

Contractor Human Resources Management

Guiding Principles

To ensure DOE contractors manage their Human Resource programs to:

- Support the DOE mission,
- Promote workforce excellence,
- Champion work force diversity,
- Achieve effective cost management performance, and
- Comply with applicable laws and regulations.

[References: [DOE Order 350.1](#), [DOE Order 350.3](#)]

1.0 **Summary of Latest Changes**

This update reflects that DOE Order 350.1 was separated into two orders:

- (1) DOE O 350.1: Contractor Human Resource Management Programs; and
- (2) DOE O 350.3: Labor Standards Compliance, Contractor Labor Relations, and Contractor Workforce Restructuring Programs.

2.1 **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.

2.2 **Contractor Human Resources**

Contractors that manage the Department's facilities have significant numbers of employees necessary for the operation of Department of Energy (DOE) sites and facilities. The Human

Resource issues which arise are complex and extremely sensitive, and can create a potentially significant cost to the Department.

This chapter covers subjects set forth in DOE O 350.1 and DOE O 350.3. Those subjects include:

- Advance understandings on cost (retirement programs, risk management, and insurance);
- Labor standards;
- Work force restructuring; and
- Labor relations.

2.3 Advance Understandings on Cost

This section provides information related to the roles and responsibilities of both Departmental elements and individuals involved in and responsible for:

- Oversight of DOE Management and Operation (M&O) and other facility operation contracts that provide cost reimbursement for contractor human resource programs;
- Determination of allowability and reasonableness of contractor employee compensation and related human resource costs; and
- Measurement and evaluation of the effectiveness of contractor human resource management in recruiting, deploying and retaining a reasonably priced workforce to meet DOE mission objectives.

The Department reaches advance understandings on contractor human resource costs (personnel appendices) in M&O and other facility operation contracts for which it reimburses those costs to:

- Determine allocability, allowability, and reasonableness of costs prior to incurrence, thereby avoiding subsequent disallowances and disputes;
- Provide appropriate and reasonable compensation levels to recruit and retain contractor employees to meet DOE mission objectives; and
- Assure prudent expenditures of public funds.

Generally, an advance understanding on contractor human resource costs is needed when:

- Policies are established specifically for contract work;
- The contractor's work is predominantly or exclusively made up of negotiated Government contract work;
- Contract work is so different from the organization's private sector contract work that existing established policies cannot reasonably be extended to and consistently applied on contract work;
- Established policies proposed for contract work are not sufficiently definitive to permit a clear advance mutual understanding of allowable costs and to provide a basis for audit;

- The contractor's personnel policies, programs, and practices must be revised or disallowed to comply with DOE policies; or
- The contractor does not have written policies/procedures.

2.4 Negotiating an advance understanding

At the beginning of the acquisition cycle a Request for Proposal may include specific requirements for contractor human resource management programs to be applied by the winning contractor. The pre-negotiation package is the precursor to the advance understanding on contractor human resource costs. Allowable Human Resource costs need to be described, but avoid process and/or transactional requirements that do not directly affect the allowability of Human Resource costs. Include the standards and methods for control of compensation increase funds, as well as comparators (benchmarks). The contractor will use those to establish, adjust, and evaluate Human Resource costs during the contract term.

Two basic methods which DOE uses to achieve and record advance understandings with its contractors:

1. Negotiation of an advance understanding (personnel appendix) to the contract, which sets forth the policies, programs, and practices accepted by the Department as items of allowable cost or as the basis for determining the allowability of human resource costs; or
2. Review of, and agreement with established policies, programs, and schedules (and any changes thereto during the contract term) applicable to the contractor's private operations that are acceptable for contract work and which are consistently and uniformly followed throughout the contractor's organization.

2.5 Model H Clause

Most advance agreements to date have followed the format of the Model H Clause, which contains sections for an introduction, definitions, compensation/pay programs, welfare benefits, retirement programs, paid time off, Employee Assistance Program (EAP) sections, and other sections necessary to deal with specific major items of allowable cost. If you have questions regarding the Model H Clause, contact the Contractor Human Resources Policy Division (MA-612).

2.6 Reasonableness of Contractor Human Resource Costs.

Evaluating the reasonableness of contractor human resource costs:

- The contractor's competitive labor market;
- The significance of Government contracting on the labor market;
- Whether the workforce is represented by one or more unions;

- The impact of the contractor's private operations (to the extent a contractor has private, non-DOE, operations);
- DOE acceptance of reasonableness findings of other federal agencies; and
- The extent to which contractor human resource costs are based upon valid survey data, and generally conform to policies and practices of the industry with which the contractor is identified in its private operations.

If an organization exists solely to perform DOE work under a cost type contract (for example, Limited Liability Companies), little financial incentive for, or experience in, exercising prudent business judgement in contractor human resource areas may exist. In such instances, DOE guidance to contractors on business management performance expectations and measures to evaluate reasonableness of such costs, and the importance of the valid application of the metrics in this section, become even more important.

The contract administration team must work in close coordination because of the:

- Magnitude of human resource costs, as a percentage of overall contract cost and as a dollar amount;
- Cost and volatility of retiree pension and medical benefits and associated long term liabilities;
- Increasing costs of health care;
- Technical, legal, and regulatory requirements under which contractor human resource programs must operate; and
- Socio-political environment in which the Department operates.

2.7 Risk Management and Insurance

Risk Management:

The Department has risks or potential liabilities or exposures in every business or activity. Risk management is the process of analyzing and identifying potential risks or liabilities associated with a business or activity processes or procedures. The Department must determine the best method to eliminate, reduce, and/or finance those risks or potential liabilities. Risks that cannot be eliminated or significantly reduced can result in potential financial liabilities that must be accepted or transferred to another entity.

Insurance:

Federal Acquisition Regulation (FAR) 28.3 and Department of Energy Acquisition Regulation (DEAR) 928.3 discuss Government policies and procedures regarding insurance. Insurance is the most common, readily available, and identifiable method to transfer a risk or potential financial liability to another entity.

Insurance is an appealing remedy and works because insurance companies can provide, for a relatively reasonable fee (premium), a significantly large financial liability coverage amount. Insurance companies can provide this normally cost effective service because of the theory of large numbers and associated risk analysis (projected losses for the risk exposure). The premiums, from a very large number of people or businesses with similar risk exposures, are held in reserve and invested to use in paying for actual covered losses as they occur.

The insurance company accepts the risk and financial liability and makes any required financial restitution. Consequently, this indemnifies the insured against financial loss resulting from the covered risk after meeting deductibles and co-pays. The premium is a pro-rated allocation to the “large number” of insured for all potential financial losses projected to occur, even if these losses do not occur, plus all of the insurance company’s administrative direct and indirect expenses, and profit. In theory, the larger the number of those insured, the smaller the premium.

