DOE Management and Operating Contracts Guide

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Chapter 17. 7 Origin, Characteristics, and Significance of Management and Operating (M&O) Form of Contract

Date: February 2026

References: [FAR 17.6, DEAR 917.6, DEAR 970]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

1.1 Introduction.

“Management and operating” (M&O) contract is a term used to describe the contracts that are central to the Department of Energy’s (DOE’s) business model. The term was adopted formally in a memorandum from the Secretary of Energy, dated October 5, 1983[1]. However, these contracts predate the inception of the term by more than thirty-five years, dating to contracts awarded by the Corps of Engineers during World War II, and other contracts awarded by the Atomic Energy Commission (AEC) from its creation in the Atomic Energy Act of 1946.

It is well known that the two atomic bombs that ended World War II in the Pacific were manufactured under the contracts awarded by the Corps of Engineers. Neither the scientific expertise responsible for the physics underlying the development of the bombs nor the manufacturing and engineering expertise that produced the bombs existed within the Federal government. The Corps acted as project manager, relying on scientists from academia and the engineering and construction skills of industry. As a result of the speed with which the Corps of Engineers’ Manhattan Engineer District successfully concluded the production of the atomic bombs, Congress decided to carry that scientific, technical, and business model forward into the organization of the AEC.

The Energy Research and Development Administration (ERDA) from 1974 to 1977, and, the Department of Energy, from 1977 to the present, successor agencies to the AEC, have carried forward the business and scientific model inherent in management and operating contracts. DOE relies upon the M&O contractors for the performance of the substantial part of the agency’s mission. That reliance, among other things, allows DOE’s staffing to be a fraction of what would otherwise be necessary to conduct its complex and multi-faceted mission.

The remainder of this discussion is devoted to the presentation of the evolution of the M&O contracting model, external recognition of the M&O contract, the characteristics of such contracts, the terms of such contracts, and decisions to use the contract.

1.2 Original Design of M&O Contracts.

What today are known as DOE’s Management and Operating contracts began during World War II. The Manhattan Engineer District was the governmental entity responsible for the design,

[1] For clarity and convenience, this analysis uses the term “management and operating contract” or “M&O contract” for the contract structure though at times prior to the October, 1983 memorandum were known by such terms as “on-site contracts,” “operating contracts,” “major cost type contracts,” or other comparable terms.

development, and production of the first atomic bombs, an undertaking, to that time, without precedent. This massive effort achieved its challenging objective on a schedule that was almost unimaginable. Over a two year period the theoretical science was advanced, the technology necessary to produce the necessary components was developed and applied, and some of the most complex and largest manufacturing facilities the world had known were designed, constructed, and brought into full operation in remote, and previously undeveloped, locales within the United States. The successful completion of the Manhattan Project resulted from the Government's substantial reliance upon private industry and educational and other nonprofit institutions for the critical scientific and business expertise.

In 1946, following on the success of the Manhattan Project, Congress created the Atomic Energy Commission to design and produce nuclear weapons, to develop nuclear energy as a source of electricity, and to research the use of nuclear energy in medicine. The legislative history of the Atomic Energy Act of 1946 indicates the basic principle that underlies M&O contracts was that the AEC, a predecessor of DOE, was to employ highly capable companies and educational institutions to carry out the actual performance of the agency's mission; that is, these contractors were to perform the agency's mission as opposed to the agency's using civil servants. "Wherever possible, the committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. Thus, the bill permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry."[2]
The Ninth Semiannual Report to Congress by the Atomic Energy Commission stated a more detailed intention of the Commission:

The firms operating large Government-owned production plants, carrying on extensive development projects, and undertaking urgent construction jobs, work in close day-by-day cooperation with the Commission and its staff. They have been selected for their competence, and the Government is contracting with them not only for technical ability but for managerial ability as well. The working relationship between the Commission and its operating contractors resemble in some respects those between industrial companies and their branch offices. The contractor undertakes to carry on an extensive operation; the Commission establishes the objectives and makes the decisions required to fit the operation into the national program, and exercises the controls necessary to assure security, safety, desirable personnel administration, and prudent use of the public funds.[3]

The report also presented four basic principles relating to the operating contractors:

a. The contractor recognizes that the AEC is responsible under the law for the conduct of the atomic energy program.

b. The AEC recognizes that the contractor is an established industrial, business, or academic organization with proved (sic) capabilities, both technical and administrative.

c. The contractor recognizes that the proper discharge of the AEC responsibilities requires that the AEC shall have full access to information concerning the contractor's performance of the contract work and the power to exercise such control and supervision under the contract as the AEC may find necessary.

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[2] S.Rept. 1211, 79th Cong. 2d Sess. 15 (1946).
[3] U.S. Atomic Energy Commission, Ninth Semiannual Report 57 (1951).

d. Both the AEC and the contractor recognize that the proper discharge of the contractor's responsibilities for management requires that it shall, to the fullest extent compatible with the law, exercise its initiative and ingenuity carrying out the contract work.[4]

The special nature of the work performed by the AEC and its operating contractors was reflected in 1949 when Congress enacted the Federal Property and Administrative Services Act (FPASA) establishing, among other things, an outline for the Federal procurement system. That statute included a provision, referred to as "nonimpairment authority," specifying that nothing in FPASA “shall impair or affect” the authority of the Atomic Energy Commission to perform its missions.[5]

Subsequently, Congress expanded the mission and authorities of the AEC with its enactment of the Atomic Energy Act of 1954. That Act has provisions that recognize the AEC's potential reliance upon contractors for performing portions of its mission. In 1958 the Act was amended to provide a system of indemnification of AEC contractors and public utilities against liability for nuclear incidents.[6]

As a result of the enactment in 1974 of the Energy Reorganization Act, the AEC no longer exists. Its nuclear regulatory functions were taken over by the Nuclear Regulatory Commission, and its nuclear research, development, and weapons production were taken over by the Energy Research and Development Administration (ERDA). The "operating contracts" continued to play the same role in ERDA that they had performed in the AEC, that is, to perform the substantial portion of the agency mission. Many pieces of non-nuclear legislation, *e.g.*, the Federal Nonnuclear Energy Research and Development Act of 1974, expanded ERDA’s and DOE’s missions substantially, resulting in a commensurate expansion of the missions of M&O contracts.

M&O contracts continue to serve their necessary function within the Department of Energy, and more recently, its security component, the National Nuclear Security Administration, since its organization in 1977.[7]

1.3 External Recognition of the Unique Nature of DOE’s M&O Contracts.

M&O contracts have received special regulatory treatment in the Government-wide Federal Acquisition Regulation (FAR), adopted in 1984, long after the creation of the contracts that have become known as M&O contracts.[8] The FAR, at Subpart 17.6, recognizes and codifies the special identity that M&O contracts have with an authorizing agency. The FAR coverage recognizes the special extend/compete process, it requires special statutory authority for an agency to establish an M&O contract, requires Secretarial designation of the M&O contracts, and authorizes agency acquisition regulations that deal with the special nature of M&O contracts. Under the authority of Subpart 17.6, the Department of Energy Acquisition Regulation (DEAR)

[4] Id. at 61-62.
[5] 40 U.S.C. § 474(d)(17), since recodified at 40 U.S.C. § 113(e)(12)(2000).
[6] Pub.L. 85-256. As a result of subsequent amendments, principally the Price Anderson Amendments Act of 1988, Pub.L.100-408 the Price-Anderson indemnity now applies to DOE contracts under which there is a risk of public liability from a nuclear incident. Congress recently extended the Price-Anderson Act, among other changes, until December 31, 2025 with enactment of the Price-Anderson Amendments Act of 2005, §§ 601-611 of Pub.L. 109-58.
[7] Congress had opportunities in 1974, at the organization of ERDA, in 1977, at the organization of DOE, and at any time since to enact legislation to alter DOE’s business model, but it has not done so, reflecting an understanding of how integral the M&O contract continues to be to DOE’s business model.
[8] See further discussion infra at 8, subsection 2.5.2 of this analysis.

has a Part 970 that supplements the FAR and governs the solicitation, award, and administration of DOE's M&O contracts.

Various pieces of legislation enacted by Congress have explicitly dealt with DOE's M&O contracts, recognizing their special relationship with DOE and its predecessor agencies and the special importance of these M&O contracts to the nation. For instance, the Bayh-Dole Act, Pub.L. 96-517, enacted in 1980, reversed the then dominant rule that the Government would take title to inventions first conceived or reduced to practice under Government contracts by granting small businesses, non-profit organizations, and educational institutions the opportunity to elect title to those inventions. The statute recognizes that it would impact title to inventions under DOE's M&O contracts.[9] In doing so, the Act provided authority for DOE to retain title to inventions in DOE's nuclear propulsion and weapons related programs.

The Department of Homeland Security (DHS), by law, has special access to DOE's national laboratories and other DOE facilities that are managed and operated by DOE's M&O contractors in support of its mission.[10] Though generic, NRC has a statutorily based special access to DOE's laboratories.[11]

In addition, various other Federal agencies have at times recognized DOE's "special relationship" with its M&O contractors. Prior to enactment of the Competition in Contracting Act in 1984 and its explicit grant to the General Accounting Office[12] of bid protest authority, the Comptroller General asserted jurisdiction over protests against the award of subcontracts by DOE's M&O contracts, a very limited instance of GAO's assertion of protest jurisdiction over the award of subcontracts under a specific type of contract.[13] Under the Brooks Act, since repealed, governing the acquisition of automatic data processing equipment (ADPE), DOE had a special delegation of procurement authority from the General Services Administration for purchases of ADPE by the M&O contractors. The Department of Labor recognizes the special identity of M&O contracts for the purposes of its administration of the Service Contract Act of 1965, as amended. The U.S. Trade Representative has provided for special treatment for DOE's M&O contractors in its negotiation of the General Agreement on Trade and Tariffs and North American Free Trade Agreement.

Finally, the Supreme Court opined that management and operating contracts are a unique type of contract, in that they have a special identity with DOE and indicia of agency without actually causing the contractors to be agents of the Department. The Court stated:

> [I]n several ways DOE agreements are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities. As the parties to this case acknowledge, the complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms While subject to the general direction of the Government, the contractors are vested with substantial autonomy in their operations and procurement practices.
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> …

[9] 35 U.S.C. § 202(a).
[10] Sec. 309 of the Homeland Security Act of 2002, Pub.L. 107-296.
[11] Sec. 205 of the Energy Reorganization Act of 1974, Pub.L. 93-438.
[12] Now the Government Accountability Office.
[13] 54 Comp. Gen. 767, 784 (1975).

AEC management contracts were developed in an attempt to secure Government control over the production of fissionable materials, while making use of private industry's expertise and resources[14]

1.4 Historical and Continuing Scientific and Technical Accomplishments Attributable to DOE's M&O Contracts.

Over the seventy years since the organization of the AEC and the institution of M&O contracts, the Government has enjoyed remarkable benefits from the world class research and the innovative technical accomplishments of M&O contractors.

For example, the M&O laboratory system has consistently produced Nobel Laureates. R&D Magazine has listed hundreds of DOE or predecessor agency research projects among its annual top 100. The naming of Nobel Laureates and the recognition of DOE laboratory research continues to occur at a relatively constant rate, repeatedly confirming the scientific excellence of DOE laboratories.

Recognition of the quality of science performed by DOE's M&O contractors is illustrated by the number of DOE's M&O laboratories that are identified as Federally Funded Research and Development Centers (FFRDCs). FFRDC status designates a laboratory or facility as a member of a group of unique organizations formed to assist the United States government in addressing specific long-term areas of considerable complexity. FFRDCs assist the United States government with scientific research and analysis, systems development, and systems acquisition in defense, energy, aviation, space, health & human services, and tax administration. FFRDC is an honorific of distinction, expressing the high scientific achievement of the particular laboratory. Sixteen of DOE's laboratories, each operated as M&O contracts, have been so designated. Ten other agencies have designated the twenty-six other FFRDCs. Said another way, DOE is one of eleven agencies that maintain FFRDCs. DOE's laboratories, in contrast, make up more than thirty-eight (38%) of all FFRDCs.

DOE laboratories continue to perform world-class basic research, e.g., they investigate the fundamental constituents of matter and the forces associated with them. They are leaders in research into the incipient research into nanotechnology and its applications. They lead research into scientific computing to aid in the modeling of complex physical and biological systems and supercomputing. They are leaders in efforts to sequence the human genome with all its potential applications. This recitation is merely representative and by no means comprehensive of the scientific research conducted under DOE's M&O contracts.

DOE's M&O contractors continue to play a critical part in national security, e.g., they have designed and produced every nuclear warhead in the arsenal of the United States and maintain that arsenal. Those contractors play critical roles in the dismantlement, pursuant to treaty obligations, of portions of the United States nuclear arsenal. Those M&O contractors play critical roles in the United States efforts in nonproliferation, international nuclear safety, and efforts to identify weapons of mass destruction. In addition, certain of those contractors are responsible for the design and production of the nuclear engines used by the United States' nuclear submarine fleet. This recitation is only exemplar, not comprehensive.

[14] United States v. New Mexico, 455 U.S. 720, 723(1982).

DOE's M&O form of contract began with contracts for the research underlying, the design, and the production of the atomic bombs that hastened the end of World War II and continues today in contracts for world class basic research and national security. That continuing success speaks to the wisdom and significance of the M&O form of contract to the missions of DOE and its predecessor agencies

1.5 Evolution of the M&O Form of Contract.

1.5.1 Formation of Certain M&O Contracts Subsequent to the AEC. The first M&O contract that ERDA awarded was for the operation of the Solar Energy Research Institute (SERI)[15] in Golden, Colorado. While the contract was not for one of the traditional purposes of a M&O contract (design and production of nuclear weapons, development of nuclear energy as a source of electricity, or research on the use of nuclear energy in medicine), the indicia of an M&O contract, discussed *infra*, were present in the plan for the management and operation of this facility.

The next use of the M&O form of contract was to manage and operate the Naval Petroleum Reserves (NPRs). These three facilities produced oil nominally for use by the U.S. Navy. The NPR functions were brought into ERDA under ERDA's organization act.[16] A legal opinion was written to consider whether the conversion of these contracts to M&O contracts was an appropriate use of such contracts. The conclusion, concurred in by the Judge Advocate General of the Navy, was that the use of ERDA's M&O form of contract was appropriate.

The Strategic Petroleum Reserve (SPR) was established under one of DOE's predecessor agencies, the Federal Energy Administration.[17] The purpose of the SPR was to create a network of facilities to offload, store, and, if called upon, to disgorge oil to protect against any subsequent interruption in the flow of oil into the United States market. A legal opinion, dated November 1, 1984, determined it appropriate for DOE to use the M&O form of contract for the management and operation of the SPR.

The Nuclear Waste Policy Act[18], enacted in 1982, directed DOE to determine the site, plan, construct, and operate a repository for long-term storage of nuclear waste that results from the operation of civilian reactors across the United States. That charter consisted of many disparate functions, including arranging transport of the waste from the site at which it was generated to the repository site. Following its business model, DOE determined to rely on an M&O form of contract for performance of major portions of its mission.

In the late 1980s, the Department of Energy planned to construct a $4 billion superconductor, supercollider facility (SCSC), extending the research into the basic components of matter that took place to that point at DOE's Fermi National Laboratory. The SCSC project was to have been orders of magnitude larger than DOE's Fermi National Accelerator Laboratory. After years of planning in the early 1990s, a site was chosen and, upon appropriations, construction begun by a contractor, a consortium of education institutions chosen through an open competition.

[15] DOE has since renamed the facility the National Renewable Energy Laboratory.
[16] Sec. 307 of the Department of Energy Organization Act, Pub.L. 95-91. Subsequently, due to programmatic and statutory changes to the mission of the NPR, these contracts were either concluded or converted to service contracts.
[17] Sec. 154 of the Energy Policy and Conservation Act, Pub.L. 94-163. The transfer into DOE occurred pursuant to § 301 of Department of Energy Organization Act.
[18] Pub.L. 97-425.

Consistent with DOE's experience to that point, DOE chose the M&O form of contract. Shortly after construction began, Congress elected to require DOE to terminate the project.

DOE established what is now known as the Thomas Jefferson National Accelerator Facility in 1994. That facility offers users access to world-class scientific facilities to research and perform experiments on the basic structure of nuclear matter. Though the lab is small in size compared to most other DOE national laboratories, DOE awarded an M&O contract because the most efficient performance of the work required a contractor to manage and operate the facility while assuming responsibility for integration of all functions at the site.

1.5.2 Regulatory Coverage of the M&O Form of Contract. Following the enactment of the amendment of the Office of Federal Procurement Policy Act[19] and during the resulting creation of the Federal Acquisition Regulation (FAR)[20], DOE sought and received formal regulatory recognition of the M&O form of contract. Subpart 17.6 of the FAR authorizes agencies with sufficient statutory authority and the need for contracts to manage and operate their facilities to use the M&O form of contract. DOE remains the only agency that has exercised this authority.

The FAR at section 17.601 defines a management and operating contract as "an agreement under which the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency."[21] At section 17.602-1 the FAR requires a written, non-delegable determination by the agency head, where there is sufficient statutory authority, in order to establish and maintain an M&O contract.

Additionally the basic criteria to be used in identifying a requirement that is appropriate for use of the M&O form of contract include if, (1) Government-owned or -controlled facilities must be utilized, because, for instance, it is in the interest of national defense or mobilization readiness, to perform the agency's mission adequately, or because private enterprise is unable or unwilling to use its own facilities for the work; (2) because of the nature of the work, or because it is to be performed in Government facilities, the Government must maintain a special, close relationship with the contractor and the contractor's personnel in various important areas (e.g., safety, security, cost control, site conditions); (3) the conduct of the work is wholly or at least substantially separate from the contractor's other business, if any; and (4) the work is closely related to the agency's mission and is of a long-term or continuing nature, and there is a need to ensure its continuity and for special protection covering the orderly transition of personnel and work in the event of a change in contractors. . Because of the need for the use of Government-owned or -controlled facilities, necessity of a special, close relationship with the contractor and the contractor's personnel in important areas, e.g., safety, security, cost control, site conditions, the performance of the contract is substantially separate from the contractor's other business, if any, the work is closely related to the agency's mission and is of a long-term or continuing nature, and for special protection covering the orderly transition of personnel and work in the event of a change in contractors.

FAR 17.602-2 places certain limitations on the types of functions M&O contractor personnel may

[19] Pub.L. 93-400, Chap. 7of Title 41 U.S.C. (2000).
[20] 48 C.F.R. Chap. 1(2005).
[21] At a result of adoption of the FAR with 17.6, the Secretary made determinations about each then existing M&O contract. The Secretary of Energy has made that determination for each of DOE's current M&O contracts.

perform, e.g., the employees may not supervise or control Government personnel or determine basic Government policies.

Beginning in the late 1980s and continuing today, the GAO and others have criticized the Department for its management of its M&O contracts, in particular for not holding the M&O contractors accountable for their performance. As a result, DOE published an accountability rule intended to hold the contractors liable for negligent acts under the contract.[22] DOE also undertook a "contract reform" initiative in 1994 (Making Contracting Work Better and Cost Less) to improve its management of the M&O contract.[23]

In this time period, DOE also confronted a significant addition to its mission. Certain facilities were no longer needed in the complex that produced nuclear weapons.[24] Those facilities and other facilities had substantial contamination that had occurred over decades as part of DOE's weapons complex. While the substantive missions were curtailed or done away with, there was a comparable need to clean the site. Rather than rely on a continuation of the M&O form contract at those locations, DOE chose to experiment with contract strategies tailored to the most efficient and effective resolution of the environmental cleanup. These former M&O contract sites now use various contract forms that to varying degrees retain some but not all of the characteristics of M&O contract.[25] Even though the contracts involve Government sites and long term and complex missions, the requirements have been deemed inappropriate for use of M&O form of contracts. In each instance, the requirement is focused on the completion of the clean-up and closure of a site or a portion of a site.

Subsequently, the Department undertook a detailed review of the then existing M&O contracts to determine if the requirements remained appropriate for use of the M&O form of contract. The result of that review was that the M&O list has been reduced from approximately 52 contracts to 29. Among those contracts dropped from the M&O list were many tracing their histories to early in the AEC, e.g., the contract for aviation services connecting Albuquerque to Los Alamos and the Inhalation Toxicology Research Institute.

1.5.3 Other DOE Management Contracts. Over the last three decades the missions at certain nuclear weapon sites and facilities changed or ceased. At these now former M&O contract locations the mission focus shifted to environmental restoration, waste management, and site closure. This shift created a need for a different type of contract and contractor than those DOE traditionally used for management and operating activities.

Notwithstanding this requirement for change, the desire to make expedited progress led predictably to DOE's adoption of contract structures that, while not management and operating contracts, shared some of their characteristics, particularly those related to site and facility stewardship and an overarching emphasis on safety and security. Sometimes described as major site and facility management contracts (sometimes as "other management contracts"[26]),

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[22] Published as an interim final rule at 54 FR 5064 (1991), since substantially modified by subsequent rulemakings, though portions remain. The potential liabilities imposed by the rule were in excess of those to which a cost reimbursement contractor would be subjected. In the intervening years, DOE has adopted a clause for use in M&O contracts, subjecting the contractor to loss of all or a portion of its fees for stated failures in performance of the contract.
[23] "Making Contracting Work Better and Cost Less, Report of the Contract Reform Team" (February 1994).
[24] e.g., Rocky Flats, Colorado and Fernald, Ohio.
[25] See infra subsection 2.5.3., entitled "Other Management Contracts."
[26] Paragraph (b) of section 6022 of the Emergency Supplemental Appropriations Act for Defense, the Global War on

these contracts involve, to various degrees, the control of the site and a large contractor workforce. Therefore, certain of the provisions appropriate to a management and operating contract are appropriate for these contracts.

1.5.4 Special Contractual Features of DOE's M&O Contracts. In recognition of the circumstances consistent with the establishment of a DOE M&O contract, the terms of the contract differentiate it from typical contracts awarded by other agencies and other contracts awarded by DOE under the FAR. These terms, listed below, are indicia of a "special relationship," the M&O contractors share with DOE:

- DOE's involvement in M&O contractor labor relations, e.g., DOE's stewardship of M&O contractor pension and post-retirement medical systems, review of contractor executive compensation, and DOE's authorizing certain M&O contractors to enter into Site Stabilization agreements.

- Laws governing contractor wages and working conditions affect DOE's M&O contractors differently than they affect other Federal contractors. For example, M&Os are not subject to the Service Contract Act;[27] however, the M&O contractors must flow down the Act to service subcontracts they award. Generally, DOE prohibits its M&O contractors from performing construction with their own workforces but requires them to apply the Davis-Bacon Act[28] to M&O subcontracts for construction.

- DOE's significant involvement in M&O contractor management controls.

- DOE's involvement with the M&O contractor's purchasing process.

- DOE's application of specific DOE directives to the operations of the M&O contractor.

- DOE's authorizing the M&O contractor to finance contract performance by use of Special Financial Institution Accounts, under which checks written by the contractor one day are covered by the Department of Treasury overnight.

- DOE's requiring the M&O contractor to maintain integrated accounting systems, under which the contractors budgeting and accounting follow DOE's Accounting Handbook.

- DOE's relying on the DOE Inspector General for auditing its M&O contractors. DOE requires the M&O contractor to maintain an internal audit function, which performs critical audit functions under DOE's Cooperative Audit Strategy.

- The M&O contractor's reconciling its accounts annually by use of DOE's Statement of Costs Incurred and Claimed.

- The M&O contractor's accepting no work from entities other than DOE, except as specifically allowed by its contract with DOE. DOE assigns program work to the M&O by means of DOE's work authorization system.

Terror, and Tsunami Relief Act, 2005, Pub.L. 109-13.
[27] 41 U.S.C. §§ 351 et seq. (2000).
[28] 40 U.S.C. §§ 3141 et seq. (2000).

- The M&O contractor's operating under certain cost principles designed by DOE for use in its M&O contracts.

1.5.5 Indicia of DOE's Use of the M&O Form of Contract. The Department of Energy has disparate missions, generally involving energy research and development, weapons production and stockpile management, and environmental remediation and restoration. DOE's scientific research and development programs are extensive and include, for example, research in nuclear energy, high energy physics, the human genome, and naval nuclear propulsion, among other demanding and important areas.

Many of DOE's sites operated and managed by DOE's M&O contracts were placed in locations that at the time were isolated from population centers due to the potential danger and security concerns inherent in the research, design, development, and production of nuclear weapons and other activities. Currently, DOE's M&O contractors have approximately 100,000 employees as compared to DOE's approximately14,000 employees.

Because of the need to share various types of controlled and sensitive information with its contractors, as well as to ensure that potential conflicts of interest are managed, DOE generally requires that the M&O contractors be subsidiaries of their corporate parents, dedicated to performance at the specific site and supported by performance guarantees from their corporate parents. This limits the ability of the performing contractor to propose on or accept work for other Federal agencies[29] or third parties. The contractors' budget processes are integrated into those of the Department, and, in almost all cases, the budgets for DOE's M&O contracts are line items in the Department's budgets. The contractors operate under special financial institution accounts established by DOE under which, for the Government's benefit, contractors incur costs under their contracts. DOE establishes requirements for the contractors' accounting systems.

Aside from the size of these M&O and other major management contracts, they differ from stereotypical contracts awarded by Federal agencies in many ways relevant to small business goaling and achievement. These contractors manage and operate vast sites, consisting of hundreds and often thousands of acres, and they are responsible for all facets of the complex and demanding scientific work DOE assigns to the contractors and for stewardship of the site infrastructure.

Under this statutory contracting model, DOE directs the subject matter areas in which the contractors are focused and the overall performance objectives to be accomplished; however, Congress directed that the contractors be relied upon to apply best management, scientific, and business practices in carrying out that direction. This reliance gave rise to what has become known as a "special relationship," characterized by the use of these contractors to perform major portions of the agency's mission.

DOE's M&O contracts share indicators of that special relationship in their history and in their current operation. Those indicators are evidence of the unique nature of these contracts, bearing directly on why DOE's M&O contracts differ from contracts awarded by all other Federal agencies.

[29] Other than that accepted under DOE's Strategic Partnership Projects program, under which it assigns qualifying work to its M&O contractors under the Economy Act, 31 U.S.C. § 1535 (2000) and sections 31 and 33 of the Atomic Energy Act. See notes 10 and 11, respectively, supra, for statutes providing special access to DOE's laboratories for the Department of Homeland Security and the Nuclear Regulatory Commission.

An evaluation of the history of DOE's M&O contracts results in the following commonly recognized indicators for their use.

- Generally, the contractor assumes multi-program scientific and technical responsibilities and work under a broad statement of work.
- The requirement is continuing with no foreseeable end.
- The contractor is responsible for integration of scientific and technical and infrastructure functions.
- The contractor performs the substantial portion of scientific and technical responsibilities with its own workforce.
- The contractor's workforce is large, remaining at the site despite change of contractors. This results in the need for DOE to assume stewardship of employee relations and workplace labor conditions.
- DOE oversees security, health, and safety at the site.
- Work takes place at very large, Government-owned reservations and facilities.
- DOE requires the successful offeror to form a corporate entity specifically for and dedicated to the performance of the DOE M&O contract. The contactor may accept work only directly from DOE or as allowed specifically under the M&O contract.
- The contractor must link its accounting system with the Department's, and integrate its budget process with the Department's; usually the budgets for M&O contracts are line items in the Department's budget.

