/or LSA competition on all appropriate contract requirements;

(4) Making maximum utilization of SBA's Procurement Automated Source System (PASS) when considering contract requirements;

(5) Ensuring that specifications are not restrictive, thereby enabling small business participation;

(6) Assisting and counseling small business firms and especially those found to be nonresponsive or nonresponsible to help qualify them for future awards;

(7) Reviewing proposed large contract requirements to determine the potential for breaking out components suitable for purchase from small business firms or LSA concerns; and

(8) Ensuring that the SBA Resident Procurement Center Representative (PCR) is provided an opportunity and reasonable time to review any solicitation that meets the dollar threshold for small business and small disadvantaged business subcontracting plans.

##### 419.202-71 Specific policies relating to minority, disadvantaged, and women-owned businesses.

OSDBU Coordinator shall take positive action to ensure maximum participation of minority business enterprises, including women-owned, in proposed acquisitions. These actions shall include:

(a) Establishing aggressive minority and women-owned business goals based on the annual review of advance acquisition plans. These goals shall be submitted in accordance with 419.201-72.

(b) Attempting to direct those contracting requirements to the 8(a) program which match the abilities of the minority contractors located in the area where the contract will be performed.

(1) Recurring requirements should not be assigned to the 8(a) program, without consulting SBA, when small businesses are dependent in whole or in significant part on such Government requirements. However, this does not mean that a segment of a requirement could not be assigned to the 8(a) program.

(2) The SBA publication "Firms in the 8(a) Business Development Program" should be used as an aid in locating eligible contractors.

(3) Field personnel should be encouraged to locate and contact minority contractors for possible 8(a) participation. These contractors should be directed to the nearest District or Regional Office of SBA to make application for certification.



(c) Fully utilizing available minority and women-owned vendor listings, directories and query systems to ensure that eligible and qualified minority and women-owned business enterprises are included on bidders mailing lists and source lists.

(d) Nominating OSDBU Coordinators for appointment by the HCA at each contracting office. Duties of these coordinators shall be in accordance with 419.201-71.

(e) Providing training opportunities for all personnel involved in carrying out the Department's minority and women-owned business enterprise program.

(f) Preparing plans for the utilization of minority and women-owned business enterprises. These plans may be in the form of standard operating procedures, and they are to be followed by all personnel involved in carrying out this program.

#### **Subpart 419.5—Set-Asides for Small Business**

##### **419.506 Withdrawing or modifying set-asides.**

Disagreements between the contracting officer and OSDBU Coordinator concerning withdrawals or modifications of individual or class set-asides shall be forwarded to the HCA for resolution. The OSDBU Coordinator shall provide timely notification of such disagreements to the OSDBU in order to afford them an opportunity to provide assistance in resolving the dispute.

#### **Subpart 419.6—Certificates of Competency and Determinations of Eligibility**

##### **419.602 Procedures.**

##### **419.602-1 Referral.**

Contracting officers shall refer determinations of non-responsibility regarding small businesses directly to the SBA Regional Office servicing the location where the contractor's office (home) is located. This referral shall consist of the documents described in FAR 19.602-1(c).

#### **PART 420—LABOR SURPLUS AREA CONCERNS**

##### **Subpart 420.1—General**

420.170 Labor surplus area performance and goals.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

##### **Subpart 420.1—General**

420.170 Labor surplus area performance and goals.

(a) Construction and other "site-specific" contract requirements are applicable to labor surplus area set-

asides. Contracts which are restricted to labor surplus area concerns shall be recorded in fulfillment of labor surplus area goals.

(b) Contracts awarded under priorities (1), (3) and (5) of FAR 19.504(a) shall be recorded in fulfillment of labor surplus area goals. Contracting activities shall not record noncompetitive 8(a) contracts, purchases from blind and handicapped workshops, and purchases from Federal Prison Industries toward their LSA goals. However, contracts may be counted toward LSA goals whenever there is competition among firms in labor surplus areas which are also in the 8(a) Program.

(c) Small business-small purchase set-asides accomplished under the procedures in FAR 13.105 shall be counted toward fulfillment of LSA goals. The clause requiring firms to perform as LSA concerns shall be included in the purchase order or other purchase document. In addition, the following statement should be included in the SF-18, when applicable: "This request is restricted to small business (and labor surplus area firms)." The contracting officer shall document a firm's acceptance of the LSA provisions whenever solicitations are conducted orally.

(d) LSA goals shall be established in accordance with the provisions of 419.201-72.

#### **PART 421—[RESERVED]**

#### **PART 422—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

##### **Subpart 422.1—Basic Labor Policies**

422.103 Overtime.

422.103-4 Approvals.

##### **Subpart 422.6—Walsh-Healy Public Contracts Act**

422.604 Exemptions.

422.604-2 Regulatory exemptions.

422.608 Procedures.

422.608-4 Award pending final determination.

##### **Subpart 422.8—Equal Employment Opportunity**

422.803 Responsibilities.

422.804 Affirmative action programs.

422.804-2 Construction.

422.805 Procedures.

422.807 Exemptions.

##### **Subpart 422.10—Service Contract Act of 1965**

422.1003 Applicability.

422.1007 Notice of intention to make a service contract.

422.1011 Hearings.

##### **Subpart 422.13—Special Disabled and Vietnam Era Veterans**

422.1303 Waivers.

422.1306 Complaint procedures.

##### **Subpart 422.14—Employment of the Handicapped**

422.1403 Waivers.

422.1406 Complaint procedures.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

##### **Subpart 422.1—Basic Labor Policies**

422.103 Overtime.

422.103-4 Approvals.

Requests for the use of overtime shall be approved at a level above the contracting officer in accordance with the procedures in FAR 22.103-4.

##### **Subpart 422.6—Walsh-Healy Public Contracts Act**

422.604 Exemptions.

422.604-2 Regulatory exemptions.

The Assistant Secretary for Administration can request the Secretary of Labor to exempt contracts from the Walsh-Healy Public Contracts Act pursuant to FAR 22.604-2(c). A written finding justifying the request for exemption shall be prepared for the Assistant Secretary's signature and submitted by the HCA to the Director, Office of Operations, for referral to the Assistant Secretary.

422.608 Procedures.

422.608-4 Award pending final determination.

The HCA is delegated authority to approve the contracting officer's certification for award required by FAR 22.608-4.

##### **SUBPART 422.8—Equal Employment Opportunity**

422.803 Responsibilities.

The contracting officer shall submit questions involving the applicability of EO-11246 and FAR Subpart 22.8 through the HCA to the Director, Office of Operations, for resolution.

422.804 Affirmative action programs.

422.804-2 Construction.

The HCA shall ensure that each contracting office awarding nonexempt construction contracts maintains a current listing of covered geographical areas subject to affirmative action requirements specifying goals for minorities and women in covered construction trades.



**422.805 Procedures.**

(a) The contracting officer shall submit requests for preaward reviews directly to the appropriate OFCCP regional office in accordance with FAR 22.805(a) (4) and (5).

(b) The contracting officer shall obtain copies of the poster "Equal Opportunity is the Law" (OFCCP 1420), from the nearest regional GSA supply depot using stock NO. 769000-926-8988.

**422.807 Exemptions.**

(a) The Assistant Secretary for Administration is authorized to make the determination in FAR 22.807(a)(1) that a contract is essential to the national security.

(b) The contracting officer shall submit request for exemptions under FAR 22.807(a)(1), (a)(2), and (b)(5) through the HCA to the Director, Office of Operations, for determination by the Assistant Secretary for Administration or referral to the Director, OFCCP, as appropriate.

**Subpart 422.10—Service Contract Act of 1965****422.1003 Applicability.**

The contracting officer shall submit requests for determinations regarding application of the Service Contract Act and exemptions to the HCA for referral to the Department of Labor (DOL), Wage and Hour Administrator.

**422.1007 Notice of intention to make a service contract.**

The contracting officer shall contact the DOL, Wage and Hour Division, directly when expediting wage determinations or checking the status.

**422.1011 Hearings.**

The contracting officer shall submit a request for a hearing in accordance with FAR 22.1011 to the HCA for referral to the DOL, Office of Government Contract Wage Standards, for determination.

**Subpart 422.13—Special Disabled and Vietnam Era Veterans****422.1303 Waivers.**

(a) The Assistant Secretary for Administration is authorized to make the waiver determination under FAR 22.1303(a), and under FAR 22.1303(b) with concurrence of the Director, OFCCP.

(b) The contracting office shall submit requests for waivers through the HCA to the Director, Office of Operations.

**422.1306 Complaint procedures.**

The contracting officer shall forward complaints received about the administration of the Vietnam Era

Veterans Readjustment Assistance Act of 1972 directly to the DOL as prescribed in FAR 22.1306.

**Subpart 422.14—Employment of the Handicapped****422.1403 Waivers.**

(a) The Assistant Secretary for Administration is authorized to make the waiver determinations under FAR 22.1403(a), and under FAR 22.1403(b) with concurrence of the Director, OFCCP.

(b) The contracting officer shall submit requests for waivers through the HCA to the Director, Office of Operations.

**422.1406 Complaint procedures.**

The contracting officer shall forward complaints received about the administration of Section 503 of the Rehabilitation Act of 1973, as amended, directly to the OFCCP as prescribed in FAR 22.1406.

**PART 423—ENVIRONMENT, CONSERVATION, AND OCCUPATIONAL SAFETY****Subpart 423.1—Pollution Control and Clean Air and Water****423.104 Exemptions.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 423.1—Pollution Control and Clean Air and Water****423.104 Exemptions.**

(a) Requests for exemption shall be submitted to the Director, Office of Operations. The Office of Operations will coordinate review of the request with the appropriate staff and program officer and submit the request to the Assistant Secretary for Administration for decision.

(b) The Office of Operations shall notify the Environmental Protection Agency upon the granting of an individual exemption, and shall consult with the Environmental Protection Agency in advance of the granting of any class exemption.

**PART 424—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION****Subpart 424.2—Freedom of Information Act****424.202 Policy.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 424.2—Freedom of Information Act****424.202 Policy.**

USDA implementation of the Freedom of Information and Privacy Acts is found in 7 CFR, Subtitle A, Part 1, Subparts A and G, respectively. Contracting officers

shall follow these regulations when responding to requests for information or awarding contracts that will involve the design, development, or operation of a system of records on individuals to accomplish agency function.

**PART 425—FOREIGN ACQUISITION****Subpart 425.1—Buy American Act—Supplies****425.102 Policy.****425.105 Evaluating offers.****425.108 Excepted articles, materials and supplies.****Subpart 425.2—Buy American Act—Construction Materials****425.202 Policy.****425.203 Evaluating offers.****425.204 Violations.****Subpart 425.3—Balance of Payments Program****425.302 Policy.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 425.1—Buy American Act—Supplies****425.102 Policy.**

(a) The Assistant Secretary for Administration shall make the determination prescribed in FAR 25.102(a)(3).

(b) The HCA shall make the determination prescribed in FAR 25.102(a)(4) in accordance with 425.108.

**425.105 Evaluating offers.**

(a) FAR 25.105 provides that the price of a domestic end product is unreasonable if it exceeds specified percentages. The FAR, however, permits the agency head to determine that offers above these percentages are acceptable.

(1) Contracting officers who determine it is in the best interest of the Government to award a contract to a domestic firm whose offer exceeds the percentages specified in FAR 25.105(a) (1) and (2) may do so only with approval of the Assistant Secretary for Administration.

(2) Requests for approval must:

(i) Be directed to the Director, Office of Operations, by the HCA;

(ii) Be in writing; and

(iii) Provide a detailed justification for the reasonableness of the domestic offer.

(b) If an award of more than \$250,000 would be made to a domestic concern if the 12 percent factor were applied, but not if the 6 percent factor were applied, the Assistant Secretary for Administration shall decide whether award to the domestic concern would involve unreasonable cost. The HCA shall refer such proposed awards to the



Director, Office of Operations, for coordination of the necessary approval.

**425.108 Excepted articles, materials, and supplies.**

(a) The HCA shall determine if articles, materials, and supplies should be added to or deleted from the list in FAR 25.108(d)(1). The HCA shall provide a copy of all such determinations to the Director, Office of Operations.

(b) The Director of the Office of Operations shall submit a copy of each determination to the FAR Council in accordance with FAR 25.108 (b) and (c).

**Subpart 425.2—Buy American Act—Construction Materials**

**425.202 Policy.**

(a) The Assistant Secretary for Administration shall make the determination prescribed in FAR 25.202(a)(2).

(b) The HCA shall make the determination prescribed in FAR 25.202(a)(3) in accordance with the procedures in 425.108.

(c) The HCA shall make the determination prescribed in FAR 25.202(b).

**425.203 Evaluating offers.**

The Assistant Secretary for Administration may determine that the use of a particular domestic construction material would be impracticable or unreasonably increase the cost of the contract. If the Assistant Secretary makes such a determination, the restrictions of the Buy American Act shall be waived for that material for the contract in question.

(a) If a contracting officer determines that the use of a particular domestic construction material should be waived for a contract, the contracting officer shall submit the proposed award and the information prescribed in FAR 25.203(b) through the HCA to the Director, Office of Operations.

(b) The Director, Office of Operations, shall evaluate all waiver requests and make a recommendation for approval or disapproval to the Assistant Secretary for Administration.

**425.204 Violations.**

Contracting officers shall, in accordance with the debarment procedures prescribed in 409.4, refer all violations of the clause found in FAR 52.225-5 to the Department Debarment Officer for possible debarment action.

**Subpart 425.3—Balance-of-Payments Program**

**425.302 Policy.**

The HCA shall make the determinations prescribed in FAR 25.302(b) (2) and (3) and may authorize differentials greater than 50 percent as prescribed in FAR 25.302(c).

**PART 426—[RESERVED]**

**SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS**

**PART 427—[RESERVED]**

**PART 428—BONDS AND INSURANCE**

**Subpart 428.1—Bonds**

428.102-3 Solicitation requirements.

**Subpart 428.2—Sureties**

428.203 Options in lieu of sureties.

**Subpart 428.3—Insurance**

428.370 Government-owned vehicles operated in foreign countries.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 428.1—Bonds**

428.102-3 Solicitation requirements.

(a) When a performance or payment bond is required, the contracting officer shall insert the clause at 452.228-70, Notice of Required Bid Security.

(b) When a performance bond is required, the contracting officer shall insert the clause at 452.228-71, Notice of Required Performance Security.

(c) When a payment bond is required, the contracting officer shall insert the clauses at 452.228-72, Notice of Required Payment Security.

**Subpart 428.2—Sureties**

428.203 Options in lieu of sureties.

HCA's shall establish procedures to ensure protection and conveyance of deposited securities of the types listed in FAR 28.203-1 and 28.203-2.

**Subpart 428.3—Insurance**

428.370 Government-owned vehicles operated in foreign countries.

The Department is authorized to obtain insurance to cover liability incurred by any of its employees while acting within the scope of their employment and operating a Government-owned vehicle in a foreign country. (7 U.S.C. 2262).

**PART 429—[RESERVED]**

**PART 430—COST ACCOUNTING STANDARDS**

**Subpart 430.3—CAS Contract Requirements**

430.304 Waiver.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 430.3—CAS Contract Requirements**

430.304 Waiver.

(a) The Director, Office of Operations, is authorized to waive CASB requirements as prescribed in FAR 30.304(c).

(b) Requests for waivers under (a) above shall be prepared by the contracting officer as prescribed in FAR 30.304(a) and submitted by the HCA.

**PART 431—[RESERVED]**

**PART 432—CONTRACT FINANCING**

**Subpart 432.4—Advance Payments**

432.402 General.

**Subpart 432.5—Progress Payments Based on Costs**

432.502 Preaward matters.

432.502-2 Contract finance office clearance.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 432.4—Advance Payments**

432.402 General.

The HCA is designated as the individual responsible for making the findings and determination and for approval of contract terms concerning advance payments as required by FAR 32.402(e).

**Subpart 432.5—Progress Payments Based on Costs**

432.502 Preaward matters.

432.502-2 Contract finance office clearance.

The contracting officer shall obtain the approval of the HCA and the cognizant finance office for the contract before taking action under FAR 32.502-2.

**PART 433—DISPUTES AND APPEALS**

433.003 Applicability.

433.003-70 Agriculture Board of Contract Appeals.

433.009 Suspected fraudulent claims.

433.011 Contracting officer's decision.

433.012 Contracting officer's duties upon appeal.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**433.003 Applicability.**

(a) The Assistant Secretary for Administration is authorized to



determine the applicability of the Contract Disputes Act to contracts with foreign governments pursuant to FAR 33.003.

(b) A written determination shall be prepared for the Assistant Secretary's signature and submitted by the HCA to the Director, Office of Operations, for review and referral to the Assistant Secretary.

#### **433.003-70 Agriculture Board of Contract Appeals.**

The Agriculture Board of Contract Appeals (AGBCA) is authorized by the Secretary of Agriculture to hear, consider and determine appeals by contractors from decisions of USDA contracting officers under a contract or relating to a contract made by the Department or by any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal. All appeals brought before the Board are subject to the AGBCA Rules of Procedure in 7 CFR, Part 24.

All correspondence and documents to be filed with the Board should be addressed to the Board of Contract Appeals, U.S. Department of Agriculture, Washington, D.C. 20250.

#### **433.009 Suspected fraudulent claims.**

The contracting officer shall refer all matters related to suspected fraudulent claims by a contractor under the conditions in FAR 33.009 to the Office of the Inspector General for further action or investigation.

#### **433.011 Contracting officer's decision.**

The contracting officer's decision under FAR 33.011(a)(4) shall include the Board or Contract Appeals' mailing address and rules of procedure citation as referenced in 433.003-70.

#### **433.012 Contracting officer's duties upon appeal.**

Once notified by the AGBCA of an appeal, the contracting officer shall provide data, documentation, information, and support in accordance with the AGBCA Rules of Procedure, 7 CFR, 24.9.

### **SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING**

#### **PART 434—MAJOR SYSTEM ACQUISITION**

##### **434.001 Implementation.**

##### **434.002 Policy.**

##### **434.003 Responsibilities.**

##### **434.004 Acquisition strategy.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

##### **434.001 Implementation.**

(a) *Definition.* For the purpose of applying the policy and procedures of OMB Circular No. A-109 within the USDA, the definition of a major system contained in the Circular is to be followed subject to the following:

(1) All system acquisitions which are expected to result in at least 50 million dollars of acquisition costs with private industry are considered to be major system acquisitions and are subject to the requirements of OMB Circular No. A-109.

(2) Other system acquisitions not expected to result in acquisition costs in excess of this 50 million dollar limit may be specifically designated as major system acquisitions subject to A-109 by the USDA Acquisition Executive.

(3) Classification as a major system acquisition is independent of the number of component USDA contracting activities involved in the process. A major system acquisition may occur entirely within the jurisdiction of a single contracting activity or may involve more than one component USDA contracting activity.

(4) The Major Missions of USDA are documented in the USDA Program Structure Dictionary. All major system acquisitions will be in response to a "need" of one of these Major Missions.

(b) *Exemption.* Acquisition of major ADP systems which would otherwise be subject to the requirements of this section and OMB Circular A-109 are exempted from these requirements. USDA has other existing controls which provide the necessary reviews, approval and monitoring procedures to manage major ADP systems acquisitions.

##### **434.002 Policy.**

USDA concurs with the objectives of OMB Circular A-109 to assure effectiveness and efficiency in acquiring major systems and also views the guidelines stated in A-109 as necessary steps in the acquisition of any system, be it major or otherwise. The steps outlined in the Circular should serve as a guide to all contracting activities in the planning and developing of all systems. These steps should include:

- (a) Expressing needs in "mission terms" to encourage innovation;
- (b) Emphasizing initial activities of the system acquisition process;
- (c) Communicating with Congress at an early stage;
- (d) Establishing clear lines of authority, responsibility, and accountability;
- (e) Designating focal points for integration and unification of activities; and

(f) Relying on private industry in accordance with the policies established by OMB Circular No. A-76.

##### **434.003 Responsibilities.**

(a) The Secretary of Agriculture is charged by OMB Circular No. A-109 with the responsibility for making four key decisions in each major system acquisition process. These are summarized in paragraph nine of the Circular and elaborated in paragraphs ten through thirteen.

(b) The key executives of USDA, i.e., the Secretary, Deputy Secretary, Under Secretaries, and Assistant Secretaries, individually or as a group, will participate in the identification and definition of specific mission needs to be fulfilled in USDA and in the assignment of priorities to these needs. They will also be involved in assisting the Secretary in making the "key decisions" identified in A-109.

(c) The Assistant Secretary for Administration has been designated by the Secretary to be the Departmental Acquisition Executive. The Assistant Secretary will assure that OMB Circular No. A-109 is implemented in USDA and ensure that the management objectives of the Circular are realized. The Acquisition Executive is responsible for designating the program manager for each Major System Acquisition designating any acquisition in the Department as a Major System Acquisition and approving the written charter and project control system for each Major System Acquisition.

(d) The Office of Operations will serve as the cognizant staff office in assisting the Assistant Secretary for Administration in carrying out the above responsibilities. The Office of Operations will access the budget development and review process to identify potential major system acquisitions and bring them to the attention of the Assistant Secretary.

##### **(e) HCA's must:**

(1) Become familiar with the requirements of OMB Circular No. A-109 and ensure that contracting activity personnel are knowledgeable regarding the Circular.

(2) Take such steps as are necessary to ensure that all potential Major System Acquisitions are brought to the attention of the Acquisitions Executive.

(3) Recommend qualified candidates for designations as program managers for each major system acquisition within their jurisdictions.

(4) Ensure that program managers fulfill their responsibilities and discharge their duties.



(5) Cooperate with the Assistant Secretary for Administration and the Office of Finance and Management in implementing the requirements of the Circular.

(6) Adhere to the principles outlined in the Circular with regard to all major system acquisitions.

(7) Use the principles outlined in the Circular as a guideline for other acquisitions.

(f) Program Managers will:

(1) Plan and carry out the proposed objective of the Major System Acquisition.

(2) Schedule and monitor all aspects of the projects using an appropriate project control system.

(3) Provide analysis papers to recommend decisions to the key executives of USDA and the Secretary.

(4) Document USDA compliance with A-109.

#### 434.004 Acquisition strategy.

(a) The Program Manager will assume operational responsibility for the planning and execution of the Major System Acquisition upon designation by the Acquisition Executive.

(b) The Program Manager will work closely with the Acquisition Executive to develop a written charter outlining the authority, responsibility, accountability, and budget for accomplishing the proposed objective.

(c) The Program Manager will develop a project control system to schedule, monitor, and regularly report on all aspects of the project. The control system will be presented to the Acquisition Executive for approval. In developing the control system, the Program Manager shall provide for appropriate reporting periods and for checkpoints consistent with the "key decisions" Section No. 9 of OMB Circular No. A-109.

(d) Upon initiation of the project, the Program Manager will report regularly (at least monthly) to the Acquisition Executive on the progress achieved to that point. The reports shall include information with regard to the requirements of OMB Circular No. A-109 and how the objectives of the Circular have been realized to present time. Also, the reports shall contain a statement as to what is planned for the next reporting period both in terms of the project itself and the requirements of A-109.

(e) As each "key decision" point is reached, the Program Manager will prepare detailed analysis, findings and recommendations to be submitted, through the Acquisition Executive, to the key executives in the Department. The

program manager shall also prepare additional reports and documentation as requested by the key executives.

(f) The Program Manager will work closely with the Director, Office of Finance and Management, with regard to budgeting and financing for the system and will provide the necessary information to OMB and Congress as required by Circular A-109.

### PART 435—RESEARCH AND DEVELOPMENT CONTRACTING

435.010 Scientific and technical reports.

435.015 Contracts for research with educational institutions and nonprofit organizations.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### 435.010 Scientific and technical reports.

(a) Pursuant to FAR 35.010(b), research and development contracts shall contain a provision requiring that the contractor send copies of all scientific and technical reports to the National Technical Information Service (303Y), Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

(b) The release of research and development contract results to other Government activities and to the private sector is subject to the provisions of FAR Subject 4.4

#### 435.015 Contracts for research with educational institutions and nonprofit organizations.

(a) Promptly after execution of a basic agreement for research and development with an educational institution or nonprofit organization, the HCA shall furnish a copy of the agreement to the Director, Office of Operations.

(b) The Director, Office of Operations, shall furnish the list required under FAR 35.015(b)(3) to the FAR Secretariat.

### PART 436—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

#### Subpart 436.2—Special Aspects of Contracting for Construction

436.201 Evaluation of contractor performance.

436.209 Construction contracts with architect-engineer firms.

#### Subpart 436.3—Special Aspects of Formal Advertising in Construction Contracting

436.370 Additive or deductive items.

#### Subpart 436.5—Contract Clauses

436.570 Prohibition against use of lead-based paint.

#### Subpart 436.6—Architect-Engineer Services

436.602 Selection of firms for architect-engineer contracts.

436.602-1 Selection criteria.

436.602-2 Evaluation boards.

436.602-3 Evaluation board functions.

436.602-4 Selection authority.

436.602-5 Short selection processes for contracts not to exceed \$10,000.

436.603 Collecting data on and appraising firms' qualifications.

436.604 Performance evaluation.

436.606 Negotiations.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 436.2—Special Aspects of Contracting for Construction

##### 436.201 Evaluation of contractor performance.

(a) HCA's shall establish procedures to evaluate construction contractor performance including instructions for review of the evaluation report (SF-1420) as prescribed in FAR 36.201 and 36.701(e).

##### 436.209 Construction contracts with architect-engineer firms.

(a) As required by FAR 36.209, no contract for construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates without the written approval of the Director, Office of Operations.

(b) Requests for approval under (a) above shall be made by the HCA to the Director, Office of Operations. The request shall include the reason(s) why award to the design firm is required; an analysis of the facts involving potential or actual organizational conflicts of interest including benefits and detriments to the Government and the prospective contractor; and the measures which are to be taken to avoid, neutralize, or mitigate conflicts of interest.

#### Subpart 436.3—Special Aspects of Formal Advertising in Construction Contracting

##### 436.370 Additive or deductive items.

(a) When it appears that funds available for a project may be insufficient for all the desired features of construction, the contracting officer may provide in the solicitation for a base bid item covering the work generally as specified and for one or more additive or deductive bid items which progressively add or omit specified features of the work in a stated order or priority. In such case, the invitation shall include a provision substantially as set forth in 452.236-71, and the low bidder and the bid items to be awarded shall be determined as therein provided.



**Subpart 436.5—Contract Clauses****436.570 Prohibition against use of lead-based paint.**

(a) *Policy.* The Lead-Based Paint Poisoning Prevention Act, as amended by the National Consumer Health Information and Health Promotion Act of 1976 (42 U.S.C. 4831), prohibits the use of lead-based paint in Federal or Federally-assisted construction or rehabilitation of residential structures. Implementing regulations of the Secretary of Housing and Urban Development under 24 CFR Part 35 requires agencies to include appropriate provisions in contracts or subcontracts for construction or rehabilitation of residential structures.

(b) *Definitions.* As used in this section, "residential structure" means any house, apartment, or structure intended for human habitation including any institutional structure where persons reside such as an orphanage, boarding school dormitory, day care center, or extended care facility.

(c) *Procedures.* The contracting officer shall insert the clause at 452.236-70, Prohibition Against Use of Lead-Based Paint, in solicitations and contracts when construction of residential structures or rehabilitation (including dismantling, demolition, or removal) of residential structures is contemplated.

**Subpart 436.6—Architect-Engineer Services****436.602 Selection of firms for architect-engineer contracts.****436.602-1 Selection criteria.**

(a) In addition to the selection criteria under FAR 36.602-1(a), the following criteria shall be used in the evaluation of each potential contractor when applicable to a particular acquisition:

- (1) Computer-assisted design capability and capacity (where such design is required).
- (2) Adequacy of facilities for performance of the work including those necessary to provide specialized services that may be required.
- (3) Volume and nature of present workload as it relates to the ability to perform the work required.
- (4) Experience and qualifications of proposed key personnel including specialized technical skills, project coordination and management skills, and experience in working together as a team.
- (5) Availability of additional contractor personnel or consultants to support expansion or acceleration of the project.
- (6) Other specific criteria as may be required.

(b) HCA's are authorized to approve the use of design competition under the conditions in FAR 36.602-1(b).

**436.602-2 Evaluation boards.**

HCA's shall establish procedures for providing permanent or ad hoc architect-engineer evaluation boards as prescribed in FAR 36.602-2. Procedures may provide for the appointment of private practitioners of architecture, engineering, or related professions when such action is determined by the HCA to be essential to meet the Government's minimum needs.

**436.602-3 Evaluation board functions.**

(a) Firms shall be evaluated in accordance with the criteria in 436.601-1, as applicable, as well as the criteria in FAR 36.602-1.

(b) The selection report required in FAR 36.602-3(d) shall be prepared for the approval of the HCA. The HCA may authorize an acquisition official above the level of the contracting officer to execute the required approval.

**436.602-4 Selection authority.**

The HCA shall serve as the selection authority in accordance with FAR 36.602-4. The HCA may authorize an acquisition official above the level of the contracting officer to serve as the selection authority.

**436.602-5 Short selection processes for contracts not to exceed \$10,000.**

The selection process prescribed in FAR 36.602-5(a) shall be used for architect-engineer contracts not expected to exceed \$10,000.

**436.603 Collecting data on and appraising firms' qualifications.**

(a) HCA's which require architect-engineer services shall establish procedures to comply with the requirements of FAR 36.603.

(b) Copies of procedures established under (a) above shall be submitted to the Director, Office of Operations, for review and approval. The procedures shall include a list of names, addresses, and phone numbers of offices or boards assigned to maintain architect-engineer qualification data files. The list shall be updated annually.

**436.604 Performance evaluation.**

(a) HCA's shall establish procedures to evaluate architect-engineer contractor performance including instructions for review of the evaluation report (SF-1421) as prescribed in FAR 36.604 and 36.702(c).

(b) Performance reports shall be distributed to the HCA for filing, distribution points in FAR 36.604(c), and

other points required by internal procedures.

**436.606 Negotiations.**

Whenever a proposal is solicited from an architect-engineer firm selected for negotiation, the contracting officer shall include in the request for proposal a reference to 436.209 as required by FAR 36.606(c).

**PART 437—SERVICE CONTRACTING****Subpart 437.2—Consulting Services****437.205 Management controls.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 437.2—Consulting Services****437.205 Management controls.**

Contracts for consulting services are subject to the management controls and procedures in Departmental Regulation 5000-2, "Contracting for Consulting Services."

**PART 438—[RESERVED]****PART 439—MANAGEMENT, ACQUISITION, AND USE OF INFORMATION RESOURCES****Subpart 439.70—Delegation of Acquisition Authority****439.7001 Delegation threshold limitations.****439.7002 Other limitations.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 439.70—Delegation of Acquisition Authority****439.7001 Delegation threshold limitations.**

Contracting activities delegated general contracting authority by the Office of Operations are hereby delegated specific authority for acquisition of automatic data processing equipment, services, and related supplies in the following circumstances:

- (a) *ADP equipment.* (1) Card punching, verifying, and manipulating equipment described as electronic accounting machines (EAM) or punch card accounting machines (PCAM) where the total dollar cost does not exceed \$100,000 for purchase or annual rental.
- (2) Any other items of ADP equipment where the total dollar cost does not exceed \$100,000 for purchase or annual rental; provided, that no existing computer system is augmented under this delegation such that the purchase cost (cost to purchase if leased) of all the components of that system are made to exceed \$400,000.
- (3) Renewal of equipment up to \$100,000 for purchase or annual rental, or within the dollar limits and time frame of the original delegation.



(b) *ADP equipment maintenance.* The acquisition does not exceed \$50,000 annually.

(c) *ADP software.* The total acquisition for the specific software package does not exceed \$15,000 annual lease cost, excluding maintenance, or \$20,000 purchase cost.

(d) *ADP services.* The cost of the ADP service does not exceed \$50,000.

(e) *ADP supplies.* (1) The cost of the supplies does not exceed \$5,000; or (2) The acquisition will be made under a specific purchase program established by CSA. These programs include electronic data processing (EDP) tapes, tabulating machine cards, and marginally punched continuous forms.

#### 439.7002 Other limitations.

All acquisitions which are not within the authorities set forth in 439.7001 must be submitted to the Director, Office of Operations, for delegation of contracting authority. The Office of Operations will either conduct the acquisition or delegate authority to the contracting activity to conduct the acquisition.

### SUBCHAPTER G—CONTRACT MANAGEMENT

#### PART 440—[RESERVED]

#### PART 441—[RESERVED]

### PART 442—CONTRACT ADMINISTRATION

#### Subpart 442.1—Interagency Contract Administration and Audit Services

##### 442.102 Procedures.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 442.1—Interagency Contract Administration and Audit Services

##### 442.102 Procedures.

(a) The Office of the Inspector General (OIG), Audit Division, has established a cross-servicing arrangement with the Defense Contract Audit Agency (DCAA) to provide contract audit services required by the FAR.

(b) All contract audit services required by contracting officers shall be coordinated through the cognizant OIG Regional Inspector General—Auditing (RIG-A). Cognizance is determined on the basis of the contractor's location. The OIG will, at its discretion, perform the audit with OIG personnel or refer the request to the DCAA if such would be more practical due to workload considerations or the location of the contractor. There is no charge for audit services coordinated through OIG.

(c) In order to ensure compliance with this requirement and to evaluate the

results of audits, contracting officers shall forward to the RIG-A copies of all price negotiation memoranda prepared for contracts and contract modifications in excess of \$500,000.

#### PART 443—[RESERVED]

#### PART 444—[RESERVED]

### PART 445—GOVERNMENT PROPERTY

#### Subpart 445.3—Providing Government Property to Contractors

##### 445.302 Providing facilities.

##### 445.302-1 Policy.

#### Subpart 445.4—Contractor Use and Rental of Government Property

##### 445.403 Rental—Use and Charges Clause.

##### 445.407 Non-Government use of plant equipment.

#### Subpart 445.6—Reporting, Redistribution and Disposal of Contractor Inventory

##### 445.608 Screening of contractor inventory.

##### 445.608-6 Waiver of screening requirements.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 445.3—Providing Government Property to Contractors

##### 445.302 Providing facilities.

##### 445.302-1 Policy.

HCA's are authorized to make determinations for providing facilities to a contractor as prescribed in FAR 45.302-1(a)(4).

#### Subpart 445.4—Contractor Use and Rental of Government Property

##### 445.403 Rental—Use and Charges clause.

HCA's are authorized to make determinations for charging rent on the basis of use under the Use and Charges clause in FAR 52.245-9 as prescribed in FAR 45.403(a).

##### 445.407 Non-Government use of plant equipment.

Requests for non-Government use of plant equipment as prescribed in FAR 45.407 shall be submitted by the HCA to the Director, Office of Operations, for approval.

#### Subpart 445.6—Reporting, Redistribution and Disposal of Contractor Inventory

##### 445.608 Screening of contractor inventory.

##### 445.608-6 Waiver of screening requirements.

Requests to waive screening requirements as prescribed in FAR 45.608-6 shall be submitted by the HCA to the Director, Office of Operations, for approval.

### PART 446—QUALITY ASSURANCE

#### Subpart 446.6—Material Inspection and Receiving Reports

##### 446.601 Inspection and receiving.

##### 446.602 Acceptance.

##### 446.603 Inspection, acceptance, and receiving certification.

##### 446.604 Distribution of material inspection and receiving reports.

#### Subpart 446.7—Warranties

##### 446.704 Authority for use of warranties.

##### 446.708 Warranties of data.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

#### Subpart 446.6—Material Inspection and Receiving Reports

##### 446.601 Inspection and receiving.

(a) The certification stated in 446.603 shall be inserted on each commercial shipping document or packing list for supplies or services and shall be signed by the authorized Government representative as required by FAR 46.401(f), except for small purchases (see FAR 46.404).

(b) Form AD-838, Purchase Order, shall be used to comply with the requirements of FAR 46.406(f) and FAR 46.404.

(c) The certification required by 446.601(a) shall be made at the place or places specified in the contract for performance of Government quality assurance as required by FAR 46.401(b) and as prescribed in FAR 46.402 or FAR 46.403, as appropriate.

##### 446.602 Acceptance.

(a) The certification stated in 446.603 shall be inserted on each commercial shipping document or packing list for supplies or services and signed by the authorized Government representative as required by FAR 46.501.

(b) The certification required by 446.602(a) shall be made at the place or places specified in the contract for Government acceptance as required by FAR 46.503.

(c) If the contracting officer elects to use a contractor's certificate of conformance as allowed by FAR 46.315 under the conditions prescribed by FAR 46.504, the certificate may be used as the basis for Government acceptance.

(d) Form AD-838, Purchase Order, shall be used to comply with the requirements of FAR 46.501.

##### 446.603 Inspection, acceptance and receiving certification.

As prescribed in this subpart, the following certification shall be inserted on commercial shipping documents or packing lists for supplies or services:



**Inspection, Acceptance and Receiving Certification**

The listed items or services have been: \_\_\_\_\_ inspected, \_\_\_\_\_ accepted, \_\_\_\_\_ received by me or under my supervision and they conform to contract except as noted below or on attached documents.

Date \_\_\_\_\_  
(Signature) \_\_\_\_\_

(Typed name of authorized  
Government representative)

**446.604 Distribution of material inspection and receiving reports.**

Distribution of material inspection and receiving reports shall be made in accordance with established procedures established by contracting activities.

**Subpart 446.7—Warranties****446.704 Authority for use of warranties.**

The HCA is authorized to approve the use of warranties as prescribed by FAR Subpart 46.7.

**446.708 Warranties of data.**

Warranties of data shall be developed and used only after review and approval by OGC.

**PART 447—[RESERVED]****PART 448—VALUE ENGINEERING****Subpart 448.1—Policies and Procedures****448.102 Policies.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 448.1—Policies and Procedures****448.102 Policies.**

(a) USDA is exempt from the requirements of FAR Part 48, Value Engineering.

(b) HCA's are encouraged to implement value engineering programs in their contracting activities in accordance with FAR Part 48 when it has been determined by the HCA that such implementation is in the best interest of the Government.

**PART 449—TERMINATION OF CONTRACTS****Subpart 449.1—General Principles****449.106 Fraud or other criminal conduct.**

449.107 Audit of prime contract settlement proposals and subcontract settlements.

449.111 Review of proposed settlements.

**Subpart 449.4—Termination for Default****449.402 Termination of fixed-price contracts for default.****449.402-3 Procedure for default.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 449.1—General Principles****449.106 Fraud or other criminal conduct.**

(a) Whenever fraud, such as falsified documents, false statements, or other criminal conduct related to the settlement of a terminated contract is suspected, the contracting officer shall discontinue negotiations and prepare a report of the facts. The report shall be submitted by the HCA to the Inspector General along with copies of documents or other information connected with the suspected violation(s). Concurrently, a copy of the report shall also be submitted to the Director, Office of Operations.

(b) Depending of the findings of the Inspector General, the HCA may initiate suspension of debarment action as prescribed in FAR Part 9.4 and Part 490.4 of this chapter.

**449.107 Audit of prime contract settlement proposals and subcontract settlements.**

Prime contractor settlement proposals and subcontract settlements requiring audit review in accordance with FAR 49.107 shall be referred to the Inspector General.

**449.111 Review of proposed settlements.**

All proposed settlement agreements shall be reviewed and approved at a level above the contracting officer in accordance with contracting activity procedures. Settlement agreements of \$50,000 or more shall be approved by the HCA.

**Subpart 449.4—Termination for Default****449.402 Termination of fixed-price contracts for default.****449.402-3 Procedure for default.**

(a) In addition to the requirements of FAR 49.402-3(g), the notice of termination shall contain instructions regarding the disposition of any Government property in the possession of the contractor (see FAR 45.508-1) and, in the case of construction contracts, such materials, appliances, and structures as may be on the site of the construction work. The notice shall also contain a statement concerning the liability of the contractor or its surety for any liquidated damages (see FAR 49.402-7).

(b) The notice of termination suggested under FAR 49.601-2 shall be modified in accordance with (a) above.

**PART 450—EXTRAORDINARY CONTRACTUAL ACTIONS****450.001 Definitions.****Subpart 450.1—General****450.103 Deviations.****450.104 Reports.****Subpart 450.2—Delegation of and Limitations on Exercise of Authority****450.201 Delegation of authority.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**450.001 Definitions.**

"Approving authority," as used in this part, means the Assistant Secretary for Administration.

**Subpart 450.1—General****450.103 Deviations.**

Requests for deviations to FAR Part 50 shall be submitted by the HCA to the Director, Office of Operations, for approval.

**450.104 Reports.**

The Director, Office of Operations, shall prepare the report required by FAR 50.104.

**Subpart 450.2—Delegation of and Limitations on Exercise of Authority****450.201 Delegation of authority.**

The Assistant Secretary for Administration is authorized to approve all actions under FAR Part 50 except indemnification actions listed in FAR 50.201(d).