2.8 The Department’s Alternative to Commercial Insurance

Commercial insurance under M&O and facility contracts:

Because our M&O site and facility contractors are few in number and, have rather unique and in some cases extreme and classified risks or potential liabilities, they are not offered the same cost savings and risk sharing opportunities provided normal commercial operations. The FAR recognizes a contractor’s potential exposure and responsibility for potential liabilities, and allows contractors to charge, under certain circumstances, insurance and insurance type expenses to a contract.

Under extraordinary emergencies as granted by Public Law (Pub. L.) 85-804, as amended by Pub. L. 93-155 (50 U.S.C. 1431-1435), DOE is allowed to indemnify contractors from certain risk and costs. FAR Part 50 prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate various indemnifications.

Using the FAR’s general contract authority and as further discussed at DEAR 950.71, DOE may enter into indemnity agreements with its contractors. Indemnities give contractors some limited risk and liability protection. The Department’s assumption of liability will be expressly limited to the availability of appropriated funds placed on the contract. DOE’s policy also limits these agreements to liabilities for nuclear incidents that may not be otherwise covered by a statutory indemnity, and for uninsured non-nuclear risks.

Subject to certain limitations, the DOE, under FAR 52.250-1, indemnifies contractors with respect to unusually hazardous or nuclear risks against:

- Claims by third persons for death; personal injury; or loss of, damage to, or loss of use of property;
- Loss of, damage to, or loss of use of Contractor property, excluding loss of profit; and

- Loss of, damage to, or loss of use of Government property, excluding loss of profit.

Types of insurance that should not be approved:

Contractors can rely on the Department to compensate for certain types of insurance, but may not always perform the most critical analysis of the types of coverage appropriate for their need. This can lead to their purchase of special insurance coverages that may not be necessary or in the Department's best interest. These coverages, to the extent they protect and benefit the contractor, but provide limited or no protection or benefit for the Department, should not be approved. Examples of the type of coverage that should not be approved include Directors' and Officers' liability insurance and other forms of professional liability insurance.

2.9 Workforce Restructuring

The Department has the responsibility to ensure contractors pursue the application of best business practices to promote efficiency and to ensure contractor workforce restructuring actions are conducted in a manner that minimizes the impact on programmatic activities. The Department has a responsibility to ensure fair treatment of workers when restructuring of the contractor work force is required and perform workforce planning that provides for the continued availability of critical knowledge, skills, and abilities required for the Department's mission.

Section 3161 of the National Defense Authorization Act of 1993, sets forth specific requirements and objectives to be followed when workforce changes occur at defense nuclear facilities. Secretarial policy and DOE O 350.3 extends these objectives to all DOE contractor workforce restructuring.

The purpose of the requirements pertaining to workforce restructuring are to:

- Minimize involuntary separations;
- Ensure contractor workforce restructuring actions are conducted in a manner that minimizes the effect on programmatic activities;
- Ensure contractors provide reasonable notice to employees, their representatives, public officials, and other stakeholders of necessary reductions in contractor employment;
- Facilitate workforce planning by Department contractors;

Workforce restructuring is based on a general plan developed by DOE for a site consistent with the objectives and requirements of Section 3161. When separations are required, the contractor develops a specific plan indicating which job classifications will be reduced, how workers will be selected, including both voluntary and involuntary processes, and what separation benefits those contractor employees will receive. Practical experience in this sensitive area demonstrates the critical importance of ongoing communication and consultation between the contractor, field organizations, affected programs, legal counsel, and the Office of the Assistant General Counsel for Contractor Human Resources (GC-63). DOE's contracts also include provisions governing

how the existing workforce will be treated in terms of hiring, bargaining recognition, and compensation if there is a change in contractors.

2.10 Labor Relations

This section provides information to the contract administration team members about the DOE's policy on labor-management relations and the roles and responsibilities of DOE and its contractors.

The extent of Government ownership of plant and materials, and the overriding concerns of national defense and security, impose special conditions on labor organizations representing the contractor employees. DOE retains absolute authority on all questions of security and security rules, including the administration of security.

FAR 22.101-1 requires agencies to remain impartial concerning any dispute between labor and contractor management and that agency personnel must not undertake the conciliation, mediation, or arbitration of a labor dispute. Furthermore, DOE must not take a public position concerning the merits of a labor dispute between a contractor and its employees or organizations representing those employees.

Although DOE is not a party to the contractual relationship between contractor and union, it does have an oversight responsibility. This ensures that contractors pursue collective bargaining practices that promote efficiency and economy in contract operations, judicious expenditure of public funds, equitable resolution of disputes, and effective collective bargaining relationships.

The Contractor shall consult with DOE prior to contract negotiations with respect to the economic parameters for bargaining and during the term of a collective bargaining agreement on matters that may have a significant impact on work rules or past customs and practices. The contracting officer, in consultation with the Head of Contracting Activity, will approve or disapprove the contractor's proposed economic bargaining parameters for cost reimbursement purposes.

The Office of the Assistant General Counsel for Contractor Human Resources (GC-63) has staff expertise to assist in answering questions and determining what actions, if any, DOE may wish to consider with regard to contractor labor relations.

Inter-Contractor Purchases

0 Overview

This chapter provides guidance on the internal management control process to be followed by contracting activities to ensure that Inter-Contractor Purchases (ICPs) entered into by authorized contractors under their cognizance comply with necessary requirements.

This guidance provided here does not affect a contractor's ability to place orders against pre-established contracts for property or services awarded by another contractor for use by other Department of Energy (DOE) contractors pursuant to the consortium purchasing concept. This guidance also does not affect the responsibilities for accounting for ICP transactions in accordance with the Accounting Handbook.

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- Inter-Contractor Purchases expedite the purchase of necessary special or unique services or expertise from other authorized DOE contractors.
- Contractors have a responsibility to periodically assess the use of ICP transactions and report to DOE any inappropriate uses.

● Background

The Department of Energy Acquisition Regulation requires that a contractor's purchasing system make use of effective competitive techniques in obtaining the services and expertise necessary to meet its mission needs.

The Department's ICP process evolved to expedite the acquiring of unique or specialized services and expertise from other DOE major facilities contractors, thereby reducing lead and delivery time from months to a matter of days. The ICP process, however, was intended for use only in special circumstances (e.g., where services are not readily available from the private sector). Many of the process steps inherent in a normal procurement transaction, such as cost and price analysis, rate verifications, flow-down clauses are eliminated through use of an ICP transaction.

In order to facilitate this type of transaction, the Department developed a process for the inter-office transfer of funds involving, among other things, ICP transactions of \$250,000 or more and a similar process for ICP transactions under \$250,000. Neither of those processes is affected by this guidance.