Chapter 70.07.103 M&O Acquisition Planning – Identification and Consideration of Lessons Learned From Prior M&O Acquisitions

Date: July 2017

References: [FAR 7.103 and Management and Operating Contracts Guide Chapter 70.1706-1]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. The purpose of this chapter is to establish procedures for the submission and sharing of lessons learned case studies to inform acquisition planning for future M&O contracts.

1.1 Background.

This chapter further implements the requirement at FAR 7.103 for the agency head to establish procedures ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies.

Lessons learned should be documented for acquisition practices relating to an M&O contract that (1) are substantively different from the practices previously employed at the site and (2) could potentially be considered for future acquisitions. Such substantive changes could include the addition or removal of significant contract scope, including the consolidation of activities under one contract that were previously performed by multiple contractors or significant changes to the award or incentive fee practices.

2.0 Lessons Learned

- Heads of Contracting Activity (HCAs) shall ensure that a lessons learned analysis is conducted, documented in writing, and submitted to the Office of Acquisition Management through the office's assigned business clearance analyst following any acquisition that utilized alternatives to the single M&O contract approach. In order to ensure a useful analysis is conducted that takes into account all relevant impacts on contract costs, performance, and any management integration issues, it will be necessary to allow a sufficient amount of time to elapse following contract award. Accordingly, lessons learned analyses should be conducted and submitted not later than three years after contract award. A sample template is provided as an attachment. For NNSA, lessons learned analyses should be submitted through the relevant HCA.

- The DOE Office of Acquisition Management (MA-60) will maintain and publish a library of the lessons learned case studies on the DOE Acquisition Answers web-page (https://community.max.gov/display/DOE/Acquisition+ANSWERS). Accordingly, HCAs should ensure that any lessons learned case studies submitted are suitable for sharing and represent the considered judgement of management.

- The Field Assistance and Oversight Division (MA-621) will ensure that lessons learned analyses are conducted and submitted as required.

- M&O contract lessons learned should be considered when developing the acquisition alternatives package (Chapter 70.1706-1) for any DOE/NNSA site that is currently operated through an M&O contract.

Attachment

Template for a Case Study Description

1. Background

    - Contracting office submitting the case study
    - Point of contact for the case study
    - Short description of the alternative approach

2. Benefits

- Describe the original reasons for choosing the alternative
- Describe the benefits anticipated at the time of acquisition planning
- Describe whether the anticipated benefits were realized

3. Impacts

Describe the effects of the alternative strategy on:
- Contract costs
- Performance
- Management integration—coordination of complementary activities at the DOE site
- Administrative efficiency—increase or decrease in contractor administrative costs, duplication or redundancy in contractor administrative functions
- Contractor Human Resource Management, including DOE's management of liabilities for contractor pensions and post-retirement benefits
- Government and contractor accountability for performance outcomes--whether the alternative approach dilutes or increased DOE's ability to hold contractors accountable for performance outcomes.
- Federal or Federal support service resources—the extent to which there were, or were not, sufficient resources in place to effectively manage the alternative approach. Discuss experience with the need for additional federal or federal support service resource needs by function (for example, procurement, safety, security, budget, legal, and other oversight areas).

4. Conclusions & key considerations for future acquisition planning

- Was the alternative successful?
- What are the circumstances under which this alternative could be used effectively for future acquisitions?

Chapter 70.1504 M&O Contractor Incentives – Fee, Rollover of Performance Fee, and Award Term

Date: May 2017

Reference: [DEAR 970.1504-102]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

1.1 Overview.

This chapter provides: (1) a synopsis of the M&O contractor fee policy (focused on the mechanics of the calculation and the key considerations of the policy); (2) guidance on a key aspect of the policy, linking performance fee to outcomes, including guidelines on allowing rollover of performance fee; and (3) guidance on the use of the non-fee incentive of award term. In this guide chapter, the term "DOE" refers to both DOE and NNSA.

1.2 Background.

M&O contractor fee policy, found at DEAR 970.1504-102, provides a comprehensive approach to determining an appropriate fee for contractors performing DOE M&O contracts and other contracts as determined by the DOE Senior Procurement Executive. Since the contractors and the work they perform cover a wide spectrum, the fee policy is necessarily complex. The first section of this guide chapter provides a straightforward articulation of basic mechanics and considerations of the policy. Fee must be tied to contractor performance. The guidance in the second section of this guide chapter discusses rollover of performance fee (fee not earned in an evaluation period that is available for payment in a subsequent period), which requires careful consideration of its effect on the contractor's motivation, because it provides the opportunity to earn the same fee more than once.

The final section of this guide chapter provides guidance on the non-fee incentive of award term. Although recognized and used for a number of years by several Federal agencies, no Government-wide regulation or guidance currently addresses award term incentives. Within DOE, the Report of the Blue Ribbon Commission on the Use of Competitive Procedures for the Department of Energy Labs, titled "Competing the Management and Operations Contracts for DOE's National Laboratories," suggested that outstanding laboratory contractors could "be rewarded with significant contract extensions, in most cases up to a maximum of 20 years." It's important to understand that this incentive has considerations that must be weighed carefully to ensure that DOE derives a meaningful benefit from its use. As a matter of DOE policy, award term incentives may only be used in management and operating (M&O) contracts for DOE laboratories and then only with the approval of the DOE Senior Procurement Executive or NNSA Senior Procurement Executive, as appropriate.

1.3 Synopsis of M&O Fee Calculation & Key Considerations of M&O Fee Policy.

1.3.1 How To Calculate Total Available Fee. There are four possible components in the fee calculation, depending on whether the site is a laboratory or a non- laboratory and whether the contract type is fixed-fee or cost-plus-award fee.

- Non-Laboratory
    - Fixed-fee contract
        - Determine the fee base
        - Determine the maximum fee from the fee schedule for that fee base
        - Calculate the "appropriate fixed fee"
            - Evaluate the eight significant factors at 970.1504-108
            - Assign "appropriate fee values"
    - Cost-plus-award-fee contract
        - Multiply the "appropriate fixed fee" by the classification factor for the facility/task (from DEAR 970.1504-107) to obtain total available fee
- Laboratory

- Fixed-fee contract
  - Determine if fee is appropriate at all (from the six considerations at 970.1504-103). If not, stop here!
  - If fee appropriate
    - Determine the fee base
    - Determine the maximum fee from the fee schedule tied to the fee base
    - Calculate the "appropriate fixed fee"
      - Evaluate the eight significant factors at 970.1504-108
      - Re-evaluate the six considerations at 970.1504-103
      - Consider benefits lab operator will receive due to its tax status
      - Assign appropriate fee values
      - Ensure appropriate fixed fee is less than or equal to 75% of the fixed fee that would have been calculated for a non-laboratory

- Cost-plus-award-fee contract
  - Determine if fee is appropriate at all (from the six considerations at 970.1504-103)
  - If fee appropriate
    - Multiply the "appropriate fixed fee" by the classification factor for the facility/task to obtain total available fee (970.1504-107)
  - Ensure the total available fee is less than or equal to 75% of the total available fee that would have been calculated for a non- laboratory.

1.3.1 Key Considerations For Determining M&O Total Available Fee

- Coordinate all M&O fee determinations with the Procurement Executive, whether or not using the maximum fee allowed or a lesser amount and whether adhering to fee policy or not

- Procurement Executive approval is required for the following
  - Establishing fees outside the annual funding cycle
  - Establishing fee amount greater than that derived from the fee schedules
  - Establishing total available fee greater than normal due either to the contractor using its own facilities or other resources or to the contractor being assigned objective performance incentives that are of unusual difficulty or performance incentives whose completion would provide extraordinary value
  - Including allowable costs as proposed fee in a laboratory contract
  - Establishing total available fee for a laboratory greater than 75% of that which would have been calculated for a non-laboratory
  - Not establishing the fee for the life of a laboratory contract
  - Using a cost-plus-fixed fee contract type for other than a laboratory contract
  - Using a fee schedule more than once in determining fee
  - For a cost-plus-award-fee contract, establishing a total available fee greater than the product of: the fee that would be calculated for a fixed fee contract and the appropriate classification factor

- Assess whether fee motivated contractor performance
  - Dramatic increases in total available fee over historical levels generally not warranted

- Consider the Fee Base/Fee Schedule
  - Generally, use only one fee base/fee schedule, that of the predominant work, for a contract
  - If unusual circumstances exist and considering using more than one fee base/fee schedule
    - Prepare rationale
    - Coordinate as soon as practical with procurement executive
    - Approval criteria are the significant differences between the nature, scope, risk, and dollar value of the other work and that of the predominant work

- Additional constraints on laboratories for determining fee
  - Six considerations (970.1504-103) to determine if any fee is appropriate; if fee is appropriate, use the six considerations again in determining appropriate fee
  - Consider tax status of contractor in determining fee
  - Fee must be less than or equal to 75% of the fee that would have been calculated for a non-laboratory
  - Fees for laboratories may be significantly less than fees for non- laboratories

1.4 <u>Linking Performance Fee to Acquisition Outcomes</u>.

A cost-plus-award-fee (CPAF) contract is generally the appropriate contract type for an M&O contract. Total available fee in this case is the sum of base fee and performance fee. Base fee is not generally appropriate. Performance fee can comprise both objective and subjective fee components.

Performance fee must relate to clearly defined performance objectives and performance measures. Where feasible, the performance objectives and measures should be expressed as desired results or outcomes. The specific measures used to determine the contractor's achievement must be stated as concretely as possible. Following these principles will increase

the probability that the contractor will only receive performance fee for government negotiated acquisition outcomes. This is especially important to keep in mind in evaluating the contractor's performance against its objectives and measures for subjective fee components.

Using subjective fee components is less desirable than using objective fee components because there is not as clear a link between performance and reward. Only when it is not feasible to use objective measures of performance should subjective fee components be used, and they should be tied to identifiable interim outcomes, discrete events, or milestones to the maximum extent practicable. When using subjective fee components it is especially important to ensure that the contract/award fee plan clearly defines how the Government will measure the contractor's performance. Fee payment must depend upon only one thing--the contractor's providing the acquisition outcomes for which DOE negotiated.

1.5 <u>Rollover of Performance Fee</u>.

Some performance evaluation and measurement plans contemplate the rollover of unearned performance fee—typically the subjective fee component—from one period to another. Since this practice gives the contractor more than one chance to earn the same fee, its use could violate the principles discussed above. Consequently, the following limitations apply when applying rollover (these limitations do not apply to the extent a clearly identifiable Government action or inaction caused the contractor to fail to earn performance fee):

- The DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate, must approve use of a rollover provision. Because the use of a rollover is an exception rather than the rule, convincing rationale addressing both benefits and costs must accompany any request for use. The DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate, will consider the following, among other things related to the benefits and costs of the proposed rollover, in determining whether rollover is appropriate:
    - The contractor may only earn a portion of the unearned performance fee—regardless of how well the contractor performs in the subsequent period. The size of this portion depends on
        - how close the contractor came to delivering the originally negotiated performance (for example, a contractor failing to reach a milestone by a year must earn significantly less that a contractor that fails by a week) and
        - how much DOE still desires the originally negotiated performance, some other performance, or both.
    - The performance expectations must be in place before the contractor starts work on the effort associated with the rollover fee.
    - The performance expectations must be of such rigor and evident nexus to the value of the "new" work as to be clearly equitable to the Department.

The contract file must include complete documentation of the use of rollover.

1.6 <u>Award Term</u>

1.6.1 <u>General</u>.

- In establishing appropriate incentives for contractors, it is well-founded Government policy that fee is to be reasonable, reflecting effort (the complexity of the work and the resources required for contract performance), cost risk (the degree of cost responsibility and associated risk the contractor assumes under the contract type and the reliability of the cost estimates in relation to the complexity of the task), and several other factors (for example, support of Federal socioeconomic programs, investment in capital, and independent development).

- An award term incentive provides a new dimension in contractor incentives. An award term incentive has similarities to award fee, with the major difference being the contractor earns additional periods of performance instead of award fee. An award term incentive rewards the contractor with additional contract term if: (1) the performance of the contractor meets specific contractually required criteria; and (2) any contract specified conditions are met. The process for administering award term can be similar to, or separate from, the process for administering award fee, but the award term performance objectives must be distinct and separate from the award fee performance objectives. Typically, the contractor's superlative performance in meeting award fee performance objectives will be the only gateway to the contractor's being eligible to earn award term. Additionally, the award term performance objectives will be higher, broader, or further reaching in scope (or perhaps all three) than the award fee performance objectives.

- If an award term incentive is used, it must be integrated with other contract incentives, for example, fee. Consequently, while the value of an award term incentive can not be easily quantified, it must be considered in determining a reasonable fee. That is, if a fee of x dollars is reasonable for a contract that includes no other incentives, then a fee of less than x dollars would be reasonable for a contract that includes an award term incentive. A 5 to 15 percent reduction (to the amount of total available fee for the contract that would be reasonable if no award term incentive were included) would usually be appropriate. An example of a reasonable reduction would be a 1 percent reduction to each annual available fee amount (that would be reasonable if there were no award term incentive) for each additional year that the contractor can earn over the course of the contract. In this example if the contract includes a base term of five years and 15 additional years that the contractor can earn, the 1 percent reduction per additional year results in a 15 percent reduction to each annual available fee amount. The formula for this example is:

  [(1 percent reduction in annual available fee amount)/(each additional year that the contractor can earn)] x

  1. [15 possible additional years that the contractor can earn]=
  2. 15 percent reduction to each annual available fee amount.

- To avoid creating commitments that the Government does not want to make and expectations of contractors that will not be fulfilled, the award term clause must specify clearly that if certain conditions (which may be outside the control of the contractor) are not met the contractor will lose (1) the opportunity to earn additional award term and (2) any award term benefits it may already have earned. The clause must also state that the Department has no further obligation to the contractor if this happens and that the determination of whether the conditions have been met is at the sole discretion of the contracting officer. These and other conditions and terms are listed in the subsequent section titled, "Award Term Clause: Required Conditions and Terms."

1.6.2 Applicability.

- Award term incentives may only be used in performance-based M&O contracts for laboratories where it is clear that the potential benefit to the Department from the contractor's increased motivation exceeds the potential impact on future competitions and the additional administrative burden/cost.

1.6.3 Limitations.

- The Head of Departmental Element must obtain the approval of the DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate, prior to initiating any plan to apply award term incentives.

- Award term incentives may not be used in conjunction with contract options to extend the contract period of performance.

- Award term incentives may be used only in contracts that have been awarded pursuant to full and open competition for the basic contract award.

- Award term incentives may be used only if all of the criteria for the contractor's earning of award term are discussed in the RFP and defined clearly in the contract before the start of each evaluation period for award term.

- Award term incentives may only be used in M&O contracts for DOE's national laboratories and only with the approval of the DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate.

1.6.4 Conditions For Use.

- Trade-off with fee--
  - Award term incentives replace, in whole or in part, monetary fee incentives. Accordingly, award term incentives are not permitted if the resultant contract would provide the contractor with a total available fee equal to the amount calculated under the DEAR fee policy. As the contemplated length of the potential award term periods increases, a corresponding decrease must occur in the contemplated total available fee.

- Length and Number of Terms--
  - The cumulative length of the contract's base term and all possible award terms shall not exceed the lesser of: 20 years; the approved length of the M&O form of contract and term (DEAR 970.1706 and any approved deviations); or the approved length of the use and need of a Federally Funded Research and Development Center (DEAR 970.3501 and any approved deviations), if applicable.
  - The length of award term periods and the number of such periods shall vary depending upon how effort under the contract is best facilitated by a potentially long contract term.
  - The contract's award term clause shall limit the maximum amount of additional term that the contractor can earn for a year of performance to one year.

- Distinction from Award Fee--
  - Performance objectives for earning award term shall be distinct from those for earning award fee.

- The Head of the Departmental Element must approve the objectives. Performance objectives for earning award term must be stated in the contract prior to the start of the evaluation period. Annually, the award term determining official shall report his/her assessment of the contractor performance of award term performance objectives to the Head of the Departmental Element.

- Award Term Clause: Required Conditions and Terms

    - Conditions: The contract's award term clause (or other clauses of the contract) must include the following conditions 1 through 7. Conditions 1 through 5 apply to both the contractor's right to earn award term and to the contractor's right to perform any term earned. Conditions 6 and 7 apply only to the contractor's right to perform any term earned.

        - The Department has a continuing need for the supplies/services.
        - The Department has sufficient funds to reimburse the contractor.
        - The Department must not have terminated the contract for convenience or default.
        - The Department has a continuing need for the M&O form of contract.
        - The Department has not concluded that it does not have a continuing need for the use of a Federally Funded Research and Development Center.
        - The contractor agrees to contract modifications applicable to the award term period earned to implement any significant new Department or government requirements.
        - The contractor agrees to contract modifications applicable to the award term period earned that reflect monetary performance incentives (performance measures, fee policy, etc.) similar to the base period, unless otherwise stated.

    - Terms: The contract's award term clause must include the following terms:

        - The contracting officer will at his or her sole discretion determine if the contractor has met the conditions to earn award term and to perform any award term earned.
        - If the conditions and terms to earn award term are not satisfied, the Department has no additional obligation under the clause to the contractor; that is, cancellation of the opportunity to earn award term or cancellation of the award term earned for any reason, term, or condition set forth in the award term clause does not entitle the contractor to an equitable adjustment or any other compensation.
        - Before the start of any award term evaluation period the Government may modify both: the criteria the contractor must meet to earn award term extensions; and the conditions to which the contractor's being able to earn award term or to perform award term extensions earned are subject.
        - The Department has the same right to terminate for convenience or default any portion of the contract (base term or earned award term) as it would have if the contract did not contain its award term cause.
        - If at the end of an evaluation period after the contractor has received credit for any earned award term extension, two or fewer years remain on the term of the contract: (i) the Government, at its sole discretion, may end the

contract as early as the end of the remaining term of the contract or as late as two years from the end of the evaluation period; and (ii) the contractor must continue to perform up to the point in time decided by the Government in (i) above.

- The contracting officer must modify the contract to reflect any earned award term extension before the contractor proceeds.

- Sample Clauses

    - Two sample award term clauses are provided as Attachments A and B. These are not mandatory clauses. They are provided simply to aid contracting officers in developing clauses that match their particular situations.

    - The Attachment A clause conforms generally to the guidelines above and includes additional conditions for consideration: the contractor loses some contract term for poor performance (using this feature necessitates stating a minimum contract term); the contractor must earn an outstanding rating for two consecutive periods to earn any award term extension; the contractor loses the ability to earn further award term extensions if the remaining contract term falls below two years (with certain exceptions); the Government may reduce any earned Award Term extension for contractor performance failures under the “Conditional Payment of Fee, Profit, and Other Incentives—Facilities Management Contracts” clause (DEAR 970.5215-3); and specific discussion of how and when changes to the Award Term Plan can be made.

    - The Attachment B clause also conforms generally to the guidelines above. It uses simpler mechanics than the clause at Attachment A, and it uses the term “Award Term Determining Official.” It also includes conditions under the “Conditional Payment of Fee, Profit, and Other Incentives—Facilities

    - Management Contracts” clause (DEAR 970.5215-3) and the “Management Controls” clause (DEAR 970.5203-1).

Attachment A

SAMPLE AWARD TERM CLAUSE

Award Term

Contract Length. The Government may extend or reduce the initial five (5) year contract term based on the contractor’s performance. The minimum contract term is three (3) years. The maximum contract term is twenty (20) years.

Contractor Performance. The Government will evaluate the contractor’s performance per the clause in Section H entitled, “Award Term Plan.”

Award Term determinations.

The term “remaining term of the contract” as used in this clause means the period of contract performance to which the contractor is entitled at the end of a performance evaluation period, after receiving credit of any earned award term extension. If at the end of an evaluation period the remaining term of the contract does not equal or exceed two years: (1) the Government, at its sole discretion, may end the contract as early as the end of the remaining term of the contract or as late as two years from the end of the performance evaluation period; and (2) the contractor must continue to perform up to the point in time decided by the Government in (1) above.

The contractor must earn an overall performance rating of “Outstanding” during two (2) consecutive annual performance evaluation periods in order to begin earning Award Term extensions, beginning with the first two years of this contract. Once two consecutive “Outstanding” ratings have been earned the contract shall be extended for two (2) years (one for each “Outstanding” performance rating earned) and shall continue to be extended an additional one (1) year for each “Outstanding” performance rating earned in consecutive years

Should the contractor earn an overall performance rating of “Excellent” during any annual performance evaluation period, the contract term will neither be extended nor reduced.
Should the contractor earn an overall performance rating of “Good” during any annual performance evaluation period, the contract term shall be reduced by one (1) year.
Should the contractor earn an overall performance rating of “Marginal” or less, the contract term shall be reduced by one (1) year and the Government may, at its sole discretion, start a new acquisition.

Conditions.

The contracting officer shall unilaterally modify the contract to reflect any extension or reduction of the contract term. In the case of extensions, the contractor shall not proceed until this modification is executed.

Nothing in this clause shall diminish or remove any rights afforded the Government regarding contract termination as may be set forth elsewhere within this contract.

The contractor’s earning of award term extensions and the contractor’s right to perform earned award term extensions are subject to:

The Government’s continuing need for the contract’s work; The availability of funds;
The Government’s continuing need for the management and operating form of contract; The Government has not concluded that it does not have a continuing need for the use of a Federally Funded Research and Development Center;
The contractor’s agreement to incorporate contract modifications that reflect significant new DOE policy;
The contractor’s agreement to reasonable monetary performance incentives; and Termination for convenience or default.

The Government may reduce any earned award term extensions by up to three years if the contractor’s performance results in a first degree performance failure under the clause of this contract entitled “Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.”

Bilateral changes may be made to the Award Term Plan at any time during contract performance. If the Government or the contractor desires to change the Award Term Plan and agreement cannot be reached, the Government may make unilateral changes before the start of an award term evaluation period.

The contractor is not entitled to any cancellation charges, termination costs, equitable adjustments, or any other compensation if its earning of award term extensions, or its right to perform earned award term extensions, or both, are cancelled due to any of the conditions stated above.
Before the start of any award term evaluation period, the Government may modify both: (1) the criteria the contractor must meet in order to earn award term extensions; and (2) conditions affecting the contractor's ability to earn award term or to perform under any earned award term extensions.

The contracting officer will at his or her sole discretion determine if the contractor has met: the criteria to earn award term; the conditions to earn award term; and the conditions to perform any award term earned.

Attachment B

SAMPLE AWARD TERM CLAUSE AWARD TERM INCENTIVE

(a) Definitions. For purposes of this clause:

(1) "Outstanding" means the highest rating available to the contractor under the performance evaluation process used to assess contractor performance against stated contract performance objectives. The term "outstanding" may be expressed using numbers, adjectives, or any other assessment approach deemed appropriate by the Government.

(2) "Satisfactory" means the rating available to the contractor under the performance evaluation process where the contractor has met the stated contract performance objectives. The term "satisfactory" may be expressed using numbers, adjectives, or any other assessment approach deemed appropriate by the Government.

(3) "Award Term Determination Official (ATDO)" means the Department of Energy official designated to determine whether the contractor has met contractual requirements to earn any award term extension during an evaluation period

(4) "Initial contract term," for purposes of this clause only, means the period of performance commencing on the date the contractor assumes full responsibility for a site pursuant to the provisions of Clause H XXXX through the end date specified in the initial contract period of performance.

(b) Eligibility for Award Term Extensions. In order for the contractor to earn a contract term extension pursuant to the award term incentive, the contactor must:

(1) Have been assessed by the ATDO to have achieved an annual average overall rating of "outstanding" for each performance evaluation period (except as provided in (2) below), and, meet contract performance objectives, standards, or criteria and other contract requirements applicable to earning additional award term, defined in the Performance Evaluation and Measurement Plan (or equivalent document), as determined by the ATDO.

(2) With respect to the evaluation periods for the first award term extension, the Contractor must achieve a minimal rating of satisfactory for the first and an overall rating of outstanding for each of the next two.

(c) Award Term Evaluation and Determination

(1) The Government may extend the initial contract term up to a total of twenty years through operation of this award term incentive clause. The evaluation periods for the first award term extension will be the first three performance evaluation periods of the initial contract term. Evaluations for subsequent award term extensions will be conducted annually.

(2) The ATDO will unilaterally determine if the contractor: (i) meets eligibility requirements to earn an award term extension; and (ii) has earned additional contract term.

(3) The amount of award term that may be earned by the contractor for performance during the first evaluation periods will not exceed 36 months. The amount of award term that may be earned by the contractor for each subsequent evaluation period is 12 months.

(4) If the ATDO determines that the contractor has earned additional award term, the contracting officer must modify the contract to extend the term of the contract before the contractor may begin work on the extended term.

(5) If the Contractor fails either (i) to earn the first award term extension, or (ii) to earn the award term during three consecutive evaluation periods, the contractor becomes ineligible to earn any additional award term extension(s) under the contract.

(6) If at the end of an evaluation period after the contractor has received credit for any earned award term extension, two or fewer years remain on the term of the contract: (i)the Government, at its sole discretion, may end the contract as early as the end of the remaining term of the contract or as late as two years from the end of the evaluation period; and (ii) the contractor must continue to perform up to the point in time decided by the Government in (i) above.

(d) Conditions.

(1) This clause does not confer any other rights to the Contractor other than the right to earn additional contract term as specified herein. Any additional contract term awarded under this clause remains subject to all other terms and conditions of this Contract. Should the terms of this clause conflict with any other terms of this Contract,

then this clause shall be subordinate.

(2) The contractor’s earning of and right to perform any award term extension are subject to:

  i. The Government’s continuing need for the contract’s work;

Chapter 70.1706-1 Acquisition Planning in the M&O Environment

Date: November 2016

References: [FAR Part 7 and Subpart 17.6; DEAR 970.1706; and Acquisition Playbook Section AP 7.1]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. The purpose of this chapter is to discuss the unique acquisition planning and approval requirements associated with the Management and Operating (M&O) form of contract.

1.1 Background

Subpart 17.6 of the Federal Acquisition Regulation (FAR) prescribes policies and procedures for the award, renewal, and extension of M&O contracts. Section 17.602-1 permits Heads of Agencies to award and renew M&O contracts in accordance with an agency's statutory authority or the Competition in Contracting Act of 1984 (CICA), and agency regulations governing such contracts.

Subpart 917.6 of the Department of Energy Acquisition Regulation (DEAR) implements the FAR by prescribing DOE’s policy regarding competition of M&O contracts. Section 917.602(b) affirms that DOE will provide for full and open competition in the award of contracts for the management and operation of its facilities and sites. Section 917.602 (c) permits the use of other than full and open competition for an extension to the term of an M&O contract, provided it can be justified in accordance with CICA and FAR Part 6, and the Head of Agency approves the justification.