**PART 451—[RESERVED]****SUBCHAPTER H—CLAUSES AND FORMS****PART 452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES****Subpart 452.2—Texts of Provisions and Clauses****452.210-70 Brand name or equal.****452.228-70 Notice of required bid security.****452.228-71 Notice of required performance security.****452.228-72 Notice of required payment security.****452.232-70 Interest on overdue payments.****452.232-71 Payment due date.****452.232-72 Invoices.****452.236-70 Prohibition against use of lead-based paint.****452.236-71 Additive or deductive items.**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**Subpart 452.2—Texts of Provisions and Clauses****452.210-70 Brand name or equal.**

As prescribed in 410.004, insert the following provision in solicitations which contain a "brand name or equal" purchase description:



**Brand Name or Equal (Apr 1984)**

(As used in this clause, the term "brand name" includes identification of products by make and model.)

(a) If items called for by this solicitation have been identified in the schedule by a "brand name or equal" description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering "equal" products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bids or proposals and are determined by the Government to meet fully the salient characteristics requirements listed in the solicitation.

(b) Unless the bidder clearly indicates in its bid that it is offering an "equal" product, its bid shall be considered as offering a brand name product referenced in the solicitation.

(c)(1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the solicitation, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in its bid as well as other information reasonably available to the contracting activity. Caution to bidders: The contracting activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the contracting activity. Accordingly, to assure that sufficient information is available, the bidder must furnish as a part of its bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the contracting activity to (i) determine whether the product offered meets the salient characteristics requirement of the solicitation and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific reference to information previously furnished or to information otherwise available to the contracting activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the solicitation, the bid shall include (i) a clear description of such proposed modifications and (ii) clearly marked descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the solicitations will not be considered.

(End of clause)

**452.228-70 Notice of Required Bid Security.**

As prescribed in 428.102-3(a), insert the following clause in solicitations:

**Notice of Required Bid Security (Apr 1984)**

Each bidder must submit a bid guarantee in the amount of \_\_\_\_\_ percent of the total bid price, but in no event shall the penal sum exceed \$3 million. If a bid bond is submitted, it should be on Standard Form 24. Money orders and checks, if used, shall be drawn payable to: (insert name of the USDA contracting activity).

(End of clause)

**452.228-71 Notice of Required Performance Security.**

As prescribed in 428.102-3(b), insert the following clause in solicitations:

**Notice of Required Performance Security (Apr 1984)**

The successful bidder shall furnish security to guarantee faithful performance of the contract in the amount of \_\_\_\_\_ percent of the total contract price. Security may be in the form of a performance bond on Standard Form 25 (furnished on request), or in the form of a postal money order, certified check or cashier's check, or United States Government bonds or notes (at par value) may be deposited in accordance with Treasury Regulations. Money orders and checks shall be drawn payable to: (insert name of the USDA contracting activity).

(End of clause)

**452.228-72 Notice of Required Payment Security.**

As prescribed in 428.102-3(c), insert the following clause in solicitations:

**Notice of Required Payment Security (Apr 1984)**

The successful bidder shall furnish security to guarantee payment to all persons supplying labor or materials in the performance of the contract, such security to be in the form of a payment bond on Standard Form 25A (furnished on request). The penal sum of the payment bond shall equal:

- (a) 50 percent of the contract price, if the contract price is not more than \$1 million;
- (b) 40 percent of the contract price, if the contract price is more than \$1 million but not more than \$5 million; or
- (c) \$2½ million, if the contract price is more than \$5 million.

(End of clause)

**452.232-70 Interest on Overdue Payments.**

The following clause, which sets forth the Government's liability for interest penalties, shall be included (incorporation may be by reference) in all nonexempt contracts and purchase orders, including leases of real property. Exempt contracts and purchase orders include:

(a) Those for which payment is made for financing purposes before receipt of complete delivered items of property or service;

(b) Contracts for utilities (gas, water, electricity, etc.) that include provisions

for late payment charges established by tariff or State regulatory commissions; or

(c) Informal contracts for the purchase of utilities under a tariff when such tariff provides for late payment charges.

**Interest on Overdue Payments (Apr 1984)**

(a) The Prompt Payment Act, Public Law 97-177 (96 Stat. 85, 31 U.S.C. 1801) is applicable to payments under this contract and requires the payment to contractors of interest on overdue payments and improperly taken discounts.

(b) Determinations of interest due will be made in accordance with the provisions of the Prompt Payment Act and Office of Management and Budget Circular A-125.

(End of clause)

**452.232-71 Payment Due Date.**

(a) When invoices required to be furnished by contractors may be received before the Government has had an opportunity to inspect and accept the supplies or services, the following clause shall be included in all nonexempt contracts and purchase orders not exceeding \$25,000 (exemptions are defined in 452.232-70):

**Payment Due Date (Apr 1984)**

(a) Payments under this contract will be due on the 30th calendar day after the latter of:

(1) The date of actual receipt of a proper invoice in the office designated to receive the invoice, or

(2) The date the supplies are accepted by the Government.

(b) For the purpose of determining the due date for payment and for no other purpose, acceptance will be deemed to occur on the 15th calendar day after the date of delivery of the supplies in accordance with the terms of the contract.

(c) If the supplies are rejected for failure to conform to the technical requirements of the contract, or for damage in transit or otherwise, the provisions in paragraph (b) of this clause will apply to the new delivery of replacement supplies.

(d) The date of the check issued in payment shall be considered to be the date payment is made.

(End of clause)

(b) The following clause shall be included in all nonexempt contracts and purchase orders not exceeding \$25,000 (exemptions are defined in 452.232-70), when invoices may be required to reflect that delivery (or performance) and acceptance has already occurred. This would be the situation in the case of supplies purchased on an f.o.b. origin basis, with inspection and acceptance at source, and proof of shipment (e.g., a Government bill of lading) required to be furnished with the invoice. This may also be the case with respect to various contracts for services.



**Payment Due Date—Alternate I (Apr 1984)**

(a) Payments under this contract will be due on the \_\_\_\_\_ calendar day after the date of actual receipt of a proper invoice in the office designated to receive the invoice.

(b) The date of the check issued in payment shall be considered to be the date payment is made.

(End of clause)

(c) The following clause shall be included in all contracts or purchase orders not exceeding \$25,000 for leases of real property:

**Payment Due Date—Alternate III (Apr 1984)**

(a) Payments under this contract will be due on the 15th calendar day of the month following that in which payment accrued.

(b) The date of the check issued in payment shall be considered to be the date payment is made.

(End of clause)

**452.232-72 Invoices.**

Insert the following clause in all contracts and purchase orders (unless the clause at FAR 52.213-2 applies). The contracting officer may appropriately modify the clause to request additional information under paragraph (b):

**Invoices (Apr 1984)**

(a) Invoices shall be submitted in an original and 2 copies to the Government office designated in this contract or on the delivery order to receive invoices. To constitute a proper invoice, the invoice must include the following information and/or attached documentation:

- (1) Name of the business concern and invoice date.
- (2) Contract number, or other authorization for delivery of property or services.
- (3) Description, price, and quantity of property and services actually delivered or rendered.
- (4) Shipping and payment terms.
- (5) Name (where practicable), title, phone number, and complete mailing address of responsible official to whom payment is to be sent.

(b) To assist the Government in making timely payments, the Contractor is requested to furnish the following additional information either on the invoice or on an attachment to the invoice: (List any such additional information.)

(End of clause)

**452.236-70 Prohibition Against Use of Lead-based Paint.**

As prescribed in 436.570, insert the following clause in solicitations and contracts when construction of residential structures or rehabilitation (including dismantling, demolition, or removal) of residential structures is contemplated:

**Prohibition Against the Use of Lead-Based Paint (Apr 1984)**

No lead-based paint containing more than .5 of 1 percent lead by weight (calculated as

lead metal) in the total nonvolatile content of paint, or the equivalent measure of lead in the dried film of paint already applied, or both, or with respect to paint manufactured after June 23, 1977, no lead-based paint containing more than .06 of 1 percent lead by weight (calculated as lead metal) in the total nonvolatile content of the paint, or the equivalent measure of lead in the dried film of paint already applied, or both, shall be used in the construction or rehabilitation of residential structures under this contract or any resulting subcontracts.

(End of clause)

**452.236-71 Additive or Deductive Items.**

As prescribed in 436.370, insert the following clause in solicitations when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. Contracting officers may use the clause in solicitations when a resultant contract within the small purchase limitation is expected.

**Additive or Deductive Items (Apr 1984)**

The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus (in the order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened. If addition of another bid item in the listed order of priority would make the award exceed such funds for all bidders, it shall be skipped and the next subsequent additive bid item in a lower amount shall be added if award thereon can be made within such funds. For example, when the amount available is \$100,000 and a bidder's base bid and four successive additives are \$85,000, \$10,000, \$8,000, \$6,000, and \$4,000, the aggregate amount of the bid for purposes of award would be \$99,000 for the base bid plus the first and fourth additives, the second and third additives being skipped because each of them would cause the aggregate bid to exceed \$100,000. In any case all bids shall be evaluated on the basis of the same additive or deductive bid items, determined as above provided. The listed order of priority need be followed only for determining the lower bidder. After determination of the low bidder as stated, award in the best interests of the Government may be made to him on his base bid and any combination of his additive or deductive bid for which funds are determined to be available at the time of the award, provided that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of items.

(End of clause)

**PART 453—FORMS****453.000 Scope of part.****Subpart 453.1—General****453.103 Exceptions.**

453.108 Recommendations concerning forms.

**Subpart 453.2—Prescription of Forms****453.200 Scope of subpart.****453.204 Administrative matters.****453.204-2 Contract reporting (AD-760).****453.213 Small purchase and other simplified purchase procedures (AD-744 and AD-838).****453.270 Request for contract action (AD-700).****Subpart 453.3—Illustrations of Forms****453.300 Scope of subpart.****453.303 Agency forms.****453.303-700 Procurement Request (AD-700)****453.303-744 Purchase Order-Invoice-Voucher (AD-744).****453.303-760 Report of Individual Procurement (AD-760).****453.303-838 Purchase Order (AD-838).**

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

**453.000 Scope of part.**

This part: (a) Prescribes Department of Agriculture (AD) forms for use in acquisition, (b) contains requirements and information generally applicable to AD forms and forms prescribed by FAR Part 53, and (c) illustrates AD forms.

**Subpart 453.1—General****453.103 Exceptions.**

(a) The contracting officer shall submit requests for exceptions to forms prescribed in FAR Part 53 through the HCA to the Director, Office of Operations, for referral to the GSA.

(b) Requests for exceptions to AD forms prescribed in Part 453 shall be handled as individual or class deviations, as appropriate (see Subpart 401.4).

**453.108 Recommendations concerning forms.**

Contract officers shall submit recommendations for new forms or to revise, eliminate, or consolidate forms prescribed by FAR 53 and Part 453 through the HCA to the Director, Office of Operations, for consideration or referral to the Civilian Agency Acquisition Council (CAAC), as appropriate.

**Subpart 453.2—Prescription of Forms****453.200 Scope of subpart.**

This subpart prescribes Department of Agriculture (AD) forms for use in acquisition. Consistent with the approach used in FAR Subpart 53.2, this subpart is arranged by subject matter, in the same order as, and keyed to, the parts of the AGAR in which the form usage requirements are addressed.



**453.204 Administrative matters.****453.204-2 Contract reporting (AD-760).**

Form AD-760, *Report of Individual Procurement*, is prescribed by the USDA Procurement Reporting System, for reporting contract actions over \$10,000 (see 404.601(b)).

**453.213 Small purchase and other simplified purchase procedures (AD-744 and AD-838).**

(a) Form AD-744, *Purchase Order-Invoice-Voucher*, is prescribed for use as an over-the-counter purchase document (see 413.505-3(a)).

(b) Form AD-838, *Purchase Order*, is prescribed for use as a small purchase/delivery order document (see 413.505-2).

**453.270 Request for contract action (AD-700).**

Form AD-700, *Procurement Request*, is prescribed as the contract requisition document for contracting activities in USDA.

**Subpart 453.3—Illustrations of Forms****453.300 Scope of subpart.**

This subpart contains illustrations of Department of Agriculture (AD) forms for use in acquisitions. Forms are not illustrated in the Federal Register, or

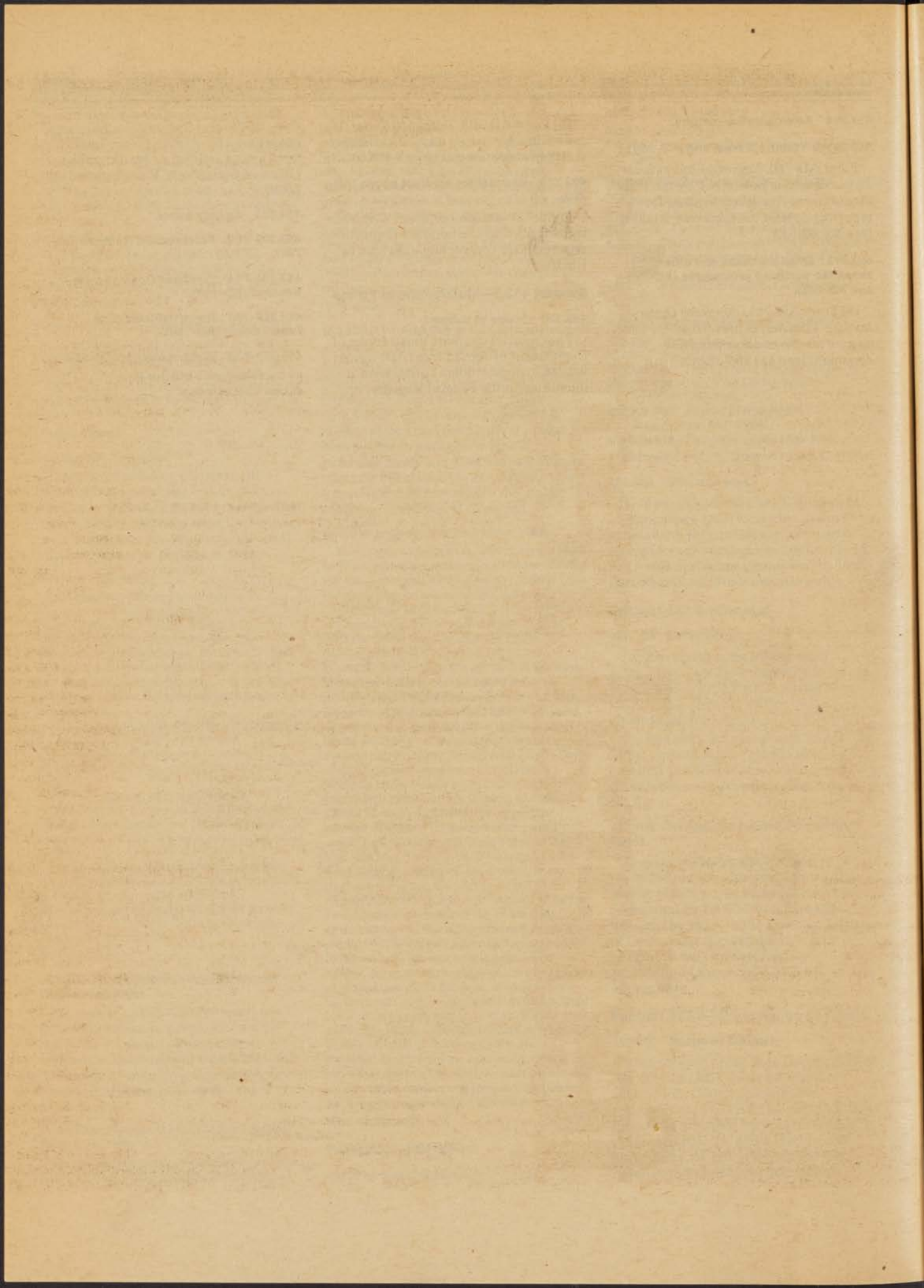
Code of Federal Regulations. Individual copies may be obtained from any USDA contracting activity, or the Director, Office of Operations, Washington, D.C. 20250.

**453.303 Agency forms.****453.303-700 Procurement Request (AD-700).****453.303-744 Purchase Order-Invoice-Voucher (AD-744).****453.303-760 Report of Individual Procurement (AD-760).****453.303-838 Purchase Order (AD-838).**

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# **Federal Register**

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**Wednesday  
March 28, 1984**

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## **Part IV**

### **Department of Transportation**

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**Federal Aviation Administration**

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**14 CFR Parts 121 and 135  
Flight Time Limitations and Rest  
Requirements for Flight Crewmembers;  
Proposed Rule**



## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Parts 121 and 135

[Docket No. 23634; Notice No. 84-3]

## Flight Time Limitations and Rest Requirements for Flight Crewmembers

**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA is proposing flight time limitations and rest requirements for flight crewmembers engaged in air transportation. This proposal is based on the recommendations of a regulatory negotiation advisory committee composed of persons who represent the interests affected by the flight time rules. This proposal results from a reassessment of the agency's role in regulating flight and rest time in light of current operating conditions and current regulatory philosophy. The proposal would simplify, clarify, and update the regulations and reduce the need for their interpretation.

**DATE:** Comments must be received on or before May 14, 1984.

**ADDRESS:** Comments on the proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-204), Docket No. 23634, 800 Independence Avenue SW., Washington, D.C. 20591; or delivered to: Room 915G, 800 Independence Avenue, SW., Washington, D.C. Comments may be examined in the Rules Docket on weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** Lawrence P. Bedore, Project Development Branch, Air Transportation Division, Office of Flight Operations, Federal Aviation Administration, Room 304, 800 Independence Avenue SW., Washington D.C. 20591; Telephone (202) 426-8096.

**SUPPLEMENTARY INFORMATION:****Comments**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments and by commenting on the possible environmental, energy, or economic impact of the adoption of this proposal. Comments are also specifically requested concerning the implementation and effective date of the final rule. For example, the FAA would like to know if operators want the option of complying before the

mandatory effective date. The FAA proposes to establish an effective date of 180 days after the publication of the final rule in the Federal Register.

The comment should carry the regulatory docket or notice number and be submitted in duplicate to the address above. All comments received as well as a report summarizing any substantive public contact with FAA personnel on this rulemaking will be filed in the docket. The docket is available for public inspection both before and after the closing date for making comments.

Before taking any final action on this proposal, the Administrator will consider the comments made on or before May 14, 1984 and the proposal may be changed in light of the comments received. The FAA is allowing only 45 days for comment on this NPRM, because notwithstanding the significance of the issues involved, the FAA believes that this is sufficient time given the length of and the accomplishments of the Regulatory Negotiation Advisory Committee sessions.

The FAA will acknowledge receipt of a comment if the commenter includes a self-addressed, stamped postcard with the comment. The postcard should be marked "Comments to Docket No. 23634." When the comment is received by the FAA, the postcard will be dated, time stamped, and returned to the commenter.

**Availability of The NPRM**

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-430, 800 Independence Avenue SW., Washington, D.C. 20591, or by calling (202) 426-8058. Communications must identify the notice number of the NPRM wanted. Anyone interested in being placed on a mailing list for future FAA NPRM's should also request a copy of Advisory Circular No. 11-2 which describes how to apply to be on the mailing list.

**Background**

The Federal Aviation Act of 1958 (49 U.S.C. 1351 et. seq.) requires the Administrator of the Federal Aviation Administration to issue "reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of aircrew and other employees of air carriers." The rules issued by the FAA under this provision are generally referred to as "flight time limitations." The flight time limitation rules that apply to the major scheduled

airlines—those most familiar to the traveling public—are contained in Part 121 of the Federal Aviation Regulations (14 CFR Part 121). These rules contain daily rest requirements for certain operations and weekly, monthly, and annual limits on the number of hours of flight time.

The flight time limitation rules that apply to the fast growing scheduled airlines that operate airplanes of 30 or less seats (commonly referred to as "commuters") and air taxi operations are contained in Part 135 of the Federal Aviation Regulations (14 CFR Part 135). These rules contain daily rest requirements as well as daily limits on the number of hours of flight time but do not contain weekly, monthly, or annual limits. The Airline Deregulation Act of 1978 requires the Administrator, among other things, to "impose requirements upon \* \* \* commuter air carriers to assure that the level of safety provided to persons traveling on such commuter air carriers is, to the maximum feasible extent, equivalent to the level of safety provided to persons traveling" on Part 121 air carriers.

Despite changes in the airline transportation industry over the past 30 years, the rules governing flight time limits and rest requirements have remained virtually unchanged. No safety reasons have been presented which have necessitated changes to the regulations. But the presumed safety of the rules does not necessarily mean that the rules are as effective as they should be or that given recent changes in the industry they will continue to provide an adequate safety standard. There are a number of factors which affect the adequacy of the rules and require that they be amended.

Perhaps the most significant factor requiring amendment of the current rules is that the rules regulating the rest requirements under Part 121 are extremely complicated. Over the 30 years of their existence they have required thousands of pages of interpretations, have sometimes been incorrectly followed by air carriers, and have been difficult to enforce. Thus, a primary aim of this rulemaking is to clarify and simplify the rest requirements for domestic air carriers. This is consistent with Executive Order 12291.

A second significant factor requiring amendment of the rules has been their inflexibility. For example, although under the current rule air carriers are not considered in violation of the rules if flight times are exceeded due to adverse weather conditions or other circumstances beyond the control of the



air carrier, an air carrier presently has not flexibility to adjust scheduled rest periods in the event of late arrivals or other factors. If a flight is late, the subsequent flights must often be held up while the flight crewmember receives his scheduled rest. This has resulted in numerous canceled flights as well as delays, and has often required crewmembers to spend extra days away from home. An important objective of this rulemaking proceeding is to eliminate this problem, without derogating safety, by allowing flexibility in scheduling rests so that air carriers, passengers, and flight crewmembers are not unnecessarily inconvenienced.

A third factor affecting the current rules is a change in the character and make-up of the air transportation industry. In the past, most of the domestic air carriers were major companies each employing several thousand crewmembers. However, under deregulation of the air transportation industry, the number and variety of part 121 domestic operators has dramatically increased. The present complexity and variety of operations require that the FAA provide clear and simple minimum safety criteria for all operators. If the present rules are examined as the criteria for safe flight time limitations and rest requirements, some potential weaknesses are apparent. For example, current Part 121 flight time limits are effective against chronic long-term fatigue because they provide weekly, monthly, and annual flight time limits as well as daily rest requirements for a pilot who flies more than 8 hours in a 24-hour period. But these rules do not provide rest requirements for a pilot scheduled for 8 hours or less flight time in a 24-hour period. Thus, under the current rules an operator can schedule a flight crewmember for 8 hours or less of flight time in a 24-hour duty day and repeat this cycle until the flight crewmember reaches the 30-hour weekly limit. The current Part 121 rule, then, provides no protection against acute short-term fatigue for flight crewmembers scheduled for 8 hours or less of flight time in a 24-hour period. On the other hand, under Part 135, acute short-term fatigue is covered by a 10-hour minimum rest requirement in a 24-hour period and by a flight time limit of 8 hours for a one-pilot crew and 10 hours for a two-pilot crew; but not annual, monthly, or weekly limits exist to protect against long-term fatigue. Under existing Part 135 rules a flight crewmember could fly 10 hours a day with a 14-hour duty day every day of the year, all year.

A fourth factor affecting the current rules, and one related to the changing character of the air transportation industry, has been the growth of commuter-type operations. Some commuter-type operations fall under Part 121 domestic rules while others fall under Part 135 rules. A question exists as to whether either set of requirements effectively covers these comparatively new and growing operations. Thus an additional aim of this rulemaking proceeding has been to study the materials submitted by this industry group and incorporate into the rules standards which will provide a level of safety equivalent to other air transportation operations.

The current rulemaking proceeding is not the FAA's first attempt to solve these problems. For several years the FAA has recognized that the flight time limits and rest requirements need to be clarified and substantively improved in those areas where they are potentially weak. On several occasions the FAA has attempted to correct the flight time limitation problems of both Parts 121 and 135 through rulemaking actions.<sup>1</sup> But because of the complexity of the flight time rules and the economic interests affected, none of the past proposals succeeded in resolving the problems to the satisfaction of the affected parties. Given the importance of these rules in air transportation safety, the FAA, therefore, decided to try an innovative approach which would bring the affected parties together to negotiate a resolution. It was the FAA's hope that this approach would produce a proposal that would at once simplify and clarify the existing regulations, increase their flexibility, and meet all statutory requirements.

#### Regulatory Negotiation

Regulatory negotiation, as recommended by the Office of Vice President and by the Administrative Conference of the United States, is a procedure by which representatives of all interests affected by a rulemaking fully discuss the issues under conditions conducive to narrowing or eliminating differences and to negotiating a proposed rule acceptable to each interest. In accordance with the recommended procedure, the FAA created an advisory committee chartered under the Federal Advisory Committee Act. The committee is

comprised of persons representing the diverse interests affected by the flight time rules including persons representing flight crewmembers, air carriers, air taxis, helicopter operators, and the public. At its opening session, the committee was addressed by the FAA Deputy Administrator, the Deputy Secretary of Transportation, the Legal Counsel to the Vice President, a representative of the Office of Information and Regulatory Affairs in the Office of Management and Budget, and the Chairman of the Administrative Conference of the United States. These individuals stated their support for the committee and encouraged the committee to take its charge seriously. In addition, representatives of these offices attended and monitored sessions. The committee met under the direction of Nicholas Fidandis (former Director of Mediation Services of the Federal Mediation and Conciliation Service) who acted as convenor/mediator.

The committee met for 16 days in 1983 (June 29-30, July 11-13, July 25-27, August 8-10, August 22-25, and September 26) and thoroughly discussed the major issues involved in the regulation of flight time limits. Numerous proposals and justifications were drafted by participants and submitted to the committee for review. Copies of all proposals submitted for consideration by committee members and copies of written summaries of each meeting are available in the public docket for this NPRM. Although the committee did not reach consensus on any particular proposal, its deliberations were successful because committee members gave serious consideration to and entered into candid discussion of the various proposals and justifications submitted to them. Thus the committee succeeded in narrowing the differences among parties and in reaching substantial agreement of some issues. In addition, the committee identified major areas of concern and all parties obtained significant, new information on a subject which has been discussed, without resolution, for years. This document is a notice of proposed rulemaking that reflects the committee's discussion of and agreements on the issues. The document sets forth the FAA's analysis of those agreements and discussions.

The Regulatory Negotiation Advisory Committee also met on February 14, 1984, to review and discuss this proposed rule and preamble. A majority of the committee members recommended that the proposed rule be published in the *Federal Register* as submitted. Several members of the

<sup>1</sup> The following past proposals have to do with flight time limitations and rest requirements:

Notice No. 77-17 [42 FR 43490, August 29, 1977]

Notice No. 78-3 [43 FR 8070, February 27, 1978]

Notice No. 78-3B [45 FR 53316, August 11, 1980]

Notice No. 82-4 [47 FR 10748, March 11, 1982]



committee, however, dissented from this recommendation because they believed that certain issues which have not been resolved to their satisfaction should be addressed further before the proposal is published. The FAA has decided to publish the proposed rule and preamble as submitted to the committee on February 14, but with modifications in the preamble which address the following unresolved issues:

1. The maximum flight time allowed between rests under proposed Parts 121 and 135 scheduled operations;
2. The minimum amount of rest required under proposed Parts 121 and 135 scheduled operations;
3. The maximum weekly, monthly, and annual flight time limits under proposed § 121.471(h);
4. The limitation of "passenger-carrying" in the definition of "scheduled operations" under proposed § 135.261(b); and
5. The lack of a specific response time for deviations under proposed § 135.263(f).

Modifications on these issues have been made in appropriate sections of the preamble.

Comments received on this proposed rule will be reviewed by the committee to determine whether it should recommend that the proposal be modified. Any necessary changes would be negotiated by the committee in the same manner as the NPRM. It must be emphasized that a decision on the final rule is the sole responsibility of the Administrator.

## PROPOSED REVISIONS

### General Discussion

The proposed rule modifies the current rule in several important ways. First, it reorganizes the regulations according to certain operational differences by creating a separate category in Part 121 domestic rules for commuter-type operations and in Part 135 by separating scheduled operations from non-scheduled. Secondly, it adds cumulative flight time limits for all Part 135 operations. The cumulative flight time limits and daily rest requirements for commuter-type Part 121 and scheduled Part 135 operations would be identical. Thirdly, it clarifies the daily rest requirements of Part 121 operators and specific Part 135 operators and adds provisions which correct potential weaknesses in the current rule and which provided scheduling flexibility for air carriers. A complete description and rationale for specific revisions appears below.

### Revisions To Part 121 and Part 135 Scheduled Operations

#### *Reorganization to cover "Commuter-type" operations*

An issue in this rulemaking proceeding has been the question of which part of the regulations the new commuter air carriers should comply with. The large domestic air carriers clearly fall under Part 121; the small on-demand operators fall under both parts. The dividing line between Parts 121 and 135 is provided by Special Federal Aviation Regulation (SFAR) 38. Operations of airplanes with more than 30 passenger seats or a payload capacity of more than 7,500 pounds must be conducted under Part 121 which contains separate flight time limits for domestic, flag and supplemental (non-scheduled) air carrier operations. Operations with airplanes below these limits must be conducted under Part 135 which at present does not distinguish between scheduled and non-scheduled operations.

While this proposal would continue the 30-passenger/7,500 pound payload distinction as the major dividing line between Part 121 and Part 135 air carrier operations, it would make some additional operational distinctions that would, in effect, make the rules in Part 121 for commuter-type operations identical to those in Part 135 for scheduled operations. The proposed rule would accomplish this in the following way:

(a) Based upon a recommendation of the advisory committee, Part 135 would contain two sets of daily rest requirements and flight time limits, one for scheduled operations and another for non-scheduled operations. The set of daily rest requirements for scheduled operations would be identical to those proposed for Part 121.

(b) Operations of aircraft exceeding the 30-passenger/7,500 pound payload line would continue to be conducted under Part 121, but a separate category would be recognized in paragraph (h) of § 121.471 for operators of propeller driven multiengine airplanes with a passenger seating configuration of 31-60 seats and a payload capacity of 18,000 pounds or less. The flight time limits set forth in paragraph (h) would be somewhat less restrictive than the flight time limits for other domestic operations under that part and would be identical to those proposed for Part 135 scheduled operations (discussed under that section).

The only minor difference between the two sets of rules would be that scheduled operations under Part 135 would in addition have a daily flight

time limit of 8 hours of flight time for one pilot crew. In all other respects the rules would be the same and an operator of aircraft with up to 60 seats having a payload capacity of 18,000 pounds or less could conduct all operations under the identical flight time limits and daily rest requirements.

The proposed creation of this "commuter-type" category is based upon a proposal submitted by the Regional Airline Association (RAA) and endorsed by other committee members that scheduled passenger-carrying operations in aircraft with 60 or less seating capacity be treated, for flight time limitation purposes, as a separate category in both Parts 121 and 135.

According to information submitted by RAA, the basic premise of its request is that "the present regulatory benchmark of 30 versus 31 seats that defines Part 135 operations from those conducted under Part 121 is inappropriate for the flight time rules." Commuter-type operations using smaller aircraft, whether conducted under Part 135 or Part 121, are like each other and substantially unlike longer haul jet operations of the major airlines. Specifically, commuter-type operations are similar in the number of aircraft operated, pilot employed, and routes served; in route distance and pilot flight times, and in operating schedules. The slightly higher flight time limits are balanced by the type of operations typically conducted by this type of operator. The route systems of these operators are such that crewmembers do less flying at night and spend more time at home.

Although the FAA has incorporated the RAA requests into this proposed rule, in view of objections to proposed paragraph (h) expressed at the February 14 advisory committee meeting, the FAA invites comments and statistics on this issue.

It should also be noted that, consistent with present regulatory requirements, Part 135 operators who operate scheduled passenger carrying operations under Part 121 are subject to the domestic air carrier flight time limitations of Subpart Q. Comments are requested as to whether additional regulatory language is needed in this rulemaking proceeding to make this requirement clear.

#### *Revision of flight time limits and daily rest requirements*

The weekly, monthly, and annual flight time limits of Part 121 would not be changed by the proposal, except (as mentioned in the previous section) that less restrictive limits are added in



§ 121.471(h) for commuter-type operations. These less restrictive limits are discussed later under "Revisions to Part 135—Scheduled Operations."

The proposed rule makes significant changes in the daily rest requirements under Part 121 and Part 135 scheduled operations. The purpose of these changes is to correct several potential problems inherent in the existing rule.

Under current § 121.471(b), a domestic air carrier may schedule a flight crewmember for more than 8 hours of flight time during a 24-hour period if a rest period is scheduled at or before the end of the 8 hours. The rest period must be twice the number of hours of flight time since the last rest period, but not less than 8 hours. In addition, a flight crewmember who has accumulated flight time of more than 8 hours during any 24 consecutive hours (whether scheduled or not) must be given, upon completion of his assigned flight or series of flights, at least 16 hours of rest before being assigned to any duty with the air carrier.

Several problems exist with these requirements. First, a 16-hour rest given at the end of a series of flights in which a rest of at least 8 consecutive hours has already been given is considered excessive since it amounts to 24 or more hours of rest in a 48-hour period. Second, a 16-hour rest is considered counterproductive because in many cases a flight crewmember will receive his actual rest (sleepful rest) in the first half of the 16-hour period and may therefore no longer be rested by the time he reports for the next duty period. Both of these points were acknowledged by most committee members. Third, and most important, the series-of-flights rule has been misunderstood by some operators to mean that the 16-hour rest must be given at the end of a series of flights that have extended over several days; this is contrary to the agency's interpretation that the 16-hour rest must be given at the end of a series of flights that have occurred within a 24-hour period.

In addition to the above problem, the current Part 121 rule does not have a rest requirement if flight time is 8 hours or less in 24, because the rule was predicated on the belief that fatigue is an issue only in circumstances where flight time is more than 8 hours in 24. Theoretically, this allows a Part 121 operator to schedule a flight crewmember for a 24-hour duty day as long as the total scheduled flight time is 8 hours or less. However unlikely such a schedule might be in practice, the potential for unsafe scheduling should not exist in regulations designed to set a minimum level of safety.

Although present Part 135 does contain a minimum 10-hour rest requirement for scheduled flight time, including flight time of 8 hours or less within any 24-hour period, this requirement has not proven flexible enough to cover some typical Part 135 commuter operations. As a result, at the request of the Regional Airline Association, the FAA issued an exemption that under specific conditions and limitations allows reduction of the rest period to 8 hours.

The proposed rule addresses all of the above mentioned problems. It would clarify and simplify the current regulations by creating reasonable and flexible rest requirements for both Part 121 operations and scheduled operations under Part 135. Proposed §§ 121.471(b) and 135.265(b) would require that a flight crewmember be given the following rest periods in any 24 consecutive hours involving flight time: (1) 9 consecutive hours of rest for less than 8 hours of flight time; (2) 10 consecutive hours of rest for 8 or more but less than 9 hours of flight time; and (3) 11 consecutive hours of rest for 9 or more hours of flight time.

The proposed rule provides flexibility to air carriers in scheduling flights or in rescheduling for flights that have arrived late. Sections 121.471(c) and 135.265(c) would allow the following:

(1) An air carrier could schedule less than a 9-hour rest or could reduce a 9-hour rest by up to 1½ hours if 10 hours of rest is given at the flight crewmember's next scheduled rest.

(2) An air carrier could schedule less than a 10-hour rest or could reduce a 10-hour rest by up to 2 hours if 11 hours of rest is given at the flight crewmember's next scheduled rest.

(3) An air carrier could schedule less than an 11-hour rest or could reduce an 11-hour rest by up to 2 hours if 12 hours of rest is given at the flight crewmember's next scheduled rest.

Thus the proposed rule would eliminate the series of flights problem by establishing a minimum rest requirement in relation to the number of flight hours, and would protect against short-term fatigue while allowing air carriers flexibility in scheduling over a 48-hour period.

In relation to the above proposal, it should be noted that each rest requirement is based on what is commonly referred to in the industry as "release to report." That is, if 8 hours of rest are required, the flight crewmember must be given at least 8 hours free of all duty from the time the flight crewmember is "released" from a duty assignment involving flight time until the crewmember "reports" for the next duty

assignment involving flight time. Transportation to or from a hotel is not considered as duty.

It must be emphasized that as a practical matter carriers will not schedule to the limitations permitted by this proposal. For example, the rest requirement for flight time of 8 or more but less than 9 hours is 10 consecutive hours of rest. That 10-hour rest can be reduced for any reason to 8 hours if 11 hours of rest is given at the next scheduled rest. Although the rule technically allows the carriers to reduce the 10-hour rest down to 8, existing practice shows that the carriers would add a "buffer" period to that minimum rest requirement to avoid the need to cancel or reschedule the crewmember's next flight. Thus, few carriers, if any, would actually schedule down to the minimum 8-hour rest. Instead, they would more likely schedule approximately 9 hours of rest leaving additional time in case the flight encountered bad weather or other delays. It must be noted that the minimum rest requirement (in this example 8 hours) cannot under any circumstances be reduced further nor can the make-up rest (11 hours) be reduced. If the carriers set the scheduled rest under this example at 8 hours 15 minutes and if there were weather delays resulting in a 30-minute late arrival, the crewmembers would not be able to report to work until they have had the 8 consecutive hours of rest. Therefore, the next scheduled flight would have to be delayed or canceled.

In this connection, it must be noted that the carriers can reduce the scheduling rest for any reason. It can be reduced for scheduling purposes or to accommodate delays in the system caused by weather or other factors. Although the current rules only allow reduction for limited reasons, the proposed change acknowledges that a crewmember who is delayed for bad weather is in the same position as one delayed for "scheduling" reasons. A flight crewmember is not necessarily more "tired" because of the type of delay. This proposed change will increase the flexibility of all parties while assuring that over a 48-hour period each crewmember would receive adequate rest. If the scheduled rest is reduced for any reason, the crewmember must receive a make-up rest. For example, if the scheduled rest was reduced to 9 hours, the crewmember would be entitled to 11 hours of rest at his next scheduled rest and, therefore, would be getting a total minimum of 20 hours of rest during approximately a 48-hour period.



The FAA wants to make it clear that this proposed requirement, as well as all requirements in this proposal, would be strictly monitored and enforced by the FAA.

In addition to the rest requirement, the proposal includes a provision (Section 121.471(a)(4)) which limits flight time to 9 hours between rest periods. This provision has been included to prevent flight crewmembers from accumulating excessive flight hours within short periods of time. This flight time limit plus the weekly flight time limit would prevent flight crewmembers from flying up to the 9-hour limit for more than a few days at a time.

The rest requirement set forth in this portion of the proposal reflects proposals submitted by the Air Transport Association (ATA), a modified version of the ATA proposal issued by the mediator, and a proposal made by the Regional Airline Association. The flight time limit between rest periods reflects with modifications, flight time limits under current Parts 121 and 135. At the February 14 advisory committee meeting which reviewed this proposed rule, flight crewmember organization representatives objected to the 9-hour flight time limit and to the minimum 7½ hour rest allowed under proposed §§ 121.471(c)(1) and 135.265(c)(1). These advisory committee members requested that the 9-hour limitation between rests be reduced to 8 hours and that the minimum rest never be less than 8 hours. They stated that they do not believe these provisions would provide adequate rest. The FAA invites further comments on these proposals including benefits and detriments. Air carriers and flight crewmember organizations should provide comments on how often the 9-hour cap would be reached including the types of schedules, in use or contemplated, to which it would apply. These comments also should discuss the 9-hour cap in relation to the present § 121.471 which, as a practical matter, may limit flight time between rest periods to 8 hours.

#### *Transcontinental Flights*

The current requirement under paragraph (b) of § 121.471 for scheduled transcontinental non-stop flights would be eliminated. Under the current requirements for such flights, a crewmember can be scheduled for more than 8 but not more than 10 hours of duty aloft without an intervening rest if the aircraft has a pressurization system and if the flight consists of two pilots and flight engineer. This requirement is outdated since transcontinental non-stop flights no longer take 8 hours.

#### **Revisions to Part 135—All Operations**

##### *Organization and Applicability of Sections*

At present, all of the flight time limitation requirements in Part 135 are contained in § 135.261. These limits apply to all Part 135 operations whether scheduled or not, whether in helicopters or airplanes, and regardless of any special nature of the operation. The variety of operations conducted under Part 135 has spawned a number of exemptions for seemingly special, but actually somewhat general, types of operations. To accommodate the variety of Part 135 operations, the proposed flight time limitation requirements would be organized into the following categories: (1) Requirements for all operations; (2) scheduled operations; (3) non-scheduled operations; and (4) helicopter emergency medical evacuation service operations.

Section 135.261(b) would define "scheduled operations" to mean "passenger-carrying operations that are conducted in accordance with a published schedule of at least five round trips per week on at least one route between two or more points which include dates or times (or both) that is openly advertised or otherwise made readily available to the general public." Operations within this definition (except those in Alaska) would fall under the requirements of § 135.265. These scheduled operations would be conducted in aircraft with a seating capacity of 30 or less and a payload capacity of 7,500 pounds or less.