- **Definitions**

The term ***Inter-Contractor Purchase*** means a subcontract level purchase transaction between two or more DOE management and operating contractors or site integrating contractors. The transaction is appropriate only as described in this guidance. These transactions tend to be less formal than a subcontract, however, the necessity of establishing a fair and reasonable cost for performance and the necessity of effectively administering the transaction remain. Inter-Contractor Purchases as used in this Guide Chapter Letter include transactions known by the following names, among others: Inter-office Work Orders, Integrated Contractor Order, Memorandum Purchase Order, Integrated Contractor Requisitions.

The term ***Contractor*** means a management and operating contractor or other major site or facilities contractor which is a party to an ICP transaction.

- **Guidance**

Contracting Officers shall ensure that the contractor's approved procurement system provides adequate management control and oversight relating to the use of ICPs, / consisting of the following principles:

An ICP transaction is used only if the following criteria are met: (a) the performing contractor has special or unique experience or equipment to perform work not readily available from the private sector; (b) the nature of the work is consistent with the scope of the performing contractor's contract; and (c) any effort subcontracted by the performing contractor is incidental to the effort.

It is the requesting contractor's responsibility to ensure that the use of an ICP is at a fair and reasonable cost or price and properly administered.

For ICP transactions expected to exceed \$250,000, the requesting contractor shall appropriately document compliance with the criteria of A 1. above and the fairness and reasonableness of the proposed cost or price. ICPs expected to exceed \$1,000,000 shall be documented and submitted to the DOE contracting officer for written consent prior to the issuance of the proposed ICP.

Upon receipt of an appropriately documented contractor's request to issue an ICP expected to exceed \$1,000,000, the contracting officer will either provide written consent to issue the ICP or require that the acquisition be processed as a normal purchase in accordance with the contractor's purchasing systems and methods. The consideration and disposition should occur within two working days of receipt of the request.

The contractor should periodically assess the adequacy of its control system, determining whether ICPs were used in an appropriate manner and are being effectively performed. The assessment is subject to validation by the DOE/NNSA field activity that has cognizance over the contractor. The contractor shall promptly notify the DOE contracting officer of any ICP transaction found to be inconsistent with these guidelines.

A contractor's inappropriate use of an ICP may be the basis for lowering the threshold for prior written consent of DOE then in effect and may result in the disallowance of costs incurred that are in excess of those that would have been incurred had the transaction been handled appropriately.

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

Guiding Principle

DOE contractors are motivated in a variety of ways, depending on the nature of the firm, the Government's requirement, or other specific circumstances. No single method applies to all contractors. The goal of the Department is to obtain maximum return from its contractors by offering a rational mix of integrated, fair, and challenging incentives to its contractors.

[Reference: [DEAR 970.1504-1-2](#)]

1.0 Summary of Latest Changes

This update makes administrative and formatting changes.

2.0 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.

2.1 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.

2.2 Background. M&O contractor fee policy, found at DEAR 970.1504-1, 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.

2.3 Synopsis of M&O Fee Calculation & Key Considerations of M&O Fee Policy

2.3.1 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 970.1504-1-5
 - Assign "appropriate fee values"
 - Cost-plus-award-fee contract
 - Multiply the "appropriate fixed fee" by the classification factor for the facility/task (from DEAR 970.1504-1-9 (c), (d), and (e)) to obtain total available fee
- Laboratory
 - Fixed-fee contract
 - Determine if fee is appropriate at all (from the six considerations at 970.1504-1-3). 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 970.1504-1-5
 - Re-evaluate the six considerations at 970.1504-1-3
 - 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 970.1504-1-3)
 - If fee appropriate
 - Multiply the “appropriate fixed fee” by the classification factor for the facility/task to obtain total available fee (970.1504-1-9 (c), (d), and (e))
 - 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.

2.3.2 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 (970.1504-1-3) 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

2.4 Linking Performance Fee to Acquisition Outcomes. 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.

2.5 Rollover of Performance Fee. 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 than 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.

2.6 Award Term

2.6.1 General.

- 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:

$$\frac{[(1 \text{ percent reduction in annual available fee amount}) / (\text{each additional year that the contractor can earn})] \times$$

1. $[\text{15 possible additional years that the contractor can earn}] =$
 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.”

2.6.2 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.

2.6.3 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.

2.6.4 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 contractor 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;

ACQUISITION PLANNING IN THE M&O ENVIRONMENT

GUIDING PRINCIPLES

Acquisition Alternatives packages should be started at least 2 years prior to contract expiration.

[References: FAR Part 7 and Subpart 17.6; DEAR 970.1706; and Acquisition Guide Chapters 7.1 and 71.1]

1.0 Summary of Latest Changes

This update: (1) deletes the previous guide chapter 70.3 and re-issues this new chapter 70.1706-1 in its place; (2) revises the description of the acquisition alternatives package to require a thorough discussion of alternatives beyond simply extending or re-competing an M&O contract; and (3) makes various formatting and editorial changes.

2.0 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.

3.0 Background

Subpart 17.6 of the FAR prescribes policies and procedures for the award, renewal, and extension of M&O contracts. Section 17.602 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 17.605 (b) and (c) 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, CO's 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(a), the Head of the Agency may authorize contracting officers to enter into or renew M&O contracts. FAR 17.605(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.

4.1 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 17.605(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 35.017-4; 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.

5.1 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 Federal Acquisition Regulation (FAR) 7.105, Contents of written acquisition plans, and the associated coverage of these requirements in the Acquisition Guide

Chapter 7.1, Acquisition Planning. In addition to the FAR and Acquisition Guide Chapter guidance, the acquisition plan must include the following:

- In the discussion required by FAR 7.105 (b) (2), Competition, include 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 6.302 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.

6.0 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 6.302. 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 Guide chapter 6.1 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 17.605(b) that the Agency Head authorize the renewal and extension of a M&O contract in conjunction with, and at the time of, 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 17.605(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****I. Findings**

A. 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.

B. 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.

C. Under current FAR policy, found at FAR 17.605(c), 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 17.605(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.

D. In accordance with FAR 17.602(a) and 17.605(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.

E. 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 17.605(b) that the Agency Head authorize the renewal and extension of a management and operating contract in conjunction with, and at the time of, 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 competitively awarded 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 17.605(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.

F. 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.

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

H. Such a deviation has not been requested before.

I. 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.

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

II. Determination

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

(1) 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.

(2) 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.

B. 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 48 CFR 17.605(b) with respect to determinations to extend or compete performance based management contracts.