Because of the significance of M&O contracts to the fulfillment of the Department's mission, there is a need to balance the benefits of competition with the benefits of relatively long-term contract relationships. DOE’s policies, as set forth in DEAR 917 and 970, accommodate both of these objectives by establishing competition as the norm and providing for a contract period of up to 10 years, including options, when the contract is awarded utilizing full and open competition. In addition, FAR 17.603 indicate that replacement of an incumbent contractor should usually be based largely upon expectation of meaningful improvement in performance or cost. Therefore, when reviewing contractor performance, contracting officers should consider:

- The incumbent contractor’s overall performance, including, specifically, technical, administrative, and cost performance;

- The potential impact of a change in contractors on program needs, including safety, national defense, and mobilization considerations; and
- Whether it is likely that qualified offerors will compete for the contract.

Under FAR 17.602-1, the Head of the Agency may authorize contracting officers to enter into or renew M&O contracts. FAR 17.603(b) requires contracting officers to review each M&O contract periodically, but at least every five years, to consider whether the M&O contract should be extended with the incumbent contractor or competed. The practical effect of these two requirements is the Agency Head's authorization to extend or compete an M&O contract and the contracting officer's review occur serially.

2.0 Acquisition Alternatives Package

Prior to finalizing the written acquisition plan required by FAR, the Secretary must decide whether to extend or compete an M&O contract. To inform this decision, programs must prepare an Acquisition Alternatives Package twenty-four months before contract expiration. The package consists of an action memo for the Secretary and the following attachments:

- A summary of acquisition alternatives which provides background, the statutory and regulatory basis for FFRDC and M&O contract decisions, a summary discussion of the continuing need for FFRDC designation (if applicable) and M&O form of contract, and a recommendation of whether to extend or compete the action supported by the analysis required by FAR 17.603(c);

- A discussion of the incumbent's performance history, including technical, administrative, and cost performance;

- A discussion of the potential impact of a change in contractors on program needs, including safety, national defense, and mobilization considerations impact of a change;

- A discussion of whether it is likely that qualified offerors will compete for the contract. In this discussion include any expressions of interest and the history of competition for the M&O contract;

- Brief description of programmatic objectives for the planned contract period, include negotiation objectives if a non-competitive extension is the recommended option;

- A thorough discussion of the acquisition alternatives, to include a reasoned consideration of whether the entire scope of work should be extended or competed as-is, or whether some aspects of the current effort should be extended while other areas (e.g. mission support functions) should be competed and contracted for separately. Include the recommended acquisition alternative and supporting rationale;

- An authorization to continue operating under an M&O contract for the Secretary to sign (See Attachments A, E and F);

- If applicable, an authorization to continue sponsorship of an FFRDC for the Secretary to sign (See Attachments C and D);

- If applicable, a review of the use and need for continued operation as an FFRDC in accordance with FAR 35.407; and

- If applicable, Congressional notification letters required by Section 995 of the Energy Policy Act (EPACT) of 2005

The contracting officer and the cognizant Program Secretarial Officer have the responsibility for developing and obtaining concurrences/approval of the acquisition alternatives package. Acquisition alternatives packages must be signed by the contracting officer, Field/Site Office Manager, Head of Contracting Activity, cognizant Program Secretarial Officer, and the cognizant Program Under Secretary. Concurrence must be obtained from MA, GC and CI (if congressional notification letters are required). Final approval rests with the Secretary.

3.0 Acquisition Plan

At DOE, the cognizant Assistant Secretary must concur in and the Senior Procurement Executive must approve any acquisition plan for an M&O contract. However, NNSA approvals will be in accordance with the most recent revision of NNSA Policy Letter BOP-003.0304. The acquisition plan must adhere to FAR 7.102 FAR Companion FC 7.104(c) Contents of acquisition plans, and the associated coverage of these requirements in the Acquisition Playbook Section AP 7.1, Acquisition Planning. In addition to the FAR and Acquisition Playbook guidance, the acquisition plan must include the following:

- A summary of the Acquisition Alternatives considered and the acquisition alternative approved by the Secretary.

- If extension was the acquisition alternative approved by the Secretary, summarize the rationale and justification for the non-competitive extension. The maximum length of the extension cannot exceed five years. Both the acquisition plan and the justification for other than full and open competition must provide clear evidence that: (1) the need to maintain a relationship with the incumbent contractor beyond the term of the contract justifies an exception to full and open competition; and (2) extending the contract is in the best interests of DOE, as justified by one of the seven statutory authorities listed in FAR 6.103 permitting contracting without providing for full and open competition.

- If the acquisition alternative approved by the Secretary is full and open competition, include the supporting rationale and include a discussion of how it is anticipated that competition will meet the Department's expectation of meaningful improvement in performance or cost.

Additionally, the acquisition plan must include:

- A description of the incumbent's performance history in areas such as program accomplishment, safety, health, environment, energy conservation, financial and business management and socio-economic programs, including measurable results against established performance measures and criteria. The detailed performance history included in the Acquisition Alternatives analysis package approved by the Secretary may be attached and referenced.

- Significant projects or other objectives planned for assignment during the planned contract period.

- A discussion of principal issues and/or significant changes to be negotiated in the terms and conditions of the planned contract, including the extent to which performance-based management provisions are present in the existing contract, will be incorporated into the new contract, or can be negotiated into the existing contract.

- A discussion of the potential impact of a change in contractors on program needs;

- A discussion of whether it is likely that qualified offerors would compete for the contract;

- Include the approved Authorization to Continue Operation of the Laboratory/Site/Facility Under a Management and Operating Contract as an attachment;

- Include the approved Approval to Continue Sponsorship of the Laboratory/Site/Facility as an attachment;

- Any other information pertinent to the decision.

The Acquisition Plan must be submitted for approval by the Senior Procurement Executive, through the cognizant Assistant Secretary and the Head of the Contracting Activity (HCA). The contracting officer and the cognizant Program Secretarial Officer have the responsibility for developing and obtaining concurrences/approval of the acquisition plan.

4.0 Justification for Other than Full and Open Competition

A justification for other than full and open competition (JOFOC) must be prepared when a non-competitive extension is contemplated, and must cite the most appropriate statutory authority listed in FAR 6.103. The JOFOC must be prepared in accordance with FAR Part 6. Include the JOFOC as an attachment to the acquisition plan. The HCA and the cognizant program Assistant Secretary(s) shall sign the JOFOC to indicate their concurrence. Refer to Acquisition Playbook, Section AP 6.102 for other required signatures.

Attachment A

AUTHORIZATION OF M&O FORM OF CONTRACT

To meet competition policy for M&O contracts, as set forth in DEAR 917.602, and preserve the benefits of long-term contract relationships, a class deviation to the requirement of FAR 17.603) that the Agency Head authorize the renewal and extension of a M&O contract in conjunction with, <u>and at the time of</u>, the contracting officer's review of the contract has been authorized by the Senior Procurement Executive. The essence of this deviation is to permit a revision to the timing of the Agency Head authorization for the renewal and extension of M&O contracts. Accordingly, the Head of Agency may authorize, prior to award of the contract, the use of the M&O form of contract for a period of up to ten years and permit extension of the contract with the incumbent contractor beyond the base term through the exercise of an option to extend the term of the contract. The length of the base term and any optional terms shall be in accordance with DEAR 970.1706-1. The Head of the Agency authorization to use the M&O form of contract and

permit a contract term of up to ten years is subject to the condition that, prior to the exercise of the option, the contracting officer complies with the review and approval requirements of DEAR 970.1706-1(b). Attachment B to this Acquisition Letter provides a copy of the deviation to FAR 17.603(b). Attachments E and F to this Acquisition Letter provide templates for Agency Head authorization of the M&O form of contract.
Where an extension using noncompetitive procedures pursuant to FAR is anticipated, the request to authorize the continued use of the M&O contract shall be submitted as part of the acquisition plan.

Attachment B

FINDINGS AND DETERMINATION CLASS DEVIATION TO THE FEDERAL ACQUISITION REGULATION

Findings

1. The Federal Acquisition Regulation (FAR), subpart 17.6, recognizes a special contract method known as management and operating contracting. FAR 17.601 defines management and operating contracts as contracts for the operation, maintenance, or support of Government-owned or Government-controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency. This subpart establishes requirements for entering into management and operating contracts and it provides procedures for extending or competing such contracts. Such contracts are to be used only by agencies with requisite statutory authority. The Department of Energy has authority for the use of such contracts based on the Atomic Energy Act, the Energy Reorganization Act of 1974, and the Department of Energy Organization Act.

2. The Department of Energy has Contract Reform Team Report concluded that the Department's policies and practices regarding the extension of its management and operating contracts needed to be revamped. The Contract Reform Team found that existing policies favored indefinite extensions of incumbent contractors and that in practice, few competitions for management and operating contracts were undertaken. Such policies and practices effectively precluded the introduction of new companies and best management practices into the Department's laboratory and weapons production complex. The Report also recognized the need to balance the benefits of a competitive environment with the recognition that long contract terms of up to 10 years can facilitate superior performance. Accordingly, the Contract Reform Report recommended that the Department institute a new policy that establishes competition as the norm, and that exceptions to competition be made only in exceptional circumstances.

3. Under current FAR policy, found at FAR 17.603, management and operating contractors should only be replaced when the Agency expects that such replacement might result in meaningful improvement in performance or costs. FAR 17.603(b) requires contracting officers to review each management and operating contract periodically, but at least every five years, to consider whether the management and operating contract should be renewed and extended with the incumbent contractor.

4. In accordance with FAR 17.602-1 and 17.603(b), a renewal and extension of a management and operating contract must be authorized by the Head of the Agency. Because management and operating contracts were usually extended with the incumbent contractor, rather than competed, the requirement for Agency Head authorization to renew and extend the contracts at intervals of no more than five years served to ensure control at the highest levels and prevent unbridled use of this unique contracting authority.

5. In order to institutionalize a policy that favors competition, yet preserves the benefits of long-term contract relationships, a class deviation to the requirement of FAR 17.603(b) that the Agency Head authorize the renewal and extension of a management and operating contract in conjunction with, <u>and at the time of</u>, the contracting officer's review of the contract is needed.

   The essence of this deviation is a revision to the timing of the Agency Head authorization for the renewal and extension of <u>competitively awarded</u> management and operating contracts. Under the Department's new policy that favors competition, the Head of Agency would authorize the use of the management and operating contract for a period of up to ten years and permit extension of the contract with the incumbent contractor beyond an initial 5 year contract.

   The requirement of FAR 17.603(b) that the contracting officer periodically review the management and operating contract would be preserved and would occur at the time the contracting officer performs and assessment as to whether competing the contract would produce a more advantageous offer than the exercise of the option. The contracting officer's decision to exercise of the option would be subject to the approval of the Head of the Contracting Activity and the cognizant program Assistant Secretary(s) or equivalent, thus ensuring high-level authorization of the action.

6. Management and operating contracts awarded and extended on a noncompetitive basis would require justification and reauthorization by the Agency Head at such time as the need to renew and extend the contract is determined, that is, at intervals of no more than 5 years. Authority for such extensions will be accomplished using new, more stringent procedures implemented on an interim basis through a Department of Energy Acquisition Letter. The issuance of Acquisition Letters is authorized by Subpart 901.301-70 of the Department of Energy Acquisition Regulation.

7. This is a class deviation which affects all management and operating contracts.

8. Such a deviation has not been requested before.

9. It is intended that the revised extend/compete policy will establish competition as the norm and encourage higher quality contractor performance by linking contract extensions more directly to performance.

10. It is intended that this deviation will remain in effect until such time as the DEAR is amended to reflect the contract reform initiatives.

Determination

1. Based upon the above findings, I hereby determine that it is reasonable and prudent that:

   a. the Head of the Agency authorize the use of the management and operating contract for a period of up to ten years when the initial contract is awarded competitively and permit extension of the contract with the incumbent contractor beyond an initial 5-year contract term through the exercise of an option period of no longer than 5 years.

   b. the Head of the Contracting Activity and cognizant program Assistant Secretary(s) approve the contracting officer's decision to exercise an option to extend a competitively- awarded management and operating contract, provided that the Head of the Agency previously has authorized use of that form of contract beyond the basic contract period.

2. Therefore, in accordance with the authority vested in me by 48 CFR 901.404, Class deviations, I hereby grant a deviation, on a class basis, to the requirements of FAR 17.603(b) with respect to determinations to extend or compete performance based management contracts.

____
Procurement Executive
Department of Energy

Concurrence:

____
Deputy General Counsel
For Technology Transfer And Procurement

Attachment C

FFRDC Determination for a Contract Competition
APPROVAL TO CONTINUE SPONSORSHIP OF THE_[insert the name of the laboratory/site/facility] AS A FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER

The _[insert the name of the laboratory/site/facility]_ is a Department of Energy (DOE) Federally Funded Research and Development Center (FFRDC) managed and operated by _[insert the name of the contractor]_ under DOE Contract _[insert contract number]_. The current contract, which serves as the sponsoring agreement, expires [insert date]. _[insert one or two sentences briefly describing the laboratory/site/facility mission]_. Federal Acquisition Regulation (FAR) 35.407 provides for the Head of the sponsoring Agency to approve the continuance of the sponsorship of the FFRDC.

A new sponsoring agreement is currently being procured by the DOE _[insert DOE office name]_, under Request for Proposals (RFP) number _[insert RFP number]_. The resultant contract from this competitive RFP will include a base period of _[insert number of years]_ years with a _[option or award term][select appropriate clause] clause that allows the contract to be extended for up to an additional _[insert number of years]_ years. It is anticipated that the new contract will be in place by _[insert date]_.

As Head of the Agency, as defined in FAR 2.101, I hereby determine, pursuant to FAR 35.407, that: (1) the technical needs and mission requirements performed by the FFRDC continue to exist at a level consistent with current needs; (2) consideration has been given to alternative sources in meeting DOE's needs; (3) in accordance with current annual assessments of the FFRDC's performance, the FFRDC continues to maintain a high level of performance in meeting the sponsor's needs; (4) the FFRDC has maintained an adequate and cost-effective operation; and (5) the criteria for establishing the FFRDC continue to be satisfied and the sponsoring agreement is in compliance with FAR 35.4. Accordingly, I approve the continued operation of _[insert the name of the laboratory/site/facility]_ as a DOE FFRDC for a five year period that will be effective on the date of the new contract award. [Note - The term of a FFRDC cannot exceed 5 years]

____
[insert the Secretary of Energy's name]
Date Secretary of Energy

Attachment D

FFRDC Determination for a Contract Extension

APPROVAL TO CONTINUE SPONSORSHIP OF THE_[insert the name of the laboratory/site/facility]__AS A FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER

The _[insert the name of the laboratory/site/facility]_ is a Department of Energy (DOE) Federally Funded Research and Development Center (FFRDC) managed and operated by _[insert the name of the contractor]_ under DOE Contract _[insert contract number]_. This contract, which serves as the sponsoring agreement, expires on [insert date]. A non-competitive contract extension is currently being pursued in accordance with FAR 6.103. _[In one or two sentences, briefly describe the laboratory/site/facility mission]_. Federal Acquisition Regulation (FAR) 35.407 provides for the Head of the sponsoring Agency to approve the continuance of the sponsorship of the FFRDC.

As Head of the Agency, as defined in FAR 2.101, I hereby determine, pursuant to FAR 35.407, that: (1) the technical needs and mission requirements performed by the FFRDC continue to exist at a level consistent with current needs; (2) consideration has been given to alternative sources in meeting DOE's needs; (3) in accordance with current annual assessments of the FFRDC's performance, the FFRDC continues to maintain a high level of performance in meeting the sponsor's needs; (4) the FFRDC has maintained an adequate and cost-effective operation; and (5) the criteria for establishing the FFRDC continue to be satisfied and the sponsoring agreement is in compliance with FAR 35.4. Accordingly, I approve the continued operation of _[insert the name of the laboratory/site/facility]_ as a DOE FFRDC for the period _[insert the starting date]_ through _[insert the end date]_. [Note – The term of a FFRDC cannot exceed 5 years]

____
[insert the Secretary of Energy's name]
Date Secretary of Energy

Attachment E

[M&O Authorization for a Contract Competition]

AUTHORIZATION TO CONTINUE OPERATION OF THE _[insert the name of the laboratory/site/facility]__UNDER A MANAGEMENT AND OPERATING CONTRACT

The _[insert the name of the laboratory/site/facility]_ is currently managed and operated by _[insert the name of the contractor]_ for the Department of Energy under a Management and Operating (M&O) contract as defined in Federal Acquisition Regulation (FAR) Subpart 17.6. The current contract and the determination authorizing the M&O form of contract expire on _[insert the expiration date]_. _[In one or two sentences, briefly describe the laboratory/site/facility mission]_.

A new contract is currently being procured by the DOE _[insert DOE office name]_, under Request for Proposals (RFP) number _[insert RFP number]_. The resultant contract from this competitive RFP will include a base period of _[insert number of years]_ years with a _[option or award term]*[select appropriate clause]* clause that allows the contract to be extended for up to an additional _[insert number of years]_ years. It is anticipated that the new contract will be in place by _[insert date]_.

The continued operation of _[insert the name of the laboratory/site/facility]_ will require the type of contractual arrangement that, by both its purpose and special relationship it creates between the government and the contractor, is characterized as an M&O contract as defined in FAR 17.601. As set forth in FAR 17.602-1, the Head of an Agency may determine in writing to authorize contracting officers to enter into, or renew, M&O contracts in accordance with the agency's statutory authority, or the Competition in Contracting Act of 1984, and the agency's regulations governing such contracts.

As Head of the Agency, as defined in FAR 2.101, I hereby authorize the continued use of a management and operating contract arrangement for the operation of _[insert the name of the laboratory/site/facility]__during the period of _[insert the starting date] through _[insert the end date].

[Note: In accordance with DEAR 970.1706-1, the total term of an M&O contract cannot exceed ten (10) years.]

____
[insert the Secretary of Energy's name]
Date Secretary of Energy

Attachment F

[M&O Authorization for a Non-competitive Extension]

AUTHORIZATION TO CONTINUE OPERATION OF THE [insert the name of the laboratory/site/facility] UNDER A MANAGEMENT AND OPERATING CONTRACT

The [insert the name of the laboratory/site/facility] is currently managed and operated by [insert the name of the contractor] for the Department of Energy under DOE contract [insert contract number]. This contract is a Management and Operating (M&O) contract as defined in Federal Acquisition Regulation (FAR) Subpart 17.6. The current contract and the determination authorizing the M&O form of contract expire on [insert the expiration date]. A non-competitive extension is currently being pursued in accordance with FAR 6.301. [In one or two sentences, briefly describe the laboratory/site/facility mission].

The continued operation of [insert the name of the laboratory/site/facility] will require the type of contractual arrangement that, by both its purpose and special relationship it creates between the government and the contractor, is characterized as an M&O contract as defined in FAR 17.601. As set forth in FAR 17.602-1, the Head of an Agency may determine in writing to authorize contracting officers to enter into, or renew, M&O contracts in accordance with the agency's statutory authority, or the Competition in Contracting Act of 1984, and the agency's regulations governing such contracts.

As Head of the Agency, as defined in FAR 2.101, I hereby authorize the continued use of a management and operating contract arrangement for the operation of [insert the name of the laboratory/site/facility] during the period of [insert the starting date] through [insert the end date].

____
[insert the Secretary of Energy's name]
Date Secretary of Energy

Chapter 70.1707-1 Responding to Solicitations Under DOE's Strategic Partnership Project (SPP) Agreements

Date: April 2018

References: [FAR 17.5, FAR 35.102, FAR 35.47, DEAR 970.1707, DEAR 970.5217-1, and DOE Order 481.1D]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and polices contained in the references above and should be considered in the context of those references. Additional information on this subject can be found in documents listed in the Authorities section below.

1.1 Overview.

This chapter provides guidance on the Department's policy related to DOE's laboratories ability to respond to solicitations from non-DOE sponsors using SPP Agreements. This chapter addresses the effect of laws, regulations, and statutes to DOE/NNSA SPP policy related to the prohibition of DOE Federally Funded Research and Development Centers (FFRDCs) and other facilities from competing directly with the domestic private sector. Particular emphasis is placed on SPP requirements governing how a DOE/NNSA site/facility management contractor operating an FFRDC or other DOE/NNSA facility may respond to Broad Agency Announcements (BAAs), financial assistance solicitations, Program Research and Development Announcements, and similar solicitations from other Federal agencies or non-Federal entities that do not result in head-to-head competition. Additional guidance is provided regarding DOE's SPP policy related to participation in and responding to Requests for Proposals. This guidance does not apply to DOE issued solicitations.

1.2 Applicability.

This guidance applies to all DOE sponsored facilities performing SPP activities. Given the complicated nature of this issue and the variety and number of potential sponsors of work, updates to this chapter will occur. DOE recognizes that while alternative terms may be used for agency specific solicitations, based on their characteristics, the solicitations fall into two categories discussed below: RFP-type or BAA-like. The following background and analysis of the regulations and their effect on DOE policy does not add additional requirements or reviews beyond those contained in DOE Order 481.1C.

1.3 Background.

DOE's National Laboratories and facilities have used their unique scientific and technical expertise to perform research and development (R&D) or applied engineering work for organizations other than DOE since the enactment of the Atomic Energy Act of 1954 (AEA). A large portion of this work is currently conducted using SPP agreements. DOE defines SPP work as the performance of work for non-DOE entities by DOE personnel and/or their respective contractor personnel or the use of DOE facilities for work that is not directly funded by DOE appropriations. DOE Order 481 .1D, "Strategic Partnership Projects [Formerly known as Work for Others (NON-DEPARTMENT OF ENERGY WORK)]" provides DOE policy for the performance of SPP. The intent of the order is to ensure compliance with laws, regulations, and statutes, including restrictions pertaining to DOE facilities competing with the private sector. DOE considers Comptroller General Decisions to inform its interpretation of federal regulations and its development of policy requirements.

Under SPP policy, DOE authorizes use of its contractor and facility resources to non-DOE sources only when such resources do not place the facility in direct competition with the private sector. Reciprocal benefits include providing support for developing and maintaining competencies important to the achievement of DOE's mission work. Although the vast majority of DOE's SPP agreements support of Other Federal Agencies (OFAs) mission work, DOE also performs work for the private sector, academia, and state, local and foreign governments.

SPP agreements are important to the vitality of the DOE, DOE's National Laboratories and DOE's other facilities. To preserve the option of performing SPP, the department must ensure that its policies and procedures ensure compliance with statutory and regulatory guidance. Foremost among these is the requirement to avoid situations where DOE's FFRDCs are engaged in practices that place these facilities in direct competition with the private sector. Below and in section 1.4.6 is discussion of the relevant laws, regulations and statutes that demonstrate the intent of authorizing access to DOE facilities for performance of work is predicated on the work not being able to be performed by the private sector.

1.4 Authority.

DOE FFRDCs and other DOE major facility contractors primarily perform work for other Federal agencies under the authority provided in Sections 31, 32, and 33 of the Atomic Energy Act (AEA) of 1954, (Pub. L. No. 83-303), as amended, (42 U.S.C. § 2011 *et seq.*) 42 U.S.C. § 2053 states:

> § 2053. Research for others; charges
>
> Where the Commission [formerly the Atomic Energy Commission, now DOE] finds private facilities or laboratories are inadequate for the purpose, it is authorized to conduct for other persons, through its own facilities, such of those activities and studies of the types specified in section 31 [42 U.S.C. § 2051] as it deems appropriate to the development of energy. To the extent the Commission determines that private facilities or laboratories are inadequate to the purpose, and that the Commission's facilities, or scientific or technical resources have the potential of lending significant assistance to other persons in the fields of protection of public health and safety, the Commission may also assist other persons in these fields by conducting for such persons, through the Commission's own facilities, research and development or training activities and studies. The Commission is authorized to determine and make such charges as in its discretion may be desirable for the conduct of the activities and studies referred to in this section.

1.4.1 Facility Contract Authorization. Under this authority, the DEAR 970.5217-1 "Work for Others (since renamed SPP) clause authorizes the performance of work for non-DOE entities by DOE management and operating contractors and establishes specific conditions under which this work can be approved and performed, including but not limited to a prohibition against direct competition with the domestic private sector. This clause in the laboratory contract satisfies the condition in FAR 17.503(e) that an FFRDC may only accept work from other federal agencies if the terms of the FFRDC's sponsoring agreement permit it; for DOE FFRDCs, the contract is the document that is the sponsoring agreement. *See also* FAR 35.402. Although the AEA is the most common authority for DOE to perform work for non-DOE activities, other more agency-specific statutory authorizations have been passed by Congress. The Energy Reorganization Act (ERA) and the Homeland Security Act (HSA) establish similar yet significantly different relationships between DOE and the Nuclear Regulatory Commission (NRC) and the Department of Homeland Security (DHS) respectively. These statutes specifically broaden DOE's authority to engage with specific agencies under DOE's SPP (but. do not relax the FAR prohibition on FFRDCs head to head competition with the private sector). For example, section 309(a)(2) of the HSA states:

1.4.2 Department of Homeland Security ACCEPTANCE AND PERFORMANCE BY LABS AND SITES.—Notwithstanding any other law governing the administration, mission, use or operations of any of the Department of Energy national laboratories and sites, such laboratories and sites are authorized to accept and perform work for the Secretary [of DHS] consistent with resources provided, and perform such work on an equal basis to other missions at the laboratory and not on a noninterference basis with other missions of such laboratory or site.

This provision of the HSA effectively elevates the core mission of DHS, concerning, national security, over any other policy concern including any unfair competitive advantage DOE's labs and sites may have over the private sector when DHS requests and places work directly with DOE . It does not permit DOE to respond to competitive solicitations issued by DHS under an RFP. DOE promulgated DOE O 484.1, "Reimbursable Work for the Department of Homeland Security," to establish DOE policies and procedures for the acceptance, performance, and administration of reimbursable work directly funded by the Department of Homeland Security to specifically address the broader parameters for acceptance and performance of DHS work. This example illustrates, however, that absent such specific statutory to authorize work for a particular agency under other circumstances, the general authority established by the AEA as implemented by the FAR and the DEAR is controlling.

The Economy Act of 1932, as amended, (31 U.S.C. § 1535) authorizes agencies to enter into agreements to obtain supplies or services by interagency acquisition. The Economy Act applies when more specific statutory authority does not exist. FAR Part 17.5, "Interagency Acquisitions" prescribes policies and procedures applicable to all interagency acquisitions under any authority except orders of $750k or less issued against Federal Supply Schedules. FAR 17.503(e) requires that "The nonsponsoring agency must provide documentation to the sponsoring agency showing that the requested work would not place the FFRDC in direct competition with domestic private industry.."

1.4.3 Non-competition Restrictions. Authorities used by DOE and other federal agencies to enter into Inter-agency Agreements (IA's) establish specific conditions on the performance of such work. A primary consideration is that the work will not place DOE facilities in direct competition with the domestic private sector. Absent an authorization like that provided to DHS for directly funded work, the FAR competition restrictions (identified below) would apply in all agency to agency agreements. This is because DOE facilities have significant advantages over other potential offerors, concerning the use of government funded facilities and technologies; reimbursement of most if not all operational costs; and indemnification from most operational liabilities. These advantages effectively remove any possibility of fair and open competition with equally qualified offerors on a level playing field. The DOE applies FFRDC competition restrictions to all non-DOE funded work.