This proposed definition would limit "scheduled operations" to "passenger-carrying" operations only. At the February 14 meeting of the advisory committee, a member objected to the proposed rule on the ground that it excluded scheduled cargo operations. The FAA requests further information on the issue of whether cargo operations which meet all other requirements of this definition should be included under "scheduled operations."

Non-scheduled operations (except helicopter emergency medical evacuation services) would be conducted under the rest period and flight time limits of §§ 135.267 and 135.269. These operations would include non-scheduled air taxi operations and commercial operations. Such operations are often seasonal and highly diverse. They include cargo transportation, work crew and executive transportation, surveying, fire fighting, etc. Most of these operations are conducted under contract and are not available to the general public.

The proposal to permit Part 135 scheduled passenger carrying operations in Alaska to be conducted under the rules applicable to non-scheduled operations was made by several members of the advisory committee. The unique characteristics of the Alaskan air transportation system were cited as the rationale for allowing Alaskan operators to conduct scheduled passenger-carrying operations under rules designed for non-scheduled operations. Comments and information regarding the safety aspects of this proposal are invited.

##### *General requirements for all operations*

Section 135.263 contains requirements that apply either to all operations under Part 135 or to more than one type of operation. There are two significant changes from the present rule proposed in this section. The first is paragraph (e) which would replace current § 135.261(d). Under the present rule is the daily flight time limit of 8 hours in any 24 hours for one pilot crew or 10 hours of flight time in any 24 hours for a two pilot crew is exceeded due to circumstances beyond the control of the certificate holder, the flight crewmember must be given 16 hours of rest before being assigned to further duty which includes flight time. The excessiveness of this penalty would be corrected by paragraph (e) of the proposed section which establishes the following sliding scale for rest periods if flight time limits are exceeded:

- (1) 11 consecutive hours of rest if the flight time limitations is exceeded by not more than 30 minutes;
- (2) 12 consecutive hours of rest if the flight time limitations is exceeded by more than 30 minutes, but not more than 60; and
- (3) 16 consecutive hours of rest if the flight time limitations is exceeded by more than 60 minutes.

In the event that Part 135 scheduled operations exceed the daily flight time limit, this penalty would supersede applicable shorter rest requirements.

The second significant change would be the addition of a deviation authority. Proposed § 135.263(g) authorizes the Director of Flight Operations to issue operations specifications authorizing a deviation from any specific requirement of §§ 135.267 and 135.269, the non-scheduled operations, within 2 years after the issuance of this regulation, if he finds that the operator's request is justified and that other conditions provide an equivalent level of safety. The FAA does not believe that the proposal for cumulative flight time limits will be burdensome. However, in an effort to relieve any potential burden of



the proposed cumulative flight time limits for non-scheduled operators, this authority would provide an alternative to the exemption process during a 2-year transition period. The intent is to provide limited transition relief and not a permanent exception.

An objection raised at the February 14 advisory committee meeting is that the provision does not specify a time within which the FAA would have to respond to a request for a deviation. A 20-day limit on the response time was recommended by an advisory committee member. The FAA does not believe that a response time limit is appropriate and is unlikely to accept such a time limit on FAA action. Comments are invited.

#### Revisions to Part 135—Scheduled Operations

As discussed earlier, under the current regulations, no distinction exists between scheduled and non-scheduled operations. All Part 135 operations have a 24-hour flight time limit of 8 hours for a one-pilot crew and 10 hours for a two-pilot crew, and a rest requirement of 10 hours in any 24-hour period. Under the proposed rule, scheduled operations would be separated from non-scheduled. For scheduled operations the daily rest requirements would be identical to daily rest requirements for Part 121 domestic operations, as discussed above under "Revisions to Part 121 and Part 135 Scheduled Operations." In addition, proposed § 135.265 would impose the following flight time limits:

- (1) 1,200 hours in any calendar year.
- (2) 120 hours in any calendar month.
- (3) 32 hours in any 7 consecutive days.
- (4) 8 hours during any 24 consecutive hours for a flight crew consisting of one pilot.

- (5) 9 hours between rest periods for a flight crew consisting of two pilots.

With the exception of the 8-hour limit, these flight time limits parallel those under § 121.471(h). These figures are similar to the recommendations of those advisory committee members representing scheduled operations subject to Part 135, and are considered to be set at a level that accommodates those operators' scheduling constraints, while requiring a much stricter flight time limit than under present regulations. Under current regulations pilots on two member crews may fly as many as 10 hours a day or 70 hours a week. Under the proposed rule they may fly only 32 hours per week.

The retention of the daily 8-hour flight time requirement for a one pilot crew is necessary because under Part 135 one pilot crews are currently permitted for certain operations, and the FAA considers 8 hours to be the maximum for

safe operation of a one-pilot crew without regard to whether there are weekly and other cumulative limits.

Another new requirement for Part 135 operators is the proposed provision in § 135.265(d) that flight crewmembers be relieved of all duty for at least 24 consecutive hours at least once during any 7 consecutive days. This requirement is identical to § 121.471(d) and works together with the weekly flight time limits to prevent the buildup of fatigue in flight crewmembers operations under Part 135.

#### Revisions to Part 135—Non-Scheduled Operations

##### *Quarterly and Yearly Flight Time Limits*

Current § 135.261 contains no cumulative flight time limits. The proposed §§ 135.267(a) and 135.269(a) would impose the following quarterly and yearly flight time limits:

- (1) 500 hours in any calendar quarter.
- (2) 800 hours in any two consecutive quarters.
- (3) 1,400 hours in any calendar year.

The quarterly and yearly flight time limitations are intended to prevent cumulative fatigue while acknowledging that the seasonal operations of a few non-scheduled operators may exceed the weekly and monthly limits proposed in § 135.265.

As used in this proposal "calendar quarter" refers to January–March, April–June, July–September, or October–December.

##### *Quarterly Rest Requirements*

In the current Part 135 rules, there is no requirement to provide one 24-hour period of rest in every 7-day period as there is in Part 121. Proposed §§ 135.267(f) and 135.269(b) would require the certificate holder to provide at least 13 rest periods of at least 24 hours in each calendar quarter. While this requirement is not identical to the rest required under Part 121, it will provide adequate rest and still allow flexibility in scheduling 24-hour rests for seasonal and on-demand operations.

##### *Daily Flight Time Limits and Rest Requirements for One- and Two-Pilot Crews*

The daily flight time limits of § 135.267(b) are parallel to the present § 135.261(a) with the following exceptions. The phrase "required by this chapter" has been replaced by the phrase "qualified under this part" with respect to the 10-hour flight time limit for a flight crew consisting of two pilots. In effect, this will allow a flight crew consisting of two qualified pilots to fly up to 10 hours in an aircraft which may

be operated by a flight crew of only one pilot under Part 135. In addition a new paragraph (c) has been added which allows a flight crewmember to exceed the flight hours of paragraph (b) within a specified duty period.

Paragraph (c) § 135.267 would allow an operator and flight crew to use a regular daily schedule rather than the rolling 24-hour clock. A flight crew could fly the allowed flight time any time during a regularly scheduled duty period which is separated from the next duty period by a regularly scheduled rest period of at least 10 hours. The duty period and the rest period together must total 24 hours. This alternative is intended to give scheduling flexibility to Part 135 operators who use a regular, diurnal cycle as the basis of their operations.

Another difference from the current rule is the addition of flight time limits for augmented crews. These limits, set forth in § 135.269, are discussed below.

##### *Daily Flight Time Limits and Rest Requirements for Three- and Four-Pilot Crews*

Since the present rules do not provide special requirements for augmented crews, operations which utilize augmented crews have been operating under exemptions. Proposed Section 135.269(c) incorporates the exemption requirements into the rule. Basically the rule would limit flight time to 8 hours in 24 consecutive hours, but would allow for an extended duty period and extended period aloft if the aircraft is equipped with approved sleeping facilities for the relief pilot. The rule also would require a minimum 12-hour rest after an extended duty period. These regulations would provide an equivalent level of safety while recognizing the benefits of augmented crews for certain operations.

##### *Helicopter Hospital Emergency Medical Evacuation Services*

Proposed § 135.271 contains regulations for the helicopter hospital emergency medical evacuation services. These regulations would differ from proposed § 135.267 in that flight time would be limited to 8 hours and the rest period would be at least 8 consecutive hours during any 24 consecutive hours. No emergency evacuation assignment would be allowed to exceed 72 consecutive hours at the hospital. In order to assure that a helicopter pilot is adequately rested, there would have to be an approved place of rest at, or in close proximity to, the hospital at which the helicopter is based. In addition, an extended rest period would be required



at the completion of an assignment. These air ambulance operations are of undoubted social benefit and proven safety. The FAA has been issuing exemptions for these operations for several years and is satisfied that they are safe. This proposal codifies the terms of the typical exemption for emergency evacuations.

#### Economic Evaluation

The proposals in this NPRM are expected to generate no net cost, while maintaining or increasing the level of safety. Although there are a number of changes in the regulation, any potentially costly changes would be balanced by benefits. Major changes are discussed below.

#### Part 121

The basic changes in Part 121 would be the inclusion of a minimum rest period for periods when flight time is less than 8 hours in any 24 consecutive hours, and changes in the required rest periods when flight time is 8 hours or more in any 24 consecutive hours. The first change is not expected to involve significant cost, because the required rest period is only 9 hours and it can be reduced to 7½ hours if a longer rest is provided at the next scheduled rest period. The second change stipulates that a rest period of 10 hours must be given if the flight time exceeds 8 hours in any 24 consecutive hours, and 11 hours if the flight time exceeds 9 hours in any 24 consecutive hours. These periods may be reduced if longer rests are given at the next scheduled rest periods. The present regulation requires that if a flight crewmember exceeds 8 hours of flight in 24 consecutive hours, an intervening rest period must be given of twice the flight time before the rest period; also, at the end of the crewmember's "series of flights," there must be a 16-hour rest period granted. While the proposed rule is substantively different from the present rule, the FAA believes it will be beneficial to operators, allowing somewhat more flexibility than the present rule.

#### Part 135

There are a number of changes from the present rule. In particular, different rules would be provided for scheduled versus non-scheduled operations. The proposed rule for Part 135 is similar to that for Part 121. However, the weekly, monthly, and annual maximum flight hours for all Part 135 operators are somewhat higher than the Part 121 limits.

The proposed Part 135 non-scheduled regulations are similar to present regulations except that certain penalties

in the present rule are moderated, while quarterly and annual flight time limits are added.

Both scheduled and non-scheduled proposals are based on industry recommendations to the committee. As such, they were presented as acceptable from a cost standpoint, and thus were only generally reviewed from a benefit/cost standpoint. The costs are expected to be minimal. For example, certain monthly, quarterly, and annual hours will have to be checked by operators. This is a minimal cost, since basic payroll type records already provide simple building blocks for developing such data.

A number of elements incorporated in the proposal would eliminate potentially costly situations. For example, non-scheduled operations have no requirement for 1 day off in 7, but are required to give 13 days off per calendar quarter. This provides the flexibility needed by non-scheduled operations. From comments to previous NPRM's, the FAA knows that there would be a significant cost if the rule required 1 day off in 7.

As outlined in the discussion of the proposals, other rule elements are either non-costly, relaxatory, or they are codifications of present exemptions. As such they are not expected to have a net cost to any segment of the industry. Also, while there are benefits to some of the changes, these are not readily quantifiable. Only the air carriers can accurately determine, by comparing crew scheduling options under present rules to the proposals, whether costs or benefits are associated with the proposals.

Under the terms of the Regulatory Flexibility Act of 1980, Federal agencies must review regulatory proposals with particular concern about the impact rules might have on small entities. The proposals will not have significant economic impact on a substantial number of small entities because the only costs implied (those for keeping track of total flight hours on a quarterly and annual basis) are minimal and are balanced by benefits of new flexibilities in the rules.

#### List of Subjects

##### 14 CFR Part 121

Aviation safety, Safety, Air carriers, Air traffic control, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Airports, Airspace, Airworthiness directives and standards, Beverages, Cargo, Chemicals, Children, Narcotics, Flammable materials, Handicapped, Hazardous materials, Hours of work, Infants, Liquor, Mail,

Drugs, Pilots, Smoking, Transportation, Common carriers.

##### 14 CFR Part 135

Air carriers, Airplanes, Airspace, Aviation safety, Air traffic control, Air transportation, Air taxi, Airworthiness, Airmen, Aircraft, Alcohol, Airports, Baggage, Beverages, Cargo, Chemicals, Drugs, Handicapped, Hazardous materials, Helicopters, Hours of work, Mail, Narcotics, Pilots, Safety, Smoking, Transportation, Weapons.

#### Proposed Rule

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Parts 121 and 135 of the Federal Aviation Regulations (14 CFR Parts 121 and 135) as follows:

#### PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. By revising the table of contents of Subpart Q of Part 121 to read as follows:

##### Subpart Q—Flight Time Limitations: Domestic Air Carriers

###### Sec.

121.470 Applicability.

121.471 Flight time limitations: All flight crewmembers.

2. By revising Subpart Q of Part 121 to read as follows:

##### Subpart Q—Flight Time Limitations: Domestic Air Carriers

###### § 121.470 Applicability.

This subpart prescribes flight time limitations for domestic air carriers.

###### § 121.471 Flight time limitations: All flight crewmembers.

(a) Except as provided in paragraph (h) of this section, no domestic air carrier may schedule any flight crewmember and no flight crewmember may accept an assignment for flight time in scheduled air transportation or in other commercial flying if that crewmember's total flight time in all commercial flying will exceed—

- (1) 1,000 hours in any calendar year;
- (2) 100 hours in any calendar month;
- (3) 30 hours in any 7 consecutive days;
- (4) 9 hours between rest periods.

(b) Except as provided in paragraph (c) of this section, no domestic air carrier may schedule a flight crewmember and no flight crewmember may accept an assignment for flight time during the 24 consecutive hours preceding the scheduled completion of any flight segment without a scheduled



rest period during that 24 hours as follows:

(1) 9 consecutive hours of rest for less than 8 hours of flight time.

(2) 10 consecutive hours of rest for 8 or more but less than 9 of flight time.

(3) 11 consecutive hours of rest for 9 or more hours of flight time.

(c) An air carrier may schedule a flight crewmember for less than the rest required in paragraph (b) of this section or may reduce a scheduled rest under the following conditions:

(1) A rest required under paragraph (b)(1) of this section may be scheduled for or reduced to a minimum of 7½ hours if the flight crewmember is given at his next scheduled rest period 10 hours of rest before being assigned to any further flight time with the air carrier.

(2) A rest required under paragraph (b)(2) of this section may be scheduled for or reduced to a minimum of 8 hours if the flight crewmember is given at his next scheduled rest period 11 hours of rest before being assigned to any further flight time with the air carrier.

(3) A rest required under paragraph (b)(3) of this section may be scheduled for or reduced to a minimum of 9 hours if the flight crewmember is given at his next scheduled rest period 12 hours of rest before being assigned to any further flight time with the air carrier.

No air carrier may assign, nor may any flight crewmember perform any flight time with the air carrier unless the flight crewmember has had at least the minimum rest required under this paragraph.

(d) Each domestic air carrier shall relieve each flight crewmember engaged in scheduled air transportation from all further duty for at least 24 consecutive hours during any 7 consecutive days.

(e) No domestic air carrier may assign any flight crewmember and no flight crewmember may accept assignment to any duty with the air carrier during any required rest period.

(f) Time spent in transportation, not local in character, that an air carrier requires of a flight crewmember and provides to transport the crewmember to an airport at which he is to serve on a flight as a crewmember, or from an airport at which he was relieved from duty to return to his home station, is not considered part of a rest period.

(g) A flight crewmember is not considered to be scheduled for duty in excess of flight time limitations if the flights to which he is assigned are scheduled and normally terminate within the limitations, but due to circumstances beyond the control of the air carrier (such as adverse weather conditions) are not at the time of

departure expected to reach their destination within the scheduled time.

(h) For operations of propeller driven multiengine airplanes having a passenger seating configuration of 31–60 seats and a payload capacity of 18,000 pounds or less, no air carrier may schedule any flight crewmember for flight time in scheduled air transportation or in other commercial flying if that crewmember's total flight time in all commercial flying will exceed—

(1) 1,200 hours in any calendar year.

(2) 120 hours in any calendar month.

(3) 32 hours in any 7 consecutive days.

(4) 9 hours between rest periods.

#### **PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS**

3. By revising the table of contents of Subpart F of Part 135 to read as follows:

##### **Subpart F—Flight Crewmember Flight Time Limitations**

Sec.

135.261 Applicability.

135.263 Flight time limitations: All certificate holders.

135.265 Flight time limitations: Scheduled operations.

135.267 Flight time limitations: Non-scheduled one- and two-pilot crews.

135.269 Flight time limitations: Non-scheduled three- and four-pilot crews.

135.271 Helicopter hospital emergency medical evacuation services (HEMES).

4. By revising Subpart F of Part 135 to read as follows:

##### **Subpart F—Flight Crewmember Flight Time Limitations**

###### **§ 135.26 Applicability.**

Section 135.263 through 135.271 prescribe flight time limitations and rest requirements for operations conducted under this part as follows:

(a) Section 135.263 applies to all operations under this subpart.

(b) Section 135.265 applies to scheduled operations except scheduled operations conducted solely within the state of Alaska. "Scheduled operations" means passenger-carrying operations that are conducted in accordance with a published schedule of at least five round trips per week on at least one route between two or more points which includes dates or times (or both) that is openly advertised or otherwise made readily available to the general public.

(c) Section 135.267 and 135.269 apply to air taxi operations, commercial operator operations, and operations conducted solely within the state of Alaska.

(d) Section 135.271 contains special daily flight time limits for operations conducted under the helicopter

emergency medical evacuation service (HEMES).

###### **§ 135.263 Flight time limitations: All certificate holders.**

(a) A certificate holder may assign a flight crewmember and a flight crewmember may accept an assignment for flight time only when the applicable requirements of §§ 135.263 through 135.271 are met.

(b) No certificate holder may assign any flight crewmember to any duty with the air carrier during any required rest period.

(c) Time spent in transportation, not local in character, that a certificate holder requires of a flight crewmember and provides to transport the crewmember to an airport at which he is to serve on a flight as a crewmember, or from an airport at which he was relieved from duty to return to his home station, is not considered part of a rest period.

(d) A flight crewmember is not considered to be scheduled for duty in excess of flight time limitations if the flights to which he is assigned are scheduled to and normally terminate within the limitations, but due to circumstances beyond the control of the air carrier or flight crewmember (such as adverse weather conditions), are not at the time of departure expected to reach their destination within the scheduled time.

(e) When a flight crewmember has exceeded the daily flight time limitations in § 135.265 through 135.271, because of circumstances beyond the control of the certificate holder or flight crewmember (such as adverse weather conditions), that flight crewmember must have a rest period before the next duty period of at least—

(1) 11 consecutive hours of rest if the flight time limitation is exceeded by not more than 30 minutes;

(2) 12 consecutive hours of rest if the flight time limitation is exceeded by more than 30 minutes, but not more than 60 minutes; and

(3) 16 consecutive hours of rest if the flight time limitation is exceeded by more than 60 minutes.

The rest requirements of this paragraph supersede shorter rest requirements of this subpart.

(f) Within 2 years after the issuance of this rule, the Director of Flight Operations may issue operations specifications authorizing a deviation from any specific requirement of §§ 135.267 and 135.269 if he finds that the deviation provides a substantially equivalent standard of safety.



**§ 135.265 Flight time limitations: Scheduled operations.**

(a) No air carrier may schedule any flight crewmember for flight time in scheduled operations or in other commercial flying if that crewmember's total flight time in all commercial flying will exceed—

- (1) 1,200 hours in any calendar year.
- (2) 120 hours in any calendar month.
- (3) 32 hours in any 7 consecutive days.
- (4) 8 hours during any 24 consecutive

hours for a flight crew consisting of one pilot.

(5) 9 hours between rest periods for a flight crew consisting of two pilots.

(b) Except as provided in paragraph (c) of this section, no air carrier may schedule a flight crewmember for flight time during the 24 consecutive hours preceding the scheduled completion of any flight segment without a scheduled rest period during that 24 hours as follows:

(1) 9 consecutive hours of rest for less than 8 hours of flight time.

(2) 10 consecutive hours of rest for 8 or more but less than 9 hours of flight time.

(3) 11 consecutive hours of rest for 9 or more hours of flight time.

(c) An air carrier may schedule a flight crewmember for less than the rest required in paragraph (b) of this section or may reduce a scheduled rest under the following conditions:

(1) A rest required under paragraph (b)(1) of this section may be scheduled for or reduced to a minimum of 7½ hours if the flight crewmember is given at his next scheduled rest period 10 hours of rest before being assigned to any further flight time with the air carrier.

(2) A rest required under paragraph (b)(2) of this section may be scheduled for or reduced to a minimum of 8 hours if the flight crewmember is given at his next scheduled rest period 11 hours of rest before being assigned to any further flight time with the air carrier.

(3) A rest required under paragraph (b)(3) of this section may be scheduled for or reduced to a minimum of 9 hours if the flight crewmember is given at his next scheduled rest period 12 hours of rest before being assigned to any further flight time with the air carrier.

(d) Each air carrier shall relieve each flight crewmember engaged in scheduled air transportation from all further duty for at least 24 consecutive hours during any 7 consecutive days.

**§ 135.267 Flight time limitations: Non-scheduled one- and two-pilot crews.**

(a) No certificate holder may assign any flight crewmember, and no flight crewmember may accept an assignment,

for duty during flight time if that crewmember's total flight time in all commercial flying will exceed—

(1) 500 hours in any calendar quarter.

(2) 800 hours in any two consecutive calendar quarters.

(3) 1,400 hours in any calendar year.

(b) Except as provided in paragraph (c) of this section, during any 24 consecutive hours the total flight time of the assigned flight when added to any other commercial flying by that flight crewmember may not exceed—

(1) 8 hours for a flight crew consisting of one pilot; or

(2) 10 hours for a flight crew consisting of two pilots qualified under this Part.

(c) A flight crewmember's flight time may exceed the flight time limits of paragraph (b) of this section if the assigned flight time occurs during a regularly assigned duty period of no more than 14 hours and—

(1) If this duty period is immediately preceded by 10 or more consecutive hours of rest;

(2) If flight time is assigned during this period, that total flight time when added to any other commercial flying by the flight crewmember may not exceed—

(i) 8 hours for a flight crew consisting of one pilot; or

(ii) 10 hours for a flight crew consisting of two pilots; and

(3) If the combined duty and rest periods equal 24 hours.

(d) Each assignment under paragraph (b) of this section must provide for at least 10 consecutive hours of rest during the 24-hour period that precedes the planned completion time of the assignment.

(e) Each assignment under paragraph (c) of this section must be immediately preceded by and followed by 10 consecutive hours of rest.

(f) The certificate holder must provide each flight crewmember at least 13 rest periods of at least 24 consecutive hours each in each calendar quarter.

**§ 135.269 Flight time limitations: Non-scheduled three- and four-pilot crews.**

(a) No certificate holder may assign any flight crewmember for duty during flight time if the crewmember's total flight time in all commercial flying will exceed—

(1) 500 hours in any calendar quarter.

(2) 800 hours in any two consecutive calendar quarters.

(3) 1,400 hours in any calendar year.

(b) A certificate holder must provide each flight crewmember at least 13 rest periods of at least 24 consecutive hours each in each calendar quarter.

(c) No certificate holder may assign any pilot to a crew of three or four

pilots, unless that assignment provides—

(1) At least 10 consecutive hours of rest immediately preceding the assignment;

(2) No more than 8 hours of flight time in any 24 consecutive hours;

(3) No more than 18 duty hours for a three-pilot crew or 20 duty hours for a four-pilot crew in any 24 consecutive hours;

(4) No more than 12 hours aloft for a three-pilot crew or 16 hours aloft for a four-pilot crew during the maximum duty hours specified in paragraph (c)(3) of this section;

(5) Approved sleeping facilities on the aircraft for the relief pilot;

(6) Upon completion of the assignment, a rest period of at least 12 hours;

(7) For a three-pilot crew, a crew which consists of at least the following:

(i) A pilot in command (PIC) who meets the applicable flight crewmember requirements of Subpart E of Part 135;

(ii) A PIC who meets the applicable flight crewmember requirements of Subpart E of Part 135, except those prescribed in § 135.244 and 135.247; and

(iii) A second in command (SIC) who meets the SIC qualifications of § 135.245

(8) For a four-pilot crew, at least three pilots who meet the conditions of paragraph (c)(7) of this section, plus a fourth pilot who meets the SIC qualifications of § 135.245.

**§ 135.271 Helicopter hospital emergency medical evacuation service (HEMES).**

(a) A certificate holder operating under this section must also comply with § 135.267 (a) and (f).

(b) No certificate holder may assign a helicopter pilot for hospital emergency medical evacuation service helicopter operations unless that assignment provides for at least 10 consecutive hours of rest immediately preceding reporting to the hospital for availability for duty during flight time.

(c) No pilot may fly for more than 8 hours during any 24-consecutive hour period of a HEMES assignment.

(d) Each pilot must be given at least 8 consecutive hours of rest during any 24 consecutive hour period of a HEMES assignment.

(e) A HEMES assignment may not exceed 72 consecutive hours at the hospital.

(f) An approved place of rest must be provided at, or in close proximity to, the hospital at which the HEMES assignment is being performed.

(g) No certificate holder may assign any other duties during a HEMES assignment.



(h) Each pilot must be given a rest period upon completion of the HEMES assignment and prior to being assigned any further duty with the certificate holder of—

(1) 12 consecutive hours for an assignment of at least 24 hours but less than 48 hours.

(2) 16 consecutive hours for an assignment of more than 48 hours.

(Sec. 313, 314, and 601 through 610, Federal Aviation Act of 1958 (49 U.S.C. 1354, 1355, and 1421 through 1430); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.45)

**Note.**—This notice proposes regulatory changes that are based on the discussions and recommendations of a regulatory negotiation advisory committee. Since this committee included representatives from the air transportation industry, the FAA believes that these regulatory proposals are not costly. Therefore, the FAA has determined that this notice involves a rulemaking action which: (1) Is not a "major rule" under Executive Order 12291, and (2) is not a "significant rule" under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). In addition, it is certified that the proposals, if promulgated, will not have a significant economic impact

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the person identified under the caption "**FOR FURTHER INFORMATION CONTACT.**"

Issued in Washington, D.C., on February 23, 1984.

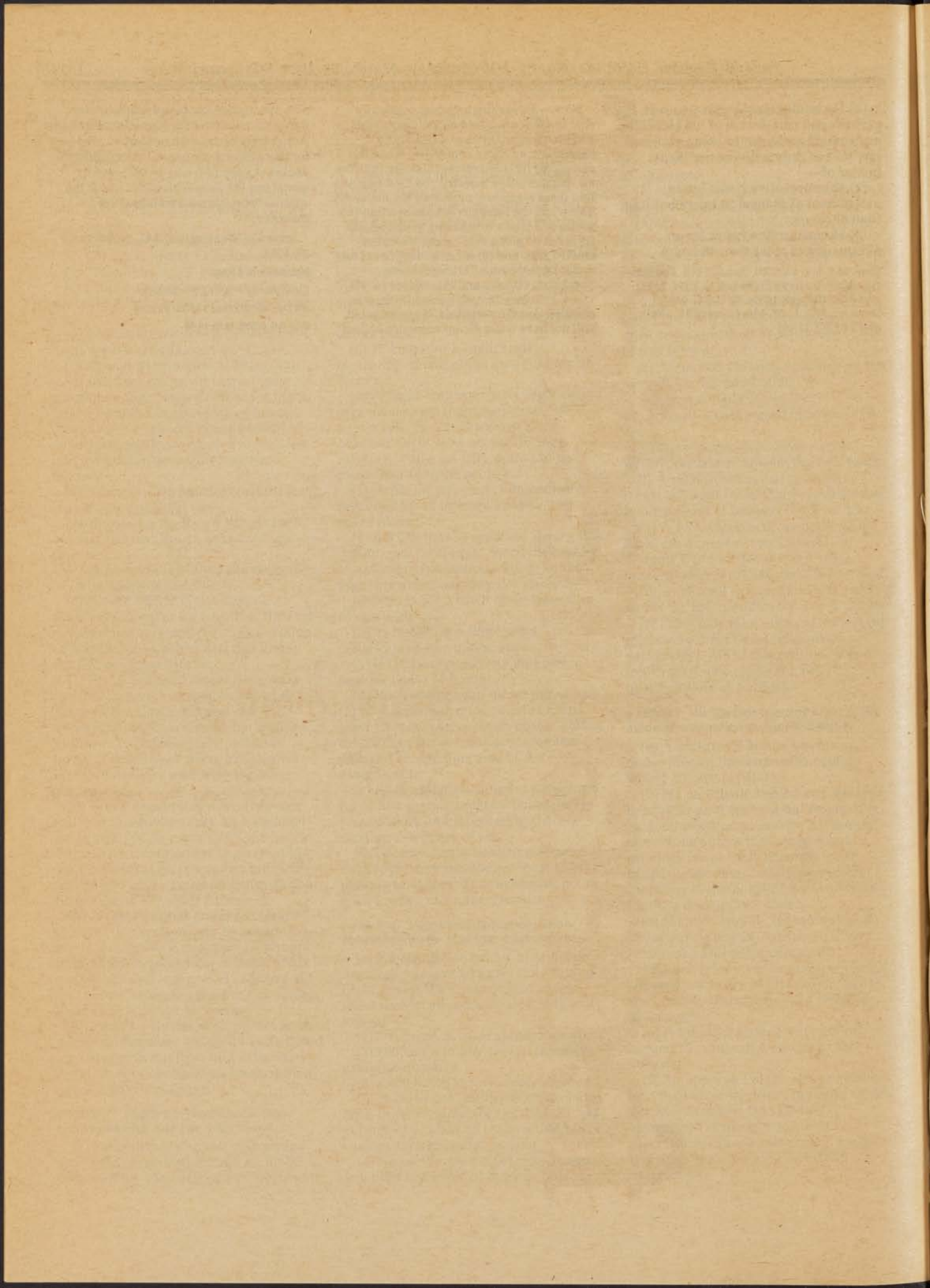
**Kenneth S. Hunt,**

*Director of Flight Operations.*

[FR Doc. 84-8233 Filed 3-27-84; 8:45 am]

**BILLING CODE 4910-13-M**







# **Federal Register**

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**Wednesday  
March 28, 1984**

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## **Part V**

### **Department of Energy**

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**Office of Conservation and Renewable  
Energy**

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#### **10 CFR Part 430**

**Energy Conservation Program for  
Consumer Products; Test Procedures for  
Furnaces, Vented Home Heating  
Equipment and Unvented Home Heating  
Equipment; Final Rule**



## DEPARTMENT OF ENERGY

Office of Conservation and  
Renewable Energy

## 10 CFR Part 430

[Docket No. CAS-RM-79-104]

Energy Conservation Program for  
Consumer Products; Test Procedures  
for Furnaces, Vented Home Heating  
Equipment, and Unvented Home  
Heating EquipmentAGENCY: Office of Conservation and  
Renewable Energy, DOE.

ACTION: Final rule.

**SUMMARY:** The Department of Energy (DOE) hereby prescribes amendments to its test procedures for furnaces, vented home heating equipment, and unvented home heating equipment. These test procedures are one part of the energy conservation program for consumer products established pursuant to the Energy Policy and Conservation Act as amended by the National Energy Conservation Policy Act. Among other program elements, the legislation requires that standard methods of testing be prescribed for 13 covered products.

DOE is referencing, the American National Standards Institute/American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ANSI/ASHRAE) Standard 103-82 into the furnace test procedure. Other amendments prescribed today for furnaces include test procedures for modulating furnaces and boilers, condensing furnaces and boilers, and thermal stack dampers, and other technical revisions. Amendments prescribed today for vented home heating equipment include test procedures for vented heaters with thermal stack dampers and/or manual controls and a simplified test procedure which covers modulating vented heaters. Amendments prescribed today for unvented home heating equipment include test procedures for unvented heaters that use natural gas, propane, or kerosene. DOE is also including an estimated cost per million Btu output as a measure of energy use for vented and unvented heaters.

EFFECTIVE DATE: (30 days from  
publication)

## FOR FURTHER INFORMATION CONTACT:

Michael J. McCabe, U.S. Department of Energy, Office of Conservation and Renewable Energy, Forrestal Building, Mail Station CE-113.1, 1000 Independence Avenue, SW., Washington, D.C. 20585 (202) 252-9127

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Forrestal Building, Mail Station GC-33, 1000 Independence Avenue, SW., Washington, D.C. 20585 (202) 252-9513.

## SUPPLEMENTARY INFORMATION:

## I. BACKGROUND

On October 1, 1977, the Department of Energy (DOE) assumed the authority of the Federal Energy Administration (FEA) for the energy conservation program for consumer products, under Section 301 of the Department of Energy Organization Act (DOE Act) (Pub. L. 95-91). The energy conservation program for consumer products was established by FEA pursuant to Title III, Part B of the Energy Policy and Conservation Act (EPCA) (Pub. L. 94-163). Subsequently, EPCA was amended by the National Energy Conservation Policy Act (NECPA) (Pub. L. 95-619). References in this notice to the Act, or to sections of the Act, refer to EPCA as amended by NECPA. Among other program elements, Section 323 of the Act requires that standard methods of testing be prescribed for covered products. Test procedures appear at 10 CFR 430, Subpart B.

## II. DISCUSSION OF COMMENTS

In general, the received comments were supportive of the proposed amendments; consequently for most of the issues, today's notice prescribes the amendments as proposed. For each issue, the following discussion sections repeat the background information that was presented in the proposal followed by a characterization of the comments received and a statement delineating the disposition of the issue with regards to today's final rule. Also, some additional issues were brought up during the comment period. Where appropriate, those issues are also discussed here today.

## A. Furnace Test Procedure

Test procedures for furnaces were prescribed by DOE by notice issued May 2, 1978, 43 FR 20155 (May 10, 1978). DOE amended the furnace test procedures by notice issued August 4, 1980, 45 FR 53720 (August 12, 1980). The amendment included provisions for pulse combustion and condensing furnaces and technical revisions. Subsequently, DOE has become aware of additional areas of concern through cooperative efforts with the furnace industry and by the test procedure waiver process. Specifically, manufacturers of condensing furnaces and boilers felt an improved method of testing was warranted to determine the

amount of beneficial condensation produced in their designs; manufacturers of boilers felt the test procedure needed further clarification in the area of advanced controls (modulating controls and pump delay controls); utilities and research groups identified the need for improving the test procedure with regard to stack dampers and draft hood designs; and the furnace industry expressed the need for the test procedure to specifically outline the method of test for units installed in "isolated combustion systems." On the basis of the information submitted under the waiver process, research done by the National Bureau of Standards (NBS), and other available information, DOE proposed to amend the furnace test procedure to address all these concerns. 48 FR 28014 (June 17, 1983) hereafter referred to as the June 17 proposal. Subsequently, a public hearing was held on June 29, 1983 and comments were received regarding the proposed rule.

## 1. ANSI/ASHRAE Standard 103-82

When the test procedures were initially developed in 1976 and 1977, existing commercial standards were referenced wherever possible. The final test procedures prescribed by DOE reference sections from many commercial standards developed by various consensus standard organizations, such as ASHRAE, Air-Conditioning and Refrigeration Institute, American National Standards Institute, Association of Home Appliance Manufacturers, and Underwriters Laboratory. However, at the time when DOE was developing test procedures for residential furnaces and boilers, no commercial standard existed from ASHRAE, or any other organization, that could meet the needs of the Act. Specifically, no commercial standard was available for referencing by DOE that could be used to determine the annual energy consumption of a furnace as outlined in EPCA. Thus, DOE and NBS set out to develop a test procedure methodology that would satisfy the legislative requirements. This effort included referencing portions of certain commercial standards for the purposes of including test set up and instrumentation provisions that were already established in the test methods used by the furnace industry at that time.

As mentioned above, final test procedures for residential furnaces were prescribed by DOE, pursuant to the Act, on May 10, 1978. In 1980, the test procedures were amended to include new furnace designs and to make some technical revisions. Following the



establishment of the test procedure amendments ASHRAE initiated the development of a standard method of measurement and test for residential furnaces and boilers that could be referenced by DOE in its test procedures. ASHRAE established a Standards Project Committee, with representation from Industry, Government, and Research groups, for the purpose of developing a consensus standard for testing furnaces and boilers. The resulting commercial standard is now available entitled "Methods of Testing for Heating Seasonal Efficiency of Central Furnaces and Boilers ASHRAE 103-82." DOE believes the referencing of the ASHRAE Standard will not result in a difference in efficiency ratings since the Project Committee has essentially adopted the existing DOE test methods.

DOE is required by Section 32 of the FEA Act to alert the public to the use and background of commercial standards in a proposed rulemaking and, through the comment and hearing process, allow interested persons to make known their views regarding the appropriateness of the use of particular commercial standards in any proposed rulemaking.

In addition to identifying the organization which promulgated the standard to be used, Section 32 requires that the Secretary make a judgmental statement concerning the organization process of promulgating any of its standards (i.e. are all interested persons given adequate notice, is there effective representation of all interested persons in the membership, are all proceedings of the organization made available to the public, and can any interested persons obtain reconsideration and review of any action taken by the organization).

In the June 17, 1983 proposal it was the judgment of DOE that ASHRAE standards are not developed in a manner which provided for public participation, comment and review. ASHRAE (ASHRAE, No. 4, at 1),<sup>1</sup> American National Standards Institute (ANSI) (ANSI, No. 5 at 1), and GAMA (GAMA No. 12, at 1), all took exception to this statement and offered that ASHRAE and ANSI<sup>2</sup> procedures do

clearly provide for public participation, comment, and review. DOE has reviewed the procedures of these organizations and agrees that, if complied with, these procedures will provide for public participation, comment, and review.

In addition, as required by Section 32(c) of FEA Act, DOE has consulted with the Attorney General and the Chairman of the Federal Trade Commission (FTC) regarding referencing ASHRAE Standard 103-82 into furnace test procedures. (Letters from DOE to the Attorney General and FTC dated July 26, 1983.)

All comments received concerning the use of ASHRAE Standard 103-82 expressed approval. In addition, neither the Attorney General nor the Chairman of FTC recommends against such referencing or use. (Letter from Attorney General dated September 14, 1983, letter from FTC dated September 12, 1983.) Therefore, DOE is referencing in today's final rule the ASHRAE Standard 103-82.

Since the standard has received approval from the American National Standards Institute (ANSI), the standard has been designated as the ANSI/ASHRAE Standard 103-82. Today's final rule reflects this change.

## 2. Modulating Furnaces and Boilers

The furnace and vented heater test procedures were developed to reflect the fact that furnaces, boilers and vented heaters operate either at the maximum firing rate or are off. This is called single step control. For heating equipment that is designed to operate at various firing rates, both the vented heater and furnace test procedures require that the testing is to be based only on the maximum firing rate. It was thought that the results of such testing were reasonably accurate and further complication of an already complicated test procedure was not warranted. However, since that time, two vented heater and three furnace manufacturers have petitioned the Department's Office of Hearings and Appeals (OHA) for an Exception from the existing test procedure on the grounds that such procedures are not appropriate for their units which have modulating controls.<sup>3</sup>

<sup>1</sup> Dearborn Stove Company, Case No. BEE-0883, *Federal Energy Guidelines*, 6 DOE 81,060.

Atlanta Stove Works, Case No. BEE-0983, *Federal Energy Guidelines*, 6 DOE 81,109.

Raypak, Inc., Case No. HXE-0012, *Federal Energy Guidelines*, 9 DOE 81,038.

Teledyne Laars, Case No. HXE-0013, *Federal Energy Guidelines*, 9 DOE 81,038.

A. O. Smith Corporation, Case No. HXE-0018, *Federal Energy Guidelines*, 81,042.

These petitioners felt that modified test procedures are necessary to account for operation with fuel modulation. OHA agreed with the petitioners and has granted an exception in each case. However, no testing provisions were specified in these grants regarding modulating controls. A revised procedure which accommodates two types of fuel modulating controls was developed by NBS and the June 17 proposal proposed this revised procedure.

The two types of modulating controls are:

1. "Step-modulating thermostat control" means a control that reduces burner fuel input rate if the heating load is light, or gradually increases or steps-up the heat input to meet any higher heating load that cannot be met with the low firing rate.

2. "Two stage thermostat control" means a control that either cycles a burner at the reduced heat input rate and off, or cycles a burner at the maximum heat input rate and off.