Signed
Richard H. Hopf
Procurement Executive
Department of Energy

9/27/94
Date

Concurrence: **Signed**
Deputy General Counsel
For Technology Transfer
And Procurement

9/23/94
Date

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) 35.017-4 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 35.017-4, 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 35.017-1. 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]
Secretary of Energy

Date

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 6.301. [In one or two sentences, briefly describe the laboratory/site/facility mission]. Federal Acquisition Regulation (FAR) Subpart 35.017-4 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 35.017-4, 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 35.017-1. 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]
Secretary of Energy

Date

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(a), 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]
Secretary of Energy

Date

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(a), 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]
Secretary of Energy

Date

Responding to Solicitations Under DOE's Strategic Partnership Project (SPP) Agreements

Guiding Principles

- SPP solicitation responses maximize access to DOE highly specialized and unique facilities, services, and technical expertise when private sector facilities are inadequate.
- Agreements increase research and development interactions and provide opportunities for transferring technology while assisting in maintaining core competencies and enhancing the science and technology base at DOE facilities.
- Effective use of the guidance ensures DOE maintains compliance with applicable non-competition laws, regulations and statutes.

References: [[FAR 17.5](#), [FAR 35.016](#), [FAR 35.017](#), [DEAR 970.1707](#), [DEAR 970.5217-1](#), and [DOE Order 481.1D](#)]

1.0 Summary of Latest Changes

This update makes administrative changes to ensure consistency with DOE Order 481.1D and DEAR language.

2.0 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. Additional information on this subject can be found in documents listed in the Authorities section below.

2.1 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.

2.2 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.

2.3 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 2.4.6 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.

2.4 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 USCS § 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.

2.4.1 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 35.017-1(a). 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:

2.4.2 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 \$500k or less issued against Federal Supply Schedules. FAR 17.503(e) requires that "[T]he non-sponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with domestic private industry."

2.4.3 Non-competiton Restrictions. Authorities used by DOE and other federal agencies to enter into Inter-agency Agreeents (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 non-sponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct

competition with the domestic private industry.”

FAR 35.017 (a)(2) provides that ... "It is not the Government's intent that an FFRDC use its privileged information or access to facilities to compete with the private sector. However, an FFRDC may perform work for other than the sponsoring agency under the Economy Act, or other applicable legislation, when the work is not otherwise available from the private sector."

FAR 35.017-1 (c)(4). A prohibition against the FFRDC competing with any non-FFRDC concern in response to a Federal agency request for proposal for other than the operation of an FFRDC. This prohibition is not required to be applied to any parent organization or other subsidiary of the parent organization in its non-FFRDC operations. Requests for information, qualifications or capabilities can be answered unless otherwise restricted by the sponsor.

FAR 35.016 (d) states, “[the primary basis for selecting] proposals received as a result of the BAA shall be evaluated in accordance with evaluation criteria specified therein through a peer or scientific review process. Written evaluation reports on individual proposals will be necessary but proposals need not be evaluated against each other since they are not submitted in accordance with a common work statement.”

FAR 35.016 (e) states, “The primary basis for selecting proposals for acceptance shall be technical, importance to agency programs, and fund availability. Cost realism and reasonableness shall also be considered 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 35.016. 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.

2.4.4 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 35.017-1(c) (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 15.308; 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 35.016 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.

2.4.5 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 contractor 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 the characteristics above and those described in FAR 35.016.
- 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.

Request for Proposals RFP and RFP-type instruments

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.

2.4.6 Additional Authorities.

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 under the Economy act,” which prescribes policies and procedures for a Federal agency to obtain supplies or services from another Federal agency.

FAR 35.016, “Broad Agency Announcement” which prescribes procedures for the use of the broad agency announcement with Peer or Scientific review (see FAR 6.102(d)(2)) 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 35.017, “Federally Funded Research and Development Centers (FFRDCs),” 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.”

DOE Strategic Partnership Projects and Cooperative Research and Development Agreements Using a Master Scope of Work

Guiding Principles

- Routine work performed by a Contractor under Strategic Partnership Project (SPP) agreements or Cooperative Research and Development Agreements (CRADAs) for non-Federal sponsors may be suitable for special processing under a Master Scope of Work.¹
- Consistent with the Deputy Secretary's decision on October 23, 2018², cognizant Contracting Officers have the option to negotiate, develop, and use a Master Scope of Work to approve certain routine work rather than provide approval on a transaction-by-transaction basis.

[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 Summary of Latest Changes

This is a new Acquisition Guide chapter.

2.0 Discussion

2.1 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 SPPs and CRADAs. 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 The use of an MSW to approve certain CRADAs relies, in part, on DOE's authority to permit a Contractor to enter into CRADAs to the extent provided in a DOE-approved Annual Strategic Plan under 15 U.S.C. § 3710a.

² Decision of Recommended technology Transition Reforms authorizing Implementation of a Risk Based, Master Scope of work Approach for the Approval of Routine Laboratory Partnering Agreements without Requiring Department of Energy Transactional Approval (EXEC-2018-004586).

2.2 Overview.

2.2.1 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.

2.2.2 *Master Scope of Work*

2.2.2.1 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 (CO) 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.

2.2.2.2 Routine work is work that is typical or customary at a particular facility which can be described in sufficient detail for the CO and the Contractor to agree to the scope of work. The CO 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 CO has substantial discretion in determining what constitutes a routine scope of work.

3.0 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 CO's discretion. The MSW is intended to provide the CO with the Contractor assurances necessary to apply the CO'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 CO 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 CO's approval, may be completed using the MSW process after the required approvals are secured.

3.1 MSW Minimum Requirements.

The CO must ensure that the MSW satisfies the minimum requirements set forth herein. To utilize the MSW process, the CO 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:

3.1.1 *Mandatory/Optional Requirements for each MSW*

3.1.1.1 Mandatory MSW Criteria

- 3.1.1.1.1 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 CO, multiple projects related to these services may be processed under the MSW.
- 3.1.1.1.2 Agreements to be Used. Any CO approved agreement terms and conditions, including any CO approved local model agreements, proposed for use in connection with each MSW.
- 3.1.1.1.3 Prohibited Work. Any type of classified or other work requiring classification guidance is not permitted.
- 3.1.1.1.4 Approval Process. Process for obtaining: (1) CO approval of a MSW; and (2) cognizant Secretarial Office approval of the first negotiated MSW.

3.1.1.2 Optional MSW Criteria

- 3.1.1.2.1 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 CO and Contractor must mutually agree to increase the limit.
- 3.1.1.2.2 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

CO and Contractor must mutually agree to the proposed period of performance.

3.1.1.2.3 Other Content. The Contractor and CO may include other agreed upon criteria or conditions that are consistent with this guidance and DOE policy.

3.1.1.3 Reauthorization. Procedures for the CO to annually review, reauthorize and, if needed, update each MSW.

3.1.2 *Procedures for Individual Project approval under an MSW*

3.1.2.1 Contractor Determination. Procedures for the Contractor to determine and provide to the CO its written determination that a specific project falls within the boundaries of the MSW.