Federal Acquisition Regulation:

The use of FFRDCs is governed by FAR Part 17, "Special Contracting Methods" and Part 35 "Research and Development Contracting."

The FAR addresses competition and FFRDCs at FAR 17.503(e), 35.017, 35.016.

FAR 17.503 (e) provides that … "The nonsponsoring agency must provide documentation to the sponsoring agency showing that the requested work would not place the FFRDC in direct competition with domestic private industry."

FAR 35 401(d)) provides that … "FFRDCs must not use their privileged access to information or facilities to compete with the private sector. However, an FFRDC may perform work for agencies other than its sponsor under the Economy Act or other applicable laws when the work is not otherwise available from the private sector..”

FAR 35.403 (b)(4) provides “A prohibition preventing the FFRDC from competing with non-FFRDCs for Federal contracts except for FFRDC operations. This restriction does not apply to the FFRDC’s parent organization or other subsidiaries in their non-FFRDC activities. The FFRDC may respond to requests for information, qualifications or capabilities unless restricted by the Sponsor.”

FAR 35.102(e) and (f) state, “Proposals should be selected based on— (1) Technical merit; (2) Importance to agency programs; and (3) Availability of funds. Contracting officers must consider cost realism and reasonableness to the extent appropriate.”

These FAR provisions further emphasize and in most cases specifically prohibit FFRDCs from directly competing with the private sector. However, it is worth noting that BAA definitions and the procedures by which solicitations are considered and awarded are discussed independently in FAR 35.102. This is in agreement with DOE’s policy that a DOE/NNSA site/facility management contractor operating an FFRDC or other DOE/NNSA facility may respond to Broad Agency Announcements, financial assistance solicitations, Program Research and Development Announcements, and similar solicitations from other Federal agencies or non-Federal entities that do not result in head-to-head competition, subject to the following requirements:

1. the solicitation must be a general research announcement used for the acquisition of basic or applied research to further advance scientific knowledge or understanding rather than focus on a specific system or hardware solution;
2. evaluation and selection is performed through a merit or peer review process using pre-established general selection criteria;
3. the primary basis for selection is technical approach, importance to the Agency, and funds availability.

1.4.4 GAO Decisions. The following GAO decisions illustrate positions on both FFRDC prohibition from direct competition with the private sector and the potential for BAA and BAA-like response opportunity.

General Accounting Office (GAO) decision, Logicon RDA, B-27624019, (1997 U.S. Comp. Gen. LEXIS 214), held that the FAR prohibition on FFRDC competition with the private sector applies equally be it at the prime contractor or subcontractor level. The Comptroller General pointed out that a FFRDC may violate the FAR prohibition of competing with the private sector by responding to an agency RFP because the prohibition in FAR 35.403(b) (4) makes no distinction between an FFRDC’s role as a prime contractor or subcontractor. The Comptroller General’s decision concludes that, "the determination [of] whether an FFRDC is competing with a private firm in violation of the regulation depends upon the impact of its participation on the procurement, from both a technical and cost standpoint." Energy Compression Research Corp., B-243650.2, November 18, 1991, 91-2 CPD ¶ 466 at 5 (1991 U.S. Comp. Gen. LEXIS 1325). Thus DOE ‘s policy aligns with GAO’s position that to the extent that proposed FFRDC’s participation impacts the outcome of the selection, the FFRDC's participation places it in position of competing head to head with the domestic private sector.

Appropriately used, the BAA process solicits for a variety of diverse responses that present dissimilar "best science solutions" to more broadly defined technical challenges. In contrast, the RFP process establishes government requirements for a specific statement of work that anticipates multiple responses proposing similar solutions within well defined cost parameters. The differences become clearer in the review and award processes. The BAA evaluation process is by peer review, using more broadly defined selection criteria, that does not anticipate proposal comparison and does not place cost as a primary consideration. The opposite is true for the RFP process. The RFP evaluation process anticipates multiple responses from firms capable of performing the work using similar approaches to provide very specific sponsor-defined deliverables. The FAR requires head to head comparisons of offers and, with the exception of Brooks Act architect-engineering contracts, using costs as a significant factor in the award decision. See FAR 15.205; 41 U.S.C. § 3306(c)(1)(B).

Because they are distinct mechanisms with different purposes, responses to a BAA, either directly or as a subcontractor, should not be constrained by the restrictions placed on evaluations of RFPs by the FAR. The characteristics of a BAA and the process for evaluating them are different from RFPs. FAR 35.102 defines these differences. They are: 1) BAAs are general research announcements that are used for the acquisition of basic and applied research ideas to further advance scientific knowledge or understanding rather than focusing on a specific system or hardware solution; 2) evaluations and selections are performed through a peer or scientific review process based on pre-established selection criteria and proposals need not be evaluated against one another (head-to-head competition) because they are not submitted in accordance with a common work statement.; and 3) the primary basis for selection is technical approach, importance to the agency, and funds availability.

Our opinion is supported by the Comptroller General in its decision in Centre Manufacturing Co. Inc., B-255347.2, March 2, 1994, 94-1 CPD ¶ 162 (1994 U.S. Comp. Gen. LEXIS 161). The Comptroller General stated that,

A BAA is a contracting method by which government agencies can acquire basic and applied research. BAAs may be used by agencies to fulfill requirements for scientific study and experimentation directed toward advancing the state of the art or increasing knowledge or understanding rather than focusing on a specific system or hardware solution. Unlike sealed bidding and other negotiated procurement methods, a BAA does not contain a specific statement of work and no formal solicitation is issued. Under a BAA, the agency identifies a broad area of interest within which research may benefit the government, and organizations are then invited to submit their ideas within a specified period of time. The firms that submit proposals are not competing against each other but rather are attempting to demonstrate that their proposed research meets the agency's requirement.

Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229 (1991 U.S. Comp. Gen. LEXIS 1017)

DOE's policy permitting responses to BAA and BAA-like solicitations will continue contingent on satisfying SPP policy and procedural requirements set forth in DOE Order 481.1D. Specific requirements include: Federal agencies must provide a written statement that placement of the work with DOE will not place DOE in direct competition with the private sector, and a written certification must be made by the approving DOE contracting officer or a DOE official to whom such authority has been delegated that the proposed work is not in direct competition with the private sector.

1.4.5 DOE RFP/RFP-type and BAA/BAA-like Solicitation responses under SPP. The department remains committed to preserving its ability to perform work for non-DOE entities. DOE must strive to comply with both specific requirements and the overall intent of non-competition restrictions placed on FFRDCs. These guidelines are intended to address the FFRDC competition restrictions as they relate to other agency solicitations and DOE's ability to respond to the solicitations using SPP agreements. Despite our best efforts the complexities of this issue can be expected to present new challenges from the departmental to the individual agreement level. Implementation of the guidance requires practitioners to use sound business judgment and common sense approaches. For purpose of implementation, the following will apply to responses to solicitations issued by any non-DOE entity. DOE SPP policy and requirements beyond those listed below will continue to apply as well.

- DOE and its contractors may provide facility capability statements or other communication to requesting organizations, at any time however, such information shall not be represented as available or included in a RFP response.

- Following completion of a competitive solicitation process, an awardee may enter into a SPP agreement with the DOE and its contractors. As stated above, the awardee must compete for award absent DOE and contactor participation. Only at the conclusion of the competitive process may an independent agreement under SPP be entered into between DOE and the sponsor.

- Federal agencies use numerous names for competitive and non-competitive solicitations/announcements including Financial Assistance, Program Research and Development, Funding Opportunities, and Research Funding. Using the FAR, most can be defined as having the characteristics of either a RFP or BAA. Agency specific names for solicitations and inconsistent use of the terms RFP and BAA can raise questions if a response is permissible under current DOE SPP policy. Therefore the agency provided name of the solicitation shall not by itself control if a response by a DOE contractor is appropriate.
- Solicitation characteristics for RFPs and BAAs shall be the first determinant for permissibility of response. Specific attention should be paid to the intent and process by which a solicitation is issued and selections are made. Responses to non-DOE RFPs or other solicitations that involve head-to-head competition as an offeror team member, or subcontractor to an offeror are not permitted.

- Discussions with the issuing agency may be held to determine if the solicitation meets DOE's SPP BAA or RFP requirements and to clarify if FFRDC responses were anticipated and would be considered.

Written certification must be made by the approving DOE contracting officer or a DOE official to whom such authority has been delegated that the proposed work is not in direct competition with the domestic private sector.

Broad Agency Announcements (BAA) and BAA-like instruments:

DOE and its contractors may respond to BAA or a BAA-like instrument as defined above as either an offeror, team member or as a proposed subcontractor subject to the following:

- BAA-like instruments are defined by the characteristics above and those described in FAR 35.102.

- Contractors will provide a written notification to the Cognizant Site Office prior to responding to a BAA (Site Offices and the Contractor can mutually agree to alternative notification timing if prior notification inhibits timely responses).

- Response must propose the use of technologies, services, etc., otherwise unavailable in the private sector.

- Responses must include notification that performance of the work is contingent on DOE approval.

- When providing an award to DOE and its contractors, Federal agency BAA sponsors shall provide a written statement that, to the best of the agency's knowledge, the work will not place DOE and their contractors in direct competition with the domestic private sector.

- Non-Federal BAA-like sponsors are not required to provide a non-competition statement under DOE 481.1C however; the DOE and contractor will apply noncompetitive restrictions (including making a non-competition determination) to all BAA and BAA-like responses.

DOE or its contractor may seek clarity if the agency will accept a response from a FFRDC, prior to responding.

<u>Request for Proposals RFP and RFP-type instruments</u>

The DOE and a federal or non-federal sponsor may enter into a SPP agreement prior to the non-DOE sponsor issuing a RFP or RFP-type solicitation. The purpose of the SPP agreement would be to include the scope of work negotiated in the SPP agreement into the subsequently issued non-DOE RFP or RFP-type solicitation as sponsor provided services. The SPP activity must be clearly identified in the RFP as sponsor provided services.

DOE and its contractors may not respond to other federal agency RFPs as offerors, team members, or subcontractors in the RFP submission and selection process.

DOE and its contractors may not respond to RFP-type solicitations by non-Federal sponsors as offerors, team members, or subcontractors where the DOE facility is placed in direct competition with the private sector.

RFP-type solicitations are defined by RFP characteristics described above.

1.4.6 <u>Additional Authorities</u>. Economy Act of 1932, as amended (31 U.S.C. § 1535), which authorizes an agency to place order for goods and services, subject to availability, with another government agency when the head of the ordering agency determines that it is in the best interest of the government to do so.

Atomic Energy Act of 1954,(Pub. L. No. 83-303), sections 31, 32, 33, as amended, (42 U.S.C § 2011 et seq.), which authorizes the conduct of research and development and certain training activities for non DOE/non-NNSA entities, provided that private facilities or laboratories are inadequate for that purpose.

The Energy Reorganization Act (ERA) of 1974 (Pub.L. No. 93-438), section 205, (42 U.S.C. § 5845), which requires Federal agencies to furnish to the NRC, on a reimbursable basis, such research services as the NRC deems necessary and requests for the performance of its function.

Homeland Security Act of 2002 (HSA) (Pub. L. No. 107-296), section 309(a) (2), (6 U.S.C. § 189), which authorizes any of DOE national laboratories and sites to accept and perform work for the Secretary of Homeland Security, consistent with resources provided, and perform such work on an equal basis to other missions at the laboratory and not on a noninterference basis with other missions of such laboratory or site.

FAR 17.5, “Interagency Acquisitions ,” which prescribes policies and procedures for a Federal agency to obtain supplies or services from another Federal agency.

FAR 35.102, “Broad Agency Announcement” which prescribes procedures for the use of the broad agency announcement with Peer or Scientific review (see FAR 6.101(b)(3)) for the acquisition of basic or applied research and that part of development not related to the development of a specific system or hardware procurement.

FAR 354, “Federally Funded Research and Development Centers ,” which establishes Government-wide policies for the review and termination of FFRDCs and related sponsoring agreements.

Department of Energy Acquisition Regulation (DEAR) 970.1707 and 970.5217-1, “Work for Others,” was renamed SPP. The standard clause at 970.5217-1 authorizes the performance of work for non-DOE entities by DOE management and operating contractors and establishes specific conditions under which this work can be approved and performed, including but not limited to a prohibition against direct competition with the domestic private sector.

DOE Order 481.1D, STRATEGIC PARTNERSHIP PROJECTS [FORMERLY KNOWN AS WORK FOR OTHERS (NON DEPARTMENT OF ENERGY FUNDED WORK)] establishes policies and procedures for the performance of non-DOE work states, “A contractor may not respond to Requests for Proposals (RFPs) or other solicitations from another Federal agency or non-federal entity that involves head-to-head competition as an offeror team member, or subcontractor to an offeror.”

Chapter 70.1707-2 DOE Strategic Partnership Projects and Cooperative Research and Development Agreements Using a Master Scope of Work

Date: March 2019

References: [DOE SPP Order 481.1E, 48 C.F.R. § 970.2770, 48 C.F.R. § 970.5227-3, Sections 31, 32, 33 of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2051-2053), 15 U.S.C. § 3710a, DOE CRADA Order 483.1B]

1.0 Discussion

1.1 Background.

Consistent with applicable DOE/NNSA authorities and policies, DOE/NNSA makes its resources available to non-DOE/non-NNSA entities through a number of contractual mechanisms including Strategic Partnership Projects (SPP) and Cooperative Research and Development Agreements (CRADA). While these mechanisms have been generally successful in allowing outside entities to engage with contractors, some SPPs and CRADAs are routine work that would benefit from a streamlined process for approval. For routine work funded by non-Federal sponsors, DOE/NNSA has authorized the use of a Master Scope of Work (MSW) to speed the start of performance for these types of projects and limit required DOE/NNSA transactional approvals. SPPs are authorized for use under M&O contracts by the clause at 48 C.F.R. § 970.5217-1 and implemented in accordance with the current version of DOE Order 481.1, while CRADAs are authorized, in part, by the clause at 48 C.F.R. § 970.5227- 3 and implemented in accordance with the current version of DOE Order 483.1.

1.2 Overview.

1.2.1 This chapter provides guidance and procedures to: (1) create and approve an MSW; and (2) use and administer the approved MSW to process individual non- Federal SPPs and CRADAs.

1.2.2 Master Scope of Work

1.2.2.1 The MSW is a detailed description of a routine scope of work (encompassing one or more projects) containing information sufficient to: (1) ensure that the contractor and the cognizant contracting officer have a common understanding of the work to be performed; and (2) allow DOE to make all reviews, approvals, determinations, and certifications required pursuant to relevant DOE Orders and policy.

1.2.2.2 Routine work is work that is typical or customary at a particular facility which can be described in sufficient detail for the contracting officer and the contractor to agree to the scope of work. The contracting officer approval of the MSW (and the requisite determinations and certifications) will be applied to the individual projects that fall within the approved MSW. MSWs may cover multiple SPP or CRADA transactions, possibly from more than one non- Federal sponsor. In addition, more than one MSW may be approved under a contract. The contracting officer has substantial discretion in determining what constitutes a routine scope of work.

2.0 Guidance

Although DOE/NNSA has authorized the use of MSWs for certain routine work for non- Federal sponsors, developing and using an MSW is at the contracting officer’s discretion. The MSW is intended to provide the contracting officer with the Contractor assurances necessary to apply the contracting officer’s approval of the MSW as a whole to individual SPP or CRADA projects falling under the MSW and to ensure contract management responsibilities are met. The MSW may be implemented only if the contracting officer and the contractor agree to the MSW in writing. An MSW must reflect current mission priorities of the facility's cognizant DOE/NNSA headquarters program office.

The MSW process must never be authorized or utilized for any type of classified or other work requiring classification guidance.

The MSW process must address removal of an individual transaction from the MSW process when the transaction requires additional approvals as described in 3.1.2.5. The transaction, with the contracting officer's approval, may be completed using the MSW process after the required approvals are secured.

2.1 MSW Minimum Requirements.

The contracting officer must ensure that the MSW satisfies the minimum requirements set forth herein. To utilize the MSW process, the contracting officer must review and approve the contractor proposed MSW procedures and each MSW that clearly defines the routine work to be performed. The contractor MSW procedures must address how the contractor will develop and obtain approval for an MSW and the process and requirements for individual projects executed under an approved MSW. The following minimum requirements must be satisfied:

2.1.1 Mandatory/Optional Requirements for each MSW

2.1.1.1 Mandatory MSW Criteria

- Routine Scope of Work. The routine scope of work must be clearly identified and may cover multiple projects for one or more sponsors. As an example, a contractor may propose a MSW for dosimetry services, and once approved by the contracting officer, multiple projects related to these services may be processed under the MSW.

- Agreements to be Used. Any contracting officer approved agreement terms and conditions, including any contracting officer approved local model agreements, proposed for use in connection with each MSW.

- Prohibited Work. Any type of classified or other work requiring classification guidance is not permitted.
- Approval Process. Process for obtaining: (1) Contracting officer approval of a MSW; and (2) cognizant Secretarial Office approval of the first negotiated MSW.

2.1.1.2 Optional MSW Criteria

- Funding Limits. The MSW may include a total funding limit for the MSW or a funding limit for individual projects under the MSW to ensure that DOE/NNSA mission work is not adversely impacted. If a funding limit is reached, the contracting officer and contractor must mutually agree to increase the limit.

- Period of Performance Limit. The MSW may include a period of performance limit for individual projects. If a new project is proposed in excess of the MSW period of performance limit, or an existing project is proposed for extension resulting in the project exceeding the MSW performance limit, the contracting officer and contractor must mutually agree to the proposed period of performance.

- Other Content. The contractor and contracting officer may include other agreed upon criteria or conditions that are consistent with this guidance and DOE policy.

2.1.1.3 Reauthorization. Procedures for the contracting officer to annually review, reauthorize and, if needed, update each MSW.

2.1.2 Procedures for Individual Project approval under an MSW

2.1.2.1 Contractor Determination. Procedures for the contractor to determine and provide to the contracting officer its written determination that a specific project falls within the boundaries of the MSW.

2.1.2.2 High Risk Criteria for Individual Projects (i.e., filters). The contracting officer and contractor must identify in the written procedures any requirements that need to be met for a project to be eligible for processing under an MSW in order to screen out potentially high risk transactions. Minimum criteria must include that the proposed project:

- Uses standard or otherwise contracting officer pre-approved terms and conditions or approved model agreements;

- Presents no conflict of interest concerns that are unmitigable under the procedures established pursuant to 48 C.F.R. § 970.5227-3(d); and

- Is not subject to DOE P 485.1, *Foreign Engagements with DOE National Laboratories*.

2.1.2.3 Re-Determination Upon Significant Change in Scope. Procedures for the contractor to determine if there has been a significant change in scope for an individual project that requires a review of the project and, if so, a written determination regarding whether it remains within the boundaries of the MSW.

2.1.2.4 Reasonable and Timely Notifications to contracting officer. Procedures to provide reasonable notification to the contracting officer of agreements the contractor is processing through the MSW including: (1) written documentation of the determination described in Section 2.1.2.1; and (2) timely access to individual transaction packages.

2.1.2.5 MSW Exit and Re-Entry. If the contractor determines that a project does not meet the criteria for processing under the MSW whether on the basis of one or more criteria identified in section 2.1.1.2 or for any other reason, the project must exit the MSW workflow. The contracting officer may approve re-entry if and when the additional requirements have been met and appropriately cleared, e.g., foreign-sponsored work.

2.1.2.6 Ability to Start Work. The contracting officer shall ensure that the contractor procedures describe how work on an individual project under an approved MSW will begin only when the contractor: (1) determines that the project is within the boundaries of the MSW under section 2.1.2.1; (2) the agreement is signed; and (3) funding is secured.

2.2 Negotiations. If and when the contractor submits the MSW to the contracting officer, the contracting officer and the contractor should promptly begin negotiations in an expedited manner and exercise reasonable diligence to reach agreement.

2.3 Effective Date and Reauthorization. A MSW will be effective for one year from the date it receives contracting officer approval. The contracting officer may reauthorize the MSW annually thereafter according to procedures in the MSW required under section 2.1.1.3. Individual transactions under the MSW may include a period of performance longer than one year and may extend beyond the end date of the MSW under which it was approved.

2.4 DOE/NNSA Review and Oversight.

2.4.1 Periodic Review of the MSW. In addition to the reauthorization procedures under section 2.1.1.3, the contracting officer and the contractor must mutually agree to procedures for a periodic contracting officer review of the MSW program, e.g., the MSW and agreements processed under it. The periodic review must occur at least semi-annually for a period of two years from the effective date of the MSW and at least annually thereafter.

2.4.2 Additional Oversight. The contracting officer may review or stop work on any individual project inappropriately processed through an MSW at the contracting officer's sole discretion. The contractor and the contracting officer may agree to impose reasonable limits on the timeframe for contracting officer review of individual projects.

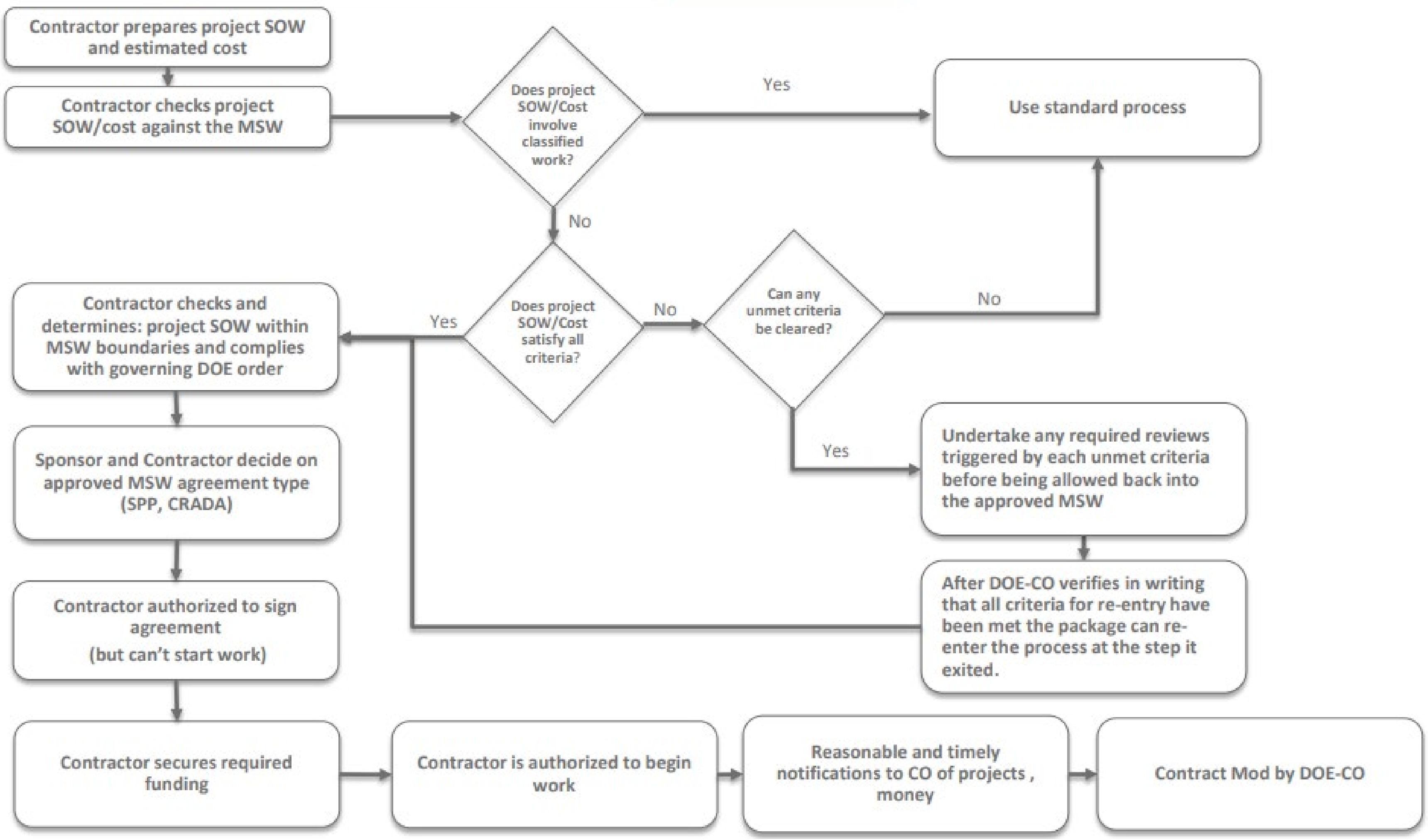
2.5 MSW Workflow Guidance - Flowchart.

If an SPP agreement subject to DOE P 485.1 is approved for re-entry into, and processes through, an MSW, that agreement remains subject to restrictions in the SPP Order (DOE O

481.1E) on applying the DOE Class Patent Waiver No. W(C)-2011-009 when the Sponsor is either foreign-owned or -controlled or is sponsoring research on behalf of a foreign entity.

U.S. DEPARTMENT of ENERGY

Approved MSW – Individual Transaction Workflow



Chapter 70.2701 Patent and Data Rights

Date: April 2017

References: [FAR 27]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the reference above and should be considered in the context of that reference.

1.1 Overview.

This chapter informs members of the contract administration team about the roles and responsibilities regarding administration of the intellectual property provisions DOE contracts, particularly DOE management and operation M&O contracts. This chapter is divided into two sections dealing with rights in data and patent rights.

1.2 Rights In Data.

In the Department, any contract for research, development, demonstration or any other contract that will involve the production of scientific or technical data must include a rights in data clause. Such a clause describes:

- The rights of the Department and the contractor in technical data and computer software first produced under the contract;
- The rights and obligations of the contractor with regard to copyrighting technical data and computer software;
- The conditions under which the contractor may include copyrighted data or proprietary data in deliverables nor originating under the contract;
- The contractor's obligations in marking its proprietary data, and
- The contractor's obligation to respect the proprietary markings of the data of others.

Major objectives of the rights in data clauses are to:

- Assure that generally the Government has the unfettered right to use and distribute, without limitation, data first produced under the contract with Government funds;
- Assure that any restrictions, such as allowing the contractor to copyright, are conscious decisions and made only for good cause after deliberation;

- Prevent any potential for the Government's having to pay royalties subsequently for data first produced under the contract;

- Prevent the potential of sole source contract awards based upon data first produced under a Government contract; and

- Prevent the potential for claims, lawsuits against the Government for copyright infringement or misuse of data which may be proprietary to a third party.

  The rights in data clauses assure that the Department acquires an unlimited rights license to use and distribute the data so produced. This license right should include, not just the data delivered by the contractor under the contract, but also the data produced under the contract but not delivered.