A. *Proposed Amendment*—The June 17 proposal included methods for measuring the Annual Fuel Utilization Efficiency (AFUE) for modulating furnaces and boilers by devising two new measures, weighted average steady state efficiency and weighted average part load efficiency. The methods are more fully described in the technical support document, *A Test Method and Calculation Procedure for Determining Annual Efficiency for Vented Household Heaters and Furnaces Equipped with Modulating-Type Controls*, NBSIR 82-2497, May 1982.

The June 17 proposal outlined calculation methods for two types of variable firing rate controls, i.e., step-modulating and two stage. All comments received expressed approval of these methods. However, Teledyne Laars and Raypak, Inc. requested clarification in the final rule on which calculation method is to be used when testing their particular design of two stage control. See Teledyne Laars and Raypak, Inc. No. 9, at 4. Specifically, the June 17 proposal assumes that two stage controls operate either from off to minimum and then to off, or from off to maximum and then to off. Their design of modulating controls differ in that they can operate from off to minimum to maximum and back to minimum (more than once) without ever going through an off cycle. NBS has determined that the proposed test method for step modulating controls is appropriate for this design of controls. Thus, the final rule is the same as the proposed rule with the addition of clarifying language

<sup>1</sup> Comments on the rulemaking were given docket numbers. Citations to comments provide the docket numbers, unless the comment was submitted as part of an oral presentation, in which case the citation is to the date and the numerical order of the presentation.

<sup>2</sup> ASHRAE Standards 103-82 received approval as an ANSI Standard on June 21, 1983.



involving user-evaluation of the control. Specifically, this control design is defined as a step modulating control in the definitions.

Also, in early comments, Raypak, Inc. expressed concerns about the appropriateness of the proposed provisions for modulating boilers in general. See Raypak, Inc., No. 1, at 1. However, the final comments from Raypak, Inc. endorsed these provisions as proposed. See Raypak, Inc., No. 6.

**B. Oversize Factor of Furnaces and Boilers**—In the existing furnace test procedure, the value of efficiency used to determine the estimated annual operating cost is prescribed to be constant for all design heating loads regardless of the extent that the capacity of the installed furnace exceeds the design heating load, i.e. the extent of oversizing. The existing furnace test procedures are only applicable to units with single-stage controls. Consequently, where the FTC labeling rule for furnaces and boilers requires annual operating costs for various design heating load to be determined, these costs are based on a single value of efficiency. NBS has found that oversizing has little effect on the efficiency of furnaces and boilers equipped with single stage controls.

However, the efficiency of modulating furnaces and boilers depend on the fraction of the heating load that occurs during the various firing rates. In turn, the fraction is dependent on the extent of oversizing. Consequently, for modulating units, DOE believes the test procedure should reflect the change in efficiency due to the differences in oversizing. This would allow the FTC labeling program to present the consumer with a valid evaluation of modulating furnaces and boilers.<sup>4</sup> Specifically, the labeled operating costs under each design heating load that appears on the FTC EnergyGuide Fact Sheet, will be based on the appropriate value of efficiency for the degree of oversizing that each design heating load represents.

Consequently, the June 17 proposal provided for a separate efficiency and annual cost calculation to be made for each oversizing factor, corresponding to each typical design heating load listed in Table 1 of the test procedure.

Teledyne Laars and Raypak, Inc. objected to the requirement to calculate the efficiency for each degree of oversizing. See Teledyne Laars and Raypak, Inc., No. 9, at 2. It is their belief

that disclosure of these different efficiencies would be of little or no use to the consumer since most consumers do not understand what oversizing means and are not likely to use FTC EnergyGuide fact sheets in any event. DOE disagrees with this contention and fails to see any merit to reducing the accuracy of a test procedure on such a basis. The procedure to determine the different efficiencies is simply an arithmetic exercise with no additional testing required. Since the energy savings potential of modulating controls depends on the extent of oversizing, DOE feels it is justified to require these additional calculations.

These same commenters stated that the proposed test procedures do not provide for the use of zone controls for boilers, and therefore will not recognize the benefits of such widely used systems. See Teledyne Laars and Raypak, Inc. No. 9, at 3. DOE realizes this shortcoming but is reluctant to expand the test procedures to allow different ratings for installations with and without zone controls. As with other installation variables (i.g. chimney height) DOE has sought to be as representative as possible. Since most residential boiler installations are without zone controls, DOE believes it appropriate to have the efficiency ratings based on this single condition. Further, the expansion necessary to accommodate zone controls would be significantly more than that already objected to above (i.e. an efficiency for each degree of oversizing). This expansion would apply not only to modulating boilers but to all boilers. Therefore, DOE is not considering expanding the test procedures to accommodate zone controls at this time.

Hydrotherm Inc., a manufacturer of boilers which are equipped with modulating controls, has been granted a test procedure waiver to use the modulating control test provisions outlined in the June 17 proposal. 48 FR 55020 (December 8, 1983). The effective date of the final rule constitutes the official expiration of the test procedure waiver by Hydrotherm Inc. (F-009). Today's provisions reflect exactly the provisions granted in the Hydrotherm waiver (F-009).

Also, since the above mentioned test procedure exceptions, HXE-0012, HXE-0013, and HXE-0018, (delineated in footnote 3) were partially granted on the basis that no modulating control provisions were included in the existing test procedures, the effective date of this rule constitutes the expiration of those exceptions with regard to modulating controls. Further, those exceptions are

superceded on the effective date of today's rule since all the grounds for these exceptions are now addressed. (See Section II a 9 "Pump Delay Boiler Controls" below).

### 3. Condensing Furnaces and Boilers

**A. Direct Condensate Method**—DOE has granted waivers to Hydrotherm, Inc. (Hydrotherm), Lennox Industries, Inc. (Lennox), Arkla Industries, Inc. (Arkla), Amana Refrigeration, Inc. (Amana), Duo/Matic Olsen, Inc. (Duo/Matic) and Heil Quaker Corporation (Heil) from the existing test procedures for furnaces and boilers because the prescribed test procedures do not adequately consider the improvement in energy efficiency attributable to the condensing and the removing of water in the flue products. 46 FR 34621 (July 2, 1981). 47 FR 32471 (July 27, 1982). 47 FR 57987 (December 29, 1982). 48 FR 28531 (June 22, 1983). 48 FR 41213 (September 14, 1983). 48 FR 41215 (September 14, 1983), respectively.

The test procedure waivers specified that the manufacturers use the test method outlined in Appendix C of the NBS report, *Recommended Testing and Calculation Procedures for Estimating the Seasonal Performance of Residential Condensing Furnaces and Boilers*, NBSIR 80-2110, April 1981. The June 17 proposal was identical to the requirements of the waivers except it proposed a six cycle test in lieu of three cycles. Hydronics Institute (HI), Carrier Corp., GAMA and Trane indicated that the six cycle test was burdensome especially for those designs that have repeatable condensate collection rates. See HI, No. 8, at 4; Carrier, No. 10, at 4; GAMA, No. 12, at 3; and Trane, No. 14, at 2. Also, the one hour period for the steady-state collection test was thought to be excessive by these commenters. NBS analyzed these issues and agrees with the recommended reduction in the number of required cycles for units with repeatable condensate collection rates and the reduction in steady-state testing time.

Accordingly, today's final rule prescribes a ½ hour steady-state test and a three cycle test for those furnaces and boilers with repeatable condensate collection rates. A furnace or boiler is considered to have a repeatable condensate collection rate if it can demonstrate a standard deviation less than 20 percent of the mean per cycle condensate collected after three cycles. For those furnaces and boilers which do not demonstrate a repeatable condensate collection rate in these first three cycles, and additional three cycles are required irrespective of variability.

<sup>4</sup> FTC labeling program for furnaces consists of a requirement to produce "EnergyGuide Fact Sheets" that report estimates of annual operating costs for several different design heating loads (degrees of oversizing).



The effective date of this final rule constitutes the official expiration of the following waivers: Hydrotherm (F-002), Lennox (F-004), Arkla (F-005), Amana (F-006), Duo-Matic/Olsen (F-008) and Heil (F-010). Today's rule differs from what was granted in these six waivers in that one hour steady-state test is changed to a 30 minute test and the cyclic test may be 3 cycles in length instead of 6 cycles in length.

#### 4. Energy Efficiency Descriptor

Although not directly related to any of the issues raised in the June 17 proposal, many commenters discussed the need for an energy efficiency descriptor (energy efficiency rating) to account for the electrical energy used by a fossil fueled furnace in addition to the fossil fuel used. The descriptor AFUE only accounts for the fossil fuel efficiency. See TRD, No. 7, at 1; Carrier, No. 10, at 1; and GAMA, No. 12, at 8. The proposed provisions for modulating controls drew these comments since in most modulating designs improved fuel efficiency (AFUE) is obtained at the expense of additional electrical energy consumption, (e.g. increased blower run time). The existing regulation for determining annual operating costs does reflect this concept, since electrical and fuel costs are separately determined and then summed. The commenters felt that in addition to the annual operating cost provisions, an energy efficiency descriptor needs to be added that will fairly disclose to the consumer the relative performance of different designs of furnaces that use both fossil fuel and electricity. Commenters felt the situation is exacerbated by FTC's Labeling program, where for furnaces the dominant disclosure is AFUE and annual operating costs are relegated to the bottom of the Fact Sheet in grid format. The consumer may make a purchasing decision solely on the AFUE and not consider the electrical cost as well. Carrier delineated an example of the misleading nature of comparisons based on AFUE by showing where a higher AFUE furnace had an actual higher annual operating cost. See Carrier Corp., No. 10, at 2. Obviously, this outcome was dependent on assumed relative costs of the fuel and electricity. Other relative costs assumptions could lead to the opposite outcome, i.e., higher AFUE, lower operating costs. The commenters suggested the adoption of a new efficiency descriptor that includes an average electricity to fuel cost ratio. Any rankings developed from this descriptor would be identical to that developed on the basis of annual operating costs using the same average

electricity to fuel costs ratio. DOE sees some merit to an efficiency descriptor based on the average electricity to fuel cost ratio but feels there exists, already in DOE procedures, a superior method of rating a furnace's performance in all costs scenarios, not just average costs scenarios. The DOE procedures currently provide the method of calculation needed to explicitly detail the electrical energy cost and the fuel energy cost for any furnace.

Therefore, for the reasons discussed above today's final rule does not include a new energy efficiency descriptor. However, DOE will continue to examine this subject and may consider revisions at a later date.

#### 5. Furnaces Without Draft Relief

The 1980 amendments clarified how to test gas furnaces equipped with reduced draft fans and no draft relief device. Specifically, a definition of "direct exhaust" was added and provisions to allow testing of direct exhaust systems were specified. In addition, the Carrier Corporation was granted a test procedure waiver for its induced draft gas furnace with a draft safeguard system. 46 FR 22799 (April 21, 1981). The waiver specified that the unit with a draft safeguard system is tested according to the same provisions specified in the 1980 amendments for "direct exhaust" systems.

The June 17 proposal would allow all manufacturers of similar designs to use the provisions granted to Carrier's draft safeguard system.

All commenters that addressed this issue agreed with the proposal. See HI, No. 8, at 4; Carrier, No. 10, at 3; ETL, No. 11, at 4; and Trane, No. 14, at 2. However, both GAMA and Hydronics Institute suggested that the term "draft safeguard system" is proprietary and should be eliminated. DOE agrees with the commenters, and today's final rule adopts the proposal except that the term "draft safeguard system" is eliminated.

The effective date of today's rule constitutes the official expiration of the Carrier waiver (F-001). Future rulemakings may consider the need to specify exactly how to determine this percent flue flow if it is found that today's provisions lead to difficulty in replicating the procedure.

#### 6. Hot Water Boiler Specifications

Existing test procedures for non-condensing hot water boilers specify testing at a 120°F temperature rise and a 200°F outlet water temperature. These specifications generally are not difficult to achieve and thereby reduce the testing burden on manufacturers. However, some manufacturers of finned

tube boilers were granted test procedure exceptions because their boilers cannot be tested safely at these conditions. (Exception requests by Teledyne Laars and Raypak, Office of Hearings and Appeals, Case Nos. DEE-3439 and DEE-3950). The August 1980 amendments to the furnace test procedures prescribed test procedures for finned tube boilers. Specifically, these amendments required boilers to be tested at a 20°F to 40°F temperature rise and a 200°F outlet water temperature.

Since the 1980 amendments, Energy Kinetics (F-003), a manufacturer of boilers which are designed with low thermal mass, received a test procedure waiver to allow testing of its boilers under the provisions prescribed for finned tube boilers. 46 FR 58732 (December 3, 1981).

The June 17 notice proposed entirely new provisions, specifically all non-condensing hot water boilers are to be tested with a return inlet water temperature of at least 120°F and a water temperature rise of at least 20°F. DOE believed that all non-condensing hot water boilers, including finned tube boilers and low thermal mass boilers, generally operate at these conditions.

Teledyne Laars and Raypak agreed with these provisions but felt the exact test apparatus necessary to supply the 120°F water should be specified. See Teledyne Laars and Raypak, Inc., No. 9, at 4. DOE disagrees and would like to avoid further specification, because in this case no increase in test procedure accuracy is likely.

The effective date of today's final rule constitutes the official expiration of the water specifications provisions of the test procedure waiver granted to Energy Kinetics (F-003).

#### 7. Thermal Stack Dampers

The June 17 proposal proposed a test method to directly measure the off-cycle losses for furnaces and boilers equipped with thermal stack dampers. These losses are the off-cycle infiltration loss ( $L_{i,OFF}$ ) and the off-cycle sensible loss ( $L_{s,OFF}$ ) which have been estimated in the past by the use of off-cycle draft factors for flue gas flow ( $D_F$ ) and for stack gas flow ( $D_S$ ). Currently, the off-cycle draft factors are assigned values in the existing furnace test procedure and these draft factors are adjusted if the unit is equipped with an electro-mechanical stack damper; this adjustment factor is the stack damper effectiveness factor  $D_o$ .

For furnaces and boilers with thermal stack dampers, the energy efficiency could not be accurately determined by using the value of  $D_o$  that was



developed for electric-mechanical stack dampers. This is based on the fact that thermal stack dampers typically have changing off-period leakage rates, whereas electro-mechanical dampers typically have relatively constant off-period leakage rates. Also, the leakage rate is strongly dependent on temperature for thermal stack dampers whereas it is not dependent on temperature for electro-mechanical stack dampers.

The June 17 proposal allowed for the direct measurement of off-cycle losses by measuring the concentration of a tracer gas in the flue and in the stack during an appropriate off-cycle period and thereby eliminating any need for assigned draft factors. The method is based on the tracer gas method described in Appendix A of the NBS milestone report, *Recommendations to DOE on Modifications of Assigned Factors for Test Procedures for Vented Gas and Oil Fueled Heaters*, May 1980, and in Appendix D of ANSI/ASHRAE Standard 103-82. See NBS letter report, *An Analysis of Burner On and Off Periods and Their Effect on Part-Load Efficiency for Furnaces and Boilers Equipped with Modulating Controls*, January 1983.

Comments received regarding this issue approved of the proposal. See HI, No. 8, at 5 and Trane No. 14, at 2. However, GAMA's test procedure committee pointed out a number of questions that needed to be clarified before GAMA could fully support the provisions (e.g. should the thermal stack damper be in place for all parts of the test? should the thermal stack damper be insulated during testing? should the provision apply to furnaces with power burners?) See GAMA, No. 12, at 6. GAMA stated that the provision needed to be re-proposed to allow comment on the complete procedures. DOE agrees and is reserving those provisions relating to thermal stack dampers until testing details and calculation procedures as required can be developed. These details and procedures are still being developed by the National Bureau of Standards. Thus, DOE will include these provisions in a separate notice.

#### 8. Improvement in Stack (Flue) Damper Evaluation in the Test Procedures

Since the development of DOE furnace test procedures, it has been suspected by many interested parties that the actual energy efficiency improvement attributable to electro-mechanical stack (flue) dampers is less than that predicted in the test procedures. At this time, DOE is aware of analyses (both theoretical and field

analyses) that support this conclusion. See *Proposed Framework for Furnace and Boiler Test Procedure Modifications*, a report to U.S. DOE Office of Buildings Energy Research and Development by Arthur D. Little, Inc., November 1982.

The current test procedure evaluates the effectiveness of a stack (flue) damper by comparing the area of the damper plate to the area of the stack. This simplified evaluation method ignores damper closing times. Thus, it is deficient in that it likely results in overstatements of efficiency. Also, the existing method discourages manufacturers from using quicker closing dampers.

The June 17 notice proposed that the direct measurement (tracer gas) method proposed for thermal stack dampers be allowed as an option for other than thermal stack flue dampers.

As with the provisions proposed for thermal stack dampers, all comments received expressed merit for the provisions. See HI, No. 8 at 5; GAMA, No. 12, at 6; and Trane, No. 14, at 2. However, since these provisions for all stack damper designs use essentially the same test method as was proposed for thermal stack dampers, the same questions as to the completeness of the proposed provisions were also raised. DOE agrees with these comments, therefore, DOE is reserving those provisions relating to the direct measurement method of testing all designs of stack dampers until testing details and calculation procedures as required can be developed.

#### 9. Pump Delay Boiler Controls.

The June 17 proposal for pump delay boiler controls included a test method similar to that for time delay blower controls for furnaces, i.e. during testing the circulating pump is allowed to operate in accordance with its own control strategy. Maximum allowable time delays, a minimum return water temperature and a method for calculating the estimated annual operating cost to reflect the additional run time of the electrical circulating pump were proposed.

HI agreed with the proposal, especially for those control strategies that are time actuated. See HI, No. 8, at 6. However, HI felt clarification of the test method with regard to temperature actuated controls was required. It recommended a 15 minute fixed time delay be used for these controls. NBS reviewed these comments and also recommends the incorporation of this provision. Consequently, DOE has incorporated these provisions into today's final rule.

Three boiler manufacturers were granted test procedure exceptions which allowed testing under these provisions for pump delay. (Previously mentioned in footnote 3 were Raypak, Teledyne-Laars, and A. O. Smith). Since both pump delay and modulating controls are addressed, the effective date of today's final rule constitutes the official expiration of exceptions HXE-0012, HXE-0013, and HXE-0018.

DOE also received comments regarding the need to specify clearly the procedures for testing boilers designed for continuous pump operations. See ETL, No. 11, at 1. This is done in today's rule by allowing such designs to have their laboratory testing conducted under continuous pump operation. In addition, the calculations are appropriately adjusted to reflect continuous operation.

#### 10. Improved Method of Determining the S/F Factor for Furnaces and Boilers

**A. Gas Furnaces and Boilers**—The June 17 proposal included a method for calculating the S/F factor (average ratio of stack gas mass flow rate to flue gas mass flow rate at steady-state operation). The S/F factor is used to measure the on-cycle infiltration losses and the off-cycle infiltration losses in the furnace test procedure. The existing method is based on assigned values. The proposed method is based on the flue and stack measurements of CO<sub>2</sub> concentration, which already are required in the existing test procedures.

All comments received regarding these issues agreed with the proposal. See HI, No. 8, at 4; Carrier, No. 10, at 4; GAMA, No. 12, at 6; and Trane, No. 14, at 3. However, GAMA and the Hydronics Institute pointed out that though the flue and stack measurements of CO<sub>2</sub> concentration are already required for gas units with integral draft diverters, they are not required for units equipped with draft hoods. In consideration of this, the commenters suggested a 2-year phase in period for gas units equipped with draft hoods since data is not on file for previously tested units and thus additional testing is necessary to develop the new S/F factors. DOE agrees and has incorporated the suggested 2-year phase in period for units equipped with draft hoods. Specifically, the draft hood units shall have the option of using the existing assigned value or today's method for a 2-year period. Thereafter only today's method may be used.

**B. Oil Furnaces and Boilers**—Based on tests conducted by NBS, it was found that the value of S/F for oil furnaces and boilers is relatively constant, therefore, the assigned value of S/F is not likely to



result in marked inaccuracy. Also, oil furnaces and boilers are commonly marketed and sold without a barometric draft regulator. Thus, for those models, a laboratory determination of an S/F value is inappropriate.

Therefore, DOE proposed to allow the use of an assigned value of S/F oil furnaces and boilers and at the manufacturers option a measured value of S/F for oil furnaces and boilers that have the barometric regulator shipped with the unit. As with the gas furnaces and boilers, CO<sub>2</sub> concentrations are used to determine the measured value of S/F.

No opposing comments were received on this issue. Therefore, DOE has adopted the provisions as proposed.

#### 11. Isolated Combustion System (ICS)

The June 17 notice addressed how DOE test procedures should be applied to determine a representative energy efficiency for units installed in an "isolated combustion system." DOE proposed that an assigned jacket loss value of 1 percent may be used, as an option, by all designs of furnaces, if an outdoor rating is made. Since many of the units in ICS installations are designed and intended for indoor installations, this will allow manufacturers to produce indoor and outdoor ratings of any design without increasing testing burden. Additionally, DOE proposed that representations specifically regarding ICS installations be based on the outdoor test method with one half of the jacket loss deduction.

All commenters supported the proposal regarding ICS systems. See HI, No. 8, at 6; Carrier, No. 10, at 3; GAMA, No. 12, at 5; and Trane, No. 14, at 3. Therefore, the provisions are adopted as proposed.

In addition, HI and GAMA suggested that this issue further be clarified by revising the definition of "outdoor furnace" in the ASHRAE/ANSI Standard 103-82. See HI, No. 8, at 6, and GAMA, No. 12, at 5. Basically, this suggestion is to require a statement on the furnace itself that indicates "intended for outdoor use" if the manufacturer is to consider his design an outdoor furnace in the test procedures. GAMA indicated it would petition the appropriate ASHRAE revision committee regarding this issue.

#### 12. Additional Issues Regarding Furnace Test Procedures

There were a number of additional issues brought up in the comments regarding the furnace test procedures. Although in most cases, these comments were not directly related to the June 17

proposal, they are discussed here for the information of all interested parties.

**A. Test Procedure Applicability to Furnaces with High Mass Heat Exchangers**—The 20th Century Heating and Ventilating Company (20th Century) believed the June 17 proposal failed to address the company's long-standing objections to the DOE furnace test procedures. See 20th Century, No. 2. Twentieth Century company believes that furnaces with higher mass are inherently more efficient than the AFUE predicted by using DOE's "average cycle" methodology. Twentieth Century contends that its design will continue to deliver heat beyond the time frame of the average cycle; thereby keeping the thermostat satisfied and keeping the burner off beyond the time the test procedures assume a furnace should recycle. This postponing of burner on time, called a "free ride" by the commenter, is the basis of the company's contention that its furnace is inherently more efficient than predicted by DOE's test procedures. The fundamental error in this contention is the belief, by the company, that the house thermostat will be satisfied as long as some heat is being delivered by the furnace. This belief is incorrect since the room temperature can decrease in spite of the delivered heat; thus, the thermostat is not satisfied and another burner cycle is needed even though the furnace blower may still be delivering some heat. The DOE test procedures allow for the rating of furnaces with various blower run times. In fact, if the design is such that the furnace would deliver heat in excess of the amount that would be delivered during the average cycle time frame, the test procedures allow ratings based on continuous fan operation.

DOE believes the existing procedures do adequately and fairly allow for the rating of furnaces with high mass heat exchangers. Therefore, DOE sees no need to further address this issue.

**B. Deletion of Test Procedures for Electric Furnaces**—Trane, Inc. recommended that "the rating of electric furnaces be deleted from the DOE test procedures since they are essentially 100 percent efficient and perpetuation of their rating with resulting FTC labeling is contributing to a waste of industry and government resource time with no benefit to the consumers." See Trane, No. 14, at 1.

DOE believes the use of the test procedure itself constitutes little or not testing burden to the manufacturer. Test procedure results and the FTC labeling program provide consumers with useful information. While there is little variation in electric furnace efficiency,

the DOE is not deleting the provisions. If the commenter has any proposed revisions to the FTC labeling program, they should be addressed to the FTC.

**C. Jacket Loss Testing Accuracy**—The existing DOE test procedures refer to the industry standards jacket loss test when determining the efficiency of furnaces installed outdoors. The jacket loss provisions of these standards of the American National Standard Institute (ANSI) (ANSI Z21.47 and ANSI Z91.1) were incorporated into the ANSI/ASHRAE 103-82 standard. These provisions as published in the ANSI/ASHRAE 103-82 was criticized by the ETL Laboratories as being extremely vague and subject to varied interpretations. See ETL, No. 11, at 1. ETL suggests a more formal and detailed jacket loss test be developed.

DOE will consider this issue as a possible area for future test procedure rulemaking. Any data, analysis, or general comment from interested parties including ANSI are welcome.

Comments were also received that the proposed jacket loss test failed to assign an adjustment factor, C<sub>j</sub>, for finned tube boilers as was done in the existing test procedures. See Teledyne Laars and Raypak, Inc., No. 9, at 4, and GAMA, No. 12, at 5. DOE regrets this inadvertent error and has included in today's rule the provision that C<sub>j</sub> = 1.0 for finned tube boilers.

**D. Need to Include a "Preamble" to the Test Procedures**—Trane, Teledyne Laars and Raypak and GAMA recommended that a preamble be included in the test procedures to clarify their intent. See Trane, No. 14, at 1, Teledyne Laars and Raypak, Inc., No. 9, at 5, and GAMA, No. 12 at 9. Basically, the preamble would serve to point out the inability of the test procedures to predict the energy performance of a furnace in every installation. Rather, it would point out that their use is for comparison purposes and thus installation variables are only representatively accounted for. DOE agrees with this statement. Thus, this discussion constitutes a "preamble" to the test procedure as requested.

GAMA and Trane suggested DOE provide that: "the procedures are not intended to provide comparisons with other types of heating devices such as heat pumps, space heater, etc." DOE strongly objects to this additional wording because this cross-product comparison was intended by DOE in developing the different test procedures for the various types of heating devices. Efforts were made by DOE to promulgate consistent test procedures that will allow, to the extent possible,



informed purchase decisions across types of heating devices. In addition, the Act requires this when it states the test procedures are to contain measures of energy consumption which are likely to assist consumers in making purchasing decisions.

#### B. Vented Heater Test Procedure

The vented heater test procedure was prescribed by DOE by notice issued May 2, 1978, 43 FR 20182 (May 10, 1978). Several manufacturers petitioned DOE to expand the vented heater test procedure to include modulating vented heaters and manually controlled vented heaters. Other manufacturers felt that an improved method of testing was needed for vented oil heaters equipped with vaporizing-type burners. In 1980, the *Ad Hoc* Technical Committee of GAMA, presented a simplified testing method to DOE. The method was intended to be an optional procedure that reduces the testing burden on manufacturers. On the basis of the information submitted by the petitioners, information from GAMA, research conducted by NBS, and other available information, DOE proposed to amend the vented heater test procedure to address these concerns in the June 17 proposal. Subsequently, a public hearing was held on June 29, 1983 and comments were received regarding the proposed rule. DOE today is amending the vented heater test procedure to expand the coverage of the test procedure while at the same time reducing the testing burden.

##### 1. Simplified Vented Heater Test Procedure

For vented heaters equipped without manual controls or without thermal stack dampers, DOE proposed a simplified test procedure. The simplified procedures addressed those heaters with modulating controls.

No disapproving comments were received regarding the simplified procedures. See GAMA, No. 12, at 10. Therefore, DOE is adopting the simplified procedure as proposed in the June 17 proposal.

Also, since the above mentioned test procedure exceptions BEE-0883 and BEE-0983 (delineated in foot note 3) were granted partially on the basis that no modulating control provisions were included in the existing vented heater test procedures, the effective date of today's rule constitutes the expiration of those exceptions with regard to modulating controls.

##### 2. Manually Controlled Vented Heaters

The June 17 proposal would allow for a determination of efficiency of

manually controlled heaters by use of a weighted-average steady-state efficiency. Since a typical manual control allows for several firing rates, this weighted average steady-state efficiency is based on the manually controlled heater operating at 50 percent of maximum heating output rate. However, GAMA testified that since there exist manually controlled heaters that have only a single firing rate and for this design, the averaging of efficiencies method is inappropriate. See GAMA, June 29. DOE agrees and today's rule provides that for such designs the weighted average steady-state efficiency is that steady state efficiency when tested at its single firing rate.

Since both modulating controls and manual controls are addressed, the effective date of this final rule constitutes the official expiration of exceptions BEE-0883 and BEE-0983 (delineated in footnote 3).

##### 3. Vented Heaters Equipped With Thermal Stack Dampers

Since no comments objecting to the June 17 proposal for testing of vented heaters with thermal dampers were received, DOE is adopting the proposed provisions in today's final rule.

##### 4. Floor Furnaces

Floor furnaces are a class of vented heaters that are specifically designed to be installed in a crawl space under a home. GAMA suggested that the similar provisions allowed ICS furnaces be allowed for floor furnaces. Specifically, ICS furnaces are allowed an assigned jacket loss of 1 percent and an adjustment factor to account for outdoor and cycling conditions of 1.7. GAMA asks that floor furnaces be allowed an assigned jacket loss of 3 percent and an adjustment factor of 1.7. See GAMA, No. 12, at 12.

NBS has reviewed these comments and recommends that the jacket loss continue to be required to be measured for floor furnaces since reduced jacket losses represent the single most important improvement available to floor furnaces. Allowing an assigned value reduces the incentive for improving jacket losses. Consequently, DOE is not allowing an assigned jacket loss for floor furnaces.

Regarding the issue of a lower adjustment factor for floor furnaces, DOE agrees that some reduction of adjustment factor is appropriate for reasons similar to ICS's (i.e. not entirely outside, protected from the wind, etc.). However, DOE believes that representatively, floor furnace installations more closely resemble outdoor installations than ICS

installations. Therefore, the appropriate adjustment factor for floor furnace jacket loss should be between that which is allowed for ICS furnaces (1.7) and what is allowed for outdoor vented heaters (3.93). The factor of 2.8 represents the midpoint of these two cases.

#### C. Unvented Heater Test Procedures

A test procedure for unvented heaters, using electricity, natural gas, or propane, was proposed by DOE on May 4, 1977, 42 FR 23860 (May 11, 1977). A test procedure for electric heaters was prescribed by DOE on May 2, 1978, 43 FR 20128 (May 10, 1978). A final test procedure was not prescribed for unvented natural and propane gas heaters at that time because the Consumer Product Safety Commission (CPSC) proposed to ban the sale of these heaters. 43 FR 6235 (February 14, 1978). CPSC has issued a safety standard in place of a sales ban (16 CFR Part 1212). Today, DOE is prescribing a test procedure appropriate for unvented natural and propane gas heaters as proposed.

In addition, DOE is today prescribing a test procedure for unvented kerosene heaters as proposed. Kerosene heaters were not considered during the previous rulemaking process essentially because these heaters were not widely marketed at the time of the original proposal. DOE believes that a test procedure for kerosene heaters is presently needed since these heaters are now widely marketed.

All comments received regarding these procedures approved of the provisions as proposed. In particular, the kerosene industry elaborated on the appropriateness of the implied 100 percent fuel efficiency. The Kerosun Company testified that since the operation of an unvented heater does not cause an additional infiltration loss to the home, and since the combustion of the fuel is essentially complete, the implied 100 percent fuel efficiency is entirely appropriate. See Kerosun, Inc. June 29. Therefore, based on this testimony and due to the fact that no opposing testimony was received, DOE is prescribing today the provisions that were proposed for these types of heaters.

Arizona Public Service Company (APSC), a public utility, generally supported the proposed amendments for unvented heaters but commented upon the unsafe nature of unvented gas-fired room heaters. See APSC, No. 13. The safety of such heaters is not within the jurisdiction of DOE.



#### D. Estimated Operating Cost for Vented and Unvented Heaters

For vented and unvented heaters, DOE is adopting the proposed method to determine an estimated operating cost per million British thermal units (Btu) output. In the past, several commenters expressed concern over the validity of an estimated annual operating cost for vented and unvented heaters. Most felt that any selection of a representative hours of annual use would be inappropriate for these heaters considering the large variability involved. Secondly, an appropriate efficiency determination was needed for vented heaters with modulating controls. As with furnaces, heaters with modulating controls would have a variable efficiency and operating costs depending on the extent of oversizing.

A valid estimated annual operating cost method for modulating vented heaters would require substantial changes in order to properly consider the effects of oversizing. The changes would require additional calculations for the weighted-average efficiency because the fraction of time that the heater would operate in each mode would depend on the extent of oversizing and on the ratio of minimum to maximum heat output rates. The changes would be similar to today's amendments for modulating furnaces and boilers discussed above.

The variable annual operating cost method was originally developed for vented heaters under the premise that the cost data would be required for the FTC labeling program. The FTC has excluded vented heaters from the labeling program. Therefore, DOE sees no need to expand the estimated annual operating cost calculations for vented heaters.

DOE believes that for vented and unvented heaters the best economic measure to assist consumers in their purchasing decisions is the estimated operating cost per million Btu output. For vented heaters, the estimated cost is determined by using the measured output, the representative unit cost of energy and the annual fuel utilization efficiency (which may be determined from the simplified test procedure proposed today). For unvented heaters, the estimated cost is determined by using the measured output, the representative unit cost of energy and the implied efficiency of 100 percent.

At the public hearing, GAMA and Kerosun, Inc. expressed support for the cost per million Btu's measure. No comments opposing the measure were received. See GAMA, June 29; Kerosun, June 29. Therefore, DOE is today

prescribing this measure for both unvented and vented home heating equipment.

However, GAMA thought it appropriate that in addition to cost per million Btu's, an hourly operating cost be included for vented heaters as is currently included in electric unvented heaters. DOE sees little merit in such a measure for vented heaters since most vented heaters have modulating type controls and, therefore, various hourly operating costs. Accordingly, a consumer could be misled by this measure if comparisons are made across various firing rates. DOE feels that such comparisons should be avoided and is, therefore, not including them in today's regulations for all types of heaters.

A number of commenters pointed out an apparent deficiency in the measures provided for vented heaters. Although a regulation to determine the operating cost for heaters which use both fossil fuel and electricity was proposed for unvented heaters, no such regulation was proposed for vented heaters. This was an oversight on DOE's part and consequently, today's rule includes a regulation to determine operating cost for such heaters in both the unvented and vented heater subparagraphs.

#### E. Miscellaneous

After careful consideration of all of the comments and further consultation with NBS, DOE has made some editorial and minor technical changes to the published proposal in today's final rule. For instance, an equals sign (=) is added to the first expression in section 4.9 of Appendix N.

### III. PROCEDURAL MATTERS

#### A. Environmental Review

Pursuant to Section 7(c)(2) of the Federal Energy Administration Act of 1974, a copy of the proposed notice was submitted to the Administrator of the Environmental Protection Agency (EPA) for his comments concerning the impact of this proposal on the quality of the environment. EPA responded by letter with no comment on September 28, 1983.

In addition, the Department has reviewed today's final rule in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.), the Council of Environmental Quality Regulations implementing the procedural provisions of NEPA (40 CFR Part 1500 et seq.), and the Department's own NEPA guidelines (45 FR 20694, March 28, 1980, as amended by 47 FR 7976, Feb. 23, 1982) to determine if an environmental impact statement (EIS) or

an environmental assessment (EA) is required.

Today's final rule serves only to standardize the measurement of energy usage for furnaces and other home heating equipment. The action of prescribing these revised test procedures will not result in any environmental impacts. Because it is clear that today's final rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, DOE has determined that neither an EA nor an EIA is required.

#### B. Regulatory Impact Review

The final rule has been reviewed in accordance with Executive Order 12291 which directs that all regulations achieve their intended goals without imposing unnecessary burdens on the economy, on individuals, on public or private organizations, or State and local governments. The Executive Order also requires that regulatory impact analyses be prepared for "major rules." The Executive Order defines a major rule as any regulation that is likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This final rule would only make minor changes in the test procedures for furnaces and other home heating equipment. Therefore, DOE has determined that this final rule does not come within the definition of a major rule.

In accordance with Section 3(c)(3) of the Executive Order, which applies to rules other than major rules, the final rule was submitted to OMB for review without a regulatory impact analysis. This rule has been reviewed by OMB in accordance with the procedures applicable to rules other than major rules.

#### C. Small Entity Review

The Regulatory Flexibility Act (Pub. L. 96-354) requires that an agency prepare a final regulatory analysis to be available at the time the final rule is published. This requirement does not apply if the agency "certifies that the final rule will not \* \* \* have a



significant economic impact on a substantial number of small entities."

In the June 17 proposal, DOE certified, pursuant to Section 605(b) of the Regulatory Flexibility Act, that the proposal, if promulgated, would not have a significant economic impact on a substantial number of small entities. All commenters were generally supportive of the proposal and no commenter took issue with DOE's certification. Accordingly, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Energy conservation, Household appliances.

(Energy Policy and Conservation Act of December 22, 1975, Pub. L. 94-163, Sec. 323(a))

Issued in Washington, D.C., March 7, 1984.

Pat Collins,

Acting Assistant Secretary, Conservation and Renewable Energy.

#### PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

Provisions of 10 CFR Part 430, § 430.2, § 430.22, Appendix G, Appendix N, and Appendix O are amended as follows:

1. Section 430.2 definition of "unvented home heating equipment" is revised and definitions of "Kerosene," "Unvented gas heater," and "unvented oil heater" are added in alphabetical order to read as follows:

##### § 430.2 Definition.

"Kerosene" means No. 1 fuel oil with a viscosity meeting the specifications as specified in UL-730-1974, section 36.9 and in tables 2 and 3 of ANSI Standard Z91.1-1972.

"Unvented gas heater" means an unvented, self-contained, free-standing, nonrecessed gas-burning appliance which furnishes warm air by gravity or fan circulation.

"Unvented home heating equipment" means a class of home heating equipment, not including furnaces, used for the purpose of furnishing heat to a space proximate to such heater directly from the heater and without duct connections and includes electric heaters and unvented gas and oil heaters.

"Unvented oil heater" means an unvented, self-contained, free-standing, nonrecessed oil-burning appliance

which furnishes warm air by gravity or fan circulation.

##### § 430.22 [Amended]

2. Section 430.22 is amended by revising paragraphs (g), (n) and (o) to read as follows:

##### (g) Unvented home heating equipment.

(1) The estimated annual operating cost for primary electric heaters, shall be the product of: (i) The average annual electric energy consumption in kilowatt-hours per year, determined according to section 3.1 of Appendix G of this subpart and (ii) the representative average unit cost in dollars per kilowatt-hour as provided pursuant to section 323(b)(2) of the Act, the resulting product then being rounded off to the nearest dollar per year.

(2) The estimated regional annual operating cost for primary electric heaters, shall be the product of: (i) The regional annual electric energy consumption in kilowatt-hours per year for primary heaters determined according to section 3.2 of Appendix G of this subpart and (ii) the representative average unit cost in dollars per kilowatt-hour as provided pursuant to section 323(b)(2) of the Act, the resulting product then being rounded off to the nearest dollar per year.

(3) The estimated operating cost per million Btu output shall be—

(i) For primary and supplementary electric heaters and unvented gas and oil heaters without an auxiliary electric system, the product of: (A) One million; and (B) the representative unit cost in dollars per Btu for natural gas, propane, or oil, as provided pursuant to section 323(b)(2) of the Act as appropriate, or the quotient of the representative unit cost in dollars per kilowatt-hour, as provided pursuant to section 323(b)(2) of the Act, divided by 3,412 Btu per kilowatt hour, the resulting product then being rounded off to the nearest 0.01 dollar per million Btu output; and

(ii) For unvented gas and oil heaters with an auxiliary electric system, the product of: (A) The quotient of one million divided by the rated output in Btu's per hour as determined in 3.4 of appendix G of this subpart; and (B) the sum of: (1) The product of the maximum fuel input in Btu's per hour as determined in 2.2. of this appendix times the representative unit cost in dollars per Btu for natural gas, propane, or oil, as appropriate, as provided pursuant to section 323(b)(2) of the Act, plus (2) the product of the maximum auxiliary electric power in kilowatts as determined in 2.1 of appendix G of this

subpart times the representative unit cost in dollars per kilowatt-hour as provided pursuant to section 323(b)(2) of the Act, the resulting quantity shall be rounded off to the nearest 0.01 dollar per million Btu output.

(4) The rated output for unvented heaters is the rated output as determined according to either sections 3.3 or 3.4 of Appendix G of this subpart, as appropriate, with the result being rounded to the nearest 100 Btu per hour.

(5) Other useful measures of energy consumption for unvented home heating equipment shall be those measures of energy consumption for unvented home heating equipment which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of Appendix G of this subpart.

(n) *Furnaces.* (1) The estimated annual operating cost for furnaces is the sum of: (i) The product of the average annual fuel energy consumption, in Btu's per year for gas or oil furnaces or in kilowatt-hours per year for electric furnaces, determined according to section 4.8 or 4.10 of Appendix N of this subpart, respectively, and the representative average unit cost in dollars per Btu for gas or oil, or dollars per kilowatt-hour for electric, as appropriate, as provided pursuant to section 323(b)(2) of the Act, plus (ii) the product of the average annual auxiliary electric energy consumption in kilowatt-hours per year determined according to section 4.9 of Appendix N of this subpart, and the representative average unit cost in dollars per kilowatt-hour as provided pursuant to section 323(b)(2) of the Act, the resulting sum then being rounded off to the nearest dollar per year. (For furnaces which operate with variable inputs, an estimated annual operating cost is to be calculated for each degree of oversizing specified in section 4 of Appendix N of this subpart.)