3.1.2.2 High Risk Criteria for Individual Projects (i.e., filters). The CO 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:

3.1.2.2.1 Uses standard or otherwise CO pre-approved terms and conditions or approved model agreements;

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

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

3.1.2.3 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.

3.1.2.4 Reasonable and Timely Notifications to CO. Procedures to provide reasonable notification to the CO of agreements the Contractor is processing through the MSW including: (1) written documentation of the determination described in Section 3.1.2.1; and (2) timely access to individual transaction packages.

3.1.2.5 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 3.1.1.2 or for any other reason, the project must exit the MSW workflow. The CO may approve re-entry if and when the additional requirements have been met and appropriately cleared, e.g., foreign-sponsored work.³

3.1.2.6 Ability to Start Work. The CO 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 3.1.2.1; (2) the agreement is signed; and (3) funding is secured.

3.2 Negotiations. If and when the Contractor submits the MSW to the CO, the CO and the Contractor should promptly begin negotiations in an expedited manner and exercise reasonable diligence to reach agreement.

3.3 Effective Date and Reauthorization. A MSW will be effective for one year from the date it receives CO approval. The CO may reauthorize the MSW annually thereafter according to procedures in the MSW required under Section 3.1.1.3. 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.

3.4 DOE/NNSA Review and Oversight.

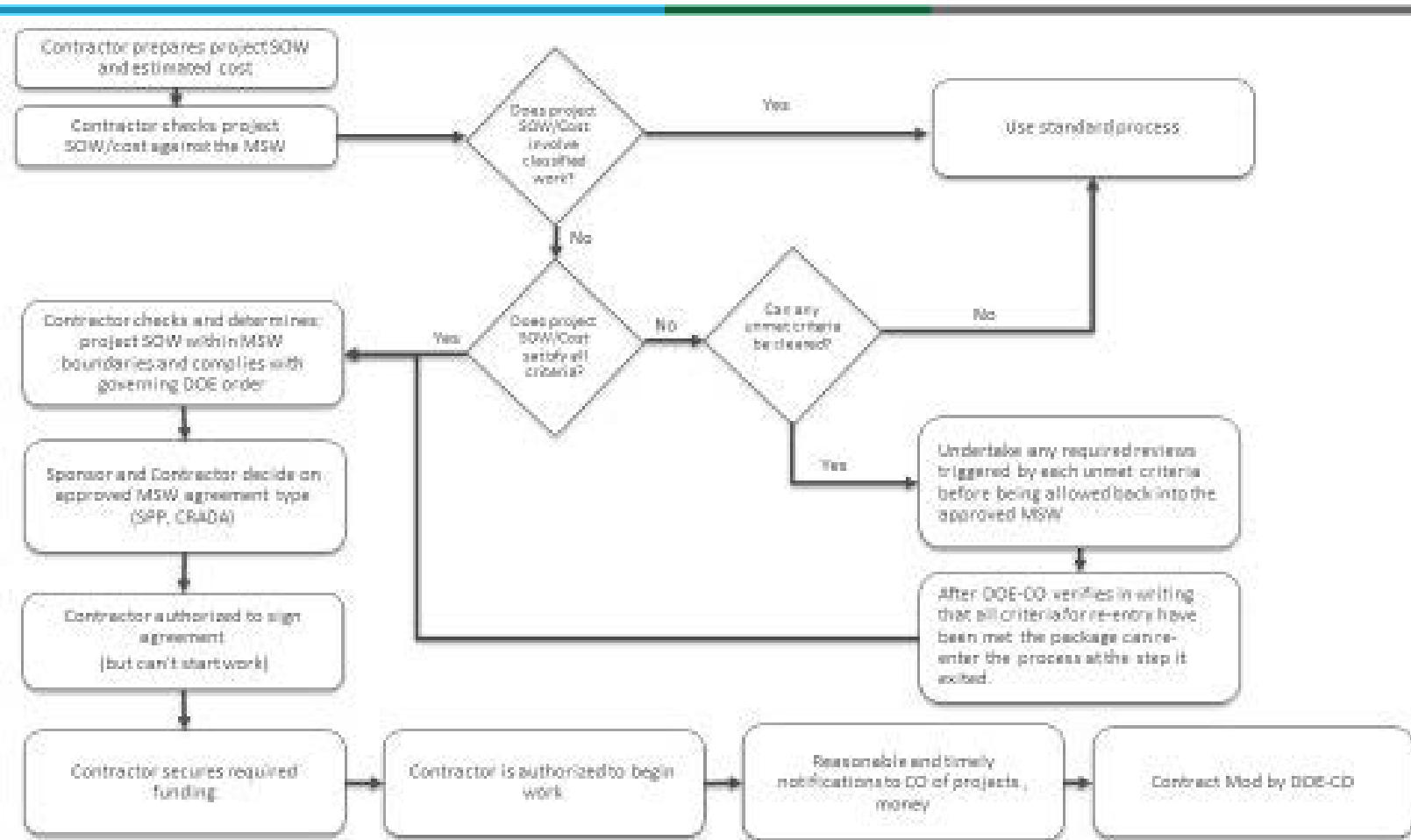
3.4.1 *Periodic Review of the MSW.* In addition to the reauthorization procedures under Section 3.1.1.3, the CO and the Contractor must mutually agree to procedures for a periodic CO review of the MSW program, e.g., the MSW and agreements processed under it. The periodic review must occur at least semi-annually for a period of two years from the effective date of the MSW and at least annually thereafter.

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

3.5 MSW Workflow Guidance - Flowchart.

³ 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.

Approved MSW – Individual Transaction Workflow



DOE/NNSA provides the flowchart as guidance for implementing an MSW workflow for processing eligible agreements.

The Diversity Plan

Guiding Principles

- Plan for and create a more diverse workforce.
- Develop an integrated approach to managing diversity across business operations.

[References: [DEAR 970.2671](#) and [970.5226-1](#)]

1.0 **Summary of Latest Changes**

This update: (1) deletes the previous guide chapter 70.7, Chapter 12, The Diversity Plan, Equal Employment Opportunity, and Small Business (June 2006) and re-issues this new chapter 70.2671 in its place, and (2) makes administrative changes.

2.1 **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.

2.1 **Diversity Plan Objective**. The objective of the Diversity Plan, as implemented by the Department of Energy Acquisition Regulation (DEAR) 970.5226-1, “Diversity Plan” clause is to obtain the contractor’s commitment to diversity sensitivity and inclusiveness in all aspects of its business practices, the workplace, and relations with the community at large. DOE Management and Operating contractors have the opportunity to be innovative with their Diversity Plans in order to increase opportunities for:

- Minorities,
- Women,
- Veterans,
- American Indians,
- Hispanics,
- Asian/Pacific Americans,
- African Americans,

- Disabled, and
- Other groups of workers, who, historically, have not had the opportunity to fully use their talents.