  It is important to recognize that the rights in data clauses only allocate rights to use and distribute, and describes the rights and responsibilities of the parties in specified circumstances. **The clauses do not require the delivery of specific work products. Deliverables must be specified elsewhere in the contract.**

Data is not limited as to form. For example, it includes:

- Any medium such as handwritten notes, electronically stored materials; and typewritten materials (technical data); and

- Computer software, which is the computer program used to create, manipulate, and store technical data.

  The clauses differentiate between technical data and computer software in copyright licenses and in the protection of allegedly proprietary data (that developed at private expense and held in confidence by the originator) used in contract performance.

  Rights in data clauses only allocate rights to use and distribute and describe the rights and responsibilities of the parties in specified circumstances. **The clauses do not require the delivery of specific work products. Deliverables must be specified elsewhere in the contract.**

1.2.1 Explaining the Rights in Data Clauses. Allocation of rights in data: The definitions necessary for the proper administration of the rights in data clauses are contained in paragraph (a) of the clause as used in Department of Energy. The Department of Energy Acquisition Regulation provided for substituting the definitions at 927.4039 for those of FAR 52.227-14. Generally (except in copyright situations), the clause provides that the Government has the unlimited right to use or distribute:

- Data first produced under the contract;

- Form, fit, and function data;

- Instructional, maintenance, or training materials; and

- Any other data delivered under the contract unless qualifying and marked as limited rights or restricted computer software in accordance with the clause. FAR 52.227-14 provides that the contractor has the right to:

    - Use and distribute data first produced under the contract,

    - Mark allegedly proprietary technical data and computer software to prevent disclosure in accordance with the clause,

    - Assure data delivered is properly marked, and

    - Establish claim to copyright in accordance with the clause. Under the clauses prescribed for use in DOE's performance-based management contracts and those that additionally involve technology transfer activities, DOE acquires ownership of all contract data.

DOE also acquires, with certain exceptions, unlimited rights in technical data and computer software specifically used in the performance of the contract. In order to ensure that the operation of a facility is not dependent on the incumbent contractor, the incumbent contractor must leave all such data at the facility. Leaving the data at the facility makes this data available to any successor contractor.

1.2.2 Controlling the Contractor's Enforcement of Copyright. Copyright is one of two major ways that can limit the distribution of data. Copyright creates in the originator of the data a right to prevent others from reproducing its work or portions of it without permission and possible payment of a royalty. This right potentially conflicts with the Government's desire to:

- Have no limitations on its ability to copy or distribute the data for any purpose,

- Allow any of its other contractors to use the data for any purpose in the performance of their contracts, and

- Disseminate data first produced under its contracts (this is also a statutory obligation).

FAR 52.227-14 discusses the copyright. It provides that the contractor may without the contracting officer's approval assert its copyright in contract data contained in academic, technical, or professional journals, symposia proceedings or similar works. The Government retains a royalty free license to copy, disseminate, and make derivative works from the copyrighted data.

By signing a contract, the contractor has agreed not to assert its copyright that exists in the data first produced under the contract in any other situation without approval of the contracting officer. The contracting officer may grant that approval, if at all, only after consultation with patent counsel and the program office.

Where approval is granted, paragraph (c)(1) states that a license is retained by the Government. The retained license differs depending upon whether the data subject to whether the copyright is for technical data or computer software. The license for the latter generally does not allow the Government to distribute copies to the public.

Under the clause, the contractor is prohibited, without the contracting officer's prior written permission, from including in any deliverable copyrighted data which was not first produced under the contract. The contractor is not prohibited from including copyrighted data if they have secured a license for the government.
The right to assert copyright is further proscribed in DOE's management contracts (DEAR 970.5227-1). The clause for use in management and operating (M&O) contracts involving technology transfer activities (DEAR 970.5227-2) contains copyright provisions that detail the effect of the contractor's right to assert copyright in the context of those technology transfer activities.

1.2.3 Procedures Dealing with the Marking of Data Delivered Under the Contract. FAR 52.227-14 puts the contractor on notice that its right to use contract data may be affected by export or national security controls. It requires that in performance of the contract, absent specific authorization from the contracting officer, the contractor must handle data in accordance with any restrictive markings.

DEAR 927.409 requires the insertion of a subparagraph (d)(3) by which the contractor agrees

not to assert its copyright in computer software first produced under the contract without the permission of local patent counsel.
The clause establishes a procedure involving the contracting officer that protects the Government from the contractor's unauthorized marking of data delivered under the contract. The clause provides a procedure by which the contracting officer may be authorized to strike improper markings, allowing the use or dissemination of the data without restriction. Data markings contain instructions on the use of data and inhibit the ability of the recipient of the data to use them for any purpose, including the further distribution of the data. The clause provides a procedure by which a contractor can seek to have the contracting officer correct markings on delivered data or add markings to proprietary data from which they were mistakenly omitted. The only notices that are allowed on data delivered under the contract are those described in Alternate II or Alternate III of FAR 52.227-14. Those alternates are used when deliverables contain technical data (Alternate II) or computer software (Alternate III) developed at private expense and considered proprietary.

Paragraph (g) of FAR 52.227-14 authorizes the contractor not to deliver proprietary data, so long as the contractor provides form, fit, and function data. Alternates II (as subparagraph (g)(2)) or III (as subparagraph (g)(3)) or both should be inserted where the contract requires the delivery of limited rights data (proprietary technical data) or restricted rights software (proprietary computer software). The contractor has the obligation to assure that data delivered with limited rights or restricted computer software markings do, in fact, qualify for such treatment.

1.2.4 Procedures Dealing with the Marking of Data Delivered Under the Contract. DOE uses Alternate V to FAR 52.227-14 which authorizes the contracting officer or an authorized representative to inspect any data withheld from delivery as proprietary under the authority of paragraph (g)(1) of this clause.

1.2.5 Other Rights in Data Clauses. The DEAR 952.227-14, "Rights in Data - General" clause contains two additional alternates for use in the rights in data clause (FAR 52.227-14). Alternate VI provides that the contractor agrees to license its limited rights data or restricted rights computer software to the Government or third parties when necessary to the practice of the technology of the contract. Alternate VII is used to limit the contractor's use of DOE restricted data.

Contract data not specified as a contract deliverable is subject to order during the contract and up to three years after contract completion under the FAR 52.227- 16 "Additional Data Requirements" clause.

There are contracting situations that call for other rights in data clauses. First, the clause, "Rights In Data-Special Works," (FAR 52.227-17) is intended for use in situations in which the contractor is to prepare a work, perhaps a book or motion picture that may be identified with the agency, for which the agency must have complete control over its content and use.
This use may be an official agency history or a public service documentary. By entering into the contract, the contractor agrees:

- Not to assert its copyright;
- Not to include copyrighted data in the deliverable;
- To assign its copyright to the Government if so desired;
- Not to use the produce; and
- To indemnify the Government against any liability incurred as a result of the violation of trade secrets, copyrights, of right of privacy or publicity. The contractor must obtain the necessary licenses to allow the Government to make use of the work product. The contractor indemnifies the Government from any resulting liability for copyright infringement or violation of proprietary data.

1.2.6 Other Related Provisions. The "Refund of Royalties" clause (DEAR 952.227-9) or the clause at DEAR 970.5227-8, Refund of Royalties (in conjunction with the solicitation provision at 970.5227-7) for M&O contracts requires the contractor to disclose any royalties it may pay or require to be paid in performing the contract. Royalties may be associated with the practice of a patent, the right to copy copyrighted materials, and the use of proprietary data. Since royalties are totally subject to negotiation and what the market will bear, this provision allows a conscious decision by the Government as to whether:

- The data is, in fact, proprietary;
- The Government has a license or other interest in the patent or copyright obviating the need to pay a royalty; or
- The amount of the royalty is a fair market value.

Solicitations that may result in a negotiated contract, should contain FAR 52.227-6 requesting royalty information in order that appropriate action may be taken to reduce or eliminate excessive or improper royalties. If a response to the solicitation includes a charge for royalties, the contracting officer shall forward the information to patent counsel for appropriate action, prior to contract award.

DEAR 952.227-82, "Rights in Proposal Data," provides that the Government has what amounts to the unlimited right to use or distribute any portion of the technical proposal which served as a basis of award of the contract. The clause provides the contractor the ability to identify portions of the proposal that it considers proprietary. However, this recognition does not prevent later action by the Government to establish that the identified data is not proprietary.

Without this provision, contractors could claim that the entire proposal or large portions of it were proprietary.

1.2.7 Responsibilities Regarding Data Rights. Each decision of the Department with respect to the intellectual property provisions of DOE's contracts necessitates consultation between the contracting officer, local patent counsel, and the Contracting Officer's Representative (COR).

Deliverables of data are subject to this clause. Any contract data that should have been delivered but was not, raises a question of whether contract data is being consciously and inappropriately withheld by the contractor. The clause establishes the rights the Government needs to ensure that contract data is available and may be used for any purpose the Department believes to be appropriate.

Critical decisions leading to effective administration of the rights in data clauses of the contract are made **BEFORE** contract award in the design of the clauses in light of the statement of work and the program. Such decisions flow from answers to questions such as:

- Does the Department have need to require delivery of limited rights data or restricted computer software, leading to the selection of Alternate II or III or both? **(FAR 52.227-14)**

- Will it be necessary for the contractor to license its limited rights data or restricted computer software to the Department or third parties, leading to the selection of Alternate VI? **(DEAR 952.227-14)**

1.3 Patent Rights.

There are several major objectives of the patent rights clauses:

- Prompt reporting by contractors of invention disclosures to DOE. If applicable, prompt election by contractor in writing, of whether to retain title to reported intervention;

- Prompt filing by contractors of patent applications to which it elects to retain title;

- Execution and prompt delivery to DOE of all instruments necessary to establish or confirm Government rights to these inventions and to convey title to DOE if applicable; and

- Inclusion of additional requirements, including restrictions on disposition of income from technology transfer activities, for M&O contractors with a technology transfer mission.

1.3.1 Brief Description of the Process Associated with Patent Rights under DOE Contracts. DOE contractors for research, developmental or demonstration work, including M& O contractors, are required to disclose to DOE, within specified time periods, each invention which is or may be patentable, that is made under the contract. The disclosure shall be in written report form and shall contain sufficient technical detail to convey a clear understanding of the invention's nature, purpose and operation. The disclosure shall also include any information pertinent to publication, sale or public use of the invention.

In order to effectuate this requirement, contractors are to require, in writing, their technical employees to promptly disclose in writing to appropriate contractor personnel, each invention made under the contract. Contractors generally report inventions to the DOE Field Patent Counsel, with a copy to the contracting officer. Field Patent Counsel review submittals for completeness and evaluate invention disclosures if DOE has an interest in filing a patent application thereon. DOE may request assignment of title, or of all rights, to inventions if the contractor fails to disclose the invention to DOE within specified times.

Contractor compliance with these provisions is incentivized by these potential penalties for non-compliance. Certain contractors, e.g., small businesses and nonprofit organizations, and other contractors who have obtained an advance patent waiver, may retain ownership, but to do so must, in writing, elect to retain ownership of subject inventions within time periods specified in their respective contracts. Their failure to make a timely election to retain ownership could result in forfeiture of invention rights. Election is generally made in writing to the contracting officer who forwards the election to field patent counsel.

In order to foster prompt filing of patent applications on suitable inventions, rather than maintaining these inventions as unpublished "trade secrets," contractors are required to file patent applications on elected inventions within specified time periods. Contractors are also required to execute and promptly deliver to DOE Field Patent Counsel, all instruments, such as patent assignments or confirmatory licenses, necessary to establish or confirm Government rights to inventions made under DOE contracts.

For large business contractors, the contracting officer may withhold payment, up to certain limits, if the contractor fails to convey to the Government title and/or rights to the invention as set forth in the contract, or if the contractor fails to establish effective procedures for reporting inventions, or fails to disclose inventions as necessary. The contracting officer or his or her authorized representative may also examine contractor records to determine whether contractors are complying with the provisions.

For M&O contractors having technology transfer missions, i.e., generally all M&O contractors other than naval nuclear propulsion contractors, additional requirements related to management of technology transfer activities are included. Generally, contractors must use income resulting from technology transfer activities at the respective facilities as set forth in the contract.

Upon termination or expiration of the contract, any unexpended balances must be transferred, at the contracting officer's request, to a successor contractor, or in the absence of a successor contractor, to an entity designated by the contracting officer. Annual reports on contractor technology transfer activities should be provided to the contracting officer.

1.3.2 Other Patent Related Provisions. In addition to a patent rights clause and a data rights clause, intellectual property provisions include clauses addressing additional matters, such as:

- Authorization and consent by the Government to the contractor using technology patented by third parties;
- Possible indemnification of the Government in the event of damages for patent infringement; and
- Clauses addressing payment or refund of royalties that may be included in a contract price. Major objectives of these provisions are the:
    - Authorization of contractors to use patented technology of others in contracts in some cases;
    - Allocation of payment of damages in the event of a claim by a patent holder for patent infringement through inclusion or lack of inclusion of a patent indemnity clause; and
    - Assurance that the Government is not required to pay a royalty for use of patented technology if it already has a license to use the technology.

A brief description of the process associated with these other patent related provisions follows:

- The Government itself can legally use a third party's patented technology without fear of court injunction preventing such use. A Government contractor can do so only if there is authorization and consent by the Government. The Government generally provides such authorization and consent in its contracts. However, such authorization is limited in the appropriate clause to that subject matter specified for delivery in the contract, or actually accepted by the Government. For research and development contracts, a broader authorization and consent clause is authorized, which provides authorization and consent for use of inventions in any activity under the contract.
- While the Government, and its contractors with authorization and consent, can legally use patented technology without consent of the patent owner obtaining an injunction preventing such use, the patent owner may still sue the Government for damages for any such use. In the absence of a patent indemnity provision, the Government itself would most likely be liable for any such damages. Generally, there is no patent indemnity provision required in research and development contracts, where broad authorization and consent is provided. We do not want to inhibit the contractor from using the best available technology in conduction research. However, in contracts for supplies or services that normally are available on the commercial market, a clause providing for the contractor's indemnifying the Government for liability for patent infringement is included.
- Research and development contracts that may include supplies or services normally available on the commercial market will also contain this clause indemnifying the Government for liability for patent infringement.

1.4 Technology Transfer Program.

The Stevenson-Wydler Technology Innovation Act of 1980 made the transfer of federally owned or originated technology to state and local governments, and to the private sector, a national policy and the duty of each federal laboratory. The purpose of the Stevenson-Wydler Act was the renewal and expansion of mechanisms to foster and encourage cooperation among academia, federal laboratories, and industry in technology transfer, personnel exchanges, and joint research projects. Since passage of the Stevenson-Wydler Act, Federal agencies have been required to have a formal Technology Transfer program.

The National Competitiveness Technology Transfer Act of 1989 (included as Section 3131, *et seq.*, of the DOD Authorization Act for FY 1990) further amended the Stevenson-Wydler Technology Innovation Act of 1980 to enhance Technology Transfer between the Federal Government and the private sector. It empowered contractor-owned Government laboratories to enter into Cooperative Research and Development Agreements (CRADAs), and allowed information and innovations brought into, and created through, CRADAs to be protected from disclosure.

The National Defense Authorization Act for Fiscal Year 1994 expanded the definition of laboratory to include weapon production facilities that are operated for national security purposes and are engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components.

1.4.1 DOE Contracts that Must Have a Technology Transfer Program. In accordance with DEAR 970.2770-3, all new awards for or extensions of existing DOE laboratory or weapon production facility management and operating contracts must have technology transfer, including authorization to award CRADAs, as a laboratory or facility mission. A management and operating contractor for a facility not deemed to be a laboratory or weapon production facility may be authorized on a case-by-case basis to support the DOE technology transfer mission including, but not limited to, participating in CRADA awarded by DOE laboratories and weapon production facilities.

1.4.2 Contract Provision that Implements the Technology Transfer Program under DOE Contracts. DEAR 970.5227-4 states that the contracting officer must insert the clause at 970.5227-3, “Technology Transfer Mission,” in each solicitation for a new or an extension of an existing laboratory or weapon production facility management and operating contract. The contracting officer shall use the basic clause with its Alternate I if the contractor:

- is a nonprofit organization or small business eligible under 35 U.S.C. §§ 200, *et seq.*,
- wishes to receive title to any inventions under the contract, and
- proposes to fund at private expense the maintaining, licensing, and marketing of the inventions.

Readers should consult DEAR 970.5227-4 for further information on the use of alternates to the clause.

1.5 Major Roles and Responsibilities in the Area of Patents and Data Rights.

On the following pages are the major roles and responsibilities of members of the contract administration team. Key sections of documents have been summarized for ease of reference. Please bear in mind that the referenced documents themselves are controlling and should be consulted for a complete discussion of the various roles, responsibilities and requirements. Additionally, other documents, not listed here, may contain other roles and responsibilities.

Note: Various responsibilities on the following pages are marked with an asterisk (*). This signifies that the responsibility is not specifically assigned to this individual by a clause, regulation, or procedure. It is suggested because:

- The responsibility is necessary to perform Government contract administration responsibilities; and is either commonly performed by this individual or reflects "good business practice."

- The responsibility is stated in the reference as a DOE/Government responsibility; and is either commonly performed by this individual or reflects "good business practice."

Local guidance may determine who specifically is obligated to perform the responsibility.

PATENT COUNSEL

- Counsel the contracting officer and the COR, understand the requirement, its potential place in DOE's programs, and the role that technical data and computer software first produced under the contract may play to design the most appropriate version of the rights in data clause.

- Participate in the enforcement of inspection rights in the clause to determine appropriate resolution, if data deliverables under the contract indicate that data first produced under the contract is being withheld by the contractor.
  [FAR 52.227-14[30], FAR 52.227-16, DEAR 952.227-14[31], DEAR 970.5227-1, DEAR 970.5227-2]

- Counsel the CO and the COR, in determining whether to grant any contractor request to copyright contract data.
  [FAR 52.227-14, DEAR 952.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

- Counsel the contracting officer and the COR, in determining whether to grant any contractor request to restrictively mark data from which it alleges markings were omitted, or to correct markings.

- Issue, to the extent appropriate, written authorization for the contractor to assert copyright in any technical data or computer software first produced in the performance of

[30] DOE uses the Rights in Data-General clause at FAR 52.227-14 in all non-M&O contracts under which technical data or software may be produced during performance. However, Contracting Officers must alter the clause in accordance with DEAR 927.409.
[31] The clause at DEAR 952.227-14 provides additional alternatives to the clause at FAR 52.227-14 and instructions for their use.

the contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the contractor.
[DEAR 970.5227-1]

- Counsel the CO and the COR, in determining whether to allow the contractor to mark data from which it alleges markings were omitted or to correct markings.
[FAR 52.227-14, FAR 52.227-16]

- Review, document, and maintain files on invention disclosures, patent assignments, confirmatory licenses, and other patent related documents submitted by contractors.
[DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10-, DEAR 970.5227-11]

- Evaluate invention disclosures where DOE has an ownership interest in the invention.
[DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10, DEAR 970.5227-11]

- Determine whether any proposed royalty is properly chargeable to the government and allocable to the contract, if the CO forwards royalty information to patent counsel.
[DEAR 952.227-9, 970.5227-7, 970.5227-8]

- Advise and coordinate with the contracting officer as appropriate when the contracting officer is conducting actions associated with the Technology Transfer provisions of the contract.

CONTRACTING OFFICER

- Enforce the inspection rights in the clause to determine appropriate resolution, if data deliverables under the contract indicate that data first produced under the contract is being withheld by the contractor.
[FAR 52.227-14, FAR 52.227-16, DEAR 952.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

- May receive copies of invention disclosures or other patent related documents. Forward to appropriate field or headquarters patent counsel.
[DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10, DEAR 970.5227-11, 970.5227-12]

- May withhold payment, for large business contractors, up to certain limits, for contractor failure to comply with certain specified patent related requirements, e.g., prompt reporting of inventions. Such action should be taken only with the recommendation and approval of appropriate patent counsel.
[DEAR 952.227-13, DEAR 970.5227-11, 970.5227-12]

- Include the broad ‘Authorization and Consent” clause at FAR 52.227-1, Alternate I, without a patent indemnity provision, for work that is primarily R&D.

- Include the basic “Authorization and Consent” clause at FAR 52.227-1, and the patent indemnity clause at FAR 52.227-3, for supplies and services, or work that includes both R&D, and supplies and services, but where R&D is not the primary purpose.
[FAR 52.227-1, FAR 52.227-3]

- Include the “Royalty Information” clause in solicitations that may result in a negotiated contract.
[DEAR 952.227-9, 970.5227-7, 970.5227-8]

- If royalty information is provided, forward this information to patent counsel for appropriate action.

- For fixed price contracts that include royalties in the target or contract price and where circumstances make it questionable whether the royalties will actually be paid by the contractor, the “Refund of Royalties” clause of DEAR 952.227-9 should be included.
[DEAR 952.227-9]

- Substitute the definitions at DEAR 927.409 for paragraph (a) of FAR 52.227-14, “Rights in Data-General,” and include the paragraph (d)(3) and Alternate V at DEAR 927.409 if it is contemplated that data will be produced, furnished, or acquired under the contract; except use Alternate IV rather than paragraph (d)(3) in contracts for basic or applied research with educational institutions except where software is specified for delivery or where other special circumstances exist.
[DEAR 927.409]

- Understand (in consultation with Patent Counsel and the Contracting Officer’s Representative) the requirement, its potential place in DOE’s programs, and the role that technical data and computer software first produced under the contract may play so that the most appropriate version of the rights in data clause may be included in the contract. This will maximize the potential for competition of future related requirements.

- Determine (in consultation with Patent Counsel and the COR), whether to grant any request by the contractor to copyright contract data.
[FAR 52.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

- Determine (*in consultation with Patent Counsel and the COR), whether to allow the contractor to mark data from which it alleges markings were omitted or to correct markings.
[FAR 52.227-14]

- For contractors with a technology transfer mission, execute the provisions of technology transfer requirements as follows:

- Ensure that, in addition to any separately designated funds, the allowable costs associated with the conduct of technology transfer through the Office of Research and Technology Applications, in any fiscal year, do not exceed an amount equal to 0.5 percent of the operating funds included in the Federal research and development budget (including Strategic Partnership Projects) of the Laboratory for that fiscal year without written approval of the contracting officer. Approve such costs only as determined to be appropriate.

- Approve implementing procedures to avoid employee or organizational conflicts of interest or require specific changes to those procedures within thirty (30) days of receipt.
- Act on all contractor requests for approval of licensing and assignment agreements which are not likely to meet either of the conditions set forth in subparagraphs (f)(1)(i) or (ii) of this clause within thirty (30) days of receipt of request.
- For contractors with a technology transfer mission, execute the provisions of technology transfer requirements as follows:
- Approve, as appropriate, proposed exceptions to the requirement, that under written technology transfer agreements, the contractor will include a requirement that the U.S. Government and the contractor be indemnified for all damages, costs, and expenses, including attorneys' fees, arising from personal injury or property damage occurring as a result of the making, using or selling of a product, process or service by or on behalf of the Participant, its assignees or licensees which was derived from the work performed under the agreement.
- Approve the contractor's policy for making awards or sharing of royalties with contractor employees, other co-inventors and coauthors.
- In the event of termination or expiration of the contract, request that the contractor transfer any unexpended balance of income received for use at the laboratory to a successor contractor or other entity.
- Direct the contractor to transfer title, as one package, to the extent the contractor retains title, in all patents and patent applications, licenses, accounts containing royalty revenues from such license agreements, including equity positions in third party entities, and other Intellectual Property rights which arose at the Laboratory, to the successor contractor or to the Government on termination or expiration of the contract.
- Approve, prior to the contractor's entering into any technology transfer arrangement, when such technology or any part of such technology is classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. § 2168).
- Evaluate as part of the annual appraisal process, with input from the cognizant Secretarial Officer or program office, the contractor's performance in implementing the technology transfer mission and the effectiveness of the contractor's procedures.
- Provide approval for the Laboratory Director or his designee to enter into CRADAs, on behalf of the DOE, as provided in a contracting officer approved Joint Work Statement.
- Approve Joint Work Statements and modifications to Joint Work Statements as appropriate and in accordance with the "Technology Transfer" clause.

- Request the contractor to transmit protected data to other DOE facilities for use by DOE or its contractors by or on behalf of the Government unless otherwise expressly approved by the contracting officer in advance for a specific CRADA.

- Determine, only as appropriate, that contractor employee financial interest is not so substantial as to be considered likely to affect (conflict of interest) the integrity of the contractor employee's participation in the process of preparing, negotiating, or approving a CRADA.

- Grant prior written permission, as appropriate, for the contractor to provide for the withholding of data produced in conducting research and development activities in cost shared agreements for a period of up to five (5) years.
  [DEAR 970.5227-3]

- Determine if royalties proposed by the contractor are properly chargeable to the government and allocable to the contract.
  [DEAR 952.227-9]

- May provide notice to the contractor as soon as practicable of any claim or suit; afford the contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof; and obtain the contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction.
  [FAR 52.227-2]

CONTRACTOR

- Where desired, request permission from the contracting officer or the Patent Counsel, as the clause indicates, to assert copyright in contract data.
  [FAR 52.227-14, FAR 52.227-17, DEAR 952.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

- Mark any qualifying proprietary data with the markings specified in the contract.
  [FAR 52.227-14, FAR 52.227-19]

- Where markings on data delivered may have been omitted or stated incorrectly, request permission from the contracting officer to insert or correct markings. Comply with a request from the contracting officer to substantiate markings on data delivered.
  [FAR 52.227-14, DEAR 952.227-14]

- Require technical employees to promptly disclose inventions, in writing, to appropriate contractor personnel and promptly forward to DOE disclosures of inventions which are or may be patentable.
  [DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10, DEAR 970.5227-11, 970.5227-12]

  Elect in writing within specified time periods, to retain ownership of the invention.
  [DEAR 952.227-11, DEAR 970.5227-10]

- Execute and promptly deliver to DOE written instruments, such as patent assignments or confirmatory licenses, necessary to confirm Government rights in a particular invention. **[DEAR 952.227-11, DEAR 970.5227-10]**

- Include "Authorization and Consent," suitably modified in appropriate subcontracts. **[FAR 52.227-1]**

- Indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent as set forth in the clause. **[FAR 52.227-3]**

- Include information in the response relating to each separate item of royalty or license fee as set forth in the clause, when an offeror's response to a solicitation contains costs or charges for royalties.
[DEAR 952.227-9, 970.5227-7]

- Furnish to the contracting officer, before final payment under the contract, a statement of royalties paid or required to be paid in connection with performing the contract and subcontracts together with the reasons.
[DEAR 952.227-9, DEAR 970.5227-8]

For contractors with a technology transfer mission, execute the provisions of Technology Transfer as follows:

- Establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications pursuant to paragraphs (b) and (c) of Section 11 of the Steven-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710).

- Establish implementing procedures that seek to avoid employee and organizational conflicts of interest, or the appearance of conflicts of interest, in the conduct of its technology transfer activities.

- Provide implementing procedures to the contracting officer for review and approval within sixty (60) days after execution of the contract.