(2) The annual fuel utilization efficiency for furnaces, expressed in percent, is the ratio of annual fuel output of useful energy delivered to the heated space to the annual fuel energy input to the furnace determined according to section 4.6 of Appendix N of this subpart for gas and oil furnaces and determined in accordance with section 4.1 of Appendix N of this subpart for electric furnaces.

(3) The estimated regional annual operating cost for furnaces is the sum of: (i) The product of the regional annual fuel energy consumption in Btu's per year for gas or oil furnaces or in kilowatt-hours per year for electric



furnaces, determined according to section 4.11 or 4.13 of Appendix N of this subpart, respectively, and the representative average unit cost in dollars per Btu for gas or oil, or dollars per kilowatt-hour for electric, as appropriate, as provided pursuant to section 323(b)(2) of the Act, plus (ii) the product of the regional annual auxiliary electrical energy consumption in kilowatt-hours per year, determined according to section 4.12 of Appendix N of this subpart, and the representative average unit cost in dollars per kilowatt-hour as provided pursuant to section 323(b)(2) of the Act, the resulting sum then being rounded off to the nearest dollar per year.

(4) The energy factor for furnaces, expressed in percent, is the ratio of annual fuel output of useful energy delivered to the heated space to the total annual energy input to the furnace determined according to section 4.14 of Appendix N of this subpart.

(5) Other useful measures of energy consumption for furnaces shall be those measures of energy consumption which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of Appendix N of this subpart.

(o) *Vented home heating equipment.*

(1) The annual fuel utilization efficiency for vented home heating equipment, expressed in percent, which is the ratio of the annual fuel output of useful energy delivered to the heated space to the annual fuel energy input to the vented heater, shall be determined either according to section 4.1.17 of Appendix O of this subpart for vented heaters without either manual controls or thermal stack dampers; according to section 4.2.6 of Appendix O of this subpart for vented heaters equipped with manual controls; or according to section 4.3.7 of Appendix O of this subpart for vented heaters equipped with thermal stack dampers.

(2) The estimated operating cost per million Btu output for vented heaters without an auxiliary electric system shall be the product of: (i) One hundred; (ii) the quotient of one million Btu output divided by the annual fuel utilization efficiency as determined in paragraph (o) (1) and (iii) the representative unit cost in dollars per Btu for natural gas, propane, or oil, as appropriate, as provided pursuant to section 323(b)(2) of the Act, the resulting product shall be rounded to the nearest 0.01 dollar per million Btu output.

(3) The estimated operating cost per million Btu output for gas or oil vented home heating equipment with an auxiliary electric system shall be the

product of: (A) The quotient of one million Btu divided by the sum of: (1) The product of the maximum fuel input in Btu's per hour as determined in 3.1.1 or 3.1.2 of Appendix O of this subpart times the annual fuel utilization efficiency in percent as determined in 4.1.17, 4.2.6, or 4.3.7 of this appendix as appropriate divided by 100, plus (2) the product of the maximum electric power in watts as determined in 3.1.3 of Appendix O of this subpart times the quantity 3.412; and (B) of the sum of: (1) the product of the maximum fuel input in Btu's per hour as determined in 3.1.1 of this appendix times the representative unit cost in dollars per Btu for natural gas, propane, or oil, as appropriate, as provided pursuant to section 323(b)(2) of the Act; plus (2) the product of the maximum auxiliary electric power in kilowatts as determined in 3.1.3 of Appendix O of this subpart times the representative unit cost in dollars per kilowatt-hour as provided pursuant to section 323(b)(2) of the Act, the resulting quantity shall be rounded off to the nearest 0.01 dollar per million Btu output.

(4) Other useful measures of energy consumption for vented home heating equipment shall be those measures of energy consumption which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of Appendix O of this subpart.

3. Appendix G. to Subpart B of Part 430 is revised to read as follows:

**Appendix G to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Unvented Home Heating Equipment**

1. *Testing conditions.*

1.1 *Installation.*

1.1.1 *Electric heater.* Install heater according to manufacturer's instructions. Heaters shall be connected to an electrical supply circuit of nameplate voltage with a wattmeter installed in the circuit. The wattmeter shall have a maximum error not greater than one percent.

1.1.2 *Unvented gas heater.* Install heater according to manufacturer's instructions. Heaters shall be connected to a gas supply line with a gas displacement meter installed between the supply line and the heater according to manufacturer's specifications. The gas displacement meter shall have a maximum error not greater than one percent. Gas heaters with electrical auxiliaries shall be connected to an electrical supply circuit of nameplate voltage with a wattmeter installed in the circuit. The wattmeter shall have a maximum error not greater than one percent.

1.1.3 *Unvented oil heater.* Install heater according to manufacturer's instructions. Oil heaters with electric auxiliaries shall be connected to an electrical supply circuit of nameplate voltage with a wattmeter installed

in the circuit. The wattmeter shall have a maximum error not greater than one percent.

1.2 *Temperature regulating controls.* All temperature regulating controls shall be shorted out of the circuit or adjusted so that they will not operate during the test period.

1.3 *Fan controls.* All fan controls shall be set at the highest fan speed setting.

1.4 *Energy supply.*

1.4.1 *Electrical supply.* Supply power to the heater within one percent of the nameplate voltage.

1.4.2 *Natural gas supply.* For an unvented gas heater utilizing natural gas, maintain the gas supply to the heater with a normal inlet test pressure immediately ahead of all controls at 7 to 10 inches of water column. The regulator outlet pressure at normal supply test pressure shall be approximately that recommended by the manufacturer. The natural gas supplied should have a higher heating value within  $\pm 5$  percent of 1,025 Btu's per standard cubic foot. Determine the higher heating value, in Btu's per standard cubic foot, for the natural gas to be used in the test, with an error no greater than one percent. Alternatively, the test can be conducted using "bottled" natural gas of a higher heating value within  $\pm 5$  percent of 1,025 Btu's per standard cubic foot as long as the actual higher heating value of the bottled natural gas has been determined with an error no greater than one percent as certified by the supplier.

1.4.3 *Propane gas supply.* For an unvented gas heater utilizing propane, maintain the gas supply to the heater with a normal inlet test pressure immediately ahead of all controls at 11 to 13 inches of water column. The regulator outlet pressure at normal supply test pressure shall be that recommended by the manufacturer. The propane supplied should have a higher heating value of within  $\pm 5$  percent of 2,500 Btu's per standard cubic foot. Determine the higher heating value in Btu's per standard cubic foot, for the propane to be used in the test, with an error no greater than one percent. Alternatively, the test can be conducted using "bottled" propane of a higher heating value within  $\pm 5$  percent of 2,500 Btu's per standard cubic foot as long as the actual higher heating value of the bottled propane has been determined with an error no greater than one percent as certified by the supplier.

1.4.4 *Oil supply.* For an unvented oil heater utilizing kerosene, determine the higher heating value in Btu's per gallon with an error no greater than one percent. Alternatively, the test can be conducted using a tested fuel of a higher heating value within  $\pm 5$  percent of 137,400 Btu's per gallon as long as the actual higher heating value of the tested fuel has been determined with an error no greater than one percent as certified by the supplier.

1.5 *Energy flow instrumentation.* Install one or more energy flow instruments which measure, as appropriate and with an error no greater than one percent, the quantity of electrical energy, natural gas, propane gas, or oil supplied to the heater.

2. *Testing and measurements.*

2.1 *Electric power measurement.*

Establish the test conditions set forth in







4. Appendix N to Subpart B of Part 430 is revised to read as follows:

**Appendix N to Subpart B of Part 430—  
Uniform Test Method for Measuring the  
Energy Consumption of Furnaces**

1. *Definitions.* Definitions shall include the definitions specified in section 3.0 of ANSI/ASHRAE 103-82 and the following additional definitions:

1.1 "ASHRAE" means the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.

1.2 "ANSI/ASHRAE 103-82" means the test standard published in 1982 by ASHRAE, approved by the American National Standards Institute (ANSI) on June 21, 1983 and titled "Methods of Testing for Heating Seasonal Efficiency of Central Furnaces And Boilers."

1.3 "Electro-mechanical stack damper" means a type of stack damper which is operated by electrical and/or mechanical means.

1.4 "Isolated combustion system" means an installation in which a furnace is installed indoors and all combustion and ventilation air is admitted through grills or ducts from outdoors and (all such air) does not communicate with air in the conditioned space.

1.5 "Modulating control" means either a step modulating or a "two-stage control"

1.6 "Reduced heat input rate" means the factory adjusted lowest reduced heat input rate for furnaces equipped with either two stage thermostats or step-modulating thermostats.

1.7 "Single stage thermostat" means a thermostat that cycles a burner from the maximum heat input rate and off.

1.8 "Step-modulating control" means a modulating control that cycles a burner from the reduced input rate to off if the heating load is light. If a higher heating load is encountered which cannot be met with the reduced input rate, the control either gradually increases or steps up the input rate to meet the higher heating load. At that point if a lower heating load is encountered, the control either gradually decreases or steps down to a lower rate, or gradually increases the heat input to meet any higher heating load that cannot be met with the low firing rate.

1.9 "Thermal stack damper" means a type of stack damper which is dependent for operation exclusively upon the direct conversion of thermal energy of the stack gases into closure of the damper.

1.10 "Two stage control" means a modulating control that cycles a burner from reduced heat input rate and off or cycles a burner at the maximum heat input rate and off.

2.0 *Testing conditions.* The testing conditions shall be as specified in section 8 of ANSI/ASHRAE 103-82 with the exception of section 8.4.2.3, and the inclusion of the following additional testing conditions:

2.1 *Gas burner adjustment at maximum input rate.* The following paragraph is in addition to the requirements specified in section 8.4.1.1 of ANSI/ASHRAE 103-82:

For gas fueled furnaces and boilers equipped with modulating type controls,

adjust the controls to operate the unit at the maximum fuel input rate. Set the thermostat control to the maximum setting. Start the furnace or boiler by turning the safety control valve to the "on" position. Use a supply water temperature for boilers that will allow for continuous operation without shut off by the thermostat control.

2.2 *Gas burner adjustment at reduced input rate.* The following paragraph is in addition to the requirements specified in section 8.4.1.1 of ANSI/ASHRAE 103-82:

For gas fueled furnaces and boilers equipped with modulating type thermostat controls, adjust the controls to operate the unit at the reduced fuel input rate. Set the thermostat control to the lowest setting that does not cause the burner to cycle on and off. Start the furnace or boiler by turning the safety control valve to the "on" position. Use supply water temperature for boilers that will allow for continuous operation without shut off by the thermostat control. If necessary, supply water may be increased above 120° F in order to maintain continuous operation at the reduced setting.

2.3 *Gas and oil fueled low pressure steam and hot water boilers (including direct vent systems).* The following paragraphs are in place of section 8.4.2.3 of ANSI/ASHRAE 103-82:

For non-condensing hot water boilers, the water flow rate shall be adjusted to produce a water temperature rise, during the steady-state test described in section 9.1 of ANSI/ASHRAE 103-82, of 19° F–24° F. During the steady-state and heat-up tests, the hot water boiler shall be supplied with water having a temperature of at least 120° F but not more than 124° F.

For steam boilers, the pressure shall be at atmospheric or at a pressure not exceeding 2 psig during the steady-state test.

3.0 *Test procedure.* Testing and measurements shall be as specified in section 9 of ANSI/ASHRAE 103-82 with the exception of sections 9.2.2 and 9.3.2, and the inclusion of the following additional procedures:

3.1 *Gas fueled gravity furnaces, forced air central furnaces, and low pressure steam and hot water boilers (including direct vent systems, excluding condensing furnaces or boilers).* The following paragraphs are in addition to the requirements specified in section 9.1.1 of ANSI/ASHRAE 103-82:

For all gas fueled furnaces and boilers, the steady-state efficiency shall be determined at the maximum fuel input rate measured in accordance with sections 2.1 of this appendix and section 9.1.1 of ANSI/ASHRAE 103-82. Also, for gas fueled furnaces and boilers equipped with either two stage thermostats or step-modulating thermostats, the steady-state efficiency shall also be determined at the reduced fuel input rate measured in accordance with sections 2.2 of this appendix and section 9.1.1 of ANSI/ASHRAE 103-82.

In addition, for gas fueled furnaces and boilers equipped with draft hoods, measure CO<sub>2</sub> in stack after dilution during the steady state condition.

3.2 *Flue temperature measurements—cool down test.* The following paragraphs are in addition to the requirements specified in section 9.2 of ANSI/ASHRAE 103-82:

For furnaces and boilers equipped with step-modulating thermostats, the cool down test shall be conducted after steady-state conditions have been reached at the reduced input rate, as specified in section 2.2 of this appendix. For furnaces and boilers equipped with two stage controls, separate cool down tests shall be conducted after steady-state conditions have been reached at both the reduced and maximum fuel input rates.

3.3 *Gas and oil fueled boilers—cool down test.* The following paragraphs are in place of the requirements specified in section 9.2.2 of ANSI/ASHRAE 103-82:

After steady-state testing has been completed, turn the main burner(s) off and measure the flue gas temperature at 3.75 (T<sub>F,OFF(3.75)</sub>) and 22.5 (T<sub>F,OFF(22.5)</sub>) minutes after the burner shuts off, using the thermocouple grid described above. During this off period for units that do not have pump delay after shut-off, no water shall be allowed to circulate through the hot water boilers. For units that have pump delay on shut-off, except those having pump controls sensing water temperature, the pump shall be stopped by the unit control and the time, t', between burner shut-off and pump shut-off shall be measured within one second accuracy. For units having pump delay controls which sense water temperature, the pump shall be operated for 15 minutes and t' shall be 15 minutes. While the pump is operating, the inlet water temperature and flow rate shall be maintained at the same values as used during the preceding steady-state test.

Make a third flue gas temperature measurement 45 minutes after the burner shuts off to determine the off-period minimum flue gas temperature (T<sub>F,OFF(45)</sub>).

During this cool down test, measure the energy input rate to the pilot light (Q<sub>p</sub>), if the unit is so equipped, to within an error no larger than ± 3 percent. Record all measured values. For oil fueled units not equipped with stack dampers, maintain the draft in the flue within the same ranges specified in section 9.2.1 of ANSI/ASHRAE 103-82. For direct vent systems with flue dampers or boilers equipped with both stack dampers and barometric dampers, close the flue or stack damper during the cool down test.

3.4 *Flue gas temperature measurements—heat-up test.* The following paragraph is in addition to the requirement specified in section 9.3 of ANSI/ASHRAE 103-82.

For furnaces and boilers equipped with step-modulating thermostats, the heat-up test shall be conducted at the reduced fuel input rate, as specified in section 2.2 of this appendix. For furnaces and boilers equipped with two stage controls, separate heat-up tests shall be conducted at both the reduced and maximum fuel input rates.

3.5 *Gas and oil fueled boilers.* The following paragraph is in place of the requirements specified in section 9.3.2 of ANSI/ASHRAE 103-82.

Fifty minutes or more after the main burner(s) is turned off for the cool down test, turn on the steam or hot water boiler and measure the flue gas temperature at 1.0 (T<sub>L,ON(1.0)</sub>) and 5.5 (T<sub>L,ON(5.5)</sub>) minutes after the main burners are turned on. The pump circulating the water through the hot water



boiler shall be started simultaneously with the main burner(s). The water flow rate shall be the same as that maintained during the steady-state test described in section 9.1 of ANSI/ASHRAE 103-82. During the heat-up test for oil fired boilers maintain the draft in the flue pipe within  $\pm 0.01$  inch of water column of the manufacturer's recommended on-period draft. Record the measured temperatures.

### 3.6 Direct measurement of condensate.

For condensing furnaces and boilers, the condensate heat loss shall be determined either by the method specified in section 11.2.33 of ANSI/ASHRAE 103-82 or by the following test procedures:

Control devices shall be installed to allow cyclical operation of the unit and return water or air flows as described in sections 9.2 and 9.3 of ANSI/ASHRAE 103-82 and sections 3.2, 3.3, 3.4 and 3.5 of this appendix. The test unit shall be leveled prior to test. Operating times and beginning and end of condensate collection shall be determined by a clock or timer with a minimum resolution of one second. Humidity of the room air shall, at no time, exceed 80 percent.

Control of on or off operation actions shall be within  $\pm 6$  seconds of the scheduled time. Condensate drain lines shall be attached to the unit as specified in the manufacturer's installation instructions. A continuous downward slope of drain lines from the unit shall be maintained. Additional precautions shall be taken to facilitate uninterrupted flow of condensate during the test.

The flue pipe installation must not allow condensate formed in the flue pipe to flow back into the unit. An initial downward slope from the unit's exit, an offset with a drip leg, annular collection rings, or drain holes must be included in the flue pipe installation without disturbing normal flue gas flow, as specified in section 7.2.2 of ANSI/ASHRAE 103-82. Flue gases should not flow out of the drain with the condensate.

Collection-containers must be glass or polished stainless steel, so removal of interior deposits can be easily made. The collection-container shall have a vent opening to the atmosphere.

The scale for measuring the containers and sample condensate mass shall be calibrated with an error no larger than  $\pm 0.5$  percent over the range of interest.

The condensing furnace or boiler shall be tested by the flue loss method in accordance with the provisions for condensing units, as specified in section 9 of ANSI/ASHRAE 103-82 and section 3 of this appendix. The condensate collection-containers shall be dried prior to each use and shall be at room ambient temperature prior to a sample collection. Tare weight of the collection-container must be measured and recorded prior to each sample collection.

The unit should be operated in a cyclical manner until flue gas temperatures at the end of each on-cycle are within  $5^\circ\text{F}$  ( $2.8^\circ\text{C}$ ) of each other for two consecutive cycles. On-cycle and off-cycle times are listed in Table 2 of this appendix. Begin three test cycles. Return air temperature for furnaces shall be as specified in section 9 of ANSI/ASHRAE 103-82 and section 3 of this appendix. Return water temperature for boilers shall be as

specified in section 2.3 of this appendix. Operation of the furnace blower or boiler pump shall conform to the time delay requirements specified in sections 9.2 and 9.3 of ANSI/ASHRAE 103-82 and sections 3.2, 3.3, 3.4, and 3.5 of this appendix for cool down and heat up tests. Operation of the boiler pump shall conform to the time delay requirements specified in section 3.3 of this appendix.

Begin condensate collection at one minute before the on-cycle period of the first test cycle. The container shall be removed one minute before the end of each off-cycle period of the sixth test cycle. Condensate mass shall be measured for each test cycle.

Fuel input shall be recorded during the entire test period starting at the beginning of the on-time period of the first cycle to the beginning of the on-time period of the second cycle, etc., for each of the test cycles. Fuel higher heating value (HHV), temperature and pressures necessary for determining fuel energy input ( $Q_c$ ) shall be recorded. The fuel quantity and HHV shall be measured with errors no greater than one percent. Determine the mass of condensate for each cycle ( $m_c$ ) in pounds. If at the end of three cycles, the sample standard deviation is within 20% of the mean value for 3 cycles use total condensate collected in the three cycles as  $m_c$ ; if not, continue collection for an additional three cycles and use the total condensate collected for the six cycles as  $m_c$ . Determine the fuel energy input during the three or six test cycles ( $Q_c$ ) expressed in Btu.

Begin a steady-state condensate collection after steady-state conditions have been achieved as specified in section 8 of ANSI/ASHRAE 103-82 and section 2 of this appendix. The steady-state collection period shall be 30 minutes. Condensate mass shall be measured immediately at the end of the collection period to prevent evaporation loss from the sample. Fuel input shall be recorded for the one hour steady-state test period. Fuel Higher Heating Value (HHV), temperature and pressures necessary for determining fuel energy input  $Q_{c,ss}$  will be observed and recorded in Btu's. The fuel quantity and HHV shall be measured with errors no greater than one percent. Determine the mass of condensate for the steady-state test,  $m_{c,ss}$ , in pounds by subtracting the tare container weight from the total container and condensate weight measured at the end of the 30 minutes test period.

### 3.7 Direct measurement of off-cycle losses testing method. Reserved.

3.8 Direct measurement of the S/F factors for oil furnaces and boilers. For oil furnaces and boilers that are marketed and sold with attached barometric dampers, the S/F factor shall be determined either by using assigned factors in Table 2 of ANSI/ASHRAE 103-82 or by the following test procedure:

To directly measure the S/F factor, seal the barometric damper plate in the closed position. Operate the furnace or boiler until steady-state temperatures are attained. Adjust the draft in the flue within one foot of the heat exchanger exit to be between 0.075 and 0.085 inch water column. A mechanical draft inducer or a natural draft developed by adjusting the height of the test stack may be used. Remove the seal from the barometric

damper and adjust the damper gate to achieve proper draft, as specified by the manufacturer. If the draft over the fire is specified as a range, adjust the draft to the mid-point of that range.

After steady-state conditions are again achieved with the draft adjusted as specified, measure  $\text{CO}_2$  before and after dilution at points marked A and B in Figure 2 of this appendix. To ensure that the sample is well mixed after dilution obtain a representative sample of stack gas by sampling from several points on a horizontal plane through the cross section of the stack. The test setup shown in Figure 2 enhances the mixing of dilution air and flue gases. Alternatively, a straight length of stack or other flue piping arrangement may be used with stack samples taken sufficiently downstream after dilution in order to obtain a well-mixed sample.

3.9 Furnaces and boilers that includes small air passages in the flue. For furnaces and boilers that includes small air passages in the flue where such passage serves a utility other than for draft relief, the air passage shall be open during all tests and the test data shall be reduced as specified in section 4 of this appendix.

These units shall be considered as direct exhaust systems, for the purposes of this test procedure. These provisions shall not apply to systems which allow for air flow through the air passage in excess of 10 percent of maximum steady state total flue flow; in these cases, such passages are to be considered as draft diverters or draft hoods.

4.0 Calculations. Calculations shall be as specified in section 11 of ANSI/ASHRAE 103-82 with the exception of section 11.2.6, and the inclusion of the following additional calculations:

4.1 Annual fuel utilization efficiency for electric furnaces and boilers. The annual fuel utilization efficiency for electric furnaces and boilers (AFUE) is equal to the heating seasonal efficiency for electric furnaces and boilers ( $\text{Eff}_{h,se}$ ) as defined in section 11.1 of ANSI/ASHRAE 103-82.

4.2. Average ratio of stack gas mass flow rate to flue gas mass flow rate at steady-state operation. The following paragraphs are in place of the requirements specified in section 11.2.6 of ANSI/ASHRAE 103-82:

For gas furnaces and boilers with integral draft diverters, calculate the average ratio of stack gas mass flow rate to flue gas mass flow rate at steady-state operation (S/F) defined as:

$$S/F = 1.3 R_{T,s}/R_{T,f}$$

where:

$R_{T,s}$  = as defined in 11.2.3 of ANSI/ASHRAE 103-82

$R_{T,f}$  = as defined in 11.2.2 of ANSI/ASHRAE 103-82

For gas furnaces and boilers equipped with draft hoods determine the S/F by the method set out above or use the assigned value of 2.4. This alternative method may be used until 24 months from the effective date of the amendment. After that date, the assigned value may not be used and only the method set out above may be used.

For oil furnaces and boilers, S/F shall be 1.40 for units not shipped with barometric



dampers or for units shipped with barometric dampers, S/F shall be either 1.40 or determined by:

$$S/F = R_{T,S}/R_{T,F}$$

where:

$R_{T,S}$  = as defined in 11.2.3 of ANSI/ASHRAE 103-82 in which the value of  $CO_2$  measured in the stack in 3.8 of this appendix is used

$R_{T,F}$  = as defined in 11.2.2 of ANSI/ASHRAE 103-82 in which the value of  $CO_2$  measured in the flue in 3.8 of this appendix is used

**4.3 Optional direct condensate measurement method.** For condensing furnaces and boilers for which the direct measurement of condensate is used, as specified in section 3.6 of this appendix, calculate the part-load efficiency ( $\eta_p$ ) and the steady-state efficiency ( $\eta_{ss}$ ) expressed as a percent and defined as:

$$\eta_p = \text{Effy}_{hs} + L_G - L_C$$

$$\eta_{ss} = \text{Effy}_{ss} + L_{G,ss} - L_{C,ss}$$

where:

$\text{Effy}_{hs}$  = heating seasonal efficiency for non-condensing furnaces and boilers, as defined in 11.2.34 of ANSI/ASHRAE 103-82

$L_G$  = latent heat gain under part-load conditions, as defined in 4.3.1 of this appendix

$L_C$  = part-load heat loss due to the condensate going down the drain and corrected for the fact that the condensate did not go up the flue as heated vapor, as was assumed in determining  $L_{G,ss,A}$ , as defined in 4.3.2 of this appendix

$\text{Effy}_{ss}$  = steady-state efficiency for non-condensing furnaces and boilers, as defined in 11.2.5 of ANSI/ASHRAE 103-82

$L_{G,ss}$  = latent heat gain under steady-state conditions, as defined in 4.3.3 of this appendix

$L_{C,ss}$  = steady-state heat loss due to the condensate going down the drain and corrected for the fact that the condensate did not go up the flue as heated vapor, as was assumed in determining  $L_{G,ss,A}$ , as defined in 4.3.4 of this appendix

**4.3.1 Latent heat gain under part-load conditions.** Calculate the latent heat gain under part-load conditions ( $L_G$ ) expressed as a percent and defined as:

$$L_G = 100(1053.3) m_c / Q_c$$

where:

100 = conversion factor to express a decimal as a percent

1053.3 = latent heat vaporization of water, Btu per pound

$m_c$  = as defined in 3.6 of this appendix

$Q_c$  = as defined in 3.6 of this appendix

**4.3.2 Part-load heat loss due to the condensate.** Calculate the part-load heat loss due to the condensate going down the drain and corrected for the fact that the condensate did not go up the flue as heated vapor, as was assumed in determining  $L_{G,ss,A}$  ( $L_C$ ) expressed as a percent and defined as:

$$L_C = L_G [1.0(T_{F,ss} - 70) - 0.45(T_{F,ss} - 42)] / 1053.3$$

where:

$L_G$  = as defined in 4.3.1 of this appendix

1.0 = specific heat of water (liquid), Btu per pound - °F

$T_{F,ss}$  = as defined in 11.2.4 of ANSI/ASHRAE 103-82

70 = assumed average indoor air temperature, °F

0.45 = specific heat of water vapor, Btu per pound - °F

42 = average outdoor temperature corresponding to 5,200 degree day location, °F

1053.3 = latent heat of vaporization of water, Btu per pound

**4.3.3 Latent heat gain under steady-state conditions.** Calculate the latent heat gain under steady-state conditions ( $L_{G,ss}$ ) expressed as a percent and defined as:

$$L_{G,ss} = 100(1053.3) m_{c,ss} / Q_{c,ss}$$

where:

100 = conversion factor to express a decimal as a percent

1053.3 = latent heat of vaporization of water, Btu per pound

$m_{c,ss}$  = as defined in 3.6 of this appendix, pound

$Q_{c,ss}$  = as defined in 3.6 of this appendix, Btu

**4.3.4 Steady-state heat loss due to the condensate.** Calculate the steady-state heat loss due to the condensate going down the drain ( $L_{C,ss}$ ) expressed as a percent and defined as:

$$L_{C,ss} = L_{G,ss} [1.0(T_{F,ss} - 70) - 0.45(T_{F,ss} - 42)] / 1053.3$$

where:

$L_{G,ss}$  = as defined in 4.3.3 of this appendix

1.0 = specific heat of water (liquid), Btu per pound - °F

$T_{F,ss}$  = as defined in 11.2.4 of ANSI/ASHRAE 103-82

70 = assumed average indoor air temperature, °F

0.45 = specific heat of water vapor, Btu per pound - °F

42 = average outdoor temperature corresponding to 5200 degree day location, °F

1053.3 = latent heat of vaporization of water, Btu per pound

**4.4 Direct determination of off-cycle losses for furnaces and boilers equipped with stack dampers.** Reserved

**4.5 Modulating controls.**

**4.5.1 Weighted-average part-load utilization efficiency.** For furnaces and boilers equipped with two stage thermostats, calculate the weighted-average part-load utilization efficiency at each design heating requirement ( $\eta_{U,WT}$ ) expressed as a percent and defined as:

$$\eta_{U,WT} = X_1 \eta_{U,RED} + X_2 \eta_{U,MAX}$$

where:

$X_1$  = fraction of heating load at reduced operating mode, as defined in 4.5.2 of this appendix

$\eta_{U,RED}$  = the part-load efficiency at the reduced fuel input rate and is defined as the heating seasonal efficiency ( $\text{Effy}_{hs}$ ) in 11.2.34 of ANSI/ASHRAE 103-82, measured at the reduced fuel input rate and calculated by using the appropriate on and off times as specified from Table 2 of this appendix

$X_2$  = fraction of heating load at maximum operating mode, as defined in 4.5.3 of this appendix

$\eta_{U,MAX}$  = the part-load efficiency at the maximum fuel input rate and is defined as the heating seasonal efficiency ( $\text{Effy}_{hs}$ ) in 11.2.34 of ANSI/ASHRAE 103-82, measured at the maximum fuel input rate and calculated by using the appropriate on and off times as specified from Table 2 of this appendix

For furnaces and boilers equipped with step-modulating thermostats, calculate  $\eta_{U,WT}$  expressed as a percent and defined as:

$$\eta_{U,WT} = X_1 \eta_{U,RED} + X_2 \eta_{U,MOD}$$

where:

$X_1$  = as defined in 4.5.2 of this appendix

$\eta_{U,RED}$  = as defined in 4.5.1 of this appendix

$X_2$  = as defined in 4.5.3 of this appendix

$\eta_{U,MOD}$  = average part-load efficiency for the modulating mode, as defined in 4.5.8 of this appendix

**4.5.2 Fraction of heating load at reduced operating mode.** Determine the fraction of heating load at the reduced operating mode ( $X_1$ ) expressed as a decimal and listed in either Figure 4 or Table 3 of this appendix for appropriate values of the balance point temperature ( $T_C$ ).  $T_C$  is defined in section 4.5.4 of this appendix.

**4.5.3 Fraction of heating load at maximum operating mode.** Determine the fraction of heating load at the maximum operating mode ( $X_2$ ) expressed as a decimal and listed in either Figure 4 or Table 3 of this appendix for appropriate values of the balance point temperature ( $T_C$ ).

**4.5.4 Balance point temperature.** Calculate the balance point temperature ( $T_C$ ) which represents a temperature used to apportion the annual heating load between the reduced input cycling mode and either the modulation mode or maximum input cycling mode.  $T_C$  is defined as:

$$T_C = 65 - [\Delta T_D (1 + \alpha_{DHR}) (Q_{OUT,RED} / Q_{OUT,MAX})]$$

where:

65 = average outdoor temperature at which a furnace or boiler starts operating, °F

$\Delta T_D$  = the difference between the outdoor air temperature where heating is typically required and the outdoor design temperature, the national average temperature difference is 65° F - 5° F or 60° F

5 = outdoor design temperature

$\alpha_{DHR}$  = oversize factor at each design heating requirement, as defined in 4.5.5 of this appendix

$Q_{OUT,RED}$  = heat output rate at the reduced fuel input rate, as defined in 4.5.6 of this appendix

$Q_{OUT,MAX}$  = heat output rate at the maximum fuel input rate, as defined in 4.5.7 of this appendix

**4.5.5 Oversize factor at each design heating requirement.** Calculate the oversize factor at each design heating requirement ( $\alpha_{DHR}$ ) expressed as a decimal and defined as:

$$\alpha_{DHR} = [Q_{OUT,MAX} / DHR] - 1$$

where:

$Q_{OUT,MAX}$  = as defined in 4.5.7 of this appendix

DHR = typical design heating requirements, as listed in Table 1 of this appendix



4.5.6 *Heat output rate at the reduced fuel input rate.* Calculate the heat output rate at the reduced fuel input rate ( $Q_{OUT,RED}$ ) defined as:

$$Q_{OUT,RED} = \eta_{SS,RED} Q_{IN,RED}$$

where:

$\eta_{SS,RED}$  = steady-state efficiency at the reduced fuel input rate and is defined as the steady-state efficiency ( $\text{Eff}_{SS}$ ) in 11.2.5 of ANSI/ASHRAE 103-82, measured at the reduced fuel input rate  
 $Q_{IN,RED}$  = the reduced fuel input rate and is defined as  $Q_{IN}$  in 11.2.34 of ANSI/ASHRAE 103-82, measured at the reduced fuel input rate

4.5.7 *Heat output rate at the maximum fuel input rate.* Calculate the heat output rate at the maximum fuel input rate ( $Q_{OUT,MAX}$ ) defined as:

$$Q_{OUT,MAX} = \eta_{SS,MAX} Q_{IN,MAX}$$

where:

$\eta_{SS,MAX}$  = steady-state efficiency at the maximum fuel input rate and is defined as the steady-state efficiency ( $\text{Eff}_{SS}$ ) in 11.2.5 of ANSI/ASHRAE 103-82, measured at the maximum fuel input rate  
 $Q_{IN,MAX}$  = the maximum fuel input rate and is defined as  $Q_{IN}$  in 11.2.34 of ANSI/ASHRAE 103-82

4.5.8 *Average part-load efficiency for the modulating mode for furnaces and boilers equipped with step-modulating thermostats.*

$$\eta_{SS,MOD} = \left[ \frac{DHR - Q_{OUT,RED}}{Q_{OUT,MAX} - Q_{OUT,RED}} \right] \left[ \frac{T_C - T_{OA^*}}{T_C - 5} \right] \left[ \eta_{SS,MAX} - \eta_{SS,RED} \right] + \eta_{SS,RED}$$

where:

DHR = average design heating requirement as listed in Table 1 of this appendix  
 $Q_{OUT,RED}$  = as defined in 4.5.6 of this appendix  
 $Q_{OUT,MAX}$  = as defined in 4.5.7 of this appendix  
 $T_C$  = as defined in 4.5.4 of this appendix and is based on the average design heating requirement listed in Table 3 of this appendix

$T_{OA^*}$  = average outdoor air temperature during the modulating mode, as defined in 4.5.1 of this appendix and is based on the average design heating requirement listed in Table 3 of this appendix

5 = outdoor design temperature, °F

$\eta_{SS,MAX}$  = as defined in 4.5.7 of this appendix

$\eta_{SS,RED}$  = as defined in 4.5.6 of this appendix

4.5.10 *Average on-cycle infiltration heat loss for the modulating mode for furnaces and boilers equipped with step-modulating thermostats.* For furnaces and boilers equipped with step-modulating thermostats, calculate the average on-cycle infiltration heat loss for the modulating mode ( $L_{I,ON,MOD}$ ) expressed as a percent and defined as:

$$L_{I,ON,MOD} = [K_{I,ON,RED}(70 - T_{OA}) + K_{I,ON,MAX}(70 - T_{OA^*})] / 2$$

where:

$K_{I,ON,RED}$  = multiplication factor for infiltration loss during burner on-cycle at the reduced firing rate, and defined as  $K_{I,ON}$  in 11.2.18 of ANSI/ASHRAE 103-82 at the reduced firing rate  
 70 = average indoor temperature, °F

For furnaces and boilers equipped with step-modulating thermostats and are located in heated spaces, calculate the average part-load efficiency for the modulating mode ( $\eta_{U,MOD}$ ) expressed as a percent and defined as:

$$\eta_{U,MOD} = \eta_{SS,MOD} - L_{I,ON,MOD}$$

where:

$\eta_{SS,MOD}$  = average steady-state efficiency for the modulating mode as defined in 4.5.9 of this appendix

$L_{I,ON,MOD}$  = average on-cycle infiltration heat loss for the modulating mode as defined in 4.5.10 of this appendix

For furnaces and boilers equipped with step-modulating thermostats and are located outside or are in unheated spaces, calculate  $\eta_{U,MOD}$  defined as:

$$\eta_{U,MOD} = \eta_{SS,MOD} - C_L L_L$$

where:

$\eta_{SS,MOD}$  = as defined in 4.5.9 of this appendix

$C_L$  = as defined in 4.6 of this appendix

$L_L$  = as defined in 4.6 of this appendix

4.5.9 *Average steady-state efficiency for the modulating mode for furnaces and boilers equipped with step-modulating thermostats.* For furnaces and boilers equipped with step-modulating thermostats, calculate the average steady-state efficiency for the modulating mode ( $\eta_{SS,MOD}$ ) expressed as a percent and defined as:

$T_{OA}$  = average outdoor temperature in the cycling mode, based on the average design heating requirement, and is listed in either Figure 3 or Table 2 of this appendix

$K_{I,ON,MAX}$  = multiplication factor for infiltration loss during burner on-cycle at the maximum firing rate, and defined as  $K_{I,ON}$  in 11.2.18 of ANSI/ASHRAE 103-82 at the maximum firing rate

$T_{OA^*}$  = average outdoor temperature in the modulating mode, based on the average design heating requirement, and is listed in either Figure 3 or Table 3 of this appendix

4.5.11 *Average heat output rate for the modulating mode for furnaces and boilers equipped with step-modulating thermostats.* For furnaces and boilers equipped with step-modulating thermostats, calculate the average heat output rate for the modulating mode ( $Q_{OUT,MOD}$ ) defined as:

$$Q_{OUT,MOD} = [(DHR - Q_{OUT,RED}) / (T_C - 5)] + Q_{OUT,RED}$$

where:

DHR = average design heating requirement, as listed in Table 1 of this appendix

$Q_{OUT,RED}$  = as defined in 4.5.6 of this appendix

$T_C$  = as defined in 4.5.4 of this appendix and is based on the average design heating requirement listed in Table 3 of this appendix

$T_{OA^*}$  = as defined in 4.5.10 of this appendix and is based on the average design

heating requirement listed in Table 3 of this appendix

5 = outdoor design temperature, °F

4.5.12 *Average fuel input rate for the modulating mode for furnaces and boilers equipped with step-modulating thermostats.* For furnaces and boilers equipped with step-modulating thermostats, calculate the average fuel input rate for the modulating mode ( $Q_{IN,MOD}$ ) defined as:

$$Q_{IN,MOD} = Q_{OUT,MOD} / \eta_{SS,MOD}$$

where:

$Q_{OUT,MOD}$  = as defined in 4.5.11 of this appendix

$\eta_{SS,MOD}$  = as defined in 4.5.9 of this appendix

4.5.13 *Average outdoor temperature.* For furnaces and boilers equipped with two stage thermostats or with step-modulating thermostats operating at the reduced operating mode, the average outdoor temperature shall be  $T_{OA}$ , as obtained either from Figure 3 or Table 3 of this appendix. For furnaces and boilers equipped with two stage thermostats operating at the maximum operating mode or with step-modulating thermostats operating at the modulating mode, the average outdoor temperature shall be  $T_{OA^*}$ , as obtained from either Figure 3 or Table 3 of this appendix. These values for the average outdoor temperature shall replace the value of 42 specified as the average outdoor temperature in sections 11.2.15, 11.2.17, 11.2.19, 11.2.30, 11.2.31, and 11.2.33 of ANSI/ASHRAE 103-82.

