

# Proposed Rules

Federal Register

Vol. 65, No. 207

Wednesday, October 25, 2000

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.

## DEPARTMENT OF ENERGY

### 48 CFR Parts 928, 944, 952 and 970

#### 10 CFR Part 719

RIN 1990-AA27

### Contractor Legal Management Requirements; Acquisition Regulations

**AGENCY:** Department of Energy.

**ACTION:** Notice of proposed rulemaking and opportunity for public comment.

**SUMMARY:** The Department of Energy (Department) is proposing to establish new regulations covering contractor legal management requirements. Conforming amendments are also proposed to the Department of Energy Acquisition Regulation (DEAR). The proposed regulation will cover legal costs to be reimbursed by the Department to its facility management contractors with contracts exceeding \$10,000,000. An appendix to the regulations provides additional guidance to contractors.

**DATES:** Written comments must be received on or before the close of business November 24, 2000.

**ADDRESSES:** Comments (3 copies) should be addressed to: Laura Fullerton, GC-61, U.S. Department of Energy, Office of Procurement and Assistance Management, 1000 Independence Avenue, SW, Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:** Laura Fullerton at (202) 586-3420 (Laura.Fullerton@hq.doe.gov) or Anne Broker at (202) 586-5060 (Anne.Broker@hq.doe.gov).

### SUPPLEMENTARY INFORMATION

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### I. Background

The cost principles and contract clauses in the Department's contracts generally make legal costs, including the cost of litigation, allowable if reasonable and incurred in accordance with the applicable cost principles and contract clauses. Consequently, the Department has an ongoing obligation to monitor, supervise, and control the legal costs that it reimburses.

The Department has engaged contractors in a public dialogue aimed at controlling the increasing legal costs reimbursed by the Department. On August 31, 1994, the Department published an interim Acquisition Letter as an interim policy in the **Federal Register** (59 FR 44981). The interim Acquisition Letter established the Department's policy regarding the terms of engagement that are a condition of any authorization to a current or former management and operating (M&O) contractor to engage a law firm for purposes of litigation. The interim Acquisition Letter, was finalized as a Policy Statement on April 3, 1996 (61 FR 14763).

The Department also developed, and distributed to field counsel, Litigation Management Procedures, as a contract reform action item on March 23, 1994. The Litigation Management Procedures and the Final Policy Statement have been referenced in, and attached to, the Department's management and operating contracts executed since then. This rulemaking action has its basis in those two documents.

This proposed rulemaking is intended to create a new Part 719, in Chapter 10 of the Code of Federal Regulations, to establish regulations to monitor and control legal costs and to provide guidance to aid contractors and Department personnel in making determinations regarding the reasonableness of all outside legal costs, including the costs of litigation. Today's proposed rules and guidance would cover all outside legal costs incurred by contractors with contracts exceeding \$10,000,000 at facilities owned or leased by the Department. The policies would

also apply to legal counsel retained by the Department itself for litigation or other legal services where the legal costs over the life of the matter for which counsel has been retained are expected to exceed \$100,000.

The Department previously determined that case-by-case review of contractor agreements with outside law firms is necessary to ensure effective control of contractor litigation costs. The Department now realizes that this procedure needs to be extended to a broader category of contractor legal costs, whether or not litigation is involved, for contracts at facilities owned or leased by the Department.

To facilitate that case-by-case review, the proposed regulation would require submission of a legal management plan by contractors where costs for legal services are to be reimbursed by the Department. Once approved by the Department, the legal management plan, as well as applicable regulations and contract provisions, will form the basis for approvals by the Department to reimburse litigation and other legal expenses.

The proposed regulation also identifies those costs that would be generally considered allowable and those that would be considered unallowable. Costs not identified as specifically allowable or unallowable are still subject to the general rules of allowability and reasonableness. Additionally, the acquisition of legal services by contractors falls within the ambit of 48 CFR (DEAR) Part 944 and Subpart 970.71, which cover contractor purchasing.

In addition to the proposed regulatory material included in this notice, an Appendix to Part 719 is attached which provides additional "safe harbor" guidance for legal management practices. The guidance provided in the Appendix may be updated from time to time by the Department and those updates will be distributed to contractors, contracting officers and Department counsel.

The Department also proposes to add 48 CFR (DEAR) 970.5204-31, Insurance-Litigation and Claims, to the contract clauses in 48 CFR (DEAR) Part 952 to clarify the requirement that facility management contracts exceeding an amount of \$10,000,000 must include this clause. The application of the proposed legal management regulation

would be tied to the application and use of the Insurance-Litigation and Claims clause, or a specialized clause requiring compliance with Part 719, in a facility management contract. The Insurance-Litigation and Claims clause already contains a requirement that contractors keep the Department informed of new and ongoing litigation, whether or not the costs are to be reimbursed.

Finally, conforming technical amendments to the Department of Energy's Acquisition Regulation (DEAR), at 48 CFR Chapter 9, are proposed at the end of this notice of proposed rulemaking.