2.2 **Diversity Plan Contents.** DEAR 970.5226-1, “Diversity Plan” requires contractors to submit a plan within 90 days of contract award that includes innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Diversity Plan should be tailored to the unique circumstances of the individual contract site (e.g., mission, organization culture). The contractor’s business and management strategies for diversity should focus on creating a work environment that accepts and respects the characteristics, skills, and experiences that each individual brings to the work environment consistent with the Department’s policy on diversity (see DEAR 970.2671-1) and the Department’s objectives for its Diversity Program (see DOE O 311.1B). Accordingly, the contractor’s Diversity Plan should address the linkage between the following elements and the contractor’s organizational business and management strategies for diversity, including the contractor’s vision and definition of diversity:

2.2.1 **Contractor’s Workforce.** The Department’s contracts contain clauses on Equal Employment Opportunity (EEO) and Affirmative Action (AA). The plan may discuss how the contractor has or plans to establish and maintain results-oriented EEO and AA programs in accordance with the requirements of these clauses, and how the contractor’s organization includes or plans to include elements/dimensions of diversity that are targeted at enhancing such programs.

2.2.2 **Educational Outreach.** The plan may discuss the contractor’s strategies to foster relationships with Minority Educational Institutions and other institutions of higher learning (e.g., Historically Black Colleges and Universities, Hispanic serving institutions, and Native American institutions) to increase their participation in federally sponsored programs through subcontracting opportunities, research and development partnerships, and mentor-protégé relationships. The contractor’s plan may also discuss cooperative programs which encourage under represented students to pursue science, engineering, and technology careers.

2.2.3 **Community Involvement and Outreach.** The plan may discuss the contractor’s community relations activities in support of diverse elements of the local community, for example: Support for science, mathematics, and engineering education; support for community service organizations; assistance to governmental and community service organizations for equal opportunity activities; community assistance in connection with work force reduction plans; Strategic partnerships with professional and scientific organizations to enhance recruitment into all levels of the organization; and Use of direct sponsorship or making individual employees available to work with a specific community activity. Also, the contractor’s plan may discuss cooperative programs which encourage under represented students to pursue science, engineering, and technology careers.

2.2.4 Subcontracting. If appropriate to the contractor, the contract will contain FAR clause 52.219-9, entitled, "Small Business Subcontracting Plan," and other small business related clauses. Additionally, the solicitation under which the contractor proposed may have contained additional guidance on small business subcontracting. The plan may discuss outreach activities and achievements for enhancing subcontracting opportunities for small businesses, small disadvantaged businesses (e.g., small businesses owned and controlled by socially and economically disadvantaged individuals, Native American Tribes, Alaska Native Corporations, or Native Hawaiian Organizations), small business firms located in historically underutilized business zones, women-owned small businesses, and veteran-owned (including service-disabled veteran-owned) small businesses. The plan may also discuss actual or planned participation in the Department's Mentor-Protégé Program.

2.2.5 Economic Development including Technology Transfer. Some of the Department's contracts include clauses dealing with technology transfer, DEAR 970.5227-2, 970.5227-3, 970.5227-10, and 970.5227-12. Planning or activities developed under such clauses may apply to this element of the Diversity Plan. Additionally, subcontracting policies and activities undertaken or planned by the contractor with small, small disadvantaged, Hubzone small business, women-owned, and veteran owned small business concerns for the purpose of assisting the economic development of, or transferring technology to, such business concerns may be discussed.

2.2.6 Prevention of Profiling Based on Race or National Origin. Profiling pertains to those practices that scrutinize, target or treat employees or applicants for employment differently or single them out or select them for unjustified additional scrutiny, based on race or national origin. The plan may discuss the contractor's approach to preventing prohibited profiling practices, including strategies for early detection of potential profiling in the contractor's business activities (e.g., personnel actions, security clearances).

2.3 **Evaluation**. The Department evaluates the contractor's performance against the requirements of the Diversity Plan to determine the extent to which the contractor's performance complies with the approved plan. Evaluated performance that is less than that required under the contract may result in either a reduction in the amount of award fee awarded to the contractor or, for those contracts not containing award fee provisions, other measures. For contracts that provide for an award fee, Heads of Contracting Activities may evaluate the contractor's performance against its Diversity Plan under the award fee portion of the annual contract Performance Evaluation and Measurement Plan (or similar document) of the contract. To the extent that general business management is a factor in the evaluation of the contract performance relating to award fee, the Diversity Plan is included as an element in that evaluation. If any elements of the Diversity Plan are already evaluated elsewhere (e.g., subcontracting plan or technology transfer) under the contract for the purposes of award fee, those elements must not be evaluated again under the Diversity Plan factor.

Patent and Data Rights

Guiding Principles

- Determination of the rights DOE and the contractor have in data first produced under a contract.
- Prompt reporting of invention disclosure and filing by contractor of patent application.
- Cooperation among academia, federal laboratories, and industry is fostered through the Technology Transfer Program.

[References: [FAR 27](#)]

1.0 **Summary of Latest Changes**

This update makes administrative changes.

2.1 **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.

2.2 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.

2.3 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.**

2.2.1 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.

2.2.2 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 (CO'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 CO. The CO 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 CO'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.

2.2.3 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 CO, 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 CO that protects the Government from the contractor's unauthorized marking of data delivered under the contract. The clause provides a procedure by which the CO 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 CO 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.

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

2.2.5 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 Federal Acquisition Regulation (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 clause, “Rights In Data-Existing Works,” (FAR 52.227-18) would be used where the agency has a need for a work that is a compendium of existing works. 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.

The rights in data clause, “Commercial Computer Software - Restricted Rights,” (FAR 52.227-19) is used when commercial computer software is procured. The clause states the license that the Government acquires. That license is modeled after the restricted computer software license, Alternate III to the “Rights in Data-General” clause, and replaces any “shrinkwrap” license under which the commercial computer software is normally sold.

2.2.6 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 CO 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.

2.2.7 Responsibilities Regarding Data Rights. Each decision of the Department with respect to the intellectual property provisions of DOE’s contracts necessitates consultation between the CO, 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**)

2.3 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.

2.3.1 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 CO. 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 CO 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 CO 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 CO 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 CO's request, to a successor contractor, or in the absence of a successor contractor, to an entity designated by the CO. Annual reports on contractor technology transfer activities should be provided to the CO.

2.3.2 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.

2.4 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 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.

2.4.1 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 Cooperative Research and Development Agreements (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.

2.4.2 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.

2.5 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 CO 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 52.227-14¹, FAR 52.227-16, DEAR 952.227-14², 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 CO 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 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]

¹ 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.

² The clause at DEAR 952.227-14 provides additional alternatives to the clause at FAR 52.227-14 and instructions for their use.

- 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.

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- 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.