4.5.14 *Weighted-average steady-state efficiency.* For furnaces and boilers equipped with two stage thermostats, calculate the weighted-average steady-state efficiency ( $\eta_{SS,WT}$ ) expressed as a percent and defined as:

$$\eta_{SS,WT} = X_1 \eta_{SS,MAX} + X_2 \eta_{SS,RED}$$

where:

$X_1$  = as defined in 4.5.2 of this appendix

$\eta_{SS,MAX}$  = as defined in 4.5.7 of this appendix

$X_2$  = as defined in 4.5.3 of this appendix

$\eta_{SS,RED}$  = as defined in 4.5.6 of this appendix

For furnaces and boilers equipped with step-modulating thermostats, calculate  $\eta_{SS,WT}$  defined as:

$$\eta_{SS,WT} = X_2 \eta_{SS,MOD} + X_1 \eta_{SS,RED}$$

where:

$X_1$  = as defined in 4.5.2 of this appendix

$\eta_{SS,MOD}$  = as defined in 4.5.9 of this appendix

$X_2$  = as defined in 4.5.3 of this appendix

$\eta_{SS,RED}$  = as defined in 4.5.6 of this appendix

4.6 *Annual fuel utilization efficiency.* The annual fuel utilization efficiency (AFUE) shall be expressed as a percent and defined as:

$$AFUE = \frac{5200 \eta_{SS} \eta_U Q_{IN}}{5200 \eta_{SS} Q_{IN} + 2.5(1 + 0.7)(4600) \eta_U Q_F}$$

where:

5200 = average annual heating degree-days

$\eta_{SS}$  as defined in 4.3 of this appendix for condensing furnaces and boilers measured by the optional direct condensate measurement method; as



$\eta_{ss,WT}$  as defined in 4.5.14 of this appendix at each design heating requirement for modulating furnaces and boilers; or as  $\text{Effy}_{ss}$  as defined in 11.2.5 of ANSI/ASHRAE 103-82 for all other furnaces and boilers

$\eta_U$  = as defined in 4.3 of this appendix for condensing furnaces and boilers measured by the optional direct condensate measurement method; as  $\eta_{U,WT}$  as defined in 4.5.1 of this appendix at each design heating requirement for modulating furnaces and boilers; or as  $\text{Effy}_{ss}$  as defined in 11.2.5 of ANSI/ASHRAE 103-82 and in 4.2 of this appendix for all other furnaces and boilers except that  $C_j$  and  $L_j$  are defined as:

$C_j$  =

- 0 for furnaces or boilers intended to be installed indoors
- 3.3 for furnaces intended to be installed outdoors
- 1.7 for furnaces intended to be installed as isolated combustion systems
- 4.7 for boilers intended to be installed outdoors
- 2.4 for boilers intended to be installed as isolated combustion systems

$L_j$  = jacket loss and is either assigned the value of 1 percent or determined in accordance with 8.6 of ANSI/ASHRAE 103-82 in percent

$Q_{IN}$  = steady-state heat input as defined in 11.2.34 of ANSI/ASHRAE 103-82

0.7 = average oversizing factor for furnaces and boilers

4600 = average non-heating season hours per year

$Q_P$  = pilot flame fuel input rate as defined in 9.2 of ANSI/ASHRAE 103-82

4.7 National average number of burner operating hours. For furnaces and boilers equipped with single stage thermostats, calculate the national average number of burner operating hours ( $\text{BOH}_{ss}$ ) defined as:

$\text{BOH}_{ss} = 2080(0.77)A \text{ DHR} - 2080 B$

where:

2080 = national average heating load hours

0.77 = adjustment factor which serves to adjust the calculated design heating requirement and heating load hours to the actual heating load experienced by a heating system

DHR = typical design heating requirements, as listed in Table 1 of this appendix using the proper value of  $Q_{OUT}$  where:

$Q_{OUT} = (\eta_{ss}/100 - (K)(L_j)/100)(Q_{IN})$  rounded off to the nearest 1,000 Btu/hr

where:

$\eta_{ss}$  as defined in 4.3 of this appendix for condensing furnaces and boilers measured by the optional direct condensate measurement method; as  $\eta_{ss,WT}$  as defined in 4.5.14 of this appendix at each design heating requirement for modulating furnaces and boilers; or as  $\text{Effy}_{ss}$  as defined in 11.2.5 of

ANSI/ASHRAE 103-82 for all other furnaces and boilers.

$Q_{IN}$  as defined in 11.2.34 of ANSI/ASHRAE 103-82

$K$  = factor that adjusts jacket losses measured in the laboratory to those that would be measured under outdoor design conditions.

0 for furnaces or boilers intended to be installed indoors.

1.7 for furnaces or boilers intended to be installed as isolated combustion systems.

3.3 for furnaces or boilers intended to be installed outdoors.

1.0 for finned tubed boilers intended for installation outdoors.

$L_j$  = jacket loss

$A = 100,000/[341,300(\text{PE} + y \text{ BE}) + (Q_{IN} - Q_P)\eta_U]$

$B = 2 Q_P \eta_U A / 100,000$

100,000 = factor that accounts for percent and kBtu

PE = power burner electrical energy input rate at full-load steady-state operation, as defined in 9.1 of ANSI/ASHRAE 103-82

ratio of average blower or pump on time to average burner on time

1, for furnaces without a fan delay

1, for boilers without a pump delay

$1 + (t^* - t^*)/3.87$ , for single stage furnaces with fan delay

$1 + (t^* - t^*)/10.00$ , for two stage and step modulating furnaces with fan delay

$1 + (t^*/9.68)$ , for single stage boilers with pump delay

$1 + (t^*/15.00)$ , for two stage and step modulating boilers with pump delay

BE = circulating air fan (or circulating water pump) electrical energy input rate at full-load steady-state operation, as defined in 9.1 of ANSI/ASHRAE 103-82

$Q_{IN}$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

$Q_P$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

$\eta_U$  = as defined in 4.6 of this appendix

2 = ratio of the average length of a heating season in hours to the average heating load hours

$t^*$  = as defined in 3.3 of this appendix

$t^*$  = as defined in 9.3.1 of ANSI/ASHRAE 103-82

For furnaces and boilers equipped with two stage thermostats or step-modulating thermostats, calculate the national average number of burner operating hours at the reduced operating mode ( $\text{BOH}_{RED}$ ) defined as:

$\text{BOH}_{RED} = X_1 E_M / Q_{IN,RED}$

where:

$X_1$  = as defined in 4.5.2 of this appendix

$E_M$  = average annual energy used during the heating season

$E_M = (Q_{IN,MAX} - Q_P)\text{BOH}_{ss} + (8760 - 4600)Q_P$

$Q_{IN,RED}$  = as defined in 4.5.6 of this appendix

$Q_{IN,MAX}$  = as defined in 4.5.7 of this appendix

$Q_P$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

$\text{BOH}_{ss}$  = as defined in 4.7 of this appendix in which  $\eta_{U,WT}$  replaces  $\eta_U$  for calculating

the values of A and B and the term (PE + y BE) in the factor A is increased by the ratio, R. It is defined as:

$R =$

- 2.3 for two stage controls
- 2.3 for step-modulating controls when the ratio of minimum-to-maximum output is greater than or equal to 0.5
- 3.0 for step modulating controls when the ratio of minimum-to-maximum out is less than 0.5

$A = 100,000/[341,300(\text{PE} + y \text{ BE})R + (Q_{IN} - Q_P)\eta_U]$

8760 = total number of hours per year

4600 = as defined in 4.6 of this appendix

For furnaces and boilers equipped with two stage thermostats, calculate the national average number of burner operating hours at the maximum operating mode ( $\text{BOH}_{MAX}$ ) defined as:

$\text{BOH}_{MAX} = X_2 E_M / Q_{IN,MAX}$

where:

$X_2$  = as defined in 4.5.3 of this appendix

$E_M$  = as defined in 4.7 of this appendix

$Q_{IN,MAX}$  = as defined in 4.5.7 of this appendix

For furnaces and boilers equipped with step-modulating thermostats, calculate the national average number of burner operating hours in the modulating mode ( $\text{BOH}_{MOD}$ ) defined as:

$\text{BOH}_{MOD} = X_2 E_M / Q_{IN,MOD}$

where:

$X_2$  = as defined in 4.5.3 of this appendix

$E_M$  = as defined in 4.7 of this appendix

$Q_{IN,MOD}$  = as defined in 4.5.12 of this appendix

4.8 Average annual fuel energy consumption for gas or oil fueled furnaces or boilers. For furnaces and boilers equipped with single stage thermostats, calculate the average annual fuel energy consumption for gas or oil fueled furnaces or boilers ( $E_F$ ) expressed in Btu's per year and defined as:

$E_F = \text{BOH}(Q_{IN} - Q_P) + 8760 Q_P$

where:

$\text{BOH}$  = as defined in 4.7 of this appendix

$Q_{IN}$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

$Q_P$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

8760 = as defined in 4.7 of this appendix

For furnaces and boilers equipped with either two stage thermostats or step-modulating thermostats, calculate  $E_F$  as defined as:

$E_F = E_M + 4600 Q_P$

where:

$E_M$  = as defined in 4.7 of this appendix

4600 = as defined in 4.6 of this appendix

$Q_P$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

4.9 Average annual auxiliary electrical energy consumption for gas or oil fueled furnaces or boilers. For furnaces and boilers equipped with single stage thermostats, calculate the average annual auxiliary electrical energy consumption ( $E_{AE}$ ) expressed in kilowatt-hours per year and defined as:



$$E_{AE} = BOH_{SS} (PE + y BE)$$

where:

BOH<sub>SS</sub> = as defined in 4.7 of this appendix  
PE = as defined in 9.1 of ANSI/ASHRAE 103-82

y = as defined in 4.7 of this appendix

BE = as defined in 9.1 of ANSI/ASHRAE 103-82

For furnaces and boilers equipped with two stage thermostats, calculate  $E_{AE}$  defined as:

$$E_{AE} = BOH_{RED} (PE_{RED} + y BE_{RED}) + BOH_{MAX} (PE_{MAX} + y BE_{MAX})$$

where:

BOH<sub>RED</sub> = as defined in 4.7 of this appendix  
PE<sub>RED</sub> = as defined in 9.1 of ANSI/ASHRAE 103-82, measured at the reduced fuel input rate

y = as defined in 4.7 of this appendix

BE<sub>RED</sub> = as defined in 9.1 of ANSI/ASHRAE 103-82, measured at the reduced fuel input rate

BOH<sub>MAX</sub> = as defined in 4.7 of this appendix  
PE<sub>MAX</sub> = as defined in 9.1 of ANSI/ASHRAE 103-82, measured at the maximum fuel input rate

BE<sub>MAX</sub> = as defined in 9.1 of ANSI/ASHRAE 103-82, measured at the maximum fuel input rate

For furnaces and boilers equipped with step-modulating thermostats, calculate  $E_{AE}$  defined as:

$$E_{AE} = BOH_{RED} (PE_{RED} + y BE_{RED}) + BOH_{MOD} (PE_{MAX} + y BE_{MAX})$$

where:

BOH<sub>RED</sub> = as defined in 4.7 of this appendix  
PE<sub>RED</sub> = as defined in 4.9 of this appendix  
y = as defined in 4.7 of this appendix  
BE<sub>RED</sub> = as defined in 4.9 of this appendix  
BOH<sub>MOD</sub> = as defined in 4.7 of this appendix  
PE<sub>MAX</sub> = as defined in 4.9 of this appendix  
BE<sub>MAX</sub> = as defined in 4.9 of this appendix

4.10 *Average annual electric energy consumption for electric furnaces or boilers.* For electric furnaces and boilers, calculate the average annual electric energy consumption ( $E_E$ ) expressed in kilowatt-hours per year and defined as:

$$E_E = 100(2080)(0.77) DHR/3.412 AFUE$$

where:

100 = conversion to express a percent as a decimal

2080 = as defined in 4.7 of this appendix

0.77 = as defined in 4.7 of this appendix

DHR = as defined in 4.7 of this appendix

3.412 = conversion to express energy in terms of watt-hours instead of Btu

AFUE = as defined in 4.1 of this appendix

4.11 *Average annual fuel energy consumption for gas or oil fueled furnaces or boilers located in different geographic regions of the United States and in buildings with different design heating requirements.* For gas or oil fueled furnaces and boilers, calculate the average annual fuel energy consumption for a specific geographic region and for a specific typical design heating requirement ( $E_{FR}$ ) expressed in Btu's per year and defined as:

$$E_{FR} = [(E_F - 8760 Q_P)HLH/2080] + 8760 Q_P$$

where:

$E_F$  = as defined in 4.8 of this appendix

8760 = as defined in 4.7 of this appendix

$Q_P$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

HLH = heating load hours for a specific geographic region determined in accordance with the heating load hour map in Figure 1 of this appendix

2080 = as defined in 4.7 of this appendix

4.12 *Average annual auxiliary electrical energy consumption for gas or oil fueled furnaces or boilers located in different geographic regions of the United States and in buildings with different design heating requirements.* For gas or oil fueled furnaces and boilers, calculate the average annual auxiliary electrical energy consumption for a specific geographic region and for a specific typical design heating requirement ( $E_{AER}$ ) expressed in kilowatt-hours per year and defined as:

$$E_{AER} = E_{AE}HLH/2080$$

where:

$E_{AE}$  = as defined in 4.9 of this appendix

HLH = as defined in 4.11 of this appendix

2080 = as defined in 4.7 of this appendix

4.13 *Average annual electric energy consumption for electric furnaces or boilers located in different geographic regions of the United States and in buildings with different design heating requirements.* For electric furnaces and boilers, calculate the average annual electric energy consumption for a specific geographic region and for a specific typical design heating requirement ( $E_{ER}$ ) expressed in kilowatt-hours per year and defined as:

$$E_{ER} = 100(0.77)DHR HLH/3.412 AFUE$$

where:

100 = as defined in 4.10 of this appendix

0.77 = as defined in 4.7 of this appendix

DHR = as defined in 4.7 of this appendix

HLH = as defined in 4.11 of this appendix

3.412 = as defined in 4.10 of this appendix

AFUE = as defined in 4.1 of this appendix

4.14 *Energy factor.* For electric furnaces and boilers, the energy factor (EF) is equal to AFUE, as defined in section 4.1 of this appendix. For gas and oil furnaces and boilers, calculate EF as defined as:

$$EF = \eta_U [E_F - 4600 Q_P] / [E_F + 3412 E_{AE}]$$

where:

$\eta_U$  = as defined in 4.6 of this appendix

$E_F$  = as defined in 4.8 of this appendix

4600 = as defined in 4.6 of this appendix

$Q_P$  = as defined in 11.2.34 of ANSI/ASHRAE 103-82

3412 = as defined in 4.10 of this appendix

$E_{AE}$  = as defined in 4.9 of this appendix

TABLE 1.—AVERAGE AND TYPICAL DESIGN HEATING REQUIREMENTS FOR FURNACES AND BOILERS WITH DIFFERENT OUTPUT CAPACITIES

| Furnace or boiler output capacity, $Q_{out}$ (Btu/hr) | Average design heating requirements (KBTU/hr) | Typical design heating requirements (KBTU/hr) |
|-------------------------------------------------------|-----------------------------------------------|-----------------------------------------------|
| 5,000-10,000                                          | 5                                             | 5                                             |
| 11,000-16,000                                         | 10                                            | 5, 10                                         |
| 17,000-25,000                                         | 15                                            | 10, 15                                        |
| 26,000-34,000                                         | 20                                            | 15, 20                                        |
| 35,000-42,000                                         | 25                                            | 20, 25, 30                                    |
| 43,000-51,000                                         | 30                                            | 25, 30, 35                                    |
| 52,000-59,000                                         | 35                                            | 30, 35, 40, 45                                |
| 60,000-75,000                                         | 40                                            | 35, 40, 45, 50                                |
| 77,000-93,000                                         | 50                                            | 40, 45, 50, 60                                |
| 94,000-110,000                                        | 60                                            | 50, 60, 70, 80                                |
| 111,000-127,000                                       | 70                                            | 60, 70, 80, 90                                |
| 128,000-144,000                                       | 80                                            | 70, 80, 90, 100                               |
| 145,000-161,000                                       | 90                                            | 80, 90, 100, 110, 120                         |
| 162,000-178,000                                       | 100                                           | 90, 100, 110, 120, 130                        |
| 179,000-195,000                                       | 110                                           | 100, 110, 120, 130, 140                       |
| over 196,000                                          | 130                                           | 120, 130, 140, 150, 160                       |

TABLE 2.—AVERAGE BURNER ON-TIME AND OFF-TIME PER CYCLE FOR FURNACES AND BOILERS (MINUTES)

| Thermostat type | Furnaces |           | Boilers  |           |
|-----------------|----------|-----------|----------|-----------|
|                 | $t_{on}$ | $t_{off}$ | $t_{on}$ | $t_{off}$ |
| Single stage    | 3.87     | 13.3      | 9.68     | 33.26     |
| Two stage       | 10.0     | 10.0      | 15.0     | 15.0      |
| Step modulating | 10.0     | 10.0      | 15.0     | 15.0      |

TABLE 3.—FRACTIONAL HEATING LOADS AND AVERAGE OUTDOOR TEMPERATURES FOR FURNACES AND BOILERS EQUIPPED WITH MODULATING CONTROLS

| Balance point temperature range (°F) | Fractional heating load |                            | Average outdoor temperature (°F) |                            |
|--------------------------------------|-------------------------|----------------------------|----------------------------------|----------------------------|
|                                      | Reduced rate            | Modulating or maximum rate | Reduced rate                     | Modulating or maximum rate |
| ( $T_c$ )                            | ( $X_1$ )               | ( $X_2$ )                  | ( $T_{0A}$ )                     | ( $T_{0A}^*$ )             |
| 6 to 15                              | 0.95                    | 0.05                       | 41                               | 9                          |
| 16 to 20                             | 0.90                    | 0.10                       | 42                               | 14                         |
| 21 to 25                             | 0.84                    | 0.16                       | 43                               | 18                         |
| 26 to 29                             | 0.77                    | 0.23                       | 44                               | 22                         |
| 29 to 31                             | 0.70                    | 0.30                       | 45                               | 24                         |
| 32 to 33                             | 0.66                    | 0.34                       | 46                               | 26                         |
| 34 to 35                             | 0.60                    | 0.40                       | 47                               | 27                         |
| 36 to 37                             | 0.54                    | 0.46                       | 48                               | 28                         |
| 38 to 39                             | 0.48                    | 0.52                       | 48                               | 30                         |
| 40 to 41                             | 0.42                    | 0.58                       | 49                               | 31                         |
| 42 to 43                             | 0.35                    | 0.65                       | 50                               | 32                         |
| 44 to 45                             | 0.29                    | 0.71                       | 51                               | 33                         |
| 46 to 47                             | 0.23                    | 0.77                       | 52                               | 35                         |
| 48 to 49                             | 0.18                    | 0.82                       | 54                               | 36                         |
| 50 to 52                             | 0.12                    | 0.88                       | 55                               | 37                         |
| 53 to 57                             | 0.07                    | 0.93                       | 58                               | 39                         |
| 58 to 62                             | 0.02                    | 0.98                       | 61                               | 40                         |

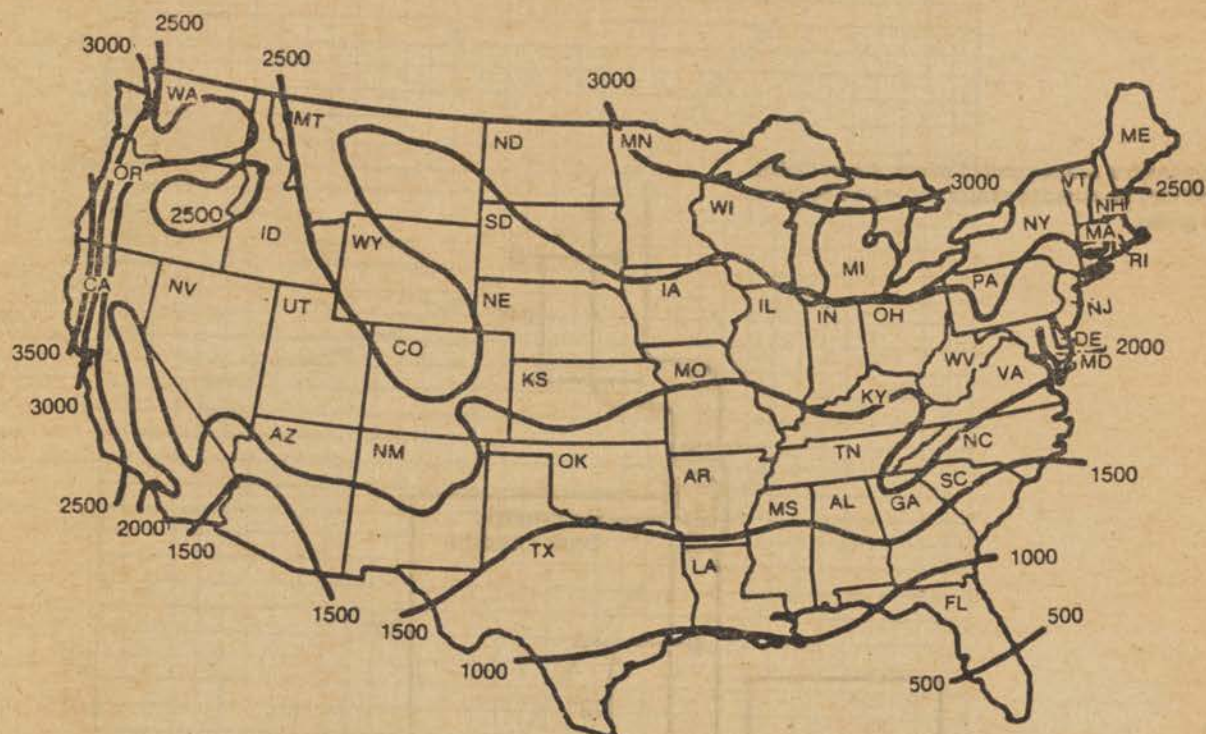
NOTE.—This table is based on national average 5,200 degree-days.

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**FIGURE I**

Heating Load Hours (HLH) for the United States and Territories



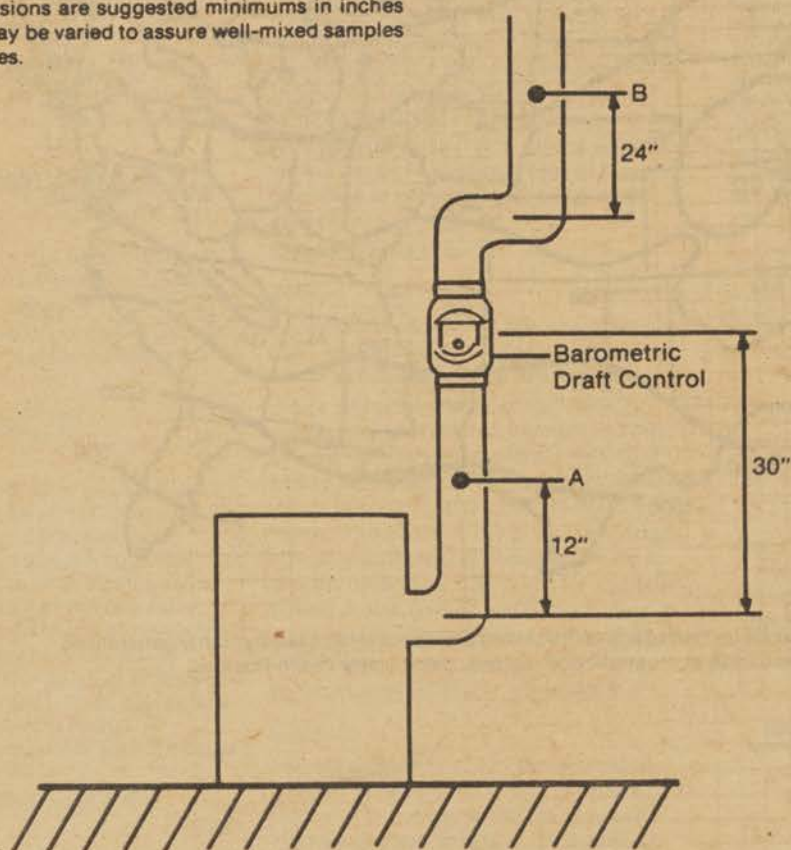
This map is reasonably accurate for most parts of the United States but is necessarily highly generalized and consequently not too accurate in mountainous regions, particularly in the Rockies.

Alaska — 3500 HLH  
Hawaii and Territories — 0 HLH

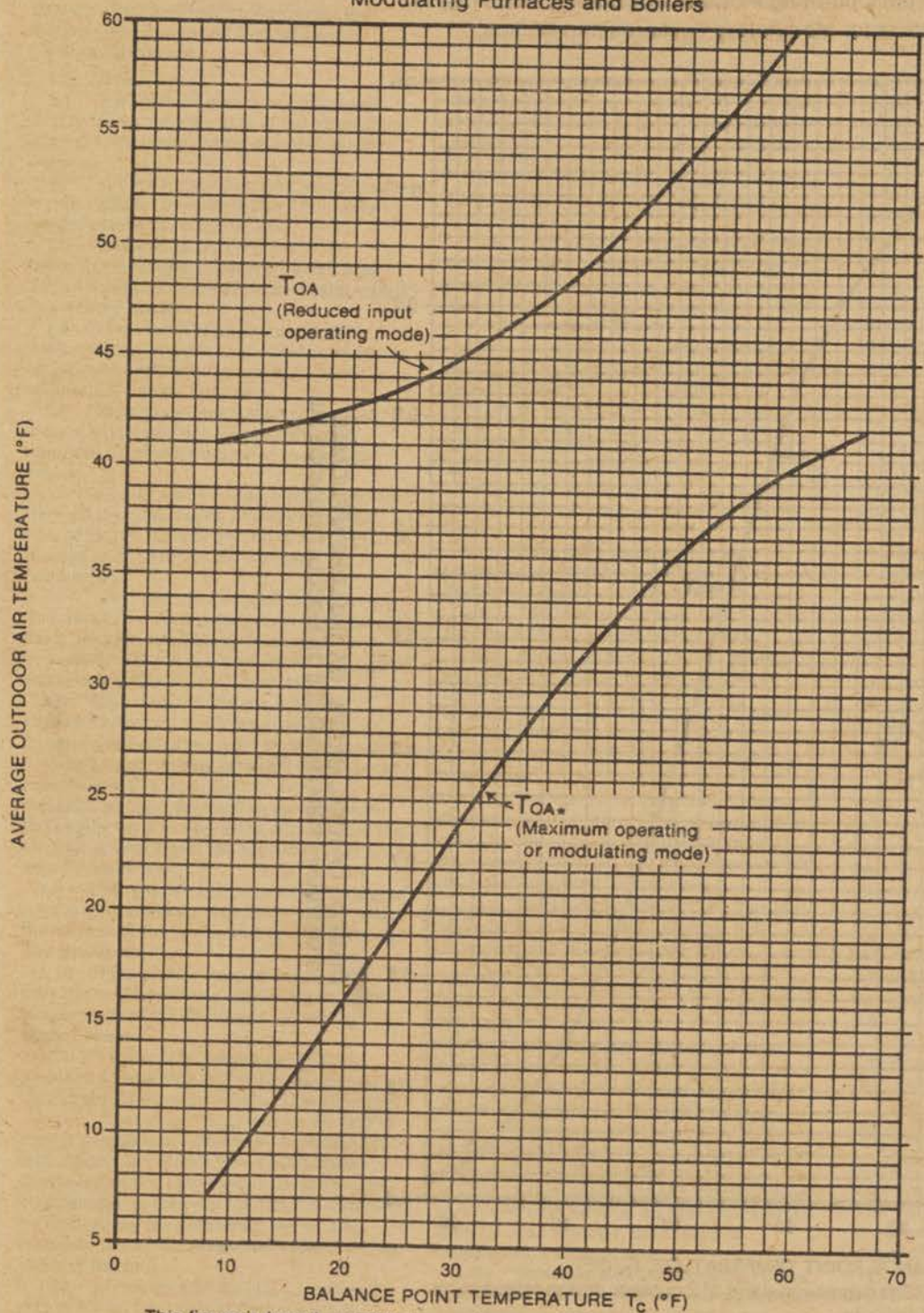


**FIGURE 2****Test Setup for Measuring S/F for Furnaces and Boilers  
with Barometric Draft Controls**

Note: Dimensions are suggested minimums in inches and may be varied to assure well-mixed samples of gases.





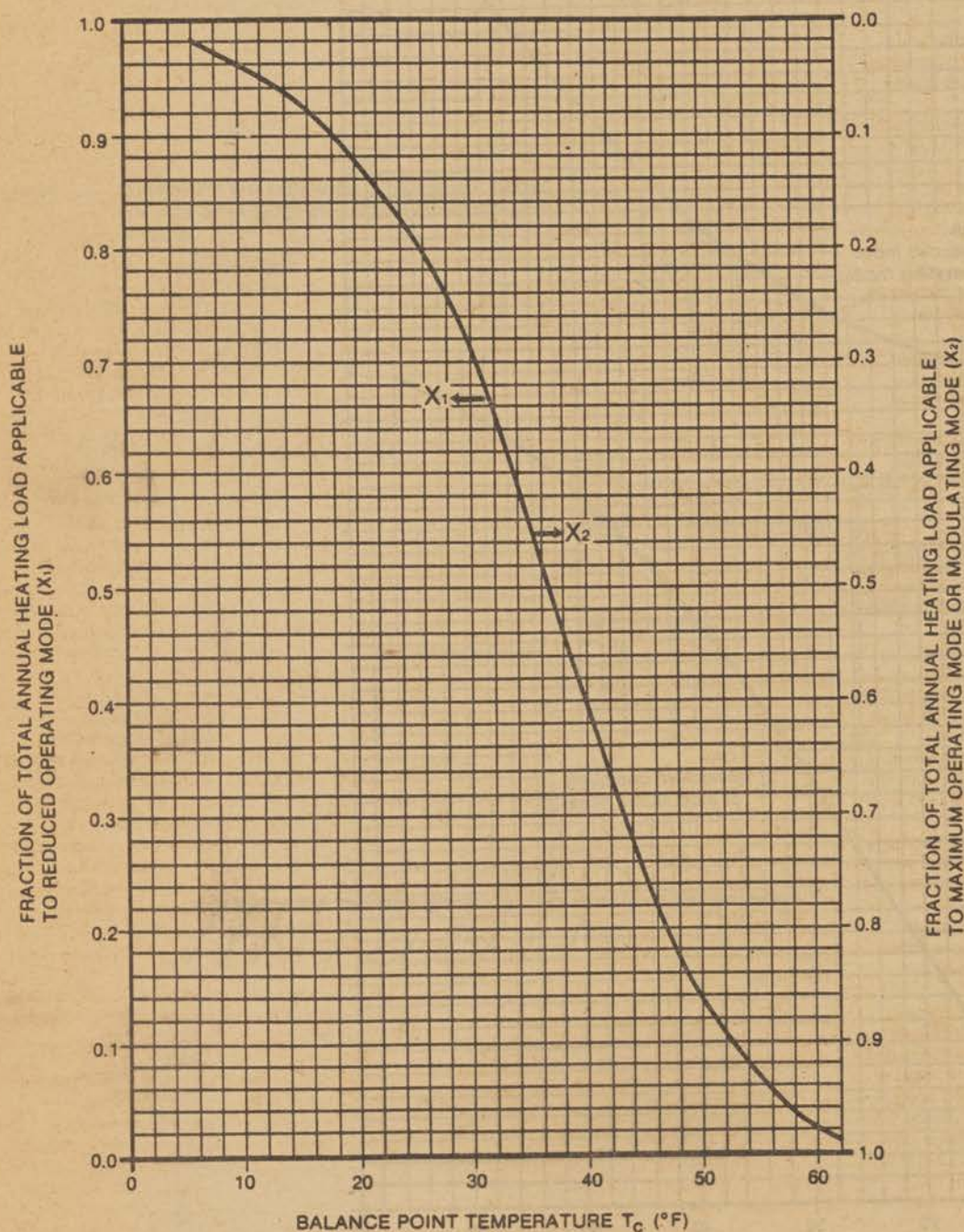
**FIGURE 3**Average Outdoor Air Temperature vs. Balance Point Temperature for  
Modulating Furnaces and Boilers

This figure is based on 5200 degree-days and 5°F outdoor design temperature.



**FIGURE 4**

Fraction of Total Annual Heating Load Applicable to Reduced Operating Mode ( $X_1$ ) and to Maximum Operating Mode or Modulating Mode ( $X_2$ ) vs. Balance Point Temperature for Modulating Furnaces and Boilers.



This figure is based on 5200 degree-days and 5°F outdoor design temperature.



5. Appendix O to Subpart B of Part 430 is revised to read as follows:

**Appendix O to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Vented Home Heating Equipment**

**1.0 Definitions.**

- 1.1 "Air shutter" means an adjustable device for varying the size of the primary air inlet(s) to the combustion chamber power burner.
- 1.2 "Air tube" means a tube which carries combustion air from the burner fan to the burner nozzle for combustion.
- 1.3 "Barometric draft regulator or barometric damper" means a mechanical device designed to maintain a constant draft in a vented heater.
- 1.4 "Draft hood" means an external device which performs the same function as an integral draft diverter, as defined in section 1.17 of this appendix.
- 1.5 "Electro-mechanical stack damper" means a type of stack damper which is operated by electrical and/or mechanical means.
- 1.6 "Excess air" means air which passes through the combustion chamber and the vented heater flues in excess of that which is theoretically required for complete combustion.
- 1.7 "Flue" means a conduit between the flue outlet of a vented heater and the integral draft diverter, draft hood, barometric damper or vent terminal through which the flue gases pass prior to the point of draft relief.
- 1.8 "Flue damper" means a device installed between the furnace and the integral draft diverter, draft hood, barometric draft regulator, or vent terminal which is not equipped with a draft control device, designed to open the venting system when the appliance is in operation and to close the venting system when the appliance is in a standby condition.
- 1.9 "Flue gases" means reaction products resulting from the combustion of a fuel with the oxygen of the air, including the inerts and any excess air.
- 1.10 "Flue losses" means the sum of sensible and latent heat losses above room temperature of the flue gases leaving a vented heater.
- 1.11 "Flue outlet" means the opening provided in a vented heater for the exhaust of the flue gases from the combustion chamber.
- 1.12 "Heat input" ( $Q_{in}$ ) means the rate of energy supplied in a fuel to a vented heater operating under steady-state conditions, expressed in Btu's per hour. It includes any input energy to the pilot light and is obtained by multiplying the measured rate of fuel consumption by the measured higher heating value of the fuel.
- 1.13 "Heating capacity" ( $Q_{out}$ ) means the rate of useful heat output from a vented heater, operating under steady-state conditions, expressed in Btu's per hour. For room and wall heaters, it is obtained by multiplying the "heat input" ( $Q_{in}$ ) by the steady-state efficiency ( $\eta_{ss}$ ) divided by 100. For floor furnaces, it is obtained by multiplying (A) the "heat input" ( $Q_{in}$ ) by (B) the steady-state efficiency divided by 100, minus the quantity (2.8) ( $L_j$ ) divided by 100,

where  $L_j$  is the jacket loss as determined in section 3.2 of this appendix.

1.14 "Higher heating value" (HHV) means the heat produced per unit of fuel when complete combustion takes place at constant pressure and the products of combustion are cooled to the initial temperature of the fuel and air and when the water vapor formed during combustion is condensed. The higher heating value is usually expressed in Btu's per pound, Btu's per cubic foot for gaseous fuel, or Btu's per gallon for liquid fuel.

1.15 "Induced draft" means a method of drawing air into the combustion chamber by mechanical means.

1.16 "Infiltration parameter" means that portion of unconditioned outside air drawn into the heated space as a consequence of loss of conditioned air through the exhaust system of a vented heater.

1.17 "Integral draft diverter" means a device which is an integral part of a vented heater, designed to: (1) Provide for the exhaust of the products of combustion in the event of no draft, back draft, or stoppage beyond the draft diverter, (2) prevent a back draft from entering the vented heater, and (3) neutralize the stack action of the chimney or gas vent upon the operation of the vented heater.

1.18 "Manually controlled vented heaters" means either gas or oil fueled vented heaters equipped without thermostats.

1.19 "Modulating control" means either a step-modulating or two-stage control.

1.20 "Power burner" means a vented heater burner which supplies air for combustion at a pressure exceeding atmospheric pressure, or a burner which depends on the draft induced by a fan incorporated in the furnace for proper operation.

1.21 "Reduced heat input rate" means the factory adjusted lowest reduced heat input rate for vented home heating equipment equipped with either two stage thermostats or step-modulating thermostats.

1.22 "Single stage thermostat" means a thermostat that cycles a burner at the maximum heat input rate and off.

1.23 "Stack" means the portion of the exhaust system downstream of the integral draft diverter, draft hood or barometric draft regulator.

1.24 "Stack damper" means a device installed downstream of the integral draft diverter, draft hood, or barometric draft regulator, designed to open the venting system when the appliance is in operation and to close off the venting system when the appliance is in the standby condition.

1.25 "Stack gases" means the flue gases combined with dilution air that enters at the integral draft diverter, draft hood or barometric draft regulator.

1.26 "Steady-state conditions for vented home heating equipment" means equilibrium conditions as indicated by temperature variations of not more than 5° F (2.8°C) in the flue gas temperature for units equipped with draft hoods, barometric draft regulators or direct vent systems, in three successive readings taken 15 minutes apart or not more than 3° F (1.7°C) in the stack gas temperature for units equipped with integral draft diverters in three successive readings taken 15 minutes apart.

1.27 "Step-modulating control" means a control that either cycles off and on at the low input if the heating load is light, or gradually, increases the heat input to meet any higher heating load that cannot be met with the low firing rate.

1.28 "Thermal stack damper" means a type of stack damper which is dependent for operation exclusively upon the direct conversion of thermal energy of the stack gases into movement of the damper plate.

1.29 "Two stage control" means a control that either cycles a burner at the reduced heat input rate and off or cycles a burner at the maximum heat input rate and off.

1.30 "Vaporizing-type oil burner" means a device with an oil vaporizing bowl or other receptacle designed to operate by vaporizing liquid fuel oil by the heat of combustion and mixing the vaporized fuel with air.

1.31 "Vent/air intake terminal" means a device which is located on the outside of a building and is connected to a vented heater by a system of conduits. It is composed of an air intake terminal through which the air for combustion is taken from the outside atmosphere and a vent terminal from which flue gases are discharged.

1.32 "Vent limiter" means a device which limits the flow of air from the atmospheric diaphragm chamber of a gas pressure regulator to the atmosphere. A vent limiter may be a limiting orifice or other limiting device.

1.33 "Vent pipe" means the passages and conduits in a direct vent system through which gases pass from the combustion chamber to the outdoor air.

**2.0 Testing conditions.**

**2.1 Installation of test unit.**

2.1.1 *Vented wall furnaces (including direct vent systems).* Install gas fueled vented wall furnaces for test as specified in sections 2.1.3 and 2.1.4 of ANSI Z21.49-1975. Install gas fueled wall furnaces with direct vent systems for test as described in sections 2.1.3 and 2.1.4 of ANSI Z21.44-1973. Install oil fueled vented wall furnaces as specified in UL-730-1974, section 33. Install oil fueled vented wall furnaces with direct vent systems as specified in UL-730-1974, section 34.

2.1.2 *Vented floor furnaces.* Install vented floor furnaces for test as specified in sections 35.1 through 35.5 of UL-729-1976.

2.1.3 *Vented room heaters.* Install in accordance with manufacturer's instructions.

**2.2 Flue and stack requirements.**

2.2.1 *Gas fueled vented home heating equipment employing integral draft diverters and draft hoods (excluding direct vent systems).* Attach to, and vertically above the outlet of gas fueled vented home heating equipment employing draft diverters or draft hoods with vertically discharging outlets, a five (5) foot long test stack having a cross sectional area the same size as the draft diverter outlet.

Attach to the outlet of vented heaters having a horizontally discharging draft diverter or draft hood outlet a 90 degree elbow, and a five (5) foot long vertical test stack. A horizontal section of pipe may be used on the floor furnace between the diverter and the elbow if necessary to clear



any framing used in the installation. Use the minimum length of pipe possible for this section. Use stack, elbow, and horizontal section with same cross sectional area as the diverter outlet.

**2.2.2 Oil fueled vented home heating equipment (excluding direct vent systems).** Use flue connections for oil fueled vented floor furnaces as specified in section 35 of UL 729-1976, sections 34.10 through 34.18 of UL 730-1974 for oil fueled vented wall furnaces and sections 36.2 and 36.3 of UL 896-1973 for oil fueled vented room heaters.

**2.2.3 Direct vent systems.** Have the exhaust/air intake system supplied by the manufacturer in place during all tests. Test units intended for installation with a variety of vent pipe lengths with the minimum length recommended by the manufacturer. Do not connect a heater employing a direct vent system to a chimney or induced draft source. Vent the gas solely on the provision for venting incorporated in the heater and the vent/air intake system supplied with it.

### 2.3 Fuel supply.

**2.3.1 Natural gas.** For a vented heater utilizing natural gas, maintain the gas supply to the unit under test at a normal inlet test pressure immediately ahead of all controls at 7 to 10 inches water column. Maintain the regulator outlet pressure at normal test pressure approximately at that recommended by the manufacturer. Use natural gas having a specific gravity of approximately 0.65 and a higher heating value within  $\pm 5$  percent of 1,025 Btu's per standard cubic foot. Determine the actual higher heating value in Btu's per standard cubic foot for the natural gas to be used in the test with an error no greater than one percent.

**2.3.2 Propane gas.** For a vented heater utilizing propane gas, maintain the gas supply to the unit under test at a normal inlet pressure of 11 to 13 inches water column and a specific gravity of approximately 1.53. Maintain the regulator outlet pressure, on units so equipped, approximately at that recommended by the manufacturer. Use propane having a specific gravity of approximately 1.53 and a higher heating value within  $\pm 5$  percent of 2,500 Btu's per standard cubic foot. Determine the actual higher heating value in Btu's per standard cubic foot for the propane to be used in the test with an error no greater than one percent.

**2.3.3 Other test gas.** Use other test gases with characteristics as described in section 2.2, table VII, of ANSI Standard Z21.11.1-1974. Use gases with a measured higher heating value within  $\pm 5$  percent of the values specified in the above ANSI standard. Determine the actual higher heating value of the gas used in the test with an error no greater than one percent.