## II. Discussion of Rule Provisions

*Subpart A, Sections 719.1–719.7*, sets out general provisions providing definitions and addressing who is covered by this part. Section 719.3 states that the Department's contracts for an amount exceeding \$10,000,000 for work performed at facilities owned or leased by the Department and containing the Insurance-Litigation and Claims clause are covered contracts subject to the proposed regulation. Section 719.3 also makes it clear that reimbursement of contractor legal costs under covered contracts is subject to compliance with the proposed regulation. Coverage is also extended to legal counsel, in section 719.4, retained by the Department itself where the legal costs are expected to exceed \$100,000 for a particular matter. Procedures for exceptions or deviations are set out in section 719.7. The procedures call for a determination by the General Counsel. In the case of a Department contract, the determination would be made by the Department's General Counsel; in the case of a National Nuclear Security Administration (NNSA) contract, it would be made by the NNSA General Counsel.

*Subpart B, Sections 719.10–719.17*, describes the requirement for submission of a legal management plan and what is to be included in the plan. Subparagraphs (c)(6) and (d)(1) in section 719.10 require that experience as an advocate in alternative dispute resolution procedures, primarily mediation, be considered as a factor in selection of retained counsel, and a system for identification of matters suitable for alternative dispute resolution be described in the legal management plan. Contractors will have 60 days following execution of a contract with the Department for submission of the legal management plan. Section 719.15 sets out a requirement for submission of a staffing and resource plan for significant matters, and section 719.16 requires

submission of the staffing and resource plan no later than 30 days after the filing of an answer in a significant matter involving litigation. Section 719.17 requires submission of an annual legal budget for matters for which reimbursable legal costs will exceed \$100,000. The annual budget should be broken down by activity or phase of a matter. The Department is interested in receiving comments on whether there is value added by having budget submission requirements in both subparagraph 719.15(c), as part of a staffing and resource plan, and in section 719.17.

*Subpart C, Sections 719.20–719.21*, describes the requirements for engagement letters. Engagement letters must be prepared and submitted to retained legal counsel for matters where costs are expected to exceed \$25,000. Subparagraph 719.21(b)(10) requires the contractor to include the right of the government to inspect, copy and audit documentation of billable fees and other records where the Department is reimbursing the legal costs.

*Subpart D, Sections 719.30–719.39*, describes the policies and limitations for reimbursement of legal costs associated with retained legal counsel. Sections 719.32–719.35 describe categories of costs which require special treatment or advance approval. Requirements for contractor management of subcontractor legal matters, so that the contractor keeps the Department informed about significant legal matters, are set out in section 719.37. Section 719.37 also prohibits the prime contractor from bundling subcontractor legal costs with non-legal costs in submissions for reimbursements so that subcontractor legal costs are clearly identified to Department counsel.

*Subpart E, Sections 719.40–719.42*, sets out requirements for the Department's field office counsel. Requests for reimbursement of legal costs made by contractors and retained legal counsel are discussed in sections 719.40–719.41. Section 719.42 describes the types of recommendations made by field counsel which must be coordinated with Headquarters.

## III. Public Comments

Interested persons are invited to participate by submitting data, views or arguments with respect to the new regulation proposed in this notice. Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All comments received will be available for public inspection as part of the administrative record on file for

this rulemaking in the Department of Energy Reading Room, Room 1E–090, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–3142, between the hours 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the **DATES** section of this notice of proposed rulemaking and all other relevant information in the record will be carefully assessed and fully considered prior to the publication of the final rule. Any information or data considered to be exempt from public disclosure by law must be so identified and submitted in writing, one copy, as well as one complete copy from which the information believed to be exempt from disclosure is deleted. The Department will determine if the information or data is exempt from disclosure.

## IV. Procedural Requirements

### A. Review Under Executive Order 12866

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

### B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines

issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department has completed the required review and determined that, to the extent permitted by law, the regulations meet the relevant standards of Executive Order 12988.

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

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, requires that a Federal agency prepare a regulatory flexibility analysis for any rule for which the agency is required to publish a general notice of proposed rulemaking. Such an analysis is not required, however, if the agency certifies that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

The Department certifies that today's proposal creating a new part 10 CFR Part 719 will not have a significant economic impact on a substantial number of small entities. This rule will only restate and clarify the Department's restrictions on the reimbursement of contractor legal costs. The rule will affect only potential claims for reimbursement of costs. The rule will not directly regulate small entities.

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

The proposed rule would require each covered contractor to submit a legal management plan that describes the contractor's practices for managing legal costs and matters for which it procures the services of retained legal counsel. This collection of information is required for the Department to determine whether to approve reimbursement of contractors' litigation and other legal expenses.

The Department is submitting to the Office of Management and Budget (OMB), simultaneously with the publication of this proposed rule, this proposed collection of information for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by OMB. Interested persons may obtain a copy of the Paperwork Reduction Act Submission from the contact person named in this notice.