- Prepare procedures and take all reasonable measures to ensure widespread notice of availability of technologies suited for transfer and opportunities for exclusive licensing and joint research agreements, as set in paragraph (e) of the clause.

- In its licensing and assignments of intellectual property, give preference in such a manner as to enhance the accrual of economic and technological benefits to the U.S. domestic economy.

- Consider the factors set forth in subparagraphs (f)(1)(i) and (ii) of the "Technology Transfer Mission" clause in all of its licensing and assignment decisions involving laboratory intellectual property where the laboratory obtains rights during the course of the contractor's operation of the laboratory under this contract.

- If the contractor determines that neither of the conditions in subparagraphs (f)(1)(i) or (ii) are likely to be fulfilled, the contractor, prior to entering into licensing and assignment agreements, must obtain the approval of the contracting officer.

- The contractor agrees to be bound by the provisions of 35 U.S.C. 204 (Preference for United States Industry).
  [DEAR 970.5227-3]

  For contractors with a technology transfer mission, execute the provisions of Technology Transfer as follows:

- In entering into written technology transfer agreements, including but not limited to, research and development agreements, licenses, assignments and CRADAs, agrees to include in such agreements the requirement set forth in paragraph (g). Identify, and obtain the approval of the contracting officer for any proposed exceptions to this requirement.

- Use royalty or other income earned or retained as a result of performance of authorized technology transfer activities for scientific research, development, technology transfer, and education at the Laboratory, consistent with the research and development mission and objectives of the Laboratory and subject to Section 12(b)(5) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(b)(5)) and Chapter 38 of the Patent Laws (35 U.S.C. §§ 200, *et seq.*) as amended**.**

- Included as part of its annual Laboratory Institutional Plan or other such annual document, a plan setting out those uses to which royalties and other income received as a result of performance of authorized technology transfer activities will be applied at the Laboratory, and at the end of the year, provide a separate accounting for how the funds were actually used.

- Shall establish subject to the approval of the contracting officer a policy for making awards or sharing of royalties with contractor employees, other co-inventors and coauthors, including Federal employee co-inventors when deemed appropriate by the contracting officer.

- Transfer, in the event of termination or upon the expiration of the contract, any unexpended balance of income received for use at the Laboratory, at the contracting officer's request to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer.

- Notify and obtain the approval of the contracting officer prior to entering into technology transfers which affect sensitive or classified technology in accordance with subparagraph (j)(1) of the clause.

- Include in all technology transfer agreements with third parties the notice that the export of goods and/or Technical Data from the United States may require some form of export control license or other authority from the U.S. Government and that failure to obtain such export control license may result in criminal liability under U.S. laws.

- Conduct internal export control reviews and assure that technology is transferred in accordance with applicable law as required by subparagraph (j)(3).

- Maintain records, of its technology transfer activities, satisfactory to DOE of its technology transfer activities and shall provide annual reports to the contracting officer to enable DOE to maintain the reporting requirements of Section 12(c)(6) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended.

- Submit an annual plan to the contracting officer for conducting its technology transfer function for the upcoming year as set forth in paragraph (l) of the clause.

- Develop and implement effective internal controls for all technology transfer activities consistent with the audit and record requirements of the contract.

- The Laboratory Director of his designee, following evaluation of CRADAs in accordance with the clause, may enter into CRADAs on behalf of the DOE subject to the requirements set forth in the upon approval of the contracting officer and as provided in a DOE approved Joint Work Statement. The contractor may not enter into, or start work on, a CRADA until the contracting officer has granted approval.

- Provide for the withholding of data produced in conduction research and development activities in cost-shared agreements not covered by paragraph (n) in accordance with subparagraph (n)(3)of the clause, with prior written permission of the contracting officer.

- Agrees, at the request of the contracting officer, to transmit data, which would be protected from disclosure under the clause, to other DOE facilities for use by DOE or its contractor by or on behalf of the Government unless otherwise expressly approved by the contracting officer in advance for a specific CRADA.

- Agrees to inform prospective CRADA participants, which are intending to substantially pay full cost recovery for the effort under a proposed CRADA, of the availability of alternative forms of agreements, i.e., WFO and UFA, and of the Class Patent Waiver provisions associated therewith.

- Ensure that not employee shall have a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA, if, to such employee's knowledge a potential conflict of interest may exist in accordance with the clause.
  [DEAR 970.5227-3]

- Grant to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under the contract.

- Indemnify the Government against any liability, including costs and expenses, incurred as the result of:

1. the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or

2. any libelous or other unlawful matter contained in such data.

[FAR 52.227-18]

CONTRACTING OFFICER'S REPRESENTATIVE

- Participate with the contracting officer and Patent Counsel by providing a perspective to facilitate understanding the requirement, its potential place in DOE's programs, and the role that technical data and computer software first produced under the contract may play in order to design the most appropriate version of the rights in data clause.

- Call to the contracting officer's attention and participate in the enforcement of inspection rights in the clause to determine appropriate resolution, if data deliverables under the contract indicate that data first produced under the contract is being withheld by the contractor.

- Participate with the contracting officer and the Patent Counsel in arriving at a determination whether to grant any request by the contractor to copyright contract data.

- Participate with the contracting officer and Patent Counsel in arriving at a determination whether to allow the contractor to mark data from which it alleges markings were omitted or to correct markings.

For More Detailed Information on Patents and Data Rights: Data Rights

1. DEAR 952.227-14, "Rights in Data-General"
2. DEAR 952.227-82, "Rights in Proposal Data"
3. DEAR 970.5227-1, "Rights in Data-Facilities"
4. DEAR 970.5227-2, "Rights in Data-Technology Transfer"
5. DEAR 927.409, "Solicitation Provisions and Contract Clauses"
6. FAR 52.227-14, "Rights in Data-General"
7. DEAR 952.227-14, "Rights in Data-General"
8. FAR 52.227-16, "Additional Data Requirements"
9. FAR 52.227-17, "Rights in Data-Special Works"
10. FAR Subpart 27.4, "Rights in Data and Copyrights"
11. DEAR Subpart 927.4, "Technical Data and Copyrights"
12. DEAR Subpart 970.27, "Patents, Data, and Copyrights"

Patent Rights

13. DEAR 952.227-11, "Patent Rights – Retention by Contractor"
14. DEAR 952.227-13, "Patent Rights - Acquisition by the Government"
15. DEAR 970.5227-3, "Technology Transfer Mission"
16. DEAR 970.5227-1004-71, "Patent Rights - Management and Operating Contracts, Nonprofit Organization or Small Business Firm Contractor"

17. DEAR 970.5227-11, “Patent Rights – Management and Operating Contracts, For-profit Contractor, Non-Technology Transfer”
18. DEAR 970.5227-1204-72, “Patent Rights - Management and Operating Contractors, For- profit Contractor, Advance Class Waiver”
19. FAR Subpart 27.2, “Patents”
20. FAR Subpart 27.3, “Patent Rights Under Government Contracts”
21. DEAR Subpart 927.2, “Patents”
22. DEAR Subpart 927.3 , “Patent Rights Under Government Contracts”
23. DEAR Subpart 970.27, “Patents, Data, and Copyrights”

Other Related Subjects

24. DEAR 952.227-9, “Refund of Royalties”
25. DEAR 970.5227-7, “Royalty Information”
26. DEAR 970.5227-8, “Refund of Royalties”
27. FAR 52.227-1, “Authorization and Consent”
28. FAR 52.227-3, “Patent Indemnity”
29. FAR 52.227-6, “Royalty Information”
30. FAR Subpart 27.1, “Patents, Data, and Copyrights – General”
31. DEAR Subpart 970.27, “Patents, Data, and Copyright”

Chapter 70.3102 Costs Associated with Whistleblower Actions

Date: June 2018

References: [DEAR 931.205-47(h), DEAR 952.216-7, Alt II, DEAR 970.3102-05-47(h), DEAR 970.5232-2]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter is applicable to all elements of the Department, including the NNSA. The purpose of this chapter is to assist contracting officers with implementing the requirements at DEAR 931.205-47(h); and to establish procedures for consulting with counsel on allowability determinations.

1.1 Background.

During the 1990s, DOE established its Contractor Employee Protection Program (10 CFR 708) that provided an administrative forum for contractor employees to bring claims of discriminatory action by contractors resulting from whistleblower activities of the employees. DOE addressed the issue of reimbursement of contractor costs related to defense of actions under this program through a rulemaking in 2000. In January 2013, a statutory pilot program was created to enhance whistleblower protections; in December 2016, the pilot program was made permanent (Pub. L. 114-261). This statute also clarifies that the cost principles at 10 U.S.C. 2324(k) and 41 U.S.C. 4304 and 4310 apply to costs incurred by a contractor, subcontractor, or personal services contractor.

1.2 Requirements of the Cost Principle.

1.2.1 Consultation with Counsel. DEAR 931.205-47(h) requires contracting officers to determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and relevant facts and circumstances, including Federal law and policy prohibiting reprisal against whistleblowers. The cost principle addresses only the costs associated with whistleblower retaliation claims filed in Federal and state courts and with Federal agencies under 29 CFR Part 24, 48 CFR (FAR) subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239. The DEAR cost principle also requires DOE to establish a whistleblower costs point of contact in the Office of General Counsel (GC). Before making an allowability determination on costs associated with whistleblower actions, contracting officers or their designated representatives must consult with counsel. This is intended to promote an even- handed approach and to avoid unwarranted variation across DOE's complex of facilities.

1.2.1.1 GC Point of Contact. The Office of the Assistant General Counsel for Procurement and Financial Assistance (GC-61) will serve as the GC point of contact. DEAR 931.205-47(h)(2)(ii) makes consultation with the GC point-of-contact mandatory. Contracting officer consultation with local counsel will also satisfy this requirement. Local counsel, when consulted instead of the GC point of contact, will determine whether further consultation with Headquarters is required. The GC point-of-contact will assist contracting officers, their designated representatives, and local counsel by providing summaries of relevant cases of Board of Contract Appeals decisions and other guidance material. When appropriate, and based on the information provided about the case, the GC point of contact will consult with the General Counsel for NNSA when a NNSA site is involved, and with other Headquarters and program offices, including the Office of Environment, Safety and Health, and the Offices of Procurement and Assistance Management.

1.2.1.2 Requests for Consultation. The following information may be useful in any request for consultation:

- Type of action: (Federal or state court, or administrative action under 29 CFR Part 24, 48 CFR subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239)
- Breakdown of costs submitted for reimbursement, including settlement costs and any of the following categories if applicable:
- Employee back-pay award;
- Damages, if any, awarded to employee, and whether they are compensatory or punitive;
- Employee legal fees reimbursed;
- Contractor legal fees reimbursed;

- Any provisions in the contract addressing the pertinent cost, including any reasons why the costs should be treated or funded differently than as a normal cost;

- Key facts or circumstances that may be pivotal in determination of allowability or unallowability (e.g., the finding was reached by a judge or jury; any statements of culpability contained in a settlement agreement; the existence of similar complaints against the employer or a particular individual; or remedial action instituted by the contractor);

- Name, email address, and phone number of person requesting the consultation.

Guidance may be requested on provisional reimbursement to the contractor of its costs while the legal action is pending, but consultation on this is not required. GC will review the available information and provide comments and guidance material to the individual requesting consultation within 30 days of receiving the information. The individual assisting in the consultation will then be available for further discussion with the contracting officer after he/she has reviewed the provided guidance.

1.2.2 Application of the Cost Principle in Specific Circumstances.

1.2.2.1 Whistleblower Claims after an Adverse Decision. Following an adverse decision by the DOE's Office of Hearings and Appeals under 10 CFR 708 or by a Department of Labor Administrative Law Judge under the Energy Reorganization Act, contracting officers may not reimburse a contractor for any legal fees or expenses incurred (see 42 U.S.C. § 5853(1)). Similarly, claims under 41 U.S.C. 4712 proceedings in which the contractor or subcontractor is required to pay a monetary penalty or take corrective action may not be reimbursed (FAR 31.205-47(b)(2)).

1.2.2.2 Whistleblower Claims after Reversal of an Adverse Decision. In the event that an adverse decision is reversed, the contracting officer may conclude that the costs of the proceeding, including costs of appeal, are allowable. However, in making that determination, the contracting officer should review the materials from the administrative or judicial proceeding, especially the adverse decision and the decision reversing it. A reviewing tribunal may reverse a decision for many reasons, some of which may not involve the merits of the case (e.g., expiration of statute of limitations). In such cases, the contracting officer may take account of the trial court's finding regarding the defendant's conduct.

1.2.2.3 Whistleblower Claims after Disposition by Consent or Compromise. After disposition of claims by consent or compromise (i.e., settlement), contracting officers must determine allowability of costs only after considering the terms of the contract, relevant cost regulations, and relevant facts and circumstances, including Federal law and policy (DEAR 931.205-47(h)(2)(iii).) In settled proceedings, one key consideration in determining allowability is whether the contractor, in fact, retaliated against a whistleblower. The contracting officer must review the available evidence, stipulations in the settlement agreement and other information, consulting with GC to assess whether the contractor violated Federal policy. If it is determined that the contractor more likely than not violated applicable law or policy, the costs associated with the related whistleblower proceeding may not be allowed.

1.2.2.4 Whistleblower Claims under 41 U.S.C. 4712 after Disposition by Consent or Compromise. FAR 31.205-47(c)(2)(ii) and (e)(3) provide that DOE may reimburse contractors for up to 80% of costs related to settled claims in which the contracting officer, in consultation with GC, determines that there was very little likelihood that the claimant would have been successful on the merits.

In making this determination, the contracting officer must consider all necessary information, including the contractor's written rationale (specific details, including a description of all claims and procedural actions in the case, copies of all filings and associated pre- or post-Complaint demand letters, the settlement agreement or proposed settlement agreement). The contracting officer may request any other information deemed necessary, including motions for summary judgment and responses to such motions.

Additionally, in making this determination, the contracting officer must examine claims with an objective view of the surrounding facts. While exogenous circumstances not related to the actual facts of a claim or the actual conduct of the contractor may support a decision to settle a claim, such circumstances are not relevant to determining whether the contractor engaged in prohibited retaliatory conduct and should not be considered in the objective review of the merits of a claim.

1.3 Accounting for Costs.

As with all costs, the contractor is responsible for proper accounting for whistleblower proceeding costs and for maintaining records to demonstrate that claimed costs have actually been incurred, are allocable to the contract, and comply with applicable FAR and DEAR cost principles (FAR 31.201-2(d)). In order to assess costs, the contracting officer must also request a description of all claims and procedural actions at issue, as well as all filings in the proceeding and the executed or proposed settlement. The contracting officer must inform the contractor that failure to expeditiously provide the requested information may result in a contracting officer determining that costs are unallowable. The contracting officer may request additional information as necessary; however, such requests should not become a full-dress litigation on the merits of the whistleblower's claims and should not normally require a contractor to develop extensive additional evidence regarding the underlying events.

1.4 Provisional Reimbursement.

The contracting officer, in conjunction with GC, must consider all contractor requests for provisional reimbursement of whistleblower proceeding costs on a case-by-case basis.

1.4.1 Provisional Reimbursement of Whistleblower Claims. DEAR 931.205- 47(h)(2)(i) provides that a contracting officer may authorize reimbursement of costs on a provisional basis in appropriate cases. The contracting officer shall require the contractor to submit a supporting justification that includes a thorough explanation of the facts underlying the proceeding; such facts may be used to determine the appropriateness of provisional reimbursement. For example, the contracting officer must weigh a contractor's historical violations of Federal law or policies barring reprisal against whistleblowers in deciding whether to permit provisional reimbursement. The contracting officer must also request an explanation as to how legal costs will be effectively managed where such a description has not already been submitted in connection with a 10 CFR part 719 significant matter determination. A contractor's past compliance with Legal Management Plans, if applicable, should also be considered.

1.4.2 Provisional Reimbursement of Whistleblower Claims under 41 U.S.C. 4712. During the pendency of any proceeding under 41 U.S.C. 4712, contracting officers are generally to withhold payment of associated costs, but are permitted to authorize provisional reimbursement if deemed to be in the best interest of the Government (see FAR 31.205-47(g)).

Chapter 70.31.205-33 Contractor Legal Management Requirements, Approving Settlements, and Determining the Allowability of Settlement Costs

Date: September 2016

References: [10 CFR Part 719, FAR Subpart 31.2, DEAR Subpart 31, and DEAR Subpart 970.31]

1.0 Overview

This guide chapter deals with three aspects of the Department's management of contractor legal matters— (1) regulatory requirements regarding contractors' litigation management and legal expenditures, (2) approving contractors' requests to settle, and (3) making cost allowability determinations for approved settlements.

2.0 Background

DOE has placed special emphasis on managing contractor litigation and its associated costs for over two decades. The first litigation management procedures, issued in March 1994, applied to virtually all cases where DOE might be contractually responsible for contractor litigation costs. These procedures imposed substantive requirements on DOE field counsel, contractor counsel, and outside counsel to ensure that the public funds were not spent imprudently.

Contactors' non-compliance resulted in disallowance of costs. The procedures have been revised several times and were codified in the Code of Federal Regulations (CFR) in April 2001. These Contractor Legal Management Requirements at 10 CFR part 719 were most recently updated in May 2013. Among other revisions, the 2013 update instituted a requirement that contractors obtain DOE permission to settle certain matters involving contractor payment of $25,000 and over and clarified that contractors' compliance with the regulations at 10 CFR part 719 is a prerequisite for reimbursement of legal costs covered by the regulations.

3.0 Discussion

3.1 Contractor Legal Management Requirements (10 CFR part 719)

Title 10 CFR part 719, *Contractor Legal Management Requirements*, "facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs." The requirements cover all M&O contracts; non-M&O cost-reimbursement contracts exceeding

$100,000,000; and non-M&O contracts exceeding $100,000,000 that include cost- reimbursable elements exceeding $10,000,000 (e.g., contracts with both fixed-price and cost- reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time- and-materials contracts where the materials portions exceed $10,000,000).

Key requirements include the following:

- Legal Management Plan (LMP) – Each contractor is required to submit this document within 60 days of contract award, describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel. Department counsel generally receives, reviews, and approves the LMP. Department counsel is defined as "the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part." (Note: LMP's may include lower dollar value thresholds for reporting and/or permission requirements than required by 10 CFR part 719.)
- Annual Legal Budget – Contractors must submit an annual legal budget that includes cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter. Significant matters include matters involving significant issues as determined by Department counsel and identified to a contractor in writing, and any legal matters where the amount of legal costs over the life of the matter is expected to exceed $100,000.
- Staffing and Resource Plans – Contractors are required to submit this document prepared by retained legal counsel that describes the method for managing a significant matter in litigation.
- Engagement Letters – Each contractor must submit a copy of an executed engagement letter between it and retained legal counsel to Department counsel when the retained counsel is expected to provide $25,000 or more in legal services for a particular matter.
- Contractor Initiation of Litigation – Each contractor must provide written notice to Department counsel prior to initiating litigation or appealing from adverse decisions. A contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department counsel.
- Litigation against the Contractor – Contractors must give the contracting officer and Department counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency.
- Settlements – Contractors must obtain permission from Department counsel to enter a settlement agreement if the settlement agreement requires contractor payment of $25,000 or more.
- Specific categories of costs – The regulations address assessment of the reasonableness of legal fees, outside counsel travel costs, and identify certain costs that require advanced approval to be considered for reimbursement.

Title 10 CFR 719.40 conditions reimbursement of legal costs on contractor compliance with the requirements of Title 10 CFR part 719. Any costs covered by the Contractor Legal Management Requirements that do not comply with them are expressly unallowable.

Any request to deviate from the Contractor Legal Management Requirements must be submitted in writing to Department counsel and approved by the DOE or NNSA General Counsel, as applicable. Even if the Contractor Legal Management Requirements have been followed, to be allowable contractor legal costs must comply with all of the other requirements at FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, Cost Accounting Standards (CAS) (or Generally Accepted Accounting Principles (GAAP) if CAS does not apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

3.2 Settlement Permission Requests Under 10 CFR 719.33

Title 10 CFR 719.33 requires contractors to seek permission from Department counsel to enter into a settlement agreement if the agreement requires contractor payment of $25,000 or more. In its written request to Department counsel seeking settlement permission, the contractor must provide the background of the case, the history of the settlement discussions, the proposed terms of the settlement, and a description as to why settlement of the matter is in the best interest of the Department. *See* 10 CFR 719.34. Title 10 CFR 719.33 specifically notes that a determination that the contractor may settle the case does not mean that the underlying costs will be considered allowable. As noted above, compliance with all parts of 10 CFR part 719, including DOE/NNSA approval of settlements, is a prerequisite for a legal cost to be allowable.

3.3 Allowability of Settlement and Associated Legal Costs

Timing of Settlement and Associated Legal Costs Allowability Decisions. An allowability determination regarding a settlement may occur either 1) simultaneous with the determination as to whether the contractor may settle a case pursuant to 10 CFR 719.33, or 2) after the settlement agreement is executed. In both cases, the contracting officer must coordinate with Department counsel to review the facts surrounding the underlying claim and settlement.

At the time a contractor seeks simultaneous settlement permission from Department counsel under 10 CFR 719.33 and a cost allowability determination, the contractor may be in a position of superior knowledge or may have failed to obtain or deliver reasonably available pertinent information regarding the underlying facts that should factor into a determination of cost allowability. If Department counsel suspects either situation exists, he or she must refrain from considering requests for a cost allowability determination and the contracting officer must not make a cost allowability determination. In addition, as a practical matter, the time between the contractor’s request to settle a case pursuant to 10 CFR 719.33 and the point at which the contractor needs an answer regarding permission to settle is often a very short period. In such instances approving simultaneous requests for settlement permission and cost allowability determinations may be impractical. The contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability.

Principles Guiding Cost Allowability Determinations. First, the contracting officer, in conjunction with Department counsel must evaluate whether the requirements of 10 CFR part 719 have been adhered to by the contractor. Then, FAR 31.205-47, *Costs related to legal and other proceedings*, should be used to determine whether the settlement and associated legal costs should be allowed under the criteria contained therein. Contracting officers must consider the specific facts surrounding the legal claims settled by the agreement under review.
Section 2.1 of Appendix A to 10 CFR part 719 provides: “While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor’s legal costs.” Such considerations include the following:

- Whistleblower claims – Costs associated with certain settled whistleblower cases are governed by DEAR 931.205-47(h) (non-M&O) or DEAR 970.3102-05-47 (M&O), which require the contracting officer (in consultation with Department counsel) to consider the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, when determining whether defense, settlement, and award costs are allowable. See Chapter 70.3102, Costs Associated with Whistleblower Actions.
- Employment Discrimination claims – Costs associated with certain settled employment discrimination lawsuits require the contracting officer (in consultation with Department counsel) to analyze the facts underlying the settled claim and determine whether the plaintiff's claims had more than very little likelihood of success on the merits to determine whether the legal costs and settlement costs are allowable. See AL 2014-03, Allowability of Contractor Litigation Defense and Settlement Costs, at http://energy.gov/sites/prod/files/2016/02/f29/AL%202014-03.pdf.
- Contractor Managerial Actions - The DEAR "Insurance-litigation and claims" clauses at DEAR 952.231–71 (non-M&O) and DEAR 970.5228-1 (M&O) provide limitations on the allowability of costs that result from the willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

It is essential to keep in mind at all times that even if the settlement is authorized and the settlement costs meet all of the above requirements, to be allowable the costs must comply with all of the other requirements of FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, CAS (or GAAP if no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

3.4 Documentation of Settlement Allowability

In all instances, contracting officers must appropriately document determinations regarding contractors' requests for permission to settle and for reimbursement of settlement and associated legal costs. Upon determination that granting settlement permission is appropriate, the contracting officer's review of the allowability of the settlement costs should be performed expeditiously. (As stated earlier, the contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability. Additionally, complex litigation may necessitate an extended period of review.) Where the contracting officer, after consulting with Department counsel, is able to provide simultaneous settlement permission and cost allowability determination regarding the allowability of any portion or aspect of settlement related costs, a post-execution review of the associated settlement agreement is not required, unless otherwise required by the Legal Management Plan. Where new information becomes available that should have been provided by the contractor with its request for settlement permission and cost allowability determination, however, contracting officers must consult with Department counsel to determine whether further review is warranted.

Chapter 70.42.102 Management and Operating Contractors' Audit Coverage of Cost-Reimbursement Subcontracts

Date: October 2019

References: [DEAR 970.5203-1; DEAR 970.5232-3; DEAR 970.5244-1]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

This guide chapter provides guidance to contracting officers regarding monitoring M&O contractors' fulfillment of their contractual obligation to provide adequate audit coverage of cost-type subcontracts.

1.1 Contractual Requirements for Subcontract Audit.

1.1.1 DEAR 970.5203-1 Management controls. DEAR 970.5203-1 requires the M&O contractor to maintain effective systems of management controls for both administrative functions and programmatic functions to ensure, among other things, that costs incurred are in compliance with the clauses and intended purposes of the contract and that resources are safeguarded against waste, loss, mismanagement, or misappropriation. Under the requirements of the clause the contractor must, among other things:

- Establish and maintain systems of controls satisfactory to the Government work;
- Document its system of controls;
- Periodically review its systems of controls to ensure they are adequate to provide reasonable assurance that the objectives of the systems are being accomplished and they are working effectively;
- Annually, or as directed by the contracting officer, supply the contracting officer copies of the reports reflecting the status of recommendations resulting from management audits performed by its internal audit activity and other audit organizations; and
- Maintain a baseline quality assurance program that implements documented performance, quality standards, and control and assessment techniques.

1.1.2 DEAR 970.5232-3 Accounts, records, and inspection. DEAR 970.5232-3 requires the M&O contractor to either conduct an audit of each cost-reimbursement subcontractor's costs or arrange for such an audit to be performed. The clause also requires the contractor to design and maintain an internal audit plan and an internal audit organization.

1.1.2.1 Clause requirements. Under the requirements of the clause the contractor must, among other things, within 30 days of contract award and at each 5th year of contract performance, the exercise of any contract option, or the extension of the contract, submit to the contracting officer for approval an Internal Audit Implementation Design to include the overall strategy for internal audits. The Internal Audit Implementation Design must discuss such matters as how the contractor will ensure that incurred contract costs are allowable under the cost principles of the contract, the universe of payments by the contractor, areas of high risk, the use of the Defense Contract Audit Agency (DCAA), and the process for auditing subcontracts. The Internal Audit Implementation Design must describe:

- The internal audit organization's placement within the contractor's organization and its reporting requirements;
- The audit organization's size and the experience and educational standards of its staff;
- The audit organization's relationship to the corporate entities of the contractor;
- The standards to be used in conducting the internal audits;
- The overall internal audit strategy of the contract, considering particularly the method of auditing costs incurred in the performance of the contract;
- The intended use of external audit resources;
- The plan for audit of subcontracts, both pre-award and post-award; and
- The schedule for peer review of internal audits by other contractor internal audit organizations, or other independent third party audit entities approved by the contracting officer.