[FAR 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 Work For Others) 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 Cooperative Research and Development Agreements, 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 Cooperative Research and Development Agreement
- 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 Cooperative Research and Development Agreement.
- Grant prior written permission, as appropriate, for the contractor to provide for the withholding of data produced in conducting research and development activities in costshared 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 CO 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 CO to insert or correct markings. Comply with a request from the CO 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 CO, 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 CO 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 CO.
- 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 Cooperative Research and Development Agreements, agrees to include in such agreements the requirement set forth in paragraph (g). Identify, and obtain the approval of the CO 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 CO 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 CO 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 or his designee, following evaluation of Cooperative Research and Development Agreements (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 CO.
 - 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 CO 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 CO’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 CO and the Patent Counsel in arriving at a determination whether to grant any request by the contractor to copyright contract data.
- Participate with the CO 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 52.227-18, “Rights in Data-Existing Works”
11. FAR 52.227-19, “Commercial Computer Software-Restricted Rights”
12. FAR Subpart 27.4, “Rights in Data and Copyrights”
13. DEAR Subpart 927.4, “Technical Data and Copyrights”
14. DEAR Subpart 970.27, “Patents, Data, and Copyrights”

Patent Rights

15. DEAR 952.227-11, “Patent Rights – Retention by Contractor”
16. DEAR 952.227-13, “Patent Rights - Acquisition by the Government”
17. DEAR 970.5227-3, “Technology Transfer Mission”
18. DEAR 970.5227-1004-71, “Patent Rights - Management and Operating Contracts, Nonprofit Organization or Small Business Firm Contractor”
19. DEAR 970.5227-11, “Patent Rights – Management and Operating Contracts, For-profit Contractor, Non-Technology Transfer”
20. DEAR 970.5227-1204-72, “Patent Rights - Management and Operating Contractors, For-profit Contractor, Advance Class Waiver”
21. FAR Subpart 27.2, “Patents”
22. FAR Subpart 27.3, “Patent Rights Under Government Contracts”
23. DEAR Subpart 927.2, “Patents”
24. DEAR Subpart 927.3, “Patent Rights Under Government Contracts”
25. DEAR Subpart 970.27, “Patents, Data, and Copyrights”

Other Related Subjects

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

Contractor Compensation - Variable Pay

Guiding Principle

Use of variable pay by contractors managing and operating DOE facilities is a cost effective compensation management practice to promote attraction, retention, and reward of valued contractor personnel.

[Reference: [FAR 31.205-6](#), [DEAR 970.3102-05-6](#), [DOE Order 350.1](#)]

1.0 **Summary of Latest Changes**

This update: (1) changes the chapter number from 70.5 to 70.3102-05-6 to reflect the applicable FAR part, and (2) includes administrative changes.

2.0 **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.

2.1 **Overview.** This section provides guidelines for the Department's Heads of Contracting Activity (HCAs) and Contracting Officers (COs) responsible for administering and managing DOE management and operating (M&O) contracts, non-M&O major site and facility contracts, and contracts that require DOE approval of contractor compensation and benefits for reasonableness.

2.2 **Background.** The Department encourages the use of variable pay programs as described in this chapter. To enable DOE contractors to effectively compete in their employment markets for critical skills, contractor pay practices must be competitive with comparable employment markets. The end of the pay freeze for DOE contractors and increasing use of variable pay in the commercial marketplace provide an opportunity to implement variable pay programs as cost effective compensation management approaches for improving market competitiveness of contractor pay practices.

To augment the ability to attract, retain, motivate and reward employees, FAR 31.205-6, Compensation for personal services, DEAR 970.3102-05-6, Compensation for personal services and DOE Order 350.1, Contractor Human Resource Management Programs permit contractors to implement variable pay programs.

Variable pay programs tied to performance can also support the Department's emphasis on performance based contracting.

The procedures for approving contractor compensation increase plans (CIPs) are included in DOE Order 350.1, Chapter IV, Compensation.

Additional guidance is provided annually by the Chief, Contractor Human Resources Policy Division (MA-612).

2.3 Contractor Variable Pay Programs. Variable pay is a lump-sum, non-base building, cash payment. It provides contractors pay delivery options to remain competitive in attracting, retaining, motivating and rewarding skilled employees.

Variable pay is normally associated with achieving desired performance and significant accomplishments.

Variable pay provides the option of reinforcing the concept of salary management. Use of variable pay recognizes that base pay alone may not be competitive with practices of companies comparable to DOE contractors.

For contractor compensation programs using variable pay, "pay" is defined as total direct cash compensation.

Contractors using variable pay compare base pay to market base pay and, total direct pay to market total direct pay (which can vary year-to-year).

Variable pay allows contractors the flexibility to deal with different employee groups appropriately (variable pay in a manufacturing setting for non-exempt employees could be based on meeting production targets and for exempt employees on meeting other objectives).

2.4 Objectives. The objectives of contractor variable pay programs are to:

- Improve cost effectiveness of contractor compensation programs;
- Promote the infusion of best practices and innovations into contractor compensation management programs;
- Support the Department's emphasis on performance based contracting; and
- Facilitate accomplishment of DOE missions.

2.5 Guidelines for Variable Pay Program Design, Administration and Contracting Officer Approval. Variable pay should be affordable and justified within the constraints of the overall operating budget. DOE contracting officer approval is required for contractor variable pay programs and budgets, including decisions related to:

- Impact on benefits.
- Method of fund generation.
- Relationship to Compensation Increase Plan (CIP).
- Change in funding arrangements.
- Integration with other contract provisions.

Variable pay may be used as a recruitment, retention and salary management tool. Individual or organizational performance is the basis for all non-recruitment variable pay awards. Payout can be to the individual, team/unit, or organization-wide.

Prerequisites for performance based variable pay programs are:

- an effective performance management system approved by DOE which provides a "line of sight" to the DOE mission at all levels, and is consistent with established "scorecard" or other performance measurement approaches.
- a sound performance appraisal system that is based on job-related criteria and standards, or performance against predetermined objectives.

Contracting Officers consider the type of contract incentive payment, (award fee, performance based) that exists to reward contractor performance when reviewing variable pay program designs, especially features related to eligible contractor employee participants in DOE reimbursed compensation programs.

Options for generating variable pay funding pools include:

- Using a portion of the base salary merit budget and permit accrual year-to-year.
- Using a discrete portion of the direct compensation budget (over and above the base salary merit budget).
- Using a fund generated or increased by pre-defined performance goals that factor dollar cost savings, productivity gains, etc., into the variable pay fund.

Costs Associated with Whistleblower Actions

Guiding Principles

- Allowability determinations for costs associated with whistleblower actions are made on a case-by-case basis after considering contract terms, relevant cost regulations, and relevant circumstances.