Interested persons are invited to submit comments to OMB addressed to: Department of Energy Desk Officer, Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington, DC 20503. Persons submitting comments to OMB also are requested to send a copy to the contact person at the address given in the ADDRESSES section of this notice. OMB is particularly interested in comments on: (1) The necessity for the proposed collection of information, including whether the information will have practical utility; (2) the accuracy of DOE's estimates of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

The proposed requirements for completion of a legal management plan under this regulation are essentially the same as the currently existing requirements that have applied to management and operating contractors for several years, with the difference that this rulemaking will extend the requirements to all legal matters and not just litigation matters.

Preparation of the initial Legal Management Plan will usually be a one-time action completed at the start of a five year contract. The estimated time for preparation of this initial plan is 15–30 hours. This estimate is based on discussions with contractors about their current burden for preparing litigation management plans. The only requirement for updating relates to the submission of an annual budget for significant matters. This revision is estimated to be about 10 hours. Approximately 36 contractors will be subject to the requirement to submit a Legal Management Plan. The Department estimates that in any one year approximately 20% or 7 Legal Management Plans will be submitted to the Department for approval each year. The total annual paperwork burden that will result from these requirements is estimated to be approximately 465 to 570 hours.

#### *E. Review Under the National Environmental Policy Act*

The Department has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by Department of Energy regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act

(NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this proposed rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

#### *F. Review Under Executive Order 13132*

Executive Order 13132 (64 FR 43255, August 10, 1999) requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have "federalism implications." As defined in the Executive Order, policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Department has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

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

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of \$100 million or more. This rulemaking affects private sector entities, and the impact is less than \$100 million. H. Review Under the Treasury and General Government Appropriations Act, 1999 Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub.L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's rule does not impact on the autonomy or integrity of the family institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Statement.

**List of Subjects****10 CFR Part 719**

Government contracts, Lawyers, Legal matters.

**48 CFR Parts 928, 944, 952 and 970.**

Government procurement.

Issued in Washington, D.C. on October 16, 2000.

**T. J. Glauthier,**  
*Deputy Secretary.*

For the reasons set out in the preamble, Chapter III of title 10 and Chapter 9 of title 48 of the Code of Federal Regulations are proposed to be amended as set forth below:

1. 10 CFR Part 719 is added to read as follows:

**PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS****Subpart A—General Provisions**

- 719.1 What is the purpose of this part?
- 719.2 What are the definitions of terms used in this part?
- 719.3 What contracts are covered by this part?
- 719.4 Are law firms that are retained by the Department covered by this part?
- 719.5 What contracts are not covered by this part?
- 719.6 Are there any types of legal matters not included in the coverage of this part?
- 719.7 Is there a procedure for exceptions or deviations from this part?

**Subpart B—Legal Management Plan**

- 719.10 What information must be included in the legal management plan?
- 719.11 Who must submit a legal management plan?
- 719.12 When must the plan be submitted?
- 719.13 Who at the Department must receive and review the plan?
- 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted plan?
- 719.15 What are the requirements for a staffing and resource plan?
- 719.16 When must the staffing and resource plan be submitted?
- 719.17 Are there any budgetary requirements?

**Subpart C—Engagement Letter**

- 719.20 When must an engagement letter be used?
- 719.21 What are the required elements of an engagement letter?

**Subpart D—Reimbursement of Costs Subject to This Part**

- 719.30 Is there a standard for determining cost reasonableness?
- 719.31 How does the Department determine whether fees are reasonable?
- 719.32 For what costs is the contractor, or Department retained counsel, limited to reimbursement of actual costs only?
- 719.33 What categories of costs are unallowable?

- 719.34 What is the treatment for travel costs?
- 719.35 What categories of costs require advance approval?
- 719.36 Who at the Department must give advance approval?
- 719.37 Are there any special procedures or requirements regarding subcontractor legal costs?
- 719.38 Will costs covered by this part be subject to audit?
- 719.39 What happens when more than one contractor is a party to the matter?

**Subpart E—Department Counsel Requirements**

- 719.40 What is the role of Department counsel as a contracting officer's representative?
- 719.41 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department counsel under this part?
- 719.42 What types of field actions must be coordinated with Headquarters?

**Appendix to Part 719—Guidance for Legal Resource Management**

**Authority:** 42 U.S.C. 2201, 5814, 5815, 7101 *et seq.*; 50 U.S.C. 2401, *et seq.*

**Subpart A—General Provisions****§ 719.1 What is the purpose of this part?**

This part is intended to facilitate control of Department and contractor legal costs, including litigation costs. The contractor is required to develop a procedure for retaining legal counsel, and to document the analysis used to decide when, where and who will be engaged as outside counsel and the terms of the engagement. Payment of law firm invoices and reimbursement of contractor legal costs under covered contracts is subject to compliance with this part.

**§ 719.2 What are the definitions of terms used in this part?**

For purposes of this part:  
*Alternative dispute resolution* includes processes such as mediation, neutral evaluation, mini-trials and arbitration.

*Contractor* means any person or entity with whom the Department contracts for the acquisition of goods or services.

*Covered contracts* means those contracts described in §§ 719.3 and 719.4.

*Department* means the Department of Energy, including the National Nuclear Security Administration.