**2.3.4 Oil supply.** For a vented heater utilizing fuel oil, use No. 1, fuel oil (kerosene) for vaporizing-type burners and either No. 1 or No. 2 fuel oil, as specified by the manufacturer, for mechanical atomizing type burners. Use No. 1 fuel oil with a viscosity meeting the specifications as specified in UL-730-1974, section 36.9. Use test fuel conforming to the specifications given in tables 2 and 3 of ANSI Standard Z91.1-1972

for No. 1 and No. 2 fuel oil. Measure the higher heating value of the test fuel with an error no greater than one percent.

**2.3.5 Electrical supply.** For auxiliary electric components of a vented heater, maintain the electrical supply to the test unit within one percent of the nameplate voltage for the entire test cycle. If a voltage range is used for nameplate voltage, maintain the electrical supply within one percent of the mid-point of the nameplate voltage range.

### 2.4 Burner adjustments.

**2.4.1 Gas burner adjustments.** Adjust the burners of gas fueled vented heaters to their maximum Btu ratings at the test pressure specified in section 2.3 of this appendix. Correct the burner volumetric flow rate to 60° F (15.6°C) and 30 inches of mercury barometric pressure, set the fuel flow rate to obtain a heat rate of within  $\pm 2$  percent of the hourly Btu rating specified by the manufacturer as measured after 15 minutes of operation starting with all parts of the vented heater at room temperature. Set the primary air shutters in accordance with the manufacturer's recommendations to give a good flame at this adjustment. Do not allow the deposit of carbon during any test specified herein.

If a vent limiting means is provided on a gas pressure regulator, have it in place during all tests.

For gas fueled heaters with modulating controls adjust the controls to operate the heater at the maximum fuel input rate. Set the thermostat control to the maximum setting. Start the heater by turning the safety control valve to the "on" position. In order to prevent modulation of the burner at maximum input, place the thermostat sensing element in a temperature control bath which is held at a temperature below the maximum set point temperature of the control.

For gas fueled heaters with modulating controls adjust the controls to operate the heater at the reduced fuel input rate. Set the thermostat control to the minimum setting. Start the heater by turning the safety control valve to the "on" position. If ambient test room temperature is above the lowest control set point temperature, initiate burner operation by placing the thermostat sensing element in a temperature control bath that is held at a temperature below the minimum set point temperature of the control.

**2.4.2 Oil burner adjustments.** Adjust the burners of oil fueled vented heaters to give the CO<sub>2</sub> reading recommended by the manufacturer and an hourly Btu input, during the steady-state performance test described below, which is within  $\pm 2$  percent of the heater manufacturer's specified normal hourly Btu input rating. On units employing a power burner do not allow smoke in the flue to exceed a No. 1 smoke during the steady-state performance test as measured by the procedure in ANSI Standard Z11.182-1965 (R1971) (ASTM D 2156-65 (1970)). If, on units employing a power burner, the smoke in the flue exceeds a No. 1 smoke during the steady-state test, readjust the burner to give a lower smoke reading, and, if necessary a lower CO<sub>2</sub> reading, and start all tests over. Maintain the average draft over the fire and in the flue during the steady-state performance test at that recommended by the manufacturer

within  $\pm 0.005$  inches of water gauge. Do not make additional adjustments to the burner during the required series of performance tests. The instruments and measuring apparatus for this test are described in section 6.3 of ANSI standard Z91.1-1972.

### 2.5 Circulating air adjustments.

**2.5.1 Forced air vented wall furnaces (including direct vent systems).** During tests maintain the air flow through the heater as specified by the manufacturer and operate the vented heater with the outlet air temperature between 80° F and 130° F above room temperature. If adjustable air discharge registers are provided, adjust them so as to provide the maximum possible air restriction. Measure air discharge temperature as specified in section 2.14 of ANSI Z21.49-1975.

**2.5.2 Fan type vented room heaters and floor furnaces.** During tests on fan type furnaces and heaters, adjust the air flow through the heater as specified by the manufacturer. If adjustable air discharge registers are provided, adjust them to provide the maximum possible air restriction.

### 2.6 Location of temperature measuring instrumentation.

**2.6.1 Gas fueled vented home heating equipment (including direct vent systems).** For units employing an integral draft diverter, install nine thermocouples, wired in parallel, in a horizontal plane in the five foot test stack located one foot from the test stack inlet. Equalize the length of all thermocouple leads before paralleling. Locate one thermocouple in the center of the stack. Locate eight thermocouples along imaginary lines intersecting at right angles in this horizontal plane at points one third and two thirds of the distance between the center of the stack and the stack wall.

For units which employ a direct vent system, locate at least one thermocouple at the center of each flue way exiting the heat exchanger. Provide radiation shields if the thermocouples are exposed to burner radiation.

For units which employ a draft hood or units which employ a direct vent system which does not significantly preheat the incoming combustion air, install nine thermocouples, wired in parallel, in a horizontal plane located within 12 inches (304.8 mm) of the heater outlet and upstream of the draft hood on units so equipped. Locate one thermocouple in the center of the pipe and eight thermocouples along imaginary lines intersecting at right angles in this horizontal plane at points one third and two thirds of the distance between the center of the pipe and the pipe wall.

For units which employ direct vent systems that significantly preheat the incoming combustion air, install nine thermocouples, wired in parallel, in a plane parallel to and located within 6 inches (152.4 mm) of the vent/air intake terminal. Equalize the length of all thermocouple leads before paralleling. Locate one thermocouple in the center of the vent pipe and eight thermocouples along imaginary lines intersecting at right angles in this plane at points one third and two thirds of the distance between the center of the flue pipe and the pipe wall.



Use bead-type thermocouples having wire size not greater than No. 24 American Wire Gauge (AWG). If there is a possibility that the thermocouples could receive direct radiation from the fire, install radiation shields on the fire side of the thermocouples only and position the shields so that they do not touch the thermocouple junctions.

Install thermocouples for measuring conditioned warm air temperature as described in ANSI Z21.49-1975, section 2.14. Establish the temperature of the inlet air by means of single No. 24 AWG bead-type thermocouple, suitably shielded from direct radiation and located in the center of the plane of each inlet air opening.

**2.6.2 Oil fueled vented home heating equipment (including direct vent systems).** Install nine thermocouples, wired in parallel and having equal length leads, in a plane perpendicular to the axis of the flue pipe. Locate this plane at the position shown in Figure 34.4 of UL 730-1974, or Figures 35.1 and 35.2 of UL 729-1976 for a single thermocouple, except that on direct vent systems which significantly preheat the incoming combustion air, it shall be located within 6 inches (152.5 mm) of the outlet of the vent/air intake terminal. Locate one thermocouple in the center of the flue pipe and eight thermocouples along imaginary lines intersecting at right angles in this plane at points one third and two thirds of the distance between the center of the pipe and pipe wall.

Use bead-type thermocouples having a wire size not greater than No. 24 AWG. If there is a possibility that the thermocouples could receive direct radiation from the fire, install radiation shields on the fire side of the thermocouples only and position the shields so that they do not touch the thermocouple junctions.

Install thermocouples for measuring the conditioned warm air temperature as described in sections 35.12 through 35.17 of UL 730-1974. Establish the temperature of the inlet air by means of a single No. 24 AWG bead-type thermocouple, suitably shielded from direct radiation and located in the center of the plane of each inlet air opening.

**2.7 Combustion measurement instrumentation.** Analyze the samples of stack and flue gases for vented heaters to determine the concentration by volume of carbon dioxide present in the dry gas with instrumentation which will result in a reading having an accuracy of  $\pm 0.1$  percentage points.

**2.8 Energy flow instrumentation.** Install one or more instruments, which measure the rate of gas flow or fuel oil supplied to the vented heater, and if appropriate, the electrical energy with an error no greater than one percent.

**2.9 Room ambient temperature.** During the time period required to perform all the testing and measurement procedures specified in section 3.0 of this appendix, maintain the room temperature within  $\pm 5^\circ\text{F}$  ( $\pm 2.8^\circ\text{C}$ ) of the value  $T_{RA}$  measured during the steady-state performance test. At no time during these tests shall the room temperature exceed  $100^\circ\text{F}$  ( $37.8^\circ\text{C}$ ) or fall below  $65^\circ\text{F}$  ( $18.3^\circ\text{C}$ ).

Temperature ( $T_{RA}$ ) shall be the arithmetic average temperature of the test area,

determined by measurement with four No. 24 AWG bead-type thermocouples with junctions shielded against radiation, located approximately at 90-degree positions on a circle circumscribing the heater or heater enclosure under test, in a horizontal plane approximately at the vertical midpoint of the appliance or test enclosure, and with the junctions approximately 24 inches from sides of the heater or test enclosure and located so as not to be affected by other than room air. Locate a thermocouple at each elevation of draft relief inlet opening and combustion air inlet opening at a distance of approximately 24 inches from the inlet openings. The temperature of the air for combustion and the air for draft relief shall not differ more than  $\pm 5^\circ\text{F}$  from room temperature as measured above.

**2.10 Equipment used to measure mass flow rate in flue and stack.** The tracer gas chosen for this task should have a density which is less than or approximately equal to the density of air. Use a gas unreactive with the environment to be encountered. Using instrumentation of either the batch or continuous type, measure the concentration of tracer gas with an error no greater than 2 percent of the value of the concentration measured.

### 3.0 Testing and measurements.

#### 3.1 Steady-state testing.

**3.1.1 Gas fueled vented home heating equipment (including direct vent systems).** Set up the vented heater as specified in sections 2.1, 2.2, and 2.3 of this appendix. The draft diverter shall be in the normal open condition and the stack shall not be insulated. (Insulation of the stack is no longer required for the vented heater test.) Begin the steady-state performance test by operating the burner and the circulating air blower, on units so equipped, with the adjustments specified by sections 2.4.1 and 2.5 of this appendix, until steady-state conditions are attained as indicated by a temperature variation of not more than  $3^\circ\text{F}$  ( $1.7^\circ\text{C}$ ) in the stack gas temperature for vented heaters equipped with draft diverters or  $5^\circ\text{F}$  ( $2.8^\circ\text{C}$ ) in the flue gas temperature for vented heaters equipped with either draft hoods or direct vent systems; in three successive readings taken 15 minutes apart.

On units employing draft diverters, measure the room temperature ( $T_{RA}$ ) as described in section 2.9 of this appendix and measure the steady-state stack gas temperature ( $T_{S,ss}$ ) using the nine thermocouples located in the 5 foot test stack as specified in section 2.6.1 of this appendix. Secure a sample of the stack gases in the plane where  $T_{S,ss}$  is measured or within 3.5 feet downstream of this plane. Determine the concentration by volume of carbon dioxide ( $X_{CO_2s}$ ) present in the dry stack gas. If the location of the gas sampling differs from the temperature measurement plane, there shall be no air leaks through the stack between these two locations.

On units employing draft hoods or direct vent systems, measure the room temperature ( $T_{RA}$ ) as described in section 2.9 of this appendix and measure the steady-state flue gas temperature ( $T_{F,ss}$ ), using the nine thermocouples located in the flue pipe as described in section 2.6.1 of this appendix.

Secure a sample of the flue gas in the plane of temperature measurement and determine the concentration by volume of  $\text{CO}_2$  ( $X_{CO_2F}$ ) present in dry flue gas. In addition, for units employing draft hoods, secure a sample of the stack gas in a horizontal plane in the five foot test stack located one foot from the test stack inlet; and determine the concentration by volume of  $\text{CO}_2$  ( $X_{CO_2s}$ ) present in dry stack gas.

Determine the steady-state heat input rate ( $Q_{in}$ ) including pilot gas by multiplying the measured higher heating value of the test gas by the steady-state gas input rate corrected to standard conditions of  $60^\circ\text{F}$  and 30 inches of mercury. Use measured values of gas temperature and pressure at the meter and the barometric pressure to correct the metered gas flow rate to standard conditions.

After the above test measurements have been completed on units employing draft diverters, secure a sample of the flue gases at the exit of the heat exchanger(s) and determine the concentration of  $\text{CO}_2$  ( $X_{CO_2F}$ ) present. In obtaining this sample of flue gas, move the sampling probe around or use a sample probe with multiple sampling ports in order to assure that an average value is obtained for the  $\text{CO}_2$  concentration. For units with multiple heat exchanger outlets, measure the  $\text{CO}_2$  concentration in a sample from each outlet to obtain the average  $\text{CO}_2$  concentration for the unit. A manifold (parallel connected sampling tubes) may be used to obtain this sample.

For heaters with single stage thermostat control (wall mounted electric thermostats), determine the steady-state efficiency at the maximum fuel input rate as specified in section 2.4 of this appendix.

For gas fueled vented heaters equipped with either two stage thermostats or step-modulating thermostats, determine the steady-state efficiency at the maximum fuel input rate, as specified in section 2.4.1 of this appendix, and at the reduced fuel input rate, as specified in section 2.4.1 of this appendix.

For manually controlled gas fueled vented heaters, with various input rates determine the steady-state efficiency at a fuel input rate that is within  $\pm 5$  percent of 50 percent of the maximum fuel input rate. If the heater is designed to use a control that precludes operation at other than maximum output (single firing rate) determine the steady state efficiency at the maximum input rate only.

**3.1.2 Oil fueled vented home heating equipment (including direct vent systems).** Set up and adjust the vented heater as specified in sections 2.1, 2.2, and 2.3.4 of this appendix. Begin the steady-state performance test by operating the burner and the circulating air blower, on units so equipped, with the adjustments specified by sections 2.4.2 and 2.5 of this appendix until steady-state conditions are attained as indicated by a temperature variation of not more than  $5^\circ\text{F}$  ( $2.8^\circ\text{C}$ ) in the flue gas temperature in three successive readings taken 15 minutes apart.

Do not allow smoke in the flue, for units equipped with power burners, to exceed a No. 1 smoke during the steady-state performance test as measured by the procedure described in ANSI standard Z11.182-1965 (R1971) (ASTM D 2156-65



(1970)). Maintain the average draft over the fire and in the breeching during the steady-state performance test at that recommended by the manufacturer  $\pm 0.005$  inches of water gauge.

Measure the room temperature ( $T_{RA}$ ) as described in section 2.9 of this appendix and measure the steady-state flue gas temperature ( $T_{F,ss}$ ) using nine thermocouples located in the flue pipe as described in section 2.6.2 of this appendix. Secure a sample of the flue gas in the plane of temperature measurement and determine the concentration by volume of  $CO_2$  ( $X_{CO_2}$ ) present in dry flue gas. Measure and record the steady-state heat input rate ( $Q_{in}$ ).

For manually controlled oil fueled vented heaters, determine the steady-state efficiency at a fuel input rate that is within  $\pm 5$  percent of 50 percent of the maximum fuel input rate.

**3.1.3 Auxiliary Electric Power Measurement.** Allow the auxiliary electrical system of a gas or oil vented heater to operate for at least five minutes before recording the maximum auxiliary electric power measurement from the wattmeter. Record the maximum electric power ( $P_E$ ) expressed in kilowatts. For vented heaters with modulating controls, the recorded ( $P_E$ ) shall be maximum measured electric power multiplied by the following factor ( $R$ ). For two stage controls,  $R=1.3$ . For step modulating controls,  $R=1.4$  when the ratio of minimum-to-maximum fuel input is greater than or equal to 0.7,  $R=1.7$  when the ratio of minimum-to-maximum fuel input is less than 0.7 and greater than or equal to 0.5, and  $R=2.2$  when the ratio of minimum-to-maximum fuel input is less than 0.5.

**3.2 Jacket loss measurement.** Conduct a jacket loss test for vented floor furnaces. Measure the jacket loss ( $L_J$ ) in accordance with the ANSI standard Z21.48-1976 section 2.12.

**3.3 Measurement of the off-cycle losses for vented heaters equipped with thermal stack dampers.** Install the thermal stack damper according to the manufacturer's instructions. Unless specified otherwise, the thermal stack damper should be at the draft diverter exit collar. Attach a five foot length of bare stack to the outlet of the damper. Install thermocouples as specified in section 2.6.1 of this appendix.

For vented heaters equipped with single stage thermostats, measure the off-cycle losses at the maximum fuel input rate. For vented heaters equipped with two stage thermostats, measure the off-cycle losses at the maximum fuel input rate and at the reduced fuel input rate. For vented heaters equipped with step-modulating thermostats, measure the off-cycle losses at the reduced fuel input rate.

Let the vented heater heat up to a steady-state condition. Feed a tracer gas at a constant metered rate into the stack directly above and within one foot above the stack damper. Record tracer gas flow rate and temperature. Measure the tracer gas concentration in the stack at several locations in a horizontal plane through a cross section of the stack at a point sufficiently above the stack damper to ensure that the tracer gas is well mixed in the stack.

Continuously measure the tracer gas concentration and temperature during a 10

minute cool down period. Shut the burner off and immediately begin measuring tracer gas concentration in the stack, stack temperature, room temperature, and barometric pressure. Record these values as the midpoint of each one-minute interval between burner shut down and ten minutes after burner shut down. Meter response time and sampling delay time shall be considered in timing these measurements.

**3.4 Measurement of the effectiveness of electro-mechanical stack dampers.** For vented heaters equipped with electro-mechanical stack dampers, measure the cross sectional area of the stack ( $A_s$ ), the net area of the damper plate ( $A_d$ ), and the angle that the damper plate makes when closed with a plane perpendicular to the axis of the stack ( $\Omega$ ). The net area of the damper plate means the area of the damper plate minus the area of any holes through the damper plate.

**3.5 Pilot light measurement.** Measure the energy input rate to the pilot light ( $Q_p$ ) with an error no greater than 3 percent for vented heaters so equipped.

**3.6 Optional procedure for determining  $D_p$ ,  $D_F$  and  $D_s$  for systems for all types of vented heaters.** For all types of vented heaters,  $D_p$ ,  $D_F$  and  $D_s$  can be measured by the following optional cool down test.

Conduct a cool down test by letting the unit heat up until steady-state conditions are reached, as indicated by temperature variation of not more than 5°F (2.8°C) in the flue gas temperature in three successive readings taken 15 minutes apart, and then shutting the unit off with the stack or flue damper controls by-passed or adjusted so that the stack or flue damper remains open during the resulting cool down period. If a draft was maintained on oil fueled units in the flue pipe during the steady-state performance test described in section 3.1 of this appendix, maintain the same draft (within a range of  $-0.001$  to  $+0.005$  inches of water gauge of the average steady-state draft) during this cool down period.

Measure the flue gas mass flow rate ( $m_{F,OFF}$ ) during the cool down test described above at a specific off-period flue gas temperature and corrected to obtain its value at the steady-state flue gas temperature ( $T_{F,ss}$ ), using the procedure described below.

Within one minute after the unit is shut off to start the cool down test for determining  $D_p$ , begin feeding a tracer gas into the combustion chamber at a constant flow rate of  $V_T$ , and at a point which will allow for the best possible mixing with the air flowing through the chamber. (On units equipped with an oil fired power burner, the best location for injecting this tracer gas appears to be through a hole drilled in the air tube.) Periodically measure the value of  $V_T$  with an instantaneous reading flow meter having an accuracy of  $\pm 3$  percent of the quantity measured. Maintain  $V_T$  at less than 1 percent of the air flow rate through the furnace. If a combustible tracer gas is used, there should be a delay period between the time the burner gas is shut off and the time the tracer gas is first injected to prevent ignition of the tracer gas.

Between 5 and 6 minutes after the unit is shut off to start the cool down test, measure at the exit of the heat exchanger the average

flue gas temperature,  $T_{F,OFF}$ . At the same instant the flue gas temperature is measured, also measure the percent volumetric concentration of tracer gas  $C_T$  in the flue gas in the same plane where  $T_{F,OFF}$  is determined. Obtain the concentration of tracer gas using an instrument which will result in an accuracy of  $\pm 2$  percent in the value of  $C_T$  measured. If use of a continuous reading type instrument results in a delay time between drawing of a sample and its analysis, this delay should be taken into account so that the temperature measurement and the measurement of tracer gas concentration coincide. In addition, determine the temperature of the tracer gas entering the flow meter ( $T_T$ ) and the barometric pressure ( $P_B$ ).

The rate of the flue gas mass flow through the vented heater and the factors  $D_p$ ,  $D_F$ , and  $D_s$  are calculated by the equations in sections 4.5.1 through 4.5.3 of this appendix.

**4.0 Calculations.**

**4.1 Annual fuel utilization efficiency for gas or oil fueled vented home heating equipment equipped without manual controls and without thermal stack dampers.** The following procedure determines the annual fuel utilization efficiency for gas or oil fueled vented home heating equipment equipped without manual controls and without thermal stack dampers.

**4.1.1 System number.** Obtain the system number from Table 1 of this appendix.

**4.1.2 Off-cycle flue gas draft factor.** Based on the system number, determine the off-cycle flue gas draft factor ( $D_F$ ) from Table 1 of this appendix.

**4.1.3 Off-cycle stack gas draft factor.** Based on the system number, determine the off-cycle stack gas draft factor ( $D_s$ ) from Table 1 of this appendix.

**4.1.4 Pilot fraction.** Calculate the pilot fraction ( $P_F$ ) expressed as a decimal and defined as:

$$P_F = Q_p / Q_{in}$$

where:

$Q_p$  = as defined in 3.5 of this appendix

$Q_{in}$  = as defined in 3.1 of this appendix at the maximum fuel input rate

**4.1.5 Jacket loss for floor furnaces.** Determine the jacket loss ( $L_J$ ) expressed as a percent and measured in accordance with section 3.2 of this appendix. For other vented heaters  $L_J=0.0$ .

**4.1.6 Latent heat loss.** Based on the fuel, obtain the latent heat loss ( $L_{L,A}$ ) from Table 2 of this appendix.

**4.1.7 Ratio of combustion air mass flow rate to stoichiometric air mass flow rate.** Determine the ratio of combustion air mass flow rate to stoichiometric air mass flow rate ( $R_{T,F}$ ), and defined as:

$$R_{T,F} = A + B / X_{CO_2}$$

where:

$A$  = as determined from Table 2 of this appendix

$B$  = as determined from Table 2 of this appendix

$X_{CO_2}$  = as defined in 3.1 of this appendix

**4.1.8 Ratio of combustion and relief air mass flow rate to stoichiometric air mass flow rate.** For vented heaters equipped with



either an integral draft diverter or a draft hood, determine the ratio of combustion and relief air mass flow rate to stoichiometric air mass flow rate ( $R_{T,S}$ ), and defined as:

$$R_{T,S} = A + [B/X_{CO_2,S}]$$

where:

A = as determined from Table 2 of this appendix

B = as determined from Table 2 of this appendix

$X_{CO_2,S}$  = as defined in 3.1 of this appendix

**4.1.9 Sensible heat loss at steady-state operation.** For vented heaters equipped with either an integral draft diverter or a draft hood, determine the sensible heat loss at steady-state operation ( $L_{S,SS,A}$ ) expressed as a percent and defined as:

where:

$$L_{S,SS,A} = C(R_{T,S} + D)(T_{S,SS} - T_{RA})$$

C = as determined from Table 2 of this appendix

$R_{T,S}$  = as defined in 4.1.8 of this appendix

D = as determined from Table 2 of this appendix

$T_{S,SS}$  = as defined in 3.1 of this appendix

$T_{RA}$  = as defined in 2.9 of this appendix

For vented heaters equipped without an integral draft diverter, determine ( $L_{S,SS,A}$ ) expressed as a percent and defined as:

$$L_{S,SS,A} = C(R_{T,F} + D)(T_{F,SS} - T_{RA})$$

where:

C = as determined from Table 2 of this appendix

$R_{T,F}$  = as defined in 4.1.7 of this appendix

D = as determined from Table 2 of this appendix

$T_{F,SS}$  = as defined in 3.1 of this appendix

$T_{RA}$  = as defined in 2.9 of this appendix

**4.1.10 Steady-state efficiency.** For vented heaters equipped with single stage thermostats, calculate the steady-state efficiency (excluding jacket loss,  $\eta_{SS}$ ), expressed in percent and defined as:

$$\eta_{SS} = 100 - L_{L,A} - L_{S,SS,A}$$

where:

$L_{L,A}$  = as defined in 4.1.6 of this appendix

$L_{S,SS,A}$  = as defined in 4.1.9 of this appendix

For vented heaters equipped with either two stage thermostats or with step-modulating thermostats, calculate the steady-state efficiency at the reduced fuel input rate,  $\eta_{SS,L}$ , expressed in percent and defined as:

$$\eta_{SS,L} = 100 - L_{L,A} - L_{S,SS,A}$$

where:

$L_{L,A}$  = as defined in 4.1.6 of this appendix

$L_{S,SS,A}$  = as defined in 4.1.9 of this appendix in which  $L_{S,SS,A}$  is determined at the reduced fuel input rate

For vented heaters equipped with two stage thermostats, calculate the steady-state efficiency at the maximum fuel input rate,  $\eta_{SS,H}$ , expressed in percent and defined as:

$$\eta_{SS,H} = 100 - L_{L,A} - L_{S,SS,A}$$

where:

$L_{L,A}$  = as defined in 4.1.6 of this appendix

$L_{S,SS,A}$  = as defined in 4.1.9 of this appendix in which  $L_{S,SS,A}$  is measured at the maximum fuel input rate

For vented heaters equipped with step-modulating thermostats, calculate the

weighted-average steady-state efficiency in

the modulating mode,  $\eta_{SS-MOD}$ , expressed in percent and defined as:

$$\eta_{SS-MOD} = [\eta_{SS-H} - \eta_{SS-L}] \left[ \frac{T_C - T_{OA}}{T_C - 15} \right] + \eta_{SS-L}$$

where:

$\eta_{SS-H}$  = as defined in 4.1.10 of this appendix

$\eta_{SS-L}$  = as defined in 4.1.10 of this appendix

$T_{OA}$  = average outdoor temperature for vented heaters with step-modulating thermostats operating in the modulating mode and is obtained from Table 3 or Figure 1 of this appendix

$T_C$  = balance point temperature which represents a temperature used to apportion the annual heating load between the reduced input cycling mode and either the modulating mode or maximum input cycling mode and is obtained either from Table 3 of this appendix or calculated by the following equation:

$$T_C = 65 - [(65 - 15)R]$$

where:

65 = average outdoor temperature at which a vented heater starts operating

15 = national average outdoor design temperature for vented heaters

R = ratio of reduced to maximum heat output rates, as defined in 4.1.13 of this appendix

**4.1.11 Reduced heat output rate.** For vented heaters equipped with either two stage thermostats or step-modulating thermostats, calculate the reduced heat output rate ( $Q_{red,out}$ ) defined as:

$$Q_{red,out} = \eta_{SS,L} Q_{red,in}$$

where:

$\eta_{SS,L}$  = as defined in 4.1.10 of this appendix

$Q_{red,in}$  = the reduced fuel input rate

**4.1.12 Maximum heat output rate.** For vented heaters equipped with either two stage thermostats or step-modulating thermostats, calculate the maximum heat output rate ( $Q_{max,out}$ ) defined as:

$$Q_{max,out} = \eta_{SS,H} Q_{max,in}$$

where:

$\eta_{SS,H}$  = as defined in 4.1.10 of this appendix

$Q_{max,in}$  = the maximum fuel input rate

**4.1.13 Ratio of reduced to maximum heat output rates.** For vented heaters equipped with either two stage thermostats or step-modulating thermostats, calculate the ratio of reduced to maximum heat output rates (R) expressed as a decimal and defined as:

$$R = Q_{red,out} / Q_{max,out}$$

where:

$Q_{red,out}$  = as defined in 4.1.11 of this appendix

$Q_{max,out}$  = as defined in 4.1.12 of this appendix

**4.1.14 Fraction of heating load at reduced operating mode.** For vented heaters equipped with either two stage thermostats or step-modulating thermostats, determine the fraction of heating load at the reduced operating mode ( $X_1$ ) expressed as a decimal

and listed in Table 3 of this appendix or obtained from Figure 2 of this appendix.

**4.1.15 Fraction of heating load at maximum operating mode or noncycling mode.** For vented heaters equipped with either two stage thermostats or step-modulating thermostats, determine the fraction of heating load at the maximum operating mode or noncycling mode ( $X_2$ ) expressed as a decimal and listed in Table 3 of this appendix or obtained from Figure 2 of this appendix.

**4.1.16 Weighted-average steady-state efficiency.** For vented heaters equipped with single stage thermostats, the weighted-average steady-state efficiency ( $\eta_{SS-WT}$ ) is equal to  $\eta_{SS}$ , as defined in section 4.1.10 of this appendix. For vented heaters equipped with two stage thermostats,  $\eta_{SS-WT}$  is defined as:

$$\eta_{SS-WT} = X_1 \eta_{SS-L} + X_2 \eta_{SS-H}$$

where:

$X_1$  = as defined in 4.1.14 of this appendix

$\eta_{SS-L}$  = as defined in 4.1.10 of this appendix

$X_2$  = as defined in 4.1.15 of this appendix

$\eta_{SS-H}$  = as defined in 4.1.10 of this appendix

For vented heaters equipped with step-modulating thermostats,  $\eta_{SS-WT}$  is defined as:

$$\eta_{SS-WT} = X_1 \eta_{SS-L} + X_2 \eta_{SS-MOD}$$

where:

$X_1$  = as defined in 4.1.14 of this appendix

$\eta_{SS-L}$  = as defined in 4.1.10 of this appendix

$X_2$  = as defined in 4.1.15 of this appendix

$\eta_{SS-MOD}$  = as defined in 4.1.10 of this appendix

**4.1.17 Annual fuel utilization efficiency.** Calculate the annual fuel utilization efficiency (AFUE) expressed as percent and defined as:

$$AFUE = [0.968 \eta_{SS-WT} - 1.78 D_F - 1.89 D_S - 129 P_F - 2.8 L_J + 1.81]$$

where:

$\eta_{SS-WT}$  = as defined in 4.1.16 of this appendix

$D_F$  = as defined in 4.1.2 of this appendix

$D_S$  = as defined in 4.1.3 of this appendix

$P_F$  = as defined in 4.1.4 of this appendix

$L_J$  = as defined in 4.1.5 of this appendix

**4.2 Annual fuel utilization efficiency for gas or oil fueled vented home heating equipment equipped with manual controls.**

The following procedure determines the annual fuel utilization efficiency for gas or oil fueled vented home heating equipment equipped with manual controls.

**4.2.1 Average ratio of stack gas mass flow rate to flue gas mass flow rate at steady-state operation.** For vented heaters equipped with either direct vents or direct exhaust or are outdoor units, the average ratio of stack gas mass flow rate to flue gas mass flow rate at steady-state operation (S/F) shall be equal to unity. (S/F = 1.) For all other types of vented heaters, calculate (S/F) defined as:

$$S/F = 1.3 R_{T,S} / R_{T,F}$$



where:

$R_{T,S}$  = as defined in 4.1.8 of this appendix with

$X_{CO_2}$  measured at 50% fuel input rate

$R_{T,F}$  = as defined in 4.1.7 of this appendix with

$X_{CO_2}$  measured at 50% fuel input rate

#### 4.2.2 Multiplication factor for infiltration

loss during burner on-cycle. Calculate the

multiplication factor for infiltration loss

during burner on-cycle ( $K_{I,ON}$ ) defined as:

$$K_{I,ON} = 100(0.24) (S/F) (0.7) [1 + R_{T,F}(A/F)] / HHV_A$$

where:

100 = converts a decimal fraction into a

percent

0.24 = specific heat of air

A/F = stoichiometric air/fuel ratio,

determined in accordance with Table 2

of this appendix

S/F = as defined in 4.2.1 of this appendix at 50

percent of rated maximum fuel input

0.7 = infiltration parameter

$R_{T,F}$  = as defined in 4.1.7 of this appendix

$HHV_A$  = average higher heating value of the

test fuel, determined in accordance with

Table 2 of this appendix

#### 4.2.3 On-cycle infiltration heat loss.

Calculate the on-cycle infiltration heat loss

( $L_{I,ON}$ ) expressed as a percent and defined as:

$$L_{I,ON} = K_{I,ON} (70 - 45)$$

where:

$K_{I,ON}$  = as defined in 4.2.2 of this appendix

70 = average indoor temperature

45 = average outdoor temperature

#### 4.2.4 Weighted-Average Steady-State

Efficiency. For manually controlled heaters

with various input rates the weighted average

steady-state efficiency ( $\eta_{SS,WT}$ ), is at 50

percent of the maximum fuel input rate as

measured in either section 3.1.1 to this

appendix for manually controlled gas vented

heaters or section 3.1.2 to this appendix for

manually controlled oil vented heaters. For

manually controlled heater with one single

firing rate the weighted average steady-state

efficiency is the steady state efficiency

measured at the single firing rate.

#### 4.2.5 Part-load fuel utilization efficiency.

Calculate the part-load fuel utilization

efficiency ( $\eta_u$ ) expressed as a percent and

defined as:

$$\eta_u = \eta_{SS,WT} - L_{I,ON}$$

where:

$\eta_{SS,WT}$  = as defined in 4.2.4 of this appendix

$L_{I,ON}$  = as defined in 4.2.3 of this appendix

#### 4.2.6 Annual fuel utilization efficiency.

For manually controlled vented heaters.

Calculate the annual fuel utilization

efficiency (AFUE) expressed as a percent and

defined as:

$$AFUE = \frac{4400\eta_{SS}\eta_u Q_{in,max}}{4400\eta_{SS}Q_{in,max} + 2.5(4600)\eta_u Q_P}$$

where:

4400 = average number of heating degree days

$\eta_{SS}$  = as defined as  $\eta_{SS,WT}$  in 4.2.4 of this

appendix

$\eta_u$  = as defined in 4.2.5 of this appendix

$Q_{in,max}$  = as defined as  $Q_{in}$  at the maximum

fuel input rate, as defined in 3.1 of this

appendix

4600 = average number of non-heating season  
hours per year

$Q_P$  = as defined in 3.5 of this appendix

#### 4.3 Annual fuel utilization efficiency by

the tracer gas method. The annual fuel

utilization efficiency shall be determined by

the following tracer gas method for all vented

heaters equipped with thermal stack

dampers. All other types of vented heaters

can elect to use the following tracer gas

method, as an optional procedure.

#### 4.3.1 On-cycle sensible heat loss.

For vented heaters equipped with single stage

thermostats, calculate the on-cycle sensible

heat loss ( $L_{S,ON}$ ) expressed as a percent and

defined as:

$$L_{S,ON} = L_{S,SS,A}$$

where:

$L_{S,SS,A}$  = as defined in 4.1.9 of this appendix

For vented heaters equipped with two

stage thermostats, calculate  $L_{S,ON}$  defined as:

$$L_{S,SS,A-avg} = \left[ (L_{S,SS,A-max} - L_{S,SS,A-red}) \left[ \frac{T_C - T_{OA}}{T_C - 15} \right] \right] + L_{S,SS,A-red}$$

where:

$L_{S,SS,A-avg}$  = as defined in 4.3.1 of this appendix

$T_C$  = as defined in 4.1.10 of this appendix

$T_{OA}$  = as defined in 4.1.10 of this appendix

15 = as defined in 4.1.10 of this appendix

#### 4.3.2 On-cycle infiltration heat loss.

For vented heaters equipped with single stage

thermostats, calculate the on-cycle

infiltration heat loss ( $L_{I,ON}$ ) expressed as a

percent and defined as:

$$L_{I,ON} = K_{I,ON} (70 - 45)$$

where:

$K_{I,ON}$  = as defined in 4.2.2 of this appendix

70 = as defined in 4.2.3 of this appendix

45 = as defined in 4.2.3 of this appendix

For vented heaters equipped with two

stage thermostats, calculate  $L_{I,ON}$  defined as:

$$K_{I,ON-avg} = \frac{[K_{I,ON,max} + K_{I,ON,red}]}{2}$$

70 = as defined in 4.2.3 of this appendix

$T_{OA}$  = as defined in 4.3.4 of this appendix

$X_2$  = as defined in 4.1.15 of this appendix

$T_{OA}$  = as defined in 4.3.4 of this appendix

#### 4.3.3 Off-cycle sensible heat loss.

For vented heaters equipped with single stage

thermostats, calculate the off-cycle sensible

heat loss ( $L_{S,OFF}$ ) at the maximum fuel input

rate. For vented heaters equipped with step-

modulating thermostats, calculate  $L_{S,OFF}$

defined as:

$$L_{S,OFF} = X_1 L_{S,OFF,red}$$

where:

$X_1$  = as defined in 4.1.14 of this appendix

$L_{S,OFF,red}$  = as defined as  $L_{S,OFF}$  in 4.3.3 of this

appendix at the reduced fuel input rate

$$L_{S,ON} = X_1 L_{S,SS,A-red} + X_2 L_{S,SS,A-max}$$

where:

$X_1$  = as defined in 4.1.14 of this appendix

$L_{S,SS,A-red}$  = as defined as  $L_{S,SS,A}$  in 4.1.9 of this

appendix at the reduced fuel input rate

$X_2$  = as defined in 4.1.15 of this appendix

$L_{S,SS,A-max}$  = as defined as  $L_{S,SS,A}$  in 4.1.9 of this

appendix at the maximum fuel input rate

For vented heaters with step-modulating

thermostats, calculate  $L_{S,ON}$  defined as:

$$L_{S,ON} = X_1 L_{S,SS,A-red} + X_2 L_{S,SS,A-avg}$$

where:

$X_1$  = as defined in 4.1.14 of this appendix

$L_{S,SS,A-red}$  = as defined in 4.3.1 of this

appendix

$X_2$  = as defined in 4.1.15 of this appendix

$L_{S,SS,A-avg}$  = average sensible heat loss for step-

modulating vented heaters operating in

the modulating mode



$$L_{S,OFF} = \frac{100(0.24)}{Q_{in,t_{on}}} \sum m_{S,OFF}(T_{S,OFF} - T_{RA})$$

where:

100=conversion factor for percent  
0.24=specific heat of air in Btu per pound - °F

$Q_{in}$ =fuel input rate, as defined in 3.1 of this appendix in Btu per minute (as appropriate for the firing rate)

$t_{on}$ =average burner on-time per cycle and is 20 minutes

$\sum m_{S,OFF}(T_{S,OFF} - T_{RA})$ =summation of the twenty values of the quantity,  $m_{S,OFF}(T_{S,OFF} - T_{RA})$ , measured in accordance with 3.3 of this appendix

$m_{S,OFF}$ =stack gas mass flow rate pounds per minute

$$m_{S,OFF} = \frac{1.325 P_B V_T (C_T - C_T)}{C_T (T_T + 460)}$$

$T_{S,OFF}$ =stack gas temperature measured in accordance with 3.3 of this appendix

$T_{RA}$ =average room temperature measured in accordance with 3.3 of this appendix

$P_B$ =barometric pressure in inches of mercury  
 $V_T$ =flow rate of the tracer gas through the stack in cubic feet per minute

$C_T$ =concentration by volume of the active tracer gas in the mixture in percent and is 100 when the tracer gas is a single component gas

$C_T$ =concentration by volume of the active tracer gas in the diluted stack gas in percent

$T_T$ =temperature of the tracer gas entering the flow meter in degrees Fahrenheit

$(T_T + 460)$ =absolute temperature of the tracer gas entering the flow meter in degrees Rankine

**4.3.4 Average outdoor temperature.** For vented heaters equipped with single stage thermostats, the average outdoor temperature ( $T_{OA}$ ) is 45 °F. For vented heaters equipped with either two stage thermostats or step-modulating thermostats,  $T_{OA}$  during the reduced operating mode is obtained from Table 3 or Figure 1 of this appendix. For vented heaters equipped with two stage thermostats,  $T_{OA}$  during the maximum operating mode is obtained from Table 3 or Figure 1 of this appendix.