1.1.2.2 Reports. The clause requires two reports:

- By each January 31 of the contract performance period, the contractor must submit an annual audit report, providing a summary of the audit activities undertaken during the previous fiscal year that reflects the results of the internal audits during the previous fiscal year and the actions to be taken to resolve weaknesses identified in the contractor's system of business, financial, or management controls; and
- By each June 30 of the contract performance period, the contractor must submit to the contracting officer an annual audit plan for the activities to be undertaken by the internal audit organization during the next fiscal year that is designed to test the costs incurred and contractor management systems described in the internal audit design

1.1.2.3 Required revisions. The clause also gives The contracting officer the authority to require revisions to the documents the clause requires the contractor submit, including the design plan for the internal audits, the annual report, and the annual internal audits.

1.1.2.4 Remedies for Unsatisfactory Performance. Regarding remedies for unsatisfactory performance, the clause contains the following language: “ If at any time during contract performance, the contracting officer determines that unallowable costs were claimed by the contractor to the extent of making the contractor's management controls suspect, or the contractor's management systems that validate costs incurred and claimed suspect, the contracting officer may, in his or her sole discretion, require the contractor to cease using the special financial institution account in whole or with regard to specified accounts, requiring reimbursable costs to be claimed by periodic vouchering.”

1.1.2.5 Penalties for Unallowable Costs and Other Actions. The contracting officer may: impose a penalty under 48 CFR 970.5242-1, Penalties for Unallowable Costs; require a refund; reduce the contractor's otherwise earned fee; and take such other action as authorized in law, regulation, or the contract.

1.1.3 DEAR 970.5244-1 Contractor Purchasing System. DEAR 970.5244-1 requires the management and operating contractor to provide for post-award audit of cost-reimbursement subcontracts, assigns responsibility for determining the costs allowable under each cost-reimbursement subcontract to the contractor, and emphasizes that for costs to be allowable they must be incurred per the FAR and DEAR cost principles.

1.2 How M&O Contractors Meet Contractual Requirements for Subcontract Audit.

M&O contractors may use their internal audit staff, engage contract auditors, or use the services of DCAA to perform audits of their subcontractors. The internally performed audits must, at a minimum, meet the Institute of Internal Auditors Standards.

1.3 How DOE Monitors Contractors' Provision of Adequate Audit Coverage of Cost-Reimbursement Subcontracts.

DOE's audit strategy for monitoring M&O contractors is outlined in Acquisition Letter AL-2022-03 The Office of Inspector General's Audit Strategy, available at https://www.energy.gov/management/acquisition-letter-no-al-2022-03.

1.4 Office of Inspector General Audits.

1.4.1 Summary of Audit Results. DOE IG audits over the past several years of M&O contractors' audit coverage of cost-type subcontracts have revealed subcontract audit issues and indicate the need for a top-down approach to resolve those issues, which have occurred at multiple sites. The audits discovered significant subcontract costs that either had not been audited or had not been reviewed in a manner that met the Institute of Internal Auditors Standards. Clearly, as the IG and the Senior Procurement Executives agreed, these issues could only have arisen because M&O contractors failed to develop and implement effective subcontract audit policies, and the issues' existence substantially increases the risk that unallowable costs will be incurred and billed without being detected in a timely manner. To resolve these issues, it is imperative contracting officers ensure contractors both: adopt a documented risk based approach for conducting audits with a reasonable threshold for selecting subcontracts; and perform or obtain audits that meet the requirements of the Institute of Internal Auditors standards.

1.4.2 Serious Issues Identified by the Audits. DOE IG audits have revealed significant subcontract audit issues. Some specific issues were:

- Lack of procedures requiring subcontract audit;
- Procedures requiring subcontract audit were not based on a reasonable risk- based approach;
- Procedures requiring subcontract audit did not require audits meet required professional standards (the standards set by the Institute of Internal Auditors); and
- Procedures were adequate for both how audit coverage was determined and professional standards being required, but the procedures were not followed.

1.5 Best Practices.

Each contracting officer must ensure, using the tools and processes of the Cooperative Audit Strategy and taking any other contract administration actions appropriate, that M&O contractors: adopt a documented approach for conducting audits with a reasonable threshold for selecting subcontracts; and perform or obtain audits that meet the requirements of the Institute of Internal Auditors standards. Specifically, each contracting officer, at a minimum, must:

- Demand the contractor submit all required documents on time;
- In reviewing and approving the contractor's Internal Audit Implementation Design, Annual Audit Plan, and Annual Audit Report consult with the IG and the CFO and jointly determine whether the contractor's planning and its execution of its planning have resulted in, and will continue to result in, provision of adequate audit coverage of its cost-type subcontracts;
- Ensure all of the specific subcontract audit issues identified in IG audits either do not exist for the contractor (or if they do exist they are explicitly addressed and appropriately resolved);
- Require the contractor to correct any inadequacies in its systems of management controls related to subcontract audit before granting related approvals; and
- Employ any appropriate contractual remedy if the contractor fails to provide adequate audit coverage of its cost-type subcontracts.

Chapter 70.44 Review of Management Contractors Purchasing Systems Purchase Card Considerations

Date: January 2005

References: [DEAR 970.44 Management and Operating Contractor Purchasing DEAR 970.4401 Responsibilities, DEAR 970.4401-1 General, DEAR 970.4401-2 Review and Approval, DEAR 970.4402 Contractor Purchasing System DEAR 970.4402-1 Policy, DEAR 970.4402-2 General Requirements]

1.0 In Case of Questions?

Contact Richard Langston of the Office of Procurement and Assistance Policy, on 202-287-1339 or via e- mail at richard.langston@hq.doe.gov.

2.0 What is the Purpose of this Chapter?

The purpose of this chapter is to provide guidance to contracting officers regarding the review and approval of the purchasing systems of the Department's major facility management contractors whose contracts contain the Contractor Purchasing System clause, DEAR 970.5244-1. The guidance focuses on the use by contractors of purchase cards to effect the purchase of property and services.

3.0 What is the Background of this Chapter?

Commercial organizations, including Government contractors, have for many years made effective use of purchase cards to facilitate the acquisition of property and services. Purchase cards provide a convenient mechanism for facilitating the acquisition and payment processes for relatively small dollar value items as well as delivery orders against established contracts. Purchase cards may also provide a mechanism for empowering other than contracting professionals to directly acquire small dollar value items at significantly reduced administrative costs and in a more timely fashion. Major facility management contractors may, as authorized by the contracting officer, obtain purchase cards through the General Services Administration SMARTPAY Program. Contractors may also choose to use other bank card programs.

Pursuant to the Contractor Purchasing System clause, DEAR 970.5244-1, the Department's major facility management contractors must obtain the contracting officer's approval of their purchasing systems to ensure that costs incurred are allowable and reasonable. This chapter provides contracting officers with additional guidance concerning the Department's expectations for contractor managed purchase card programs for use in determining whether contractor purchasing systems adequately protect the Government's interests under a cost reimbursement contract. The chapter also further defines the role of the contracting officer in ensuring that major facility management contractors conform to approved purchasing system policies and procedures.

4.0 Discussion

4.1 What Are the Responsibilities of the contracting officer?

- Contracting officers should, in their review and approval of a contractor's purchasing system, ensure that systems which authorize the use of purchase cards provide adequate policies, procedures and management controls to guard against fraud, waste, and abuse and ensure the incurrence of allowable costs; the absence of such may result in the disapproval of the contractor's purchasing system, and disallowance of associated costs, as appropriate.

- Contracting officers should, as a facet of their normal operational awareness and systems oversight, ensure that contractor purchase card policies, procedures and management controls are implemented by major facility management contractors.

- Contracting officers should ensure that they have access to major facility management contractors' list of purchase card users and associated single purchase or other card use restrictions or limitations.

4.2 What Are DOE's Expectations Regarding An Acceptable Purchase Card Program?

In reviewing a contractor's purchasing system in accordance with DEAR 970.44, contracting officers should determine whether the contractor intends to use purchase cards to facilitate procurement actions and, if so, the issuing institution. If cards are to be authorized for use, the contractor's written system description must provide policies and procedures for the use of purchase cards that provide effective management controls to guard against fraud, waste, and abuse, and ensure that purchase card expenditures meet contract criteria for the reimbursement of allowable costs. Contractors who use the Federal government's GSA SMARTPAY Program must comply with the terms and conditions of the GSA SMARTPAY contract and develop local purchase card procedures which reflect the policies and principles set forth in the DOE Guidelines and Operating Procedures for Use of the GSA SMARTPAY Purchase Card. For contractors using other, commercially available, purchase card programs, the contractor's purchasing system should contain the following program elements which are indicative of an effective management system that provides adequate controls for the use of purchase cards:

1. Designation of a purchase card program coordinator or other central management official responsible for maintenance of policies and procedures, interface with the issuing bank, interface with the DOE contracting officer, and overall purchase card program management and oversight.

2. Written limitations on the use of the purchase card (e.g., subject matter restrictions, dollar limits on individual transactions, and monthly or yearly total expenditures) as appropriate to the need of its prescribed uses and its user(s).

3. Written designation and authorization of cardholders and reviewing or approving officials.

4. Maintenance of an up-to-date listing of all authorized cardholders and their purchase limitations.

5. Training of cardholders and reviewing or approving officials prior to assuming their roles and receiving cards.

6. Procedures for assuring cards are available only to those with a confirmed need.

7. Prescribed limitations on the number of cardholders that may be assigned to reviewing or approving officials in order to ensure that control functions will be effectively carried out.

8. Procedures regarding internal annual audit or review of the effectiveness of the contractors purchase card policies and procedures, cardholder files, and transactions in accordance with standard sampling techniques. This may be accomplished by internal audit staff operating under the Cooperative Audit Program, by the contractor purchase card coordinator, or both.

9. Procedures for communication to the DOE contracting officer of issues identified as a result of audits/reviews, including the identification of any transactions which have or may have resulted in unallowable costs. Costs incurred as a result of purchase card transactions which are unallowable in amount or purpose, including costs associated with fraudulent transactions, are unallowable under the contract.

10. Procedures to ensure the collection of rebates, if available and when appropriate.

11. Procedures for ensuring that cards are cancelled at the termination of an authorized user’s employment

12. Policies and procedures for sanctioning the abuse or misuse of purchase cards in effecting purchasing transactions, including procedures for assignment to a position not authorized purchase card usage, when appropriate in response to abuse or misuse.

13. Transaction management controls, including:

a. Controls to ensure the appropriateness of the transaction and the absence of fraud, waste or abuse (e.g., controls requiring each purchase or class of purchases to be reviewed and approved in advance and/or subsequent to the transaction by a designated independent reviewing or approving official);

b. Controls requiring that invoices or packing lists for supplies or services are reviewed and approved by the cardholder and a designated independent reviewing or approving official in order to confirm appropriate billing and actual receipt of goods or services ordered; and,

c. Controls requiring that property acquired through purchase cards is entered into the contractor's property management system as appropriate.

Chapter 70.4402 M&O Contractor Standard Research Subcontract (Educational Institution or Nonprofit Organization)

Date: March 2017

References: [DEAR 970.4402]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

1.1 Purpose.

The purpose of this chapter is to provide an updated version of the Management and Operating (M&O) Contractor Standard Research Subcontract (Educational Institution or Nonprofit Organization) Model and to encourage its use whenever appropriate.

1.2 Background.

In 2004, the Integrated Contractor Purchasing Team (including representatives from other federally funded research facilities and DOE/NNSA) developed a model research subcontract. A subsequent review and update was completed in 2010 and disseminated via Policy Flash 2010-79. The attached update to the model subcontract (see Attachment 1) is the result of a similar stakeholders' collaboration from across the DOE complex. Accordingly, DOE encourages M&O contractors to use this model subcontract for unclassified research and development work not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. If the proposed subcontract is for other than standard research and development work (e.g. work performed on a DOE/NNSA site, a programmatic requirement for open source software distribution, etc.), the articles and clauses, in the model should be tailored to address those specific requirements.
While we understand that some M&O contractors have developed automated systems that may not be able to handle the identical sequence of the standard subcontract without major reprogramming (e.g. signature page is at the end rather than the beginning), it is not necessary to reprogram existing systems as long as the model text of the articles and clauses are used.

Contractors may also make minor changes and/or additions to the text (e.g. change "mailed" to "e-mailed" or "faxed," require payment by electronic funds transfer, or require reports to be submitted electronically, etc.).

We believe that usage of this standardized research subcontract will benefit the DOE complex as well as the university research community and request your support and encouragement of its use.

Attachment 1

STANDARD RESEARCH	CONTRACTOR
SUBCONTRACT (EDUCATIONAL INSTITUTION or NONPROFIT ORGANIZATION)	ADDRESS

[FOR UNCLASSIFIED WORK]

(DEPARTMENT OF ENERGY M&O CONTRACT NO.)

Subcontractor:

Attention:	Contractor's Procurement Representative [Contract Administrator]:
Address	Proc. Rep Title:
City, State, Zip Phone:	Phone #:
E-Mail: Fax:	Fax#:

Introduction

This is a cost-reimbursement, no-fee, standard subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. This Subcontract is between [Insert contractor's name], (hereinafter "Contractor") and [Insert subcontractor's name] (hereinafter "Subcontractor"). The Subcontract is issued under Prime Contract No. [Insert contract no.] between the Contractor and the United States Department of Energy (hereinafter "DOE") [include the following phrase in weapons lab contracts--] and the National Nuclear Security Administration (hereinafter "NNSA"») for the management and operation of [insert name of the DOE/NNSA facility] (hereinafter "DOE [or NNSA] Facility").

Agreement

The parties agree to perform their respective obligations in accordance with the terms and conditions of the Schedule and the General Provisions (Appendix A) and other documents attached or incorporated by reference, which together constitute the entire Subcontract and supersede all prior discussions, negotiations, representations, and agreements.

By: Name: Title: Date:
[SUBCONTRACTOR NAME)

By: Name: Title: Date:

[M&O CONTRACTOR NAME)

Attachment 1

TABLE OF CONTENTS

SCHEDULE OF ARTICLES

1. Statement of Work

The Subcontractor shall perform certain research and development work identified as " ", dated, and more fully described in the *Statement of Work,* Appendix B, to this Subcontract.

The Subcontractor’s Principal Investigator assigned to this work is [insert Principal Investigator's Name]. The Principal Investigator shall not be replaced or reassigned without the advance written approval of the Contractor's Procurement Representative.

2. Report Preparation Requirements

a. These instructions apply to all formal reports, including the final report, required by the Subcontract. It does not apply to letter reports or reports specifically identified as Milestones in *Article* 3. *Period of Performance* in this Subcontract as informal reports.
b. The final report shall contain a comprehensive summary of all work results and conclusions. All reports shall fairly and completely describe the efforts applied to and the results obtained toward achievement of objectives of the subcontract work. If an objective is not accomplished, such failure shall be fully documented and explained in the report.
c. Reports shall include the following elements: (a) a brief abstract of the report which describes the overall objectives and results; (b) a full statement of each objective and description of the effort performed and the accomplishments achieved; (c) a list of any publication or information release made of material developed or maintained through the performance of the subcontract; and (d) any other relevant information.
d. The Subcontractor shall submit the final and any intermediate reports to the Contractor's Technical Representative, upon completion of the work and, when the Subcontract contains milestone requirements, on the indicated milestone dates. When requested by the Contractor's Technical Representative, the Subcontractor shall submit a draft copy of the final report for review prior to finalization. The Contractor's Technical Representative need not approve the Subcontractor's reported conclusions of the research.

3. Period of Performance

The work described in Article 1, Statement of Work, shall commence upon signature of this Subcontract by both parties and shall be completed on or before [insert end date].

[OR, if there is a milestone schedule, add: in accordance with the following milestones: Milestone and Completion Date]

4. Costs and Payments

a. The estimated cost of the work called for in this Subcontract is $, and is based upon the following estimated levels of effort necessary to perform the Subcontract work:
   Category No. of Staff
   No. of Months
   [OR: is based on the Subcontractor's Cost Proposal Attachment (or Appendix E) to this Subcontract.]
b. Check provision below that applies OR include only applicable provision:
   This Subcontract is fully-funded and is subject to the *Limitation of Cost* clause of the General Provisions.
   This Subcontract is incrementally funded and is subject to the *Limitation of Funds* clause of the General Provisions. The funding amount currently allotted to this Subcontract is $ and covers (describe what work the incremental funding covers or a period of performance.)
c. The Contractor will pay the Subcontractor for performance of this Subcontract, unless excluded or limited by other provisions of this Subcontract, the allowable direct costs incident to performance, plus the allocable portion of the allowable indirect costs of the Subcontractor. Allowable and allocable costs shall be

determined in accordance with the cost principles of the Allowable Cost and Payment clause of the General Provisions.

5. Invoices for Payment

a. Payments for Subcontract work shall be made monthly based on invoices submitted by the Subcontractor for work performed. Invoices shall bear the following certification signed by a responsible official of the Subcontractor:

"The undersigned certifies that the information set forth herein is true and correct and may be used as a basis for payment for work."

b. Invoices must identify the subcontract number, the period covered, and the total expenditures claimed for each of the following categories: salaries, fringe benefits, travel, materials and supplies, equipment, subcontracts/consultants, other direct costs such as rent, when applicable, and indirect or Facility and Administration costs.

c. Invoices shall be mailed to: [Insert address]

d. Payments shall be mailed to: [Insert address]

e. The Contractor will use its best efforts to process invoices for payment within 30 days of receipt; provided, however, that payments made more than 30 days after receipt of an invoice shall not be subject to penalty, interest, or late charges.

f. Invoices which include any property acquired by the Subcontractor shall include the following information: a description of the property, an assigned property number, the name of the manufacturer, serial and model number, the acquisition date, unit price, quantity, total cost and location of the item.

6. Contractor-Furnished and Subcontractor-Acquired Property

a. The Contractor shall furnish the Subcontractor the materials, equipment, and supplies listed in *Contractor-Furnished Government Property,* Appendix F, to this Subcontract.

b. Purchase of equipment or other tangible personal property, which is not identified in the Subcontractor's cost proposal for this Subcontract and for which the Subcontractor is entitled to be reimbursed as a direct item of cost under this Subcontract, shall be approved in advance by the Contractor's Procurement Representative.

c. All property furnished by the Contractor or acquired by the Subcontractor, as a direct cost under the Subcontract, title to which vests in the Government, shall be identified, controlled, and protected as required by the *Government Property* clause of the General Provisions of this Subcontract. Disposition of such property upon completion of this Subcontract shall be as directed by the Contractor's Procurement Representative.

d. If the Contractor provides the Subcontractor property that is marked as "high risk property" for use under this award, the Subcontractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of this property in accordance with the policies, practices and procedures for property management contained in the DOE Property Management regulations (41 CFR 109-1.53). Title to all property marked as "high risk property" vests in the Government.

e. The Contractor shall determine at the conclusion of the Subcontract whether the educational institution shall be allowed to retain high risk and/or sensitive items.

7. Subcontract Administration

a. The Contractor's Procurement Representative for this Subcontract is [insert Contractor's Procurement Representative's Name]. The Procurement Representative is the only person authorized to make changes in the requirements of this Subcontract or make modifications to this Subcontract including changes or modifications to the Statement of Work and the Schedule. The Subcontractor shall direct all notices and requests for approval required by this Subcontract to the Procurement Representative at the following address:
   Procurement Department
   ATTN:
   [Insert mailing address]
b. Any notices and approvals required by this Subcontract from the Contractor to the Subcontractor shall be issued by the Procurement Representative.
c. The Contractor's Technical Representative for this Subcontract is [insert Contract's Technical Representative's Name]. The Technical Representative is the person designated to monitor the Subcontract work and to interpret and clarify the technical requirements of the Statement of Work. The Technical Representative is not authorized to make changes to the work or modify this Subcontract.
d. The Subcontractor shall, as a condition of full payment, assist the Contractor after the completion of the work in accomplishing the administrative closeout of this Subcontract, including, as necessary or required, the furnishing of documentation and reports, the disposition of property, the disclosure of any inventions, the execution of any required documents, the performance of any audits, and the settlement of any interim or disallowed costs.

8. Travel Requirements

a. All travel not included in the Subcontractor's cost proposal must be approved in advance by the Contractor.
b. All foreign travel must be approved in advance (at least 45 days prior to travel) by the Contractor, even if the cost is included in the Subcontractor's cost proposal for this Subcontract. Foreign travel requests should be submitted in accordance with DOE Order 551.1D (or current version).
c. Any travel costs will be reimbursable in accordance with the Subcontractor's institutional travel policy.

9. Performance of Work

The Subcontractor will/will not perform the work at a DOE/NNSA Facility.

10. Incorporated Documents

The following documents are hereby incorporated as Attachments to this Schedule of Articles of this Subcontract:

- Appendix A- General Provisions for Standard Research Subcontracts, dated_____
- Appendix B- Statement of Work dated______
- Appendix C- Travel Costs, dated________(if applicable)
- Appendix D- Intellectual Property, dated_______(if applicable)

- Appendix E- Subcontractor’s Cost Proposal dated______(if applicable)
- Appendix F – Contractor-Furnished Government Property dated_______(if applicable)
- [List others if applicable.]

APPENDIX A - GENERAL PROVISIONS CLAUSE 1 - PUBLICATIONS

A. The Subcontractor shall closely coordinate with the Contractor's Technical Representative regarding any proposed scientific, technical or professional publication of the results of the work performed or any data developed under this Subcontract. The Subcontractor shall provide the Contractor an opportunity to review any proposed manuscripts describing, in whole or in part, the results of the work performed or any data developed under this Subcontract at least forty- five (45) days prior to their submission for publication. The Contractor will review the proposed publication and provide comments. A response shall be provided to the Subcontractor within forty-five (45) days; otherwise, the Subcontractor may assume that the Contractor has no comments. Subject to the requirements of Clause 9, the Subcontractor agrees to address any concerns or issues identified by the Contractor prior to submission for publication.

B. Subcontractor may acknowledge the Contractor and Government sponsorship of the work as appropriate.

CLAUSE 2 - NOTICES

1. The Subcontractor shall immediately notify the Contractor's Procurement Representative in writing of: (1) any action, including any proceeding before an administrative agency, filed against the Subcontractor arising out of the performance of this Subcontract; and (2) any claim against the Subcontractor, the cost and expense of which is allowable under the terms of this Subcontract.
2. If, at any time during the performance of this Subcontract, the Subcontractor becomes aware of any circumstances which may jeopardize its performance of all or any portion of the Subcontract, it shall immediately notify the Contractor's Procurement Representative in writing of such circumstances, and the Subcontractor shall take whatever action is necessary to cure such defect within the shortest possible time.

CLAUSE 3 - ASSIGNMENTS

The Contractor may assign this Subcontractor to the Government or its designee(s). Except as to assignment of payment due, the Subcontractor shall have no right to assign or mortgage this Subcontract or any part of it without the prior written approval of the Contractor's Procurement Representative, except for subcontracts already identified in the Subcontractor's proposal.

CLAUSE 4 – DISPUTES

A. Informal Resolution
   1. The parties to a dispute shall attempt to resolve it in good faith, by direct, informal negotiations. All negotiations shall be confidential. Pending resolution of the dispute, the Subcontractor shall proceed diligently with the performance of this Subcontract, in accordance with its terms and conditions.

2. The parties, upon mutual agreement, may, but are not required to, seek the assistance of a neutral third party at any time, but they must seek such assistance no later than 120 days after the date of the Contractor's receipt of a claim. The parties may request the assistance of an established Ombuds Program, where available, or hire a mutually agreeable mediator, or ask the DOE Office of Dispute Resolution to assist them in selecting a mutually agreeable mediator. The cost of mediation shall be shared equally by both parties. If requested by both parties, the neutral third party may offer a non-binding opinion as to a possible settlement. All discussions with the neutral third party shall be confidential.
3. In the event the parties are unable to resolve the dispute by using a neutral third party or waive the requirement to seek such assistance, the Contractor will issue a written decision on the claim.

B. Formal Resolution

1. If a dispute has not been resolved by informal resolution, it may, but is not required to, be submitted to binding arbitration upon agreement of both parties, by and in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA). If arbitration is agreed to by both parties, such decision is irrevocable and the outcome of the arbitration shall be binding on all parties.
2. Each party to the arbitration shall pay its pro rata share of the arbitration fees, not including counsel fees or witness fees or other expenses incurred by the party for its own benefit.
3. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction.

C. Litigation

If arbitration is declined for such disputes, the parties may pursue litigation in any court of competent jurisdiction.

D. Governing Law

This Subcontract shall be interpreted and governed in accordance with all applicable federal and state laws and all applicable federal rules and regulations.

CLAUSE 5 - RESPONSIBILITY FOR TECHNOLOGY EXPORT CONTROL

The parties understand that materials and information resulting from the performance of this Subcontract may be subject to export control laws and that each party is responsible for its own compliance with such laws in accordance with DEAR 970.5225-1 COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS, incorporated herein by reference.

CLAUSE 6 - COST ACCOUNTING STANDARDS (CAS) LIABILITY

[Applicable to Subcontracts exceeding $750,000]

Clause 10 below incorporates into these GENERAL PROVISIONS clauses entitled, "COST ACCOUNTING STANDARDS" and "ADMINISTRATION OF COST ACCOUNTING STANDARDS."

Notwithstanding the provisions of these clauses, or of any other provision of the Subcontract, the Subcontractor shall be liable to the Government for any increased costs, or interest thereon, resulting from any failure of the Subcontractor or lower-tier subcontractor, with respect to activities carried on at the site of the work, or of a subcontractor, to comply with applicable cost accounting standards or to follow any practices disclosed pursuant to the requirements of such clause.

CLAUSE 7 - DISCLOSURE AND USE RESTRICTIONS FOR LIMITED RIGHTS DATA

Generally, delivery of Limited Rights Data (or Restricted Computer Software) should not be necessary. However, only if Limited Rights Data will be used in meeting the delivery requirements of the subcontract, the following disclosure and use restrictions shall apply to and shall be inserted in, any FAR 52.227-14, Rights in Data-General (MAY 2014) on any Limited Rights Data furnished or delivered by the Subcontractor or a lower-tier subcontractor:

A. These "Limited Rights Data" may be disclosed for evaluation purposes under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed;
B. These "Limited Rights Data" may be disclosed to other contractors participating in the Government's program of which this Subcontract is a part for information or use in connection with the work performed under their contracts and under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed; and
C. These "Limited Rights Data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed.

CLAUSE 8 - ORDER OF PRECEDENCE

Any inconsistencies in the documents comprising this Subcontract shall be resolved by giving precedence in the following order: (a) the SCHEDULE OF ARTICLES and this Subcontract Signature Page; (b) these GENERAL PROVISIONS; (c) other referenced documents, exhibits, and attachments; and (d) any referenced specification or *Statement of Work.*

CLAUSE 9 - SECURITY REQUIREMENTS

A. This Subcontract is intended for unclassified, publicly releasable research or development work. The Contractor does not expect that results of the research project will involve classified information or Unclassified Controlled Nuclear Information (UCNI) (See 10 CFR part 1017). However, the Contractor may review the research work generated under this Subcontract at any time to determine if it requires classification or control as UCNI.
B. If, subsequent to the date of this Subcontract, a review of the information reveals that classified information or UCNI is being generated under this Subcontract, then the security requirements of this Subcontract must be changed. If such changes cause an increase or decrease in costs or otherwise affect any other term or condition of this Subcontract, the Subcontract shall be subject to an equitable adjustment as if the changes were directed under the Changes clause of this Subcontract.
C. If the security requirements are changed, the Subcontractor shall exert every reasonable effort compatible with its established policies to continue the performance of work under the Subcontract in compliance with the change in the security requirements. If the Subcontractor determines that continuation of the work under this Subcontract is not

practicable because of the change in security requirements, the Subcontractor shall notify the Contractor's Procurement Representative in writing. Until the Contractor's Procurement Representative provides direction, the Subcontractor shall protect the material as directed by the Contractor.