*Department counsel* means the individual in the field office, or Headquarter's office, designated as the contracting officer's representative and point of contact for a contractor or Department retained legal counsel, for purposes of this part only, for

submission and approval of the legal management plan, advance approval of certain costs, and submission of a staffing and resource plan, as addressed in this part.

*Legal costs* include, but are not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided by retained legal counsel; the costs of the services of accountants, consultants, or others retained by the contractor or by retained legal counsel to assist retained legal counsel; and any similar costs incurred by or in connection with the services of retained legal counsel.

*Legal management plan* means a statement describing the contractor's practices for managing legal costs and matters for which it procures the services of retained legal counsel.

*Retained legal counsel* means members of the bar working in the private sector, either individually or in law firms, who are retained by a contractor or the Department to provide legal services.

*Significant matters* means legal matters, including litigation, involving significant issues as determined by Department counsel, and any legal matter where the amount of any legal costs, over the life of the matter, is expected to exceed \$100,000.

*Staffing and resource plan* means a statement prepared by retained legal counsel describing plans for managing a significant matter.

**§ 719.3 What contracts are covered by this part?**

This part covers cost reimbursement contracts:

- (a) For an amount exceeding \$10,000,000;
- (b) Involving work performed at the facilities owned or leased by the Department; and
- (c) Containing the contract clause Insurance-Litigation and Claims, 48 CFR (DEAR) 952.228-1 or 970.5204-31, or a specialized clause requiring compliance with this part.

**§ 719.4 Are law firms that are retained by the Department covered by this part?**

Retained legal counsel under contract with the Department itself to provide legal services must also comply with this part where the legal costs over the life of the matter for which counsel has been retained are expected to exceed \$100,000.

**§ 719.5 What contracts are not covered by this part?**

This part does not cover:

- (a) Fixed price contracts; and

(b) Cost reimbursement contracts for an amount less than \$10,000,000.

**§ 719.6 Are there any types of legal matters not included in the coverage of this part?**

Matters not covered by this part include:

(a) Matters handled by counsel retained by an insurance carrier, except for insurance providers of third party administrator services or retrospective policies where the Department has retained the risk of liability;

(b) Routine intellectual property law support services;

(c) Routine unemployment compensation matters and labor arbitrations; and

(d) Routine matters handled by counsel retained through a GSA supply schedule.

**§ 719.7 Is there a procedure for exceptions or deviations from this part?**

(a) Requests for exceptions or deviations from this part by contractors must be made in writing to Department counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the contractor.

(b) The General Counsel may authorize exceptions based on a recommendation of Department counsel. The General Counsel may also establish exceptions to this part based on current field office and contractor practices which satisfy the purpose of these requirements.

(c) Exceptions to this part which are also a deviation from the cost principles (see subpart D of this part) must be approved by the Procurement Executive. See 48 CFR (FAR) 31.101. Written requests from contractors for a deviation to a cost principle must be submitted to the contracting officer, with a copy provided to Department counsel.

**Subpart B—Legal Management Plan**

**§ 719.10 What information must be included in the legal management plan?**

The legal management plan must include the following items:

(a) A description of the legal matters that may necessitate handling by retained legal counsel.

(b) A discussion of the factors the contractor will consider in determining whether to handle a particular matter utilizing retained legal counsel.

(c) An outline of the factors the contractor will consider in selecting retained legal counsel, including:

(1) Competition;

(2) Past performance and proficiency shown by previously retained counsel;

(3) Particular expertise in a specific area of the law;

(4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;

(5) Location of retained legal counsel relative to:

(i) The site involved in the matter,

(ii) Any forum in which the matter will be processed, and

(iii) Where a significant portion of the work will be performed;

(6) Experience as an advocate in alternative dispute resolution procedures such as mediation;

(7) Actual or potential conflicts of interest; and

(8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees, etc.).

(d) A description of:

(1) The system that the contractor will use to review each case to determine whether and when alternative dispute resolution is appropriate;

(2) The role of in house counsel in cost management;

(3) The contractor's process for review and approval of invoices from outside law firms or consultants;

(4) The contractor's strategy for interaction with, and supervision of, retained legal counsel;

(5) How appropriate interaction with the contracting officer and Department counsel will be ensured; and,

(6) The contractor's corporate approach to legal decision making.

**§ 719.11 Who must submit a legal management plan?**

Contractors identified under § 719.3 must submit a legal management plan.

**§ 719.12 When must the plan be submitted?**

Contractors identified under § 719.3 must submit a legal management plan within 60 days following the execution of a contract with the Department.

**§ 719.13 Who at the Department must receive and review the plan?**

The contractors identified under § 719.3 must file a legal management plan with Department counsel.

**§ 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted plan?**

(a) The Department will notify the contractor within 30 days of the contractor's submission of the plan of any deficiencies in its submitted plan.

(b) The contractor must correct identified deficiencies within 30 days of notice of the deficiency.

**§ 719.15 What are the requirements for a staffing and resource plan?**

(a) For significant matters, the contractor must require retained legal counsel providing legal services to prepare a staffing and resource plan as provided in this section. The contractor must then forward the staffing and resource plan to Department counsel. Department retained counsel subject to this part must prepare a staffing and resource plan and forward it to Department counsel.