**4.3.5 Off-cycle infiltration heat loss.** For vented heaters equipped with single stage thermostats, calculate the off-cycle infiltration heat loss ( $L_{I,OFF}$ ) at the maximum fuel input rate. For vented heaters equipped with step-modulating thermostats, calculate  $L_{I,OFF}$  defined as:

$$L_{I,OFF} = X_1 L_{I,OFF,red}$$

where:

$X_1$ =as defined in 4.1.14 of this appendix

$L_{I,OFF,red}$ =as defined in  $L_{I,OFF}$  in 4.3.3 of this appendix at the reduced fuel input rate

For vented heaters equipped with two stage thermostats, calculate  $L_{I,OFF}$  defined as:

$$L_{I,OFF} = X_1 L_{I,OFF,red} + X_2 L_{I,OFF,max}$$

where:

$X_1$ =as defined in 4.1.14 of this appendix

$L_{I,OFF,red}$ =as defined as  $L_{I,OFF}$  in 4.3.3 of this appendix at the reduced fuel input rate

$X_2$ =as defined in 4.1.15 of this appendix

$L_{I,OFF,max}$ =as defined as  $L_{I,OFF}$  in 4.3.3 of this appendix at the maximum fuel input rate

Calculate the off-cycle infiltration heat loss ( $L_{I,OFF}$ ) expressed as a percent and defined as:

$$L_{I,OFF} = \frac{100(0.24)(1.3)(0.7)(70 - T_{OA})}{Q_{in,t_{on}}} \sum m_{S,OFF}$$

where:

100=conversion factor for percent

0.24=specific heat of air in Btu per pound - °F

1.3=dimensionless factor for converting laboratory measured stack flow to typical field conditions

0.7=infiltration parameter

70=assumed average indoor air temperature, °F

$T_{OA}$ =average outdoor temperature as defined in 4.3.4 of this appendix

$Q_{in}$ =fuel input rate, as defined in 3.1 of this appendix in Btu per minute (as appropriate for the firing rate)

$t_{on}$ =average burner on-time per cycle and is 20 minutes

$\sum m_{S,OFF}$ =summation of the twenty values of the quantity,  $m_{S,OFF}$ , measured in accordance with 3.3 of this appendix

$m_{S,OFF}$ =as defined in 4.3.3 of this appendix

**4.3.6 Part-load fuel utilization efficiency.**

Calculate the part-load fuel utilization efficiency ( $\eta_u$ ) expressed as a percent and defined as:

$$\eta_u = 100 - L_{I,OA} - C_j L_j - \left[ \frac{t_{on}}{t_{on} + P_F t_{OFF}} \right] + [L_{N,ON} + L_{B,OFF} + L_{I,ON} + L_{B,OFF}]$$

where:

$C_j$ =2.8, adjustment factor

$L_j$ =jacket loss as defined in 4.1.5

$L_{I,OA}$ =as defined in 4.1.6 of this appendix

$t_{on}$ =as defined in 4.3.3 of this appendix

$L_{S,ON}$ =as defined in 4.3.1 of this appendix

$L_{S,OFF}$ =as defined in 4.3.3 of this appendix

$L_{I,ON}$ =as defined in 4.3.2 of this appendix

$L_{I,OFF}$ =as defined in 4.1.4 of this appendix

$P_F$ =as defined in 4.1.4 of this appendix

$t_{OFF}$ =average burner off-time per cycle and is 20 minutes

**4.3.7 Annual fuel utilization efficiency.**

Calculate the annual fuel utilization efficiency (AFUE) expressed as a percent and defined as:

$$AFUE = \frac{4400 \eta_{SS-WT} \eta_u Q_{in-max}}{4400 \eta_{SS} Q_{in-max} + 2.5(4600) \eta_u Q_p}$$

where:

4400=as defined in 4.2.6

$\eta_{SS-WT}$ =as defined in 4.1.16 of this appendix

$\eta_u$ =as defined in 4.3.6 of this appendix

$Q_{in-max}$ =as defined in 4.2.6 of this appendix

4600=as defined in 4.2.6 of this appendix

$Q_p$ =as defined in 3.5 of this appendix

**4.4 Stack damper effectiveness for vented heaters equipped with electro-mechanical**

*stack dampers.* Determine the stack damper effectiveness for vented heaters equipped with electro-mechanical stack dampers ( $D_o$ ), defined as:

$$D_o = 1.62 [1 - A_D \cos \Omega / A_S]$$

where:

$A_D$ =as defined in 3.4 of this appendix

$\Omega$ =as defined in 3.4 of this appendix

$A_S$ =as defined in 3.4 of this appendix

**4.5 Addition requirements for vented home heating equipment using indoor air for combustion and draft control.** For vented home heating equipment using indoor air for combustion and draft control,  $D_F$ , as described in section 4.1.2 of this appendix, and  $D_S$ , as described in section 4.1.3 of this appendix, shall be determined from Table 1 of this appendix.

**4.5.1 Optional procedure for determining  $D_F$  for vented home heating equipment.**

Calculate the ratio ( $D_F$ ) of the rate of flue gas mass through the vented heater during the off-period,  $M_{F,OFF}(T_{F,SS})$ , to the rate of flue gas mass flow during the on-period,  $M_{F,SS}(T_{F,SS})$ , and defined as:

$$D_F = M_{F,OFF}(T_{F,SS}) / M_{F,SS}(T_{F,SS})$$

For vented heaters in which no draft is maintained during the steady-state or cool down tests,  $M_{F,OFF}(T_{F,SS})$  is defined as:

$$M_{F,OFF}(T_{F,SS}) = M_{F,OFF}(T_{F,OFF}^*) \left[ \frac{T_{F,SS} - T_{RA}}{T_{F,OFF}^* - T_{RA}} \right]^{0.56} \left[ \frac{T_{F,OFF}^* + 460}{T_{F,SS} + 460} \right]^{1.19}$$

For oil fueled vented heaters in which an imposed draft is maintained, as described in section 3.6 of this appendix,  $M_{F,OFF}(T_{F,SS})$  is defined as:

$$M_{F,OFF}(T_{F,SS}) = M_{F,OFF}(T_{F,SS}^*)$$

where:

$T_{F,SS}$ =as defined in 3.1.1 of this appendix

$T_{F,OFF}^*$ =flue gas temperature during the off-period measured in accordance with 3.6 of this appendix in degrees Fahrenheit

$T_{RA}$ =as defined in 2.9 of this appendix



$$M_{F,OFF}(T_{F,OFF}) = \frac{1.325 P_B V_T (100 - C_T)}{C_T (T_T + 460)}$$

$P_B$  = barometric pressure measured in accordance with 3.6 of this appendix in inches of mercury

$V_T$  = flow rate of tracer gas through the vented heater measured in accordance with 3.6 of this appendix in cubic feet per minute

$C_T$  = concentration by volume of tracer gas present in the flue gas sample measured in accordance with 3.6 of this appendix in percent

$C_T^*$  = concentration by volume of the active tracer gas in the mixture in percent and is 100 when the tracer gas is a single component gas

$T_T$  = the temperature of the tracer gas entering the flow meter measured in accordance with 3.6 of this appendix in degrees Fahrenheit

$(T_T + 460)$  = absolute temperature of the tracer gas entering the flow meter in degrees Rankine

$M_{F,SS}(T_{F,SS}) = Q_{in}[R_{T,F}(A/F) + 1]/[60HHV_A]$

$Q_{in}$  = as defined in 3.1 of this appendix

$R_{T,F}$  = as defined in 4.1.7 of this appendix

$A/F$  = as defined in 4.2.2 of this appendix

$HHV_A$  = as defined in 4.2.2 of this appendix

4.5.2 *Optional procedure for determining off-cycle draft factor for flue gas flow for vented heaters.* For systems numbered 1 thru 10, calculate the off-cycle draft factor for flue gas flow ( $D_F$ ) defined as:

$$D_F = D_P$$

For systems numbered 11 or 12:  $D_F = D_P D_0$

where:

$D_P$  = as defined in 4.5.1 of this appendix

$D_0$  = as defined in 4.4 of this appendix

4.5.3 *Optional procedure for determining off-cycle draft factor for stack gas flow for vented heaters.* Calculate the off-cycle draft factor for stack gas flow ( $D_S$ ) defined as:

For systems numbered 1 or 2:  $D_S = 1.0$

For systems numbered 3 or 4:  $D_S = (D_P + 0.79)/1.4$

For systems numbered 5 or 6:  $D_S = D_0$

For systems numbered 7 or 8 and if  $D_0(S/F) < 1$ :  $D_S = D_0 D_P$

For systems numbered 7 or 8 and if  $D_0(S/F) > 1$ :

$$D_S = D_0 D_P + [0.85 - D_0 D_P] [D_0(S/F) - 1]/[S/F - 1]$$

where:

$D_P$  = as defined in 4.5.1 of this appendix

$D_0$  = as defined in 4.4 of this appendix

TABLE 1.—OFF-CYCLE DRAFT FACTORS FOR FLUE GAS FLOW ( $D_F$ ) AND FOR STACK GAS FLOW ( $D_S$ ) FOR VENTED HOME HEATING EQUIPMENT EQUIPPED WITHOUT THERMAL STACK DAMPERS

| System number | ( $D_F$ ) | ( $D_S$ ) | Burner type | Venting system type <sup>1</sup>    |
|---------------|-----------|-----------|-------------|-------------------------------------|
| 1             | 1.0       | 1.0       | Atmospheric | Draft hood or diverter.             |
| 2             | 0.4       | 1.0       | Power       | Draft hood or diverter.             |
| 3             | 1.0       | 1.0       | Atmospheric | Barometric draft regulator.         |
| 4             | 0.4       | 0.85      | Power       | Barometric draft regulator.         |
| 5             | 1.0       | $D_0$     | Atmospheric | Draft hood or diverter with damper. |
| 6             | 0.4       | $D_0$     | Power       | Draft hood or diverter with damper. |

TABLE 1.—OFF-CYCLE DRAFT FACTORS FOR FLUE GAS FLOW ( $D_F$ ) AND FOR STACK GAS FLOW ( $D_S$ ) FOR VENTED HOME HEATING EQUIPMENT EQUIPPED WITHOUT THERMAL STACK DAMPERS—Continued

| System number | ( $D_F$ ) | ( $D_S$ ) | Burner type | Venting system type <sup>1</sup>        |
|---------------|-----------|-----------|-------------|-----------------------------------------|
| 7             | 1.0       | $D_0$     | Atmospheric | Barometric draft regulator with damper. |
| 8             | 0.4       | $D_0 D_P$ | Power       | Barometric draft regulator with damper. |
| 9             | 1.0       |           | Atmospheric | Direct vent.                            |
| 10            | 0.4       |           | Power       | Direct vent.                            |
| 11            | $D_0$     |           | Atmospheric | Direct vent with damper.                |
| 12            | 0.4       | $D_0$     | Power       | Direct vent with damper.                |

<sup>1</sup> Venting systems listed with dampers means electro-mechanical dampers only.

TABLE 2.—VALUES OF HIGHER HEATING VALUE ( $HHV_A$ ), STOICHIOMETRIC AIR/FUEL ( $A/F$ ), LATENT HEAT LOSS ( $L_{LA}$ ) AND FUEL-SPECIFIED PARAMETERS ( $A$ ,  $B$ ,  $C$ , AND  $D$ ) FOR TYPICAL FUELS

| Fuels            | HHV (Btu/lb) | A/F   | $L_{LA}$ | A      | B     | C      | D     |
|------------------|--------------|-------|----------|--------|-------|--------|-------|
| No. 1 oil        | 19,800       | 14.56 | 6.55     | 0.0679 | 14.22 | 0.0179 | 0.167 |
| No. 2 oil        | 19,500       | 14.49 | 6.50     | 0.0667 | 14.34 | 0.0181 | 0.167 |
| Natural gas      | 20,120       | 14.45 | 9.55     | 0.0919 | 10.96 | 0.0175 | 0.171 |
| Manufactured gas | 18,500       | 11.81 | 10.14    | 0.0965 | 10.10 | 0.0155 | 0.235 |
| Propane          | 21,500       | 15.58 | 7.99     | 0.0841 | 12.60 | 0.0177 | 0.151 |
| Butane           | 20,000       | 15.36 | 7.79     | 0.0808 | 12.93 | 0.0180 | 0.143 |

TABLE 3.—FRACTION OF HEATING LOAD AT REDUCED OPERATING MODE (X1) AND AT MAXIMUM OPERATING MODE (X2), AVERAGE OUTDOOR TEMPERATURES (TOA AND TOA\*), AND BALANCE POINT TEMPERATURE (TC) FOR VENTED HEATERS EQUIPPED WITH EITHER TWO-STAGE THERMOSTATS OR STEP-MODULATING THERMOSTATS

| Heat output ratio * | X1  | X2  | TOA | TOA* | TC |
|---------------------|-----|-----|-----|------|----|
| 0.20 to 0.24        | .12 | .88 | 57  | 40   | 53 |
| 0.25 to 0.29        | .16 | .84 | 56  | 39   | 51 |
| 0.30 to 0.34        | .20 | .80 | 54  | 38   | 49 |
| 0.35 to 0.39        | .30 | .70 | 53  | 36   | 46 |
| 0.40 to 0.44        | .36 | .64 | 52  | 35   | 44 |
| 0.45 to 0.49        | .43 | .57 | 51  | 34   | 42 |
| 0.50 to 0.54        | .52 | .48 | 50  | 32   | 39 |
| 0.55 to 0.59        | .60 | .40 | 49  | 30   | 37 |
| 0.60 to 0.64        | .70 | .30 | 48  | 29   | 34 |
| 0.65 to 0.69        | .76 | .24 | 47  | 27   | 32 |
| 0.70 to 0.74        | .84 | .16 | 46  | 25   | 29 |
| 0.75 to 0.79        | .88 | .12 | 46  | 22   | 27 |
| 0.80 to 0.84        | .94 | .06 | 45  | 20   | 23 |

TABLE 3.—FRACTION OF HEATING LOAD AT REDUCED OPERATING MODE (X1) AND AT MAXIMUM OPERATING MODE (X2), AVERAGE OUTDOOR TEMPERATURES (TOA AND TOA\*), AND BALANCE POINT TEMPERATURE (TC) FOR VENTED HEATERS EQUIPPED WITH EITHER TWO-STAGE THERMOSTATS OR STEP-MODULATING THERMOSTATS—Continued

| Heat output ratio * | X1  | X2  | TOA | TOA* | TC |
|---------------------|-----|-----|-----|------|----|
| 0.85 to 0.89        | .96 | .04 | 45  | 18   | 21 |
| 0.90 to 0.94        | .98 | .02 | 44  | 16   | 19 |
| 0.95 to 0.99        | .99 | .01 | 44  | 13   | 17 |

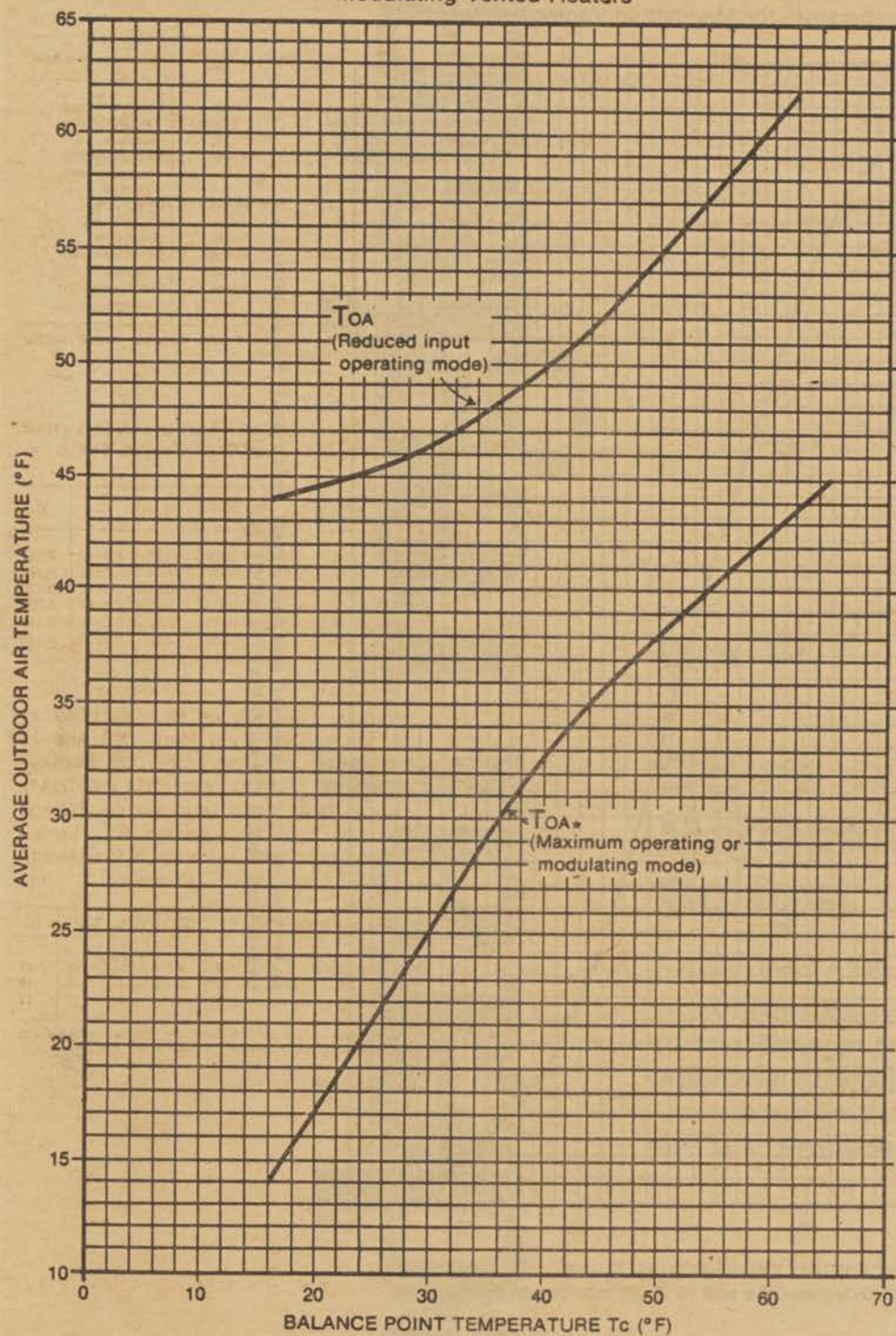
\* The heat output ratio means the ratio of minimum to maximum heat output rates as defined in 4.1.13.

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**FIGURE 1**

Average Outdoor Air Temperature vs. Balance Point Temperature for  
Modulating Vented Heaters

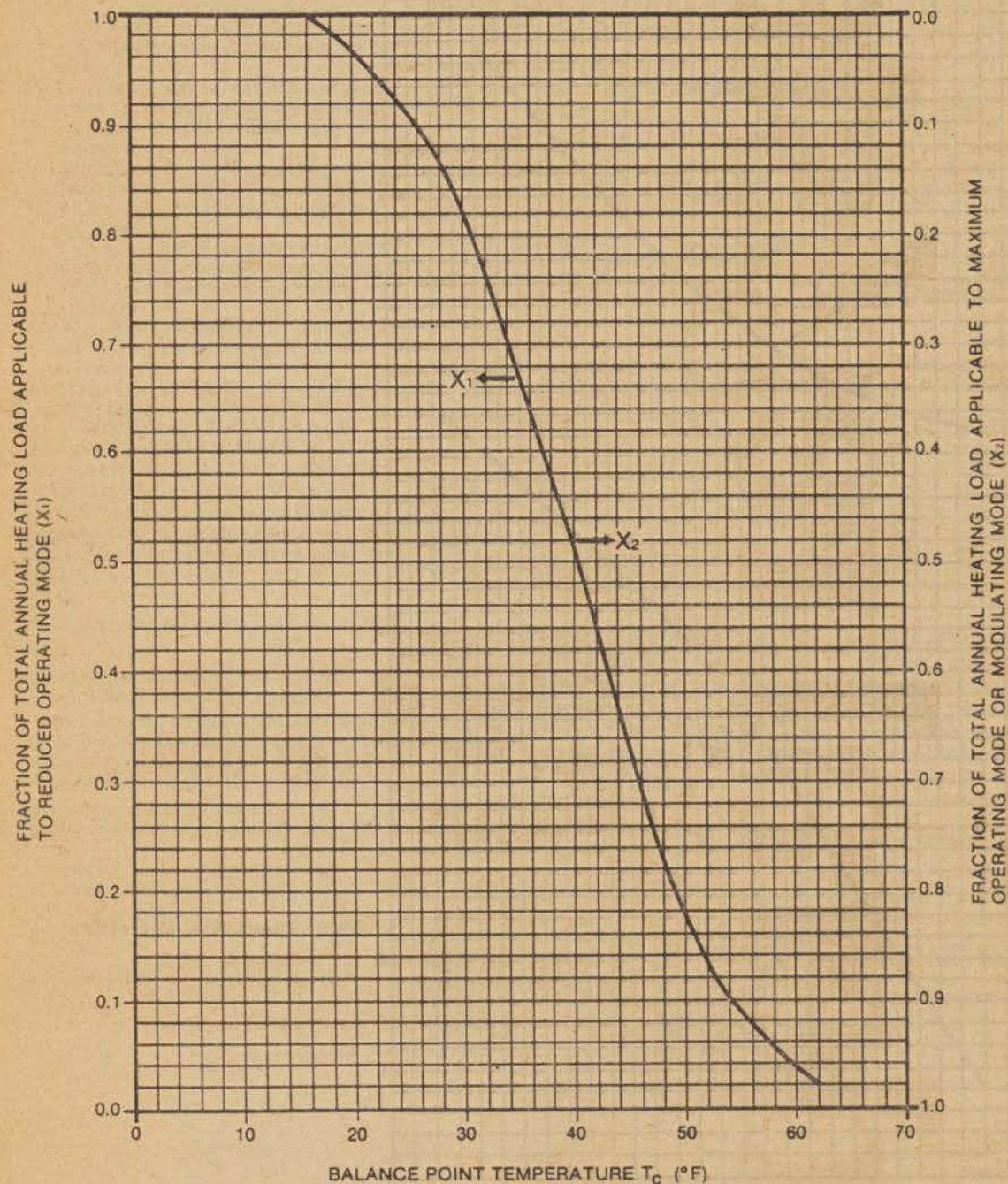


This figure is based on 4500 degree-days and 15°F outdoor design temperature.



**FIGURE 2**

Fraction of Total Annual Heating Load Applicable to Reduced Operating Mode ( $X_1$ ) and to Maximum Operating Mode or Modulating Mode ( $X_2$ ) vs. Balance Point Temperature for Modulating Vented Heaters



This figure is based on 4500 degree-days and 15°F outdoor design temperature.



# **Federal Register**

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**Wednesday  
March 28, 1984**

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## **Part VI**

### **Office of Management and Budget**

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#### **5 CFR Part 1320**

**Controlling Paperwork Burdens on the  
Public, Delegation of Review and  
Approval Authority to the Board of  
Governors of the Federal Reserve  
System; Proposed Rulemaking**



# OFFICE OF MANAGEMENT AND BUDGET

## 5 CFR Part 1320

### Controlling Paperwork Burdens on the Public, Delegation of Review and Approval Authority to the Board of Governors of the Federal Reserve System; Notice of Proposed Rulemaking

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This regulation would delegate to the Board of Governors of the Federal Reserve System the authority, under the Paperwork Reduction Act of 1980 and 5 CFR 1320.9, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Federal Reserve Board (Board). This delegation is proposed to cover all collections of information by the Board except those meeting certain criteria specified in Appendix A and discussed in the Supplementary Information section which follows. In exercising this delegated authority, the Board is to afford the public opportunity to participate in the review process, where this is possible and appropriate, assure that the requirements of 5 CFR 1320.4(b) are adhered to, and assure that the guidelines in 5 CFR 1320.6 are considered in the review process. Board-approved collections of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the SF83 and supporting statement and the approved collection of information instrument(s) will be placed into OMB's public docket files. Under the Act, OMB may limit, condition, or rescind this delegation at any time, but it is intended that OMB will exercise this authority only rarely and in unusual circumstances.

The Office of Management and Budget is seeking comments on this proposal to add a new paragraph (d) to 5 CFR 1320.9 and a new Appendix A to 5 CFR 1320.

**DATE:** Comments must be received on or before April 27, 1984.

**ADDRESS:** Please address all written comment to Mr. Arnold Strasser, Assistant Chief, Reports Management Branch, Office of Information and Regulatory Affairs, OMB, Washington, D.C. 20503.

**FOR FURTHER INFORMATION CONTACT:** Mr. Arnold Strasser, Assistant Chief, Reports Management Branch, Office of Information and Regulatory Affairs,

OMB, Washington, D.C. 20503 ((202) 395-6880).

**SUPPLEMENTARY INFORMATION:** Section 3507(e) of the Paperwork Reduction Act of 1980 (Act) and 5 CFR 1320.9 provide that OMB may delegate its authority to approve collections of information to an agency's designated senior official for Paperwork Reduction or to the agency head if certain conditions are met. The Act and OMB's implementing regulations require OMB to comply with the notice and comment procedures of Title 5 U.S.C. Chapter 5 before providing delegation to any agency. OMB has determined that the Board of Governors of the Federal Reserve System (Board) meets all of the requirements for delegation. Accordingly, and because OMB believes that the public has a vital interest in the administration of the Act, OMB is seeking public comment on this proposal.

The delegation would be to the Board itself because as head of the agency, the Board retains final authority to approve the agency's collections of information, subject to OMB's Paperwork Reduction Act review and approval. This authority is usually exercised by the Board as a collegial body during scheduled meetings conducted "on the record" after the public has received notification of the meeting. The agency review process for proposed collections of information considers the purpose, need, burden, and utility of each collection, and determines whether the information needed is already available to the Board. This review process culminates with Board authorization of the collection either as proposed or with Board-ordered modifications (after which Board staff transmits the proposed collections to OMB for review and approval), an order for the Board staff to reexamine and modify the proposal, or a determination that the collection of information should not be conducted because it is not necessary for the proper performance of the agency function.

Under this review procedure, instituted by the Board in 1975, collections of information proposed to be started, revised, continued without modification, or deleted are subjected to a comprehensive and rigorous evaluation by several Federal Reserve groups. Each group is charged with, among other things, the responsibility of minimizing reporting burdens while focusing special attention on smaller institutions, questioning the need for the information, and evaluating the trade-off between data needs and reporting burdens. Each reviewing group separately analyzes the proposals and

considers the need for the information, including the need for individual report items, the reporting frequency, and selection of the reporting panel. The reviews cover statutory or regulatory authority, issues of confidentiality, availability of related information, clarity of format and instructions, reporting deadlines, costs and burdens, relative burden of alternative approaches, and other relevant items. The next to the last stage of this system of critique and evaluation is conducted by three Board members including the Governor who is the Board's designated senior official for paperwork reduction activities. At each stage, the initiators may modify the proposal as a result of the review and an evaluation of the proposal at that stage accompanies the proposal to the next stage. The final, and decision, stage of the process, as noted above, is action by the Board of Governors.

The exact procedures and the particular structure of the reviewing groups may vary depending upon the nature of the collection, its relationship to statutory or regulatory requirements, and whether or not the collection is mandated by other agencies (e.g., the Federal Financial Institutions Examination Council (FFIEC)). For the bulk of proposals that entail reporting to the Board, the current process is initiated by the submission of a proposal by the Division with subject-matter responsibility for the new, revised, or extended reporting. The initiating Division prepares the proposal and reviews it for conformance with the review standards. After preliminary screening by the Financial Reports Section, the proposal is reviewed in-depth by the Steering Committee for Report Review, which is made up of staff members from both the Board and the Reserve Banks, and then is reviewed by the Presidents of the Federal Reserve Banks before being submitted to the Board members.

The whole process is under the general direction of the Board member designated as the Board's senior official for Paperwork Reduction and under the day-to-day supervision and management of a senior staff member—an Assistant to the Board who is outside the structure of the program offices that would originate proposals for information collections. The Financial Reports Section maintains staff-level administrative control throughout the review process regardless of how or where the collection proposal originates. Each Division with program responsibilities has staff designated to act as liaison with the review structure



described above and to monitor that Division's adherence to the paperwork clearance standards and procedures.

OMB believes that this review and approval process meets all the requirements for full delegation of OMB's Paperwork Reduction Act approval authority. These requirements and the reasons why OMB believes that the Board fully meets them follow.

(1) The agency review process must exhibit independence from program responsibility.

The Board of Governors, which as a collegial body is the head of the agency, makes the final decisions as to whether to conduct or sponsor a collection of information. These decisions are based on independent Board review following the intensive review within the Federal Reserve. Since the final decisions are made at head-of-agency level, the process satisfies the required independence from program responsibility.

(2) The agency must have sufficient resources to carry out responsibilities.

The Board has demonstrated a commitment to information collection reviews that, as described above, includes the use of extensive resources and personnel from all areas within the Federal Reserve.

(3) The agency review process must evaluate fairly whether the proposed collections of information should be approved.

OMB is convinced that a fair evaluation is afforded each proposal throughout each stage of the Board review process. This is evident by the fact that OMB has only refused approval to the Board twice since the Paperwork Reduction Act was implemented. Both refusals were on grounds of timing, not substance, and in each case the disapproved request was mandated by the FFIEC. (All such mandated requirements would be excluded from the area of delegated authority.)

(4) Evidence of successful performance.

All the other points previously mentioned indicate the successful performance of the Board's review process. Additionally, the Board has achieved a 25% reporting burden reduction over the FY 1981 to FY 1983 period. The Board has achieved this reduction on its own initiatives, each year requesting an information collection budget (ICB) with substantial reductions, and its requested budget has always been approved. Under the proposed delegation, the Board would continue to be subject to the ICB process, would have a budget ceiling approved, and would be required to request a higher ceiling from OMB prior

to approving an information collection that would otherwise result in the existing ceiling being exceeded by fiscal year-end.

Based on these facts, OMB proposes to give the Board of Governors of the Federal Reserve System a delegation to approve its collections of information subject to the following three exceptions.

The first exception would apply when the proposed collections or proposed revisions to existing collections are required by the FFIEC or other Federal executive branch entity with authority to require the Board to conduct or sponsor a collection of information. In this situation, the Board's review authority would not satisfy the criterion for an independent evaluation as to whether the proposed collection or change should be approved. Since the decision to require the information collection came from outside the Board and was imposed on the Board, the Board would not be an independent party in the review.

The second exception where review would revert to OMB is if the Board proposed to delete or change information it currently collects that is required and used by another agency, and, after the staff of the Board and the other agency have attempted to resolve the problem, the head of that agency objects is writing to OMB before the end of the comment period specified by the Board.

The third exception would be in the case of a new collection or change to an existing collection that would cause the Board to exceed its ICB ceiling by fiscal year-end.

The Board may also, at its option, request OMB to conduct any delegated review.

The Board's final action would normally be taken after the public was given reasonable opportunity to comment on the collection of information through notice in the *Federal Register*. These *Federal Register* notices will advise the public that a copy of comments may also be submitted to the OMB/OIRA desk officer for the Board. When the Board submits the notice to the *Federal Register*, a copy must also be sent to the OMB/ORRA desk officer.

However, in a situation where the Board determines that a new collection or proposed change must be instituted so quickly that public participation is not feasible and that immediate action is necessary for the Board to carry out its statutory authority or that any delay would defeat the purpose of the collection, the Board may grant an "immediate" clearance to the collection,

that is, without providing opportunity for public comment. However, upon issuing that clearance, the Board must publish in the *Federal Register* a notice informing the public of its approval and indicating why immediate action was necessary. Prior to any extension of such an approval, the Board will take into account any comments received after the institution of the collection.

The Board must also assure that all approved collections of information are reviewed at least once every three years and when any changes in the collections are proposed. This review would normally be conducted before the expiration date of the prior approval. Where the review has not been completed prior to the expiration date, the Board may extend the report, up to three months, without public notice in order to complete the review and consequent revisions, if any. There may also be other circumstances in which the Board determines that a three-month extension without public notice is appropriate.

OMB and the Board recognize that there may be some collection of information requirements in existing regulations that have not yet been reviewed by OMB and assigned OMB control numbers. According to 5 CFR 1320.14, OMB must approve all collection of information requirements contained in existing regulations, though OMB may require an agency to initiate subsequent rulemaking to modify or eliminate a requirement. Inasmuch as the proposed delegation to the Board would extend to newly instituted collection-of-information requirements, OMB believes that the Board should also have delegated authority to approve like requirements contained in existing regulations. Accordingly, the OMB proposed delegation would also permit the Board to exercise delegated authority over all collections of information in existing regulations that do not have current OMB control numbers without any suspension of their effectiveness. Upon issuance of a final OMB rule providing the proposed delegation to the Board, the Board will promptly review all such requirements, assign OMB control numbers to them, and display such numbers as required by 5 CFR 1320.14.

In determining whether to approve a collection of information under the delegation, the Board is to comply with the review criteria specified in 5 CFR 1320.4. In doing so, the Board must assure itself: (1) That the collection of information is the least burdensome necessary for the proper performance of the Board's functions and to comply



with legal requirements and achieve program objectives; (2) that the collection of information does not duplicate information otherwise accessible to the Board; and (3) that the collection of information has practical utility and that the Board has sought to minimize the cost to itself but not by means of shifting disproportionate costs or burdens onto the public.

The Board must also consider all relevant concerns, including but not limited to, comments received from the public and other government agencies, and whether or not the collection satisfies the guidelines set forth in 5 CFR 1320.6. If the collection is determined by the Board to be inconsistent with those guidelines, the Board must either disapprove the collection, change the proposal so that it conforms to the guidelines, or, upon determining that it is essential to the proper performance of the Board's function to conduct the collection as proposed, approve it.

The Board will also assure that each approved information collection displays an OMB control number, which it will assign from the block of numbers provided in advance by OMB, and the expiration date (unless the collection is contained in a regulation).

As soon as practical after approval, the Board will provide to OMB each approved collection of information, together with a completed SF83, a supporting statement, a copy of each comment received or a summary of these comments and a certification that the Board has approved the collection of information. This package will be incorporated into OMB's public docket files.

OMB may choose to review the Board's paperwork review process under the delegation at any time. The Board will cooperate in carrying out such a review. The Board will respond to any recommendations resulting from such review and, if it finds the recommendations to be appropriate, will either accept the recommendations or propose an alternative approach to achieve the intended purpose.

As required by 5 CFR 1320.9(c), the delegation may be limited, conditioned, or rescinded in whole or in part at any time. However, OMB will exercise its right to review individual information collection proposals only in unusual circumstances and, in those rare instances, will do so, subject to the provisions of 5 CFR 1320.11(f), prior to the expiration of the time period set for public comment in the Board's *Federal Register* notices. OMB will generally exercise this authority in only three situations:

(a) If prior to the commencement of a Board review (e.g., during the ICB review), it has notified the Board that it intends to review a specific new proposal for the collection of information or the continued use (with or without modification) of an existing collection;

(b) If there is substantial public objection to a proposed information collection;

(c) If OMB determines that a substantially inadequate and inappropriate lead time has been provided between the final announcement date of the proposed requirement and the first date when the information is to be submitted or disclosed.

Where OMB conducts a review of a Board information collection proposal, either because the collection is exempt from the delegation or because OMB has exercised its right to rescind the delegation with respect to that collection, or the Board has asked OMB to review the collection, the provisions of 5 CFR 1320.17 and 5 CFR 1320.19 shall continue to apply.

#### Regulatory Impact and Regulatory Flexibility Act Analysis

OMB has determined that this regulation is not a major rule as defined by Executive Order 12291 and that the regulation would not have a significant economic impact on a substantial number of small businesses or other small entities.

Issued in Washington, D.C., March 22, 1984.  
Christopher C. DeMuth,  
Administrator, Office of Information and  
Regulatory Affairs.

#### List of Subjects in 5 CFR Part 1320

Reporting and recordkeeping requirements, Paperwork, Collection of information, Delegated review authority.

#### PART 1320—[AMENDED]

For the reasons set forth in the preamble, OMB proposes to amend 5 CFR Part 1320 by adding a new paragraph, (d) to § 1320.9 and by adding a new Appendix A to Part 1320 which read as follows:

#### § 1320.9 Delegation of approval authority.

(d) Subject to the provisions of this part, and in accord with the terms and conditions of each delegation as specified in Appendix A to this part, the Director delegates review and approval authority to the following agencies:

(1) Board of Governors of the Federal Reserve System

\* \* \* \* \*

#### Appendix A. Agencies With Delegated Review and Approval Authority

1. The Board of Governors of the Federal Reserve System.

(a) Authority to review and approve collection of information requests, collection of information requirements, and collections of information in current rules is delegated to the Board of Governors of the Federal Reserve System (Board).

(1) This delegation does not include review and approval authority over any new collection of information or any modification to an existing collection of information that:

(i) Is proposed to be collected as a result of a requirement or other mandate of the Federal Financial Institutions Examination Council, or other Federal executive branch entities with authority to require the Board to conduct or sponsor a collection of information.

(ii) Is objected to by another Federal agency on the grounds that that agency requires information currently collected by the Board, that the currently collected information is being deleted from the collection, and the deletion will have a serious adverse impact on the agency's program provided that such objection is certified to OMB by the head of the Federal agency involved, with a copy to the Board, before the end of the comment period specified by the Board in the *Federal Register* notices specified in (3) (i) below.

(iii) Would cause the burden of the information collections conducted or sponsored by the Board to exceed by the end of the fiscal year the Information Collection Budget allowance provided to the Board by OMB for the fiscal year-end.

(2) The Board may ask that OMB review and approve collections of information covered by this delegation.

(3) In exercising delegated authority, the Board will: (i) Provide the public, to the extent possible and appropriate, with reasonable opportunity to comment on collections of information under review prior to taking final action approving the collection. Reasonable opportunity for public comment will include publishing a notice in the *Federal Register* informing the public of the proposed collection of information, notifying the public of the availability of copies of the "clearance package," and providing the public with the opportunity to comment. Such *Federal Register* notices shall also advise the public that they may also send a copy of their comments to the OMB/OIRA Desk Officer for the Federal Reserve Board.

(A) Should the Board determine that a new collection of information or a change in an existing collection must be instituted quickly and that public participation in the approval process would defeat the purpose of the collection or substantially interfere with the Board's ability to perform its statutory obligation, the Board may approve of the collection of information without providing opportunity for public comment. At the earliest practical date after approving the collection of information, the Board will publish a *Federal Register* notice informing the public of its approval of the collection of



information and indicating why immediate action was necessary.

(B) In such cases, before taking final action to reauthorize the collection of information for an additional period, the Board will take into account any comments received after the institution of the collection.

(ii) Provide the OMB desk officer for the Federal Reserve Board with a copy of the Board's Federal Register notice not later than the day the Board files the notice with the Office of the Federal Register.

(iii) Assure that approved collections of information are reviewed not less frequently than once every three years, and that such reviews are normally conducted before the expiration date of the prior approval. Where the review has not been completed prior to the expiration date, the Board may extend the report, for up to three months, without public notice in order to complete the review and consequent revisions, if any. There may also be other circumstances in which the Board determines that a three-month extension without public notice is appropriate.

(iv) Take every reasonable step to ensure that the collection of information conforms to the requirements of 5 CFR 1320.4(b). In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies. The Board will not approve a collection of information that it determines does not satisfy the guidelines set forth in 5 CFR 1320.6, unless it determines that departure from these guidelines is necessary to satisfy statutory requirements or other substantial need.

(v) Assure that each approved collection of information displays an OMB control number and that all collections of information, except

those contained in regulations, display the expiration date of the approval.

(vi) Assure that each approved collection of information, together with a completed SF83, a supporting statement, a copy of each comment received from the public and other agencies in response to the Board's Federal Register notice or a summary of these comments, and a certification that the Board has approved of the collection of information in accordance with the provisions of this delegation is transmitted to OMB for incorporation into OMB's public docket files. Such transmittal shall be made as soon as practical after the Board has taken final action approving the collection. However, no collection of information may be instituted until the Board received written or oral notification from OMB or OMB staff that the transmittal has been received.

(b) OMB will:

(1) Provide the Board in advance with a block of control numbers which the Board will assign in sequential order to, and display on, new collections of information.

(2) Provide a written notice of action to the Board indicating the Board approvals of collections of information have been received by OMB and incorporated into OMB's public docket files and inventory of currently approved collections of information.

(3) Review any collection of information referred by the Board in accordance with the provisions of section 1(a)(2) of the appendix.

(c) OMB may review the Board's paperwork review process under the delegation. The Board will cooperate in carrying out such a review. The Board will respond to any recommendations resulting from such review and, if it finds the recommendations to be appropriate, will either accept the recommendations or

propose an alternative approach to achieve the intended purpose.

(d) This delegation may, as provided by 5 CFR 1320.9(c), be limited, conditioned, or rescinded, in whole or in part at any time. OMB will exercise this authority only in unusual circumstances and, in those rare instances, will do so subject to the provisions of 5 CFR 1320.11(f), prior to the expiration of the time period set for public comment in the Board's Federal Register notice and generally only if:

(1) Prior to the commencement of a Board review (e.g., during the ICB review), OMB has notified the Board that it intends to review a specific new proposal for the collection of information or the continued use (with or without modification) of an existing collection;

(2) There is substantial public objection to a proposed information collection; or

(3) OMB determines that a substantially inadequate and inappropriate lead time has been provided between the final announcement date of the proposed requirement and the first date when the information is to be submitted or disclosed.

When OMB exercises this authority it will consider that the period of its review began the day that OMB received the Federal Register notice provided for in Section 1(a)(3)(i) of the Appendix.

(e) Where OMB conducts a review of a Board information collection proposal under Section 1(a)(1), 1(a)(2), or 1(d) of this Appendix, the provisions of 5 CFR 1320.17 and 5 CFR 1320.19 continue to apply.

(Paperwork Reduction Act of 1980, (Pub. L. 96-511); 44 U.S.C. Chapter 3)

[FR Doc. 84-8242 Filed 3-27-84; 8:45 am]

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**S. 820 / Pub. L. 98-241**

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