D. After receiving the written notification, the Contractor's Procurement Representative shall explore the circumstances surrounding the proposed change in security requirements and shall endeavor to work out a mutually satisfactory method to allow the Subcontractor to continue performance of work under this Subcontract.

E. Within 15 days of receiving the written notification of the Subcontractor's stated inability to proceed, the Contractor's Procurement Representative must determine whether (I) these security requirements do not apply to this contract or (2) a mutually satisfactory method for continuing performance of work under this Subcontract can be agreed upon. If this determination is not made, the Subcontractor may request the Contractor's Procurement Representative to terminate the Subcontract in whole or in part. The Contractor's Procurement Representative shall terminate the Subcontract in whole or in part, as may be appropriate, and the termination shall be deemed a termination under the terms of the Termination for the Convenience of the Government clause.

CLAUSE 10 - CLAUSES INCORPORATED BY REFERENCE

The FEDERAL ACQUISITION REGULATION (FAR) and the U.S. DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) clauses listed below, which are located in Chapters 1 and 9, respectively, of Title 48 of the Code of Federal Regulations, are incorporated by this reference as a part of these GENERAL PROVISIONS, **as they exist on the effective date of this Subcontract,** with the same force and effect as if they were given in full text, as prescribed below.

The full text of the clauses may be accessed electronically at:
http://ecfr.gpoaccess.gov/cgilt/text/text-idx?sid=802fadefcObfl8e947d936c6ef6ec328&c=ecfr&tp!=!ecfrbrowseiTitle4 8 /4 8 tab02.tpl

As used in the clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean the "Government" and "contracting officer" shall mean the Contractor, except in FAR clause 52.227-14, and DEAR clauses 970.5227-4, 952.227-11, 970.5232-3 and 52.245-1, Alternate II, in which clauses "Government" shall mean the United States Government and "contracting officer" shall mean the DOE/NNSA contracting officer for Prime Contract DE- [insert number] with the Contractor. As used in DEAR clauses 952.204-72 and 952.227-9, the term "DOE" shall mean DOE/NNSA or the Contractor.

The modifications of these clause terms are intended to appropriately identify the parties and establish their contractual and administrative reporting relationship, and shall not apply to the extent they would affect the U.S. Government's rights. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

The FAR and DEAR clauses listed below shall be applicable to this Subcontract based on the value of the Subcontract and the nature and location of the work, as indicated.

APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:

U.S. DEPARTMENT of ENERGY

DEAR 952.204-71	SENSITIVE FOREIGN NATIONS CONTROLS. Applies if the Subcontract is for unclassified research involving nuclear technology.
FAR 52.215-23	LIMITATIONS ON PASS-THROUGH CHARGES
FAR 52.216-7	ALLOWABLE COST AND PAYMENT. Substitute 31.3 in subcontracts with educational institutions and 31.7 in subcontracts with nonprofit organizations for 31.2 in paragraph (a).
FAR 52.216-15	PREDETERMINED INDIRECT COSTS RATES
FAR 52.222-50	COMBATING TRAFFICKING IN PERSONS
FAR 52.222-54	EMPLOYMENT ELIGIBILITY VERFICATION
FAR 52.223-3	HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA SHEETS (JAN 1997) AND ALTERNATE I. Applies only if Subcontract involves delivery of hazardous materials.
DEAR 970.5225-1	COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS
DEAR 970.5227-4	AUTHORIZATION AND CONSENT, Paragraph (a).
DEAR 952.227-9	REFUND OF ROYALTIES. Applies if "royalties" of more than $250 are paid by a subcontractor at any tier.
DEAR 952.227-11	PATENT RIGHTS - RETENTION BY THE CONTRACTOR (SHORT FORM). (Applies only if Subcontractor is a nonprofit organization as set forth in 48 CFR 27.301. If Subcontractor does not qualify in accordance with 48 CFR 27.301, it may request a patent waiver pursuant to 10 CFR 784.) [Check provision below that applies OR include only applicable provision].
FAR 52.227-14	RIGHTS IN DATA-GENERAL with ALTERNATE V including new paragraph G) and DEAR 927.409 revised paragraphs (a) Definitions and (d)(3). Applies if the Subcontract is for development work, or for basic and applied research where computer software is specified as a Deliverable in the Statement of Work or other special circumstances apply as specified in the agreement. RIGHTS IN DATA-GENERAL with ALTERNATE IV and revised paragraph (c)(I) and DEAR 927.409, revised paragraph (a) Definitions applies if the Subcontract is for basic or applied research to be performed solely by colleges and universities, computer software is not being developed as indicated in the Statement of Work, and no other special circumstances apply per DEAR 927.409.
FAR 52.229-10	STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX. Applies if any part of this Subcontract is to be performed in the State of New Mexico.
DEAR 970.5232-3	ACCOUNTS, RECORDS, AND INSPECTION
FAR 52.232-20	LIMITATION OF COST. Applies if the Subcontract is fully funded.
FAR 52.232-22	LIMITATION OF FUNDS. Applies if the Subcontract is incrementally funded.

FAR 52.242-15	STOP-WORK ORDER with ALTERNATE I.
FAR 52.243-2	CHANGES - COST -REIMBURSEMENT, WITH ALTERNATE V
FAR 52.244-2	SUBCONTRACTS with ALTERNATE I. Insert in Paragraph (e): "Any subcontract or purchase order for other than "commercial items" exceeding the simplified acquisition threshold. ("Commercial item" has the meaning contained in FAR 52.202-1, Definitions.)"
FAR 52.245-1	GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS with Alternate II (JUN 2007). Paragraphs (e)(l), (e)(2), and revised (e)(3). Insert DEAR Subpart 945.5, after the reference to FAR Subpart 45.5).
FAR 52.246-9	INSPECTION OF RESEARCH AND DEVELOPMENT (SHORT FORM) (APR 1984).
FAR 52.247-63	PREFERENCE FOR U. S. FLAG AIR CARRIERS. Applies if the Subcontract involves international air transportation.
FAR 52.247-64	PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS.
DEAR 952.247-70	FOREIGN TRAVEL.
FAR 52.249-5	TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS).
DEAR 952.217-70	ACQUISTION OF REAL PROPERTY. Applies if the Subcontract involves leased space that is reimbursed.

APPLICABLE IF THE SUBCONTRACT IS FOR $15,000 OR MORE:

FAR 52.222-36	EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES.

APPLICABLE IF THE SUBCONTRACT EXCEEDS $350,000

FAR 52.203-5	COVENANT AGAINST CONTINGENT FEES
FAR 52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT
FAR 52.203-7	ANTI-KICKBACK PROCEDURES
FAR 52.203-10	PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY
FAR 52.203-12	LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS
FAR 52.219-8	UTILIZATION OF SMALL BUSINESS CONCERNS
FAR 52.222-35	EQUAL OPPORTUNITY FOR VETERANS
FAR 52.222-37	EMPLOYMENT REPORTS ON VETERANS
DEAR 970.5227-5	NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

APPLICABLE IF THE SUBCONTRACT EXCEEDS $500,000:

FAR 52.227-16	ADDITIONAL DATA REQUIREMENTS.

APPLICABLE IF THE SUBCONTRACT EXCEEDS $900,000:

FAR 52.219-9	SMALL BUSINESS SUBCONTRACTING PLAN. Applies unless there are no subcontracting possibilities.

APPLICABLE IF THE SUBCONTRACT EXCEEDS $900,000:

FAR 52.215-10	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA if subcontract exceeds $750,000.
FAR 52.215-11	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS not used when 52.215-10 is included. In subcontracts greater than $750,000.
FAR 52.215-12	SUBCONTRACTOR COST OR PRICING DATA. Applies if 52.215-10 applies.
FAR 52.215-13	SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS. Applies if 52.215-11 applies.
FAR 52.230-2	COST ACCOUNTING STANDARDS, excluding paragraph (b). Applies to nonprofit organizations if they are subject to full CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-3	DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES, excluding paragraph (b). Applies to nonprofit organizations if they are subject to modified CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-5	COST ACCOUNTING STANDARDS - EDUCATIONAL INSTITUTION, excluding paragraph (b).
FAR 52.230-6	ADMINISTRATION OF COST ACCOUNTING STANDARDS.

(END OF GENERAL PROVISIONS)

Chapter 70.44.3 DOE's Oversight of its M&O Contractors' Purchasing Systems

Date: May 2018

[References: FAR Part 44, DEAR Part 970.44]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the reference above and should be considered in the context of that reference. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

The purpose of this chapter is to establish a clear construct of how DOE ensures its M&O contractors meet the FAR's requirements for their management of their purchasing systems.

1.1 FAR Requirements.

1.1.1 The Contractor's Purchasing System. FAR requires a contractor's purchasing system ensure the contractor: spends Government funds efficiently and effectively; and complies with Government policy when subcontracting.

1.1.2 How the Government Assesses the Contractor's Purchasing System. The FAR requires the contracting officer in overseeing the contractor's purchasing system to:

- Create a plan at contract award with the help of specialists to maintain a sufficient level of surveillance to ensure that the contractor is effectively managing its purchasing program;
- Execute the surveillance plan and ensure that the contractor is effectively managing its purchasing program; and
- Based upon his/her surveillance, decide at contract award and every three years if a contactor purchasing system review is necessary (and arrange for one if one is necessary).

The FAR requires the contracting officer, when developing and executing a surveillance plan for a contractor's purchasing system or conducting a contractor purchasing system review, to consider the following (FAR 44.201-3 and):

Is the contactor--

- Following its approved make-or-buy plan, if any?
- Obtaining special test equipment, equipment, or real property from Government sources when appropriate?
- Selecting supplies, equipment, or services that are technically justified?
- Complying with its contract's requirements for subcontracting with small businesses and purchasing from nonprofit agencies designated by the Committee for Purchase from People Who Are Blind or Severely Disabled?
    - Including establishing and following policies for subcontracting with small businesses?
- Obtaining adequate price competition when appropriate and justifying its determination adequate price competition is not appropriate?

    - Including using market research effectively?

- Adequately assessing subcontractors’ alternate proposals, if offered?

- Using a sound basis to select and determine the responsibility of subcontractors?

- Obtaining certified cost or pricing data when appropriate or data other than certified cost or pricing data when appropriate and performing adequate cost or price analysis?

    - Including establishing and using effective pricing policies and techniques?

    - Including appropriately treating affiliates and other concerns having close working arrangements with the contractor?

- Using subcontract types appropriate for the risks involved and consistent with current policy?

- Adequately considering what is needed when planning to use subcontracts that will involve using Government-provided equipment and real property?

- Adequately and reasonably translating prime contract technical requirements into subcontract requirements?

- Complying with applicable cost accounting standards in awarding subcontracts?

- Determining if potential subcontractors are in the System for Award Management Exclusions?

    - Including establishing and using methods to

        - evaluate subcontractor responsibility, and

        - if subcontracting with a party on the Exclusions list, adequately protect the Government’s interests?

- Effectively planning for, making awards under, and performing contract management of major subcontract programs?

- Effectively using management control systems, including internal audit procedures, to administer progress payments to subcontractors?

- Using higher-level quality standards?

1.2 DOE’s Construct for Meeting the FAR’s Requirements for Overseeing Contractor Purchasing Systems.

DOE's construct for ensuring its M&O contractors (and other contractors if appropriate) effectively manage their purchasing systems comprises the development and execution of the FAR surveillance plan (surveillance) supported by:

- The DOE risk assessment tool (surveillance);
- The DOE handbook for contractor purchasing system reviews;
- Utilization of M&O contractors' purchasing expertise; and
- Performance Management Reviews (PMRs) and Cooperative Audit Strategy.

1.3 Details of DOE's Construct for Meeting the FAR's Requirements for Overseeing Contractor Purchasing Systems.

In other words, DOE meets FAR's requirements regarding overseeing the contractor's purchasing system by:

- Requiring the contracting officer at contract award to create and execute the required FAR surveillance plan to maintain a sufficient level of surveillance; and in support of that plan:
    - Requiring the contracting officer to use a DOE risk assessment tool as a benchmark to:
        - Ensure he/she is maintaining the sufficient level of surveillance; and
        - Determine both at contract award and periodically if a contactor purchasing system review is necessary (and obtain one if one is necessary);
- Requiring the contracting officer to obtain a contactor purchasing system review every six years, regardless of the contracting officer's determination of the need for one;
- When a contractor purchasing system review is necessary or required, sending a contingent of federal and contractor officials, headed by a federal official, to conduct it using a DOE handbook (currently titled "PERT") that ensures the contingent's review--
- Includes FAR Companion's thirteen "considerations" (FC 44.201-3) and eleven "special attention" areas (FC 44.301), while taking into account DOE's unique utilization of the M&O contractors' purchasing expertise; and
- Using PMRs and the capabilities available under the Cooperative Audit Strategy to provide additional assurance the contracting officer's execution of his/her surveillance plan is ensuring the contractor's effective management of its purchasing program.

1.4 FAR Surveillance Plan, DOE Risk Assessment Tool, DOE Handbook, and DOE Utilization of the M&O Contractors' Expertise.

1.4.1 FAR Surveillance Plan. The FAR requires the contracting officer to ensure the contractor is effectively managing its purchasing system. In consonance with that requirement, FAR also requires the contracting officer to develop a plan to maintain a sufficient level of surveillance and to do so with the help of subcontracting, audit, pricing, technical, and other necessary specialists. The plan should cover: the "phases" of the contractor's purchasing system (preaward, postaward, performance, and contract completion); the "operations" that affect the contractor's purchasing system; and the effectiveness of the contractor's corrective actions taken as a result of Government recommendations.

In addition to requiring the contracting officer to execute the surveillance plan, in consonance with that requirement FAR also requires the contracting officer to determine at contract award and every three years after if a contactor purchasing system review is required—and arrange for one if one is required. DOE adds an additional requirement—the contracting officer must arrange for a contractor purchasing system review at least every six years regardless of his/her determination of whether one is needed.

1.4.2 DOE Risk Assessment Tool. DOE provides the contracting officer its risk assessment tool to help him/her follow a consistent and sound approach to:

- Maintain a sufficient level of surveillance of his/her contractor's purchasing system; and

- Determine if a contractor purchasing system review is needed. In other words, the tool helps the contracting officer:
- Assess the health of the contractor's purchasing system;

- Document his/her assessment; and

- Support his/her determination of whether a contractor purchasing system review is needed.

1.4.3 DOE Handbook for contractor purchasing system reviews. When DOE conducts a contractor purchasing system review, it uses a contingent of federal and contractor officials, headed by a federal official. A "contractor purchasing system review" means the complete evaluation of a contractor's purchasing of material and services, subcontracting, and subcontract management from development of the requirement through completion of subcontract performance."

In conducting its review, the contingent follows a handbook to ensure its evaluation of the contractor's purchasing system:

- Includes the thirteen "considerations" listed in FAR Companion FC 44.201-3;

- Gives "special attention" to the eleven areas listed in the FAR Companion at FC 44.301; and

- Takes into account DOE's unique utilization of the M&O contractor's expertise.

1.4.4 DOE Unique Utilization of M&O Contractor Expertise. DOE takes advantage of its M&O contactors' unique expertise by:

- Allowing them to use their contracting procedures as the basis for developing their purchasing systems;
- Recognizing their purchases are neither Federal procurements nor directly subject to FAR; and
- Ensuring they apply the best in commercial purchasing practices.

Chapter 70.48 Value Engineering In M&O Contracts

Date: August 2017

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies and should be considered in the context of them.

1.1 **Value Engineering in Major Contracts.** This Guide Chapter provides contracting officers guidance on the application of value engineering (VE) to management and operating contracts and other contracts for the performance of work at current or former management and operating contract sites and facilities that would require or benefit from VE, where the requirements of the prescribed FAR clauses are inappropriate (hereinafter referred to as "major contracts").

1.2 **Value Engineering Approaches.** There are two VE approaches described in FAR Part 48, the "incentive" (also known as voluntary) and the "mandatory program." In the incentive approach, the contractor participates voluntarily and uses its resources to develop and submit value engineering change proposals. If the Government accepts a value engineering change proposal, the contractor shares in savings and receives payment for its allowable proposal costs. In the mandatory program approach, the Government requires and pays for a specific VE effort. The contractor must perform VE of the scope and level of effort required by the contract. The contractor shares in savings, but at a lower percentage than under the incentive approach.

FAR Part 48 also prescribes three clauses, 52.248-1, 52.248-2, and 52.248-3. The clauses apply to contracts in general, architect-engineer contracts, and construction contracts, respectively. Procedures are slightly different and sharing of savings are more restricted for architect-engineer contracts and construction contracts. FAR 52.248-1 has three Alternates. Alternate I applies if the contracting officer chooses the mandatory program approach. Alternate II applies if the contracting officer chooses both the incentive approach and the mandatory program approach. Alternative III applies if collateral savings are not to be included.

1.3 **Applying Value Engineering to Major Contracts.** DOE major contracts are different than those envisioned by the authors of FAR Part 48. The structure of the Department's major contracts includes general conditions that mitigate against achieving equitable cost sharing. They are:

- A lack of firm cost estimates;
- Requirements covered by award fee that already require the contractor to identify and institute practices to improve performance;
- Requirements covered by a contract clause;
- Accounting systems that do not separately track the benefits and costs of VE efforts;
- Costs of unsuccessful VE proposals are direct costs (under the cost accounting standards) to the contract, while in the existing FAR Value Engineering policy these costs are indirect costs; and
- Some contracts are a composite of dissimilar work and contract types.

1.4 **Cost Savings Can Be Achieved through Various Mechanisms.** We expect our major contractors to help is save money in three ways, two of which are value engineering. The three ways are:

- We agree to fairly consider the contractor's suggestions to replace specifications, standards, etc., that are stipulated for the contractor to follow. This is the FAR incentive approach. This concept does not apply where the contractor has participated in determining the specifications, standards, etc., of the contract;
- We direct the contractor to perform value engineering. This is the FAR mandatory program approach; and
- We require the contractor to identify and institute practices that will improve performance. This is not value engineering under the FAR definition. It does not allow the contractor a share of the cost savings that result. Examples are the "Performance Improvement and Collaboration" clause and the subjective evaluation of the contractor's performance efforts under award fee.

1.5 **The FAR Incentive Approach May Apply to Portions of a Major Contract.** The general conditions present in a major contract mean the incentive approach as prescribed in FAR Part 48 will only apply to those portions of a major contract where the particular conditions described below exist, and even then only in a modified form (also described below).

The particular conditions that must exist for the incentive approach to apply are:

- DOE dictated the specification, design, process, etc., that the contractor must follow;
- The contractor's cost reduction effort is not covered under award fee (or any other incentive);
- The contracting officer has confidence in the cost estimate for the work at issue; that is, confidence in the cost estimate is similar to that which would be achieved under normal FAR pricing conditions. While obtaining cost and pricing data and performing cost analysis are not required, the contracting

officer must have adequate rationale for concluding the cost estimate is reliable enough to merit sharing savings based on the contractor performing at less than the estimate; and
- The proposal, if accepted, must require a change to the contract and result in overall savings to DOE after implementation.

When all the particular conditions listed above exist, a modified incentive approach is applicable. Modified incentive approach means:

- Costs of unsuccessful proposals are not allowable unless approved in advance by the contracting officer;
- A lower percentage of savings is provided to the contractor than permitted by FAR (typically no more than 20 percent), based on the contracting officer's confidence in the cost estimate;
- The HCA must approve the VE proposal; and
- Savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

1.6 **The FAR Mandatory Program Approach May Apply to Portions of a Major Contract.** Because the Government decides when to require VE effort in mandatory program approach, the contractor's allowable, allocable and reasonable proposal costs are reimbursed. The Government would, however, only share savings where the particular conditions described above for the incentive approach exist, and, even then, only at a lower percentage than the FAR permits.

When all of the particular conditions described above exist, a modified mandatory program approach is applicable. Modified mandatory program approach means:

- A lower percentage of savings is provided to the contractor than permitted by FAR (typically no more than 10 percent), based on the contracting officer's confidence in the cost estimate. In some cases the percentage should be zero;
- The HCA must approve the VE proposal; and
- Savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

1.7 **Both Approaches Can Be Used in the Same Major Contract.** In certain circumstances, one or more value engineering approaches may apply to different portions of a major contract. You can "mix and match" the value engineering approach and the affected contract effort. Examples of different approaches are:

- Under one major contract, for example, the FAR "Value Engineering-Architect- Engineer" clause may apply to an Architect-Engineering effort, a modified FAR "Value Engineering" clause may apply to the acquisition of a large capital asset, and a modified FAR "Value Engineering Alternate I" clause may apply to a significant and costly project;

- Under another major contract no FAR value engineering approach may be appropriate because the reliability of the cost estimates does not merit cost sharing;
- Under another major contract the modified mandatory program approach may be appropriate for a specific project, and the contractor's share of savings should be only 5 percent; and
- Under another major contract DOE may direct the contractor to subcontract for a value engineering analysis of a costly and complex project; this situation is not a FAR value engineering approach and does not merit cost sharing.

1.8 **VE Provisions Flow-down to Subcontracts.** Major contractors should extend VE provisions to their subcontractors, where appropriate, by granting them a percentage of whatever share of savings the major contractors receive from DOE. Major contractors will be required to approve subcontractors' requests to perform value engineering analyses in advance. Agreements between the major contractors and their subcontractors do not affect the contractual relationship between major contractors and DOE. DOE's share of savings, for example, is not affected by the major contractor's agreement to provide a portion of its share of savings to a subcontractor.

1.9 **Value Engineering and Award Fee/Incentive Structures.** Value engineering incentive payments do not constitute profit or fee within the limitations imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b). The benefits of an accepted value engineering change proposal should not be rewarded both as value engineering shares and as incentives under performance, design-to-cost, or similar incentives of the contract. Only those benefits of an accepted value engineering change proposal not rewardable under other incentives may be rewarded under a value engineering clause.

1.10 **If the Particular Conditions Are Present.** If the particular conditions that must exist for one of the value engineering approaches to apply are present, contracting officers should consider inserting and applying to appropriate portions of existing major contracts one or more of the modified versions of clauses at FAR 52.248-1 and FAR 52.248-3 (after first removing the clause at DEAR 970.5215-4, Cost reduction, if present).

Contracting officers must modify the clause at FAR 52.248-1 so that it:

- Requires the contractor to obtain the contracting officer's approval before incurring any value engineering development and implementation costs;
- States the sharing arrangement for the incentive (voluntary) approach for a cost- reimbursement contract will be determined by the contracting officer and will be no greater than 20%;
- States the sharing arrangement for the program requirement (mandatory) approach for a cost-reimbursement contract will be determined by the Contacting Officer, will be no greater than 10%, and may be zero; and
- States the collateral savings rate for a cost-reimbursement contract will be determined by the contracting officer, will be no greater than 10%, and may be zero.

Contracting officers must modify the clause at FAR 52.248-3 so that it:

- Requires the contractor to obtain the contracting officer's approval before incurring any value engineering development and implementation costs; and
- States the collateral savings rate for a cost-reimbursement contract will be determined by the contracting officer, will be no greater than 10%, and may be zero.

Attachment #1

DEPARTMENT OF ENERGY DETERMINATION AND FINDINGS
FEDERAL ACQUISITION REGULATION (FAR) CLASS DEVIATION REGARDING FAR 52.248-1 and FAR 52.248-3

FINDINGS:

1. There are two Value Engineering (VE) approaches described in FAR Part 48, the "incentive" (also known as voluntary) and the "mandatory program." In the incentive approach, the contractor participates voluntarily and uses its resources to develop and submit value engineering change proposals. If the government accepts a value engineering change proposal, the contractor shares in savings and receives payment for its allowable proposal costs. In the mandatory program approach, the Government requires and pays for a specific VE effort. The contractor must perform VE of the scope and level of effort required by the contract. The contractor shares in savings, but at a lower percentage than under the incentive approach.

2. The structure of the Department's major contracts (management and operating contracts and other contracts for the performance of work at current or former management and operating contract sites and facilities that would require or benefit from VE, where the requirements of the prescribed FAR clauses are inappropriate) includes general conditions that involve mitigating factors that prelude equitable cost sharing. They are: a lack of firm cost estimates; requirements covered by award fee that already require the contractor to identify and institute practices to improve performance; requirements for performance improvements covered by other contract clauses; accounting systems that do not separately track the benefits and costs of VE efforts; costs of unsuccessful VE proposals are direct costs (under the cost accounting standards) to the contract, while in the existing FAR Value Engineering policy these costs are indirect costs; and some contracts are a composite of dissimilar work and contract types.

3. The general conditions present in a major contract mean the incentive approach as prescribed in FAR Part 48 will only apply to those portions of a major contract where particular conditions exist, and even then only in a modified form.

4. The particular conditions that must exist for the incentive approach to apply are: DOE dictated the specification, design, process, etc., that the contractor must follow; the

contractor's cost reduction effort is not covered under award fee (or any other incentive); the contracting officer has confidence in the cost estimate for the work at issue; and the proposal, if accepted, must require a change to the contract and result in overall savings to DOE after implementation. When all of the particular conditions exist, a modified incentive approach is applicable. Modified incentive approach means: costs of unsuccessful proposals are not allowable unless approved in advance by the contracting officer; lower percentage of savings given to the contractor than permitted by FAR (typically no more 20 percent), based on the contracting officer's confidence in the cost estimate; the Head of the Contracting Activity must approve the VE proposal; and savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

5. For the mandatory program approach, the Government would only share savings where the particular conditions described above for the incentive approach exist, and even then only at a lower percentage than the FAR permits. When all of the particular conditions described above exist, a modified mandatory program approach is applicable. Modified mandatory program approach means: lower percentage of savings given to the contractor than permitted by FAR; the Head of the Contracting Activity must approve the VE proposal; and savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

6. In accordance with FAR 1.404, consultation with the Civilian Agency Acquisition Council Chairman before approving this class deviation to the FAR has been accomplished. The appropriate consultation and approval have been completed under the authority granted to the civilian agencies under Civilian Agency Acquisition Letter 2002-01.

DETERMINATION:

Based upon these findings, I hereby determine that it is necessary to deviate from the clauses at FAR 52.248-1 and FAR 52.248-3 to reflect fairly the structure of DOE's major contracts as it affects equitable cost sharing in value engineering arrangements.

APPROVAL______________________________DATE_________

Director, Office of Procurement and Assistance Management Department of Energy