(b) A staffing and resource plan is a plan describing:

(1) Major phases likely to be involved in the handling of the matter;

(2) Timing and sequence of such phases;

(3) Projected cost for each phase of the representation; and

(4) Numbers and mix of resources, when applicable, that the retained legal counsel intends to devote to the representation.

(c) For significant matters in litigation, in addition to the generalized annual budget required by § 719.10, a staffing and resource plan must include a budget, broken down by phases, including at a minimum:

(1) Matter assessment, development and administration;

(2) Pretrial pleadings and motions;

(3) Discovery;

(4) Trial preparation and trial; and

(5) Appeal.

**§ 719.16 When must the staffing and resource plan be submitted?**

(a) For significant matters in litigation, the contractor or Department retained counsel must submit the staffing and resource plan no later than 30 days after the filing of an answer or a dispositive motion in lieu of an answer.

(b) For other significant legal services matters, the contractor or Department retained counsel must submit the staffing and resource plan within 30 days following execution of an engagement letter.

(c) Contractors and Department retained counsel must submit updates to staffing and resource plans annually or sooner if significant changes occur in the matter.

**§ 719.17 Are there any budgetary requirements?**

(a) Contractors required to submit a legal management plan must also submit an annual legal budget to Department counsel.

(b) The annual legal budget must include cost projections for known or existing matters for which reimbursable legal costs will exceed \$100,000, at a

level of detail reflective of the types of billable activities and the stage of each such matter.

(c) At the conclusion of the period covered by each annual legal budget, the contractor must report on its success on staying within budget.

### **Subpart C—Engagement Letter**

#### **§ 719.20 When must an engagement letter be used?**

Contractors must prepare and submit an engagement letter to retained legal counsel expected to provide \$25,000 or more in legal services and submit a copy of this correspondence, including correspondence from retained legal counsel addressing issues under § 719.21(b), to Department counsel.

#### **§ 719.21 What are the required elements of an engagement letter?**

(a) The engagement letter must require retained legal counsel to assist the contractor in complying with this part and any supplemental guidance distributed under this part.

(b) At a minimum, the engagement letter must include the following:

(1) A process for review and documented approval of all billing by a contractor representative, including the timing and scope of billing reviews.

(2) A statement that provision of records to the Government does not constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties.

(3) A requirement that the contractor, the Department, and the General Accounting Office, have the right upon request, at reasonable times and locations, to inspect, copy, and audit all records documenting billable fees and costs and any other records or systems of records relevant to the representation by retained legal counsel.

(4) A statement that all records must be retained for a period of three (3) years after the final payment.

(c) The contractor must obtain the following information from retained counsel:

(1) Identification of all attorneys and staff who will be assigned to the matter and the rate and basis of their compensation i.e., hourly rates, fixed fees, contingency arrangement).

(2) An initial assessment of the matter, along with a commitment to provide updates as necessary.

(3) A description of billing procedures, including frequency of billing and billing statement format.

(d) The contractor must obtain retained counsel's agreement to the following:

(1) That in significant matters a staffing and resource plan for the conduct of the matter will be submitted by the retained legal counsel to the contractor in accordance with the requirements of §§ 719.15 and 719.16.

(2) That alternative dispute resolution will be considered at as early a stage as possible where litigation is involved.

(3) That retained counsel will comply with the cost guidelines in this subpart C.

(4) That retained counsel will provide a certification concerning the costs submitted for reimbursement that is consistent with the certification in the Attachment to Appendix A to this part.

(5) That professional conflicts of interest issues will be identified and addressed promptly.

(e) Additional requirements may be included in an engagement letter based on the needs of the contractor or the office requiring the Department retained counsel.

### **Subpart D—Reimbursement of Costs Subject to This Part**

#### **§ 719.30 Is there a standard for determining cost reasonableness?**

The standard for cost reasonableness determinations is contained in the Federal Acquisition Regulation (FAR), at 48 CFR (FAR) 31.201–3.

#### **§ 719.31 How does the Department determine whether fees are reasonable?**

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider:

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

(b) Whether lower rates from other firms providing comparable services were available;

(c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were utilized;

(d) The complexity of the legal matter and the expertise of the law firm in this area; and

(e) The factors listed in § 719.10(c).

#### **§ 719.32 For what costs is the contractor, or Department retained counsel, limited to reimbursement of actual costs only?**

All costs are reimbursable for actual costs only, with no overhead or surcharge adjustments.

#### **§ 719.33 What categories of costs are unallowable?**

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and

48 CFR (DEAR) part 931 and 970.31. See also 41 U.S.C. 256(e).

(b) The Department will not consider for reimbursement any costs incurred for entertainment or alcoholic beverages. See 48 CFR (FAR) 31.205–14 and 31.205–51 and 41 U.S.C. 256(e).

(c) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.

(d) Interest charges that a contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.

#### **§ 719.34 What is the treatment for travel costs?**

Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR (FAR) 31.205–46, or 48 CFR (DEAR) 970.3102–46, as appropriate, to be reimbursable.

#### **§ 719.35 What categories of costs require advance approval?**

Costs for the following will not be eligible for reimbursement without prior written approval from Department counsel:

(a) Computers or general application software, or computerized databases specifically created for a particular matter;

(b) Charges for materials or non-attorney services expected to exceed \$5,000;

(c) Secretarial and support services, word processing, or temporary support personnel;

(d) Attendance by more than one person at a deposition, court hearing, interview or meeting;

(e) Expert witnesses and consultants;

(f) Trade publications, books, treatises, background materials, and other similar documents;

(g) Professional or educational seminars and conferences;

(h) Preparation of bills or time spent responding to questions about bills from either the Department or the contractor;

(i) Food and beverages when the attorney or consultant is not on travel status and away from the home office; and

(j) Pro hac vice admissions.

#### **§ 719.36 Who at the Department must give advance approval?**

If advance approval is required under this part, the advance approval must be obtained from the Department counsel unless the Department counsel indicates that approval of a request may only be given by the contracting officer.

#### **§ 719.37 Are there any special procedures or requirements regarding subcontractor legal costs?**

(a) The contractor must have a monitoring system for subcontractor

legal matters likely to reach \$100,000 over the life of the matter. The purpose of this system is to enable the contractor to perform the same type of analysis and review of subcontractor legal management practices that the Department can perform of the contractor's legal management practices. The monitoring is intended to enable the contractor to keep the Department informed about significant subcontractor legal matters, including significant matters in litigation. The burden will be on the prime contractor to be responsive to questions raised by the Department concerning significant subcontractor legal matters.

(b) Subcontractor legal costs are not allowable without the prior approval of Department counsel.

**§ 719.38 Will costs covered by this part be subject to audit?**

All costs covered by this part are subject to audit by the Department, its designated representative or the General Accounting Office. See § 719.21.

**§ 719.39 What happens when more than one contractor is a party to a matter?**

(a) If more than one contractor is a party in a particular matter and the issues involved are similar for all the contractors, a single legal counsel designated by Department counsel must either represent all of the contractors or serve as lead counsel, when the rights of the contractors and the government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter.

(b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor persuasively shows that it was reasonable for the contractor to incur such expenses.

**Subpart E—Department Counsel Requirements**

**§ 719.40 What is the role of Department counsel as a contracting officer's representative?**

(a) The individual selected as Department counsel for a contract subject to the requirements of this part must be approved by the contracting officer and the appropriate Chief Counsel, or General Counsel if at Headquarters. The Department counsel must receive written delegated authority from the contracting officer to serve as

the contracting officer's representative for legal matters. The contractor will receive a copy of this delegation of authority.

(b) Actions by Department counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority may not be construed to include the authority to execute or to agree to any modification of the contract nor to attempt to resolve any contract dispute concerning a question of fact arising under the contract.

**§ 719.41 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department counsel under this part?**

Department counsel must submit through the General Counsel reporting system, the approved costs and status updates for all matters involving retained counsel, including but not limited to contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

**§ 719.42 What types of field actions must be coordinated with Headquarters?**

(a) Requests from contractors for exception from this entire part must be coordinated with Headquarters.

(b) Requests from contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of significance to the Department nationwide or issues of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department counsel with the Deputy General Counsel for Litigation or his/her designee.

(c) Department field counsel must inform the General Counsel of any significant matter, as defined in this part, and must coordinate any action involving a significant matter with the General Counsel, or his/her designee, as directed by the General Counsel or his/her designee.

**Appendix to Part 719—Guidance for Legal Resource Management**

Management and Administration of Outside Legal Services

**1.0 Initiation of Litigation**

**2.0 Defense of Litigation**

**2.1 Disapproval of Defensive Litigation**

**3.0 Notice to the Department of Special**

**Interest Matters and Litigation**

**4.0 Alternative Dispute Resolution**

**5.0 Cost Allowability Issues**

**5.1 Underlying Cause for Incurrence of Costs**

**5.2 Fees and Other Charges**

**6.0 Role of Department Counsel as the Contracting Officer's Representative**

**7.0 Future Amendments to Guidance**

**Management and Administration of Outside Legal Services**

This guidance is intended to assist contractors and the Department's contracting officers and counsel in managing the costs of outside legal services. This guidance is also intended to assist retained legal counsel who provide services to the Department or to the Department's contractors.

**1.0 Initiation of Litigation**

(A) The Insurance—Litigation and Claims clause (48 CFR (DEAR) 952.228–1 and 970.5204–31) in the Department's facility management contracts provides that the contractor may not initiate litigation, including appeals from adverse decisions, without the prior authorization or approval of the Department's contracting officer, who must consult with Department counsel. The following are the minimum informational requirements for requests for authorization or approval under that clause:

- (1) Identification of the proposed parties;
  - (2) The nature of the proposed action;
  - (3) Relief sought;
  - (4) Venue;
  - (5) Proposed representation and reason for selection;
  - (6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;
  - (7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;
  - (8) Whether, for any reason, the contractor will assume any part of the costs of the action;
  - (9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and
  - (10) A discussion of why initiating litigation would prove beneficial to the contractor and to the Government.
- (B) Department counsel should advise the contracting officer concerning each request and must provide assistance to the contracting officer in communicating the Department's decision to the contractor.

**2.0 Defense of Litigation**

(A) In accordance with the Insurance-Litigation and Claims clause, the contractor must immediately notify Department counsel of the initiation of litigation against the contractor. Department counsel will advise the contractor as to:

- (1) Whether the defense of the litigation will be either approved or disapproved or approval deferred and any conditions to which approval is subject;
  - (2) Whether the contractor will be required to authorize the Government to defend the action;
  - (3) Whether the Government will take charge of the action; or
  - (4) Whether the Government will receive an assignment of the contractor's rights.
- (B) When defensive litigation is approved at a later stage or at the conclusion of the matter, reimbursement will be made for only those expenses which would have been reimbursable as allowable costs if the



Department had originally approved the defense of the litigation.

### 2.1 Disapproval of Defensive Litigation

If the Department disapproves in advance the costs of defense of the litigation, the contractor will be notified of the disapproval and that contract funds may not be used to fund the defense of the litigation. The contractor will also be informed if the Department changes its position. Contractor compliance with these policies and procedures will not itself obligate the Department to reimburse litigation costs or judgment costs when Departmental approval of the litigation cost has been denied or deferred.

### 3.0 Notice to the Department of Special Interest Matters and Litigation

The contractor's procedures under its Legal Management Plan should include provisions for earliest possible notification to the Department of the likely initiation of any "significant matters" such as class actions, cases involving radiation or toxic substance exposure, cases involving problems concerning the safeguarding of classified information, and any other matters involving issues which the contractor has reason to believe are of general importance to the Department or the government as a whole.

### 4.0 Alternative Dispute Resolution

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, pre-discovery, after initial discovery and pre-trial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or the Department counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department counsel are also encouraged to consult with the Department's Director of the Office of Dispute Resolution. The Department anticipates that mediation will be the principal and most common method of alternative dispute resolution. In exceptional circumstances, arbitration may be appropriate. However, agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, et seq.) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

### 5.0 Cost Allowability Issues

A determination of cost reasonableness may depend on a variety of considerations and circumstances. In accordance with 48 CFR (FAR) 31.201-3, no presumption of reasonableness is attached to the incurrence of costs by a contractor. 10 CFR part 719 and this Appendix provide contractors guidelines for incurring legal costs to which adherence should result in a determination of allowability if the cost is otherwise allowable under the contract.

### 5.1 Underlying Cause for Incurrence of Costs

While 10 CFR part 719 provides procedures for incurring legal costs, the determination of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate determination. This latter determination may involve, for example, a possible finding of willful misconduct or lack of good faith by contractor management in the case of third party liability, or a finding of violation of a statute or regulation by the contractor in a governmental proceeding. The reason for the contractor incurring costs may be determinative of the allowability of the contractor's legal costs. For example, legal costs incurred by a contractor in defending actions brought by governmental agency may be covered by the Major Fraud Act, 41 U.S.C. 256(k), implemented as a cost principle at 48 CFR (FAR) 31.205-47. In such cases, the statute may restrict the Department's authority to reimburse legal costs incurred by the contractor regardless of the outcome of the action.

(B) In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. This is particularly true in the case of legal defense costs covered by the restrictions in the Major Fraud Act and is also a common problem in cases covered by various whistleblower statutes and regulations. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must satisfy the standards of cost reasonableness.

### 5.2 Fees and Other Charges

(A) Requests by retained legal counsel that are not in a direct contract with the Department for fee increases should be sent in writing to the contractor, who should review the request for reasonableness. If the contractor determines the request is reasonable, the contractor should seek approval for the request from Department counsel and the contracting officer before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two-year period.

(B) Rate and fee structures for retained legal counsel should include all "overhead" and "profit," and, therefore, any additional overhead or profit charged by retained legal counsel should be considered unreasonable. Costs listed in 10 CFR 719.33(c) are usually incorporated into the rate or fee structure. Consultants or experts hired by retained legal counsel who do not include any overhead or similar charges, such as computer time, in their base rate, must have those charges approved in advance by Department counsel and the contracting officer. Time charged by law students should be scrutinized for its efficiency and have prior authorization.

(C) Travel time may be reimbursed at a full rate for the portion of time during which retained legal counsel actually performs work

for which it was retained; any remaining travel time during normal working hours shall be reimbursed at 50 percent, except that in no event is travel time for time during which work was performed for other clients reimbursable. Also, for long distance travel that could be completed by various methods of transportation, i.e., car, train, or plane, only the charge for the overall fastest travel time will be considered reasonable.

(D) For costs associated with the creation and use of computerized databases, contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Potential use of databases originally created by the Department or its contractors for other purposes, but that can be used to assist a contractor or retained legal counsel in connection with a particular matter, should be considered and be coordinated with Department counsel.

### 6.0 Role of Department Counsel as the Contracting Officer's Representative

(A) An attorney from the field office or from Headquarters will be appointed a contracting officer's representative by the cognizant contracting officer. A contracting officer may designate other Government personnel to act as authorized representatives for functions not involving a change in the scope, price, terms or conditions of the contract. This designation is made in writing and contains specific instructions regarding the extent to which the representatives may take action for the contracting officer, and will prohibit the representative from signing contractual documents. The contracting officer is the only person authorized to approve changes in any of the requirements under the contract.

(B) Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR (FAR) 1.602-1, and for contracting officer's representatives at 48 CFR (DEAR) 942.270-1. A recently standardized clause, Technical Direction, 48 CFR (DEAR) 952.242-70, also discusses the responsibilities and limitations of a contracting officer's representative.

### 7.0 Future Amendments to Guidance

The Office of the General Counsel may by memorandum provide additional guidance to contractors. These memoranda will serve as guidance for "safe harbor" practices for contractors procuring outside legal services.

### Attachment—Contractor Litigation and Legal Costs, Model Bill Certification and Format

#### 1. Certification

Bills or invoices should contain a certification signed by a representative of the retained legal counsel to the effect that:

"Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set



forth in the Department of Energy's regulation and guidance on contractor legal

management requirements, and that the costs and charges set forth herein are necessary."

## 2. Model Bill Format

I. FOR FEES					
Date of service	Description of service (see note 1 below)	Name or initials of attorney	Approved rate	Time charged	Amount (rate × time)
II. FOR DISBURSEMENTS					
Date	Description of disbursement (see note 2 below)	Amount			

**Note 1—Description of Service:** All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

**Note 2—Description of Disbursement:** Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of contractor legal costs and the terms of engagement between the contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (i.e., number of pages times a maximum of 10 cents per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (i.e., bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

**Note 3—Receipts:** Receipts for all expenses equal to or above \$75 must be attached.

2. The authority citation for Parts 928 and 952 continues to read as follows:

**Authority:** 42 U.S.C. 7101, *et seq.*; 40 U.S.C. 486(c); 50 U.S.C. 2401, *et seq.*; 42 U.S.C. 2201.

### PART 928—BONDS AND INSURANCE

3. Section 928.311–2 is added to read as follows:

**§ 928.311–2 Agency solicitation provisions and contract clauses. (Department coverage—paragraph (b)).**

(b) Cost reimbursement contracts for an amount exceeding \$10,000,000, involving work performed at facilities owned or leased by the Department, must use the clause at 952.228–1.

4. Part 944 is added to read as follows:

### PART 944—SUBCONTRACTING POLICIES AND PROCEDURES

**Authority:** 42 U.S.C. 7101 *et seq.*; 40 U.S.C. 486(c); 50 U.S.C. 2401 *et seq.*; 42 U.S.C. 2201.

### § 944.102 Policy. (Department coverage—paragraph (c)).

(c) Contractor purchases of litigation and other legal services are subject to the requirements in 10 CFR part 719 and this part 944 of 48 CFR (DEAR).

### PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 952.228–1 is added to read as follows:

#### § 952.228–1 Insurance—Litigation and Claims.

As prescribed at 928.311–2(b), insert the clause at 970.5204–31. The contracting officer shall substitute these paragraphs of the clause:

(e) (2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or limitation of funds clause of this contract.

(h) In addition to the cost reimbursement limitations contained in FAR 31.201–3 and DEAR 931.205–33, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons, including employees but excluding costs incidental to workers' compensation actions, (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by contractor managerial personnel's.

(j) (4) The term "contractor's managerial personnel" is defined in the Property clause in this contract.

### PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

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

**Authority:** Atomic Energy Act of 1954 (42 U.S.C. 2201); Department of Energy Organization Act (42 U.S.C. 7101, *et seq.*); and National Nuclear Security Administration Act (50 U.S.C. 2401, *et seq.*)

7. Section 970.5204–31 is amended by adding clause paragraph (m) to read as follows:

#### § 970.5204–31 Insurance—litigation and claims.

\* \* \* \* \*

(m) Reasonable litigation and other legal expenses are allowable when incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements, which includes a requirement to submit a Legal Management Plan within 60 days of execution of a contract, and if not otherwise made unallowable by law or the provisions of this contract.

10. Section 970.7103 is amended by adding paragraph (e) to read as follows:

#### § 970.7103 Contractor purchasing system.

\* \* \* \* \*

(e) Contractor purchases of litigation and other legal services are subject to the requirements in 10 CFR part 719, 48 CFR (FAR) part 44 and this subpart, 48 CFR (DEAR) 970.71.

[FR Doc. 00–26995 Filed 10–24–00; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2000–NM–214–AD]

RIN 2120–AA64

#### Airworthiness Directives; Airbus Model A310 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all Airbus Model A310 series airplanes. This proposal would require repetitive detailed visual inspections to detect cracks propagating from the fastener holes that attach the left- and right-hand pick-up angles at frame 40 to the wing lower skin and fuselage panel, and