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

1.0 Summary of Latest Changes

This update: (1) incorporates changes resulting from the enhanced whistleblower protections made permanent by Public Law 114-261 in 2016; (2) incorporates relevant material from Acquisition Letter 2016-6; and (3) includes administrative changes.

2.0 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 (COs) with implementing the requirements at DEAR 931.205-47(h); and to establish procedures for consulting with counsel on allowability determinations.

2.1 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.

2.2 Requirements of the Cost Principle.

2.2.1 Consultation with Counsel. DEAR 931.205-47(h) requires COs 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, COs 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.

2.2.1.1 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.

2.2.1.2 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.

2.2.2 Application of the Cost Principle in Specific Circumstances.

2.2.2.1 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, COs 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)).

2.2.2.2 Whistleblower Claims after Reversal of an Adverse Decision. In the event that an adverse decision is reversed, the CO may conclude that the costs of the proceeding, including costs of appeal, are allowable. However, in making that determination, the CO 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 CO may take account of the trial court's finding regarding the defendant's conduct.

2.2.2.3 Whistleblower Claims after Disposition by Consent or Compromise. After disposition of claims by consent or compromise (i.e., settlement), COs 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 CO 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.

2.2.2.4 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 CO, 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 CO 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 CO 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.

2.3 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 CO 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 CO must inform the contractor that failure to expeditiously provide the requested information may result in a contracting officer determining that costs are unallowable. The CO 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.

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

2.4.1 Provisional Reimbursement of Whistleblower Claims. DEAR 931.205-47(h)(2)(i) provides that a CO may authorize reimbursement of costs on a provisional basis in appropriate cases. The CO 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 CO must weigh a contractor's historical violations of Federal law or policies barring reprisal against whistleblowers in deciding whether to permit provisional reimbursement. The CO 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.

2.4.2 Provisional Reimbursement of Whistleblower Claims under 41 U.S.C. 4712.

During the pendency of any proceeding under 41 U.S.C. 4712, COs 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)).

Allowable Food and Beverage Costs At Department Of Energy (DOE) and Contractor Sponsored Conferences

Guiding Principles

- Effective oversight systems are essential to ensuring the high quality/integrity of costs charged to contracts.
- Collaboration and cooperation are required to maintain timely, effective control processes.

1.0 Summary of Latest Changes

This update: (1) revises the allusion to chapter 31.2 to chapter 31.205-13 (the number of chapter 31.2 was changed to align with FAR), and (2) includes administrative changes.

2.0 Discussion

See Acquisition Guide Chapter 31.205-13 Allowable Food and Beverage Costs At Department Of Energy (DOE) and Contractor Sponsored Conferences.

Contractor Legal Management Requirements, Approving Settlements, and Determining the Allowability of Settlement Costs

Guiding Principles:

Close collaboration between Department counsel and Contracting Officers is required to ensure effective management of contractors' legal costs.

Decisions regarding contractors' requests to settle legal claims and the allowability of associated costs may be made simultaneously only in limited circumstances.

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

Summary of latest changes

This guide chapter replaces its predecessor (Chapter 70-31C of September 2010 “Contractor Legal Management Requirements”) and significantly expands upon its guidance. The predecessor chapter only briefly discussed two aspects of managing contractor legal costs: contractors' hiring outside counsel; and contractors' exercise of prudent business judgement. This guide chapter provides great detail concerning the requirements of the current version of the Contractor Legal Management Requirements at 10 CFR part 719 (reflecting its May 2013 update), addresses considerations for approving settlements, and covers several key facets of determining the allowability of settlement costs.

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.

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. Contractors' 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.

Discussion

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 no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

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.

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 AL 2016-06, Provisional Reimbursement and Allowability of Costs Associated with Whistleblower Actions, at http://energy.gov/sites/prod/files/2016/08/f33/08-04-16_-_Acquisition_Letter_No._AL-2016-06.pdf.
- 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.

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.

Cooperative Audit Strategy

Guiding Principles

- The creation and maintenance of rigorous business, financial, and accounting systems by the contractor is crucial to ensuring the integrity and reliability of the cost data used by officials of the Office of the Chief Financial Officer, the Office of the Inspector General, and the office of the Director, Office of Acquisition Management.
- To ensure the reliability of these systems the Department requires each contractor to maintain an internal audit activity to support the Office of the Inspector General as part of the Cooperative Audit Strategy. The internal audit activity is responsible for performing operational and financial audits (including allowable cost reviews) and assessing the adequacy of management control systems.

References: [DEAR 970.5203-1, Management Controls, DEAR 970.5232-2, entitled Payments and advances, DEAR 970.5232-3, entitled Accounts, Records and Inspection, Chapter 23 of the Financial Management Handbook, and Chapter 14 of the Inspector General Audit Manual]

1.0 Summary of Latest Changes

This update: (1) corrects outdated references and streamlines descriptions of roles and processes to reflect more cogently the roles of the participants in the Cooperative Audit Strategy; and (2) includes administrative changes.

2.0 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 update does not contain any significant changes, but it does include clearer descriptions of the processes involved in executing the Cooperative Audit Strategy, including current best practices.

2.1 Overview. This chapter provides guidance to contracting officers in their reviews of: (1) the Internal Audit Implementation Design, submitted within 30 days of contract award, at each 5th year of contract performance, upon the exercise of an option, upon any

contract extension, or upon a significant contract change; (2) the Annual Audit Plan, the plan for audit activities during the next fiscal year; (3) the Annual Audit Report, a summary of the audit activities undertaken during the previous fiscal year and the plans for resolution of audit findings; and (4) the annual submission of the Statement Of Costs Incurred And Claimed. The contractor is required to provide these documents and perform supporting activities pursuant to DEAR 970.5232-3, Accounts, Records, and Inspection and DEAR 970.5203-1, Management Controls.

This chapter also explains the responsibilities and interactions of the contracting officer, the Office of the Inspector General, and the cognizant Chief Financial Officer in the operation of the cooperative audit strategy.

2.2 Background. The Office of Inspector General, in consultation with the Office of the Chief Financial Officer, the Office of Acquisition Management, and the Contractor Internal Audit Council, developed and implemented the Cooperative Audit Strategy in October 1992 to maximize the overall audit coverage at management and operating (M&O) contractors and fulfill its responsibility for auditing the costs incurred by the Department's major facilities contractors. The Cooperative Audit Strategy enhances the Department's efficient use of available audit resources by allowing the Department to rely on the work of contractor internal audit activities. The Office of Inspector General has implemented the Cooperative Audit Strategy at most major contractor locations.

The success of the Cooperative Audit Strategy depends on the Office of Inspector General and Contractor Internal Auditors working closely with Cognizant Chief Financial Officers, the Office of Acquisition Management, NNSA's Office of Acquisition and Project Management, contracting officers, and cognizant program personnel. The Office of Inspector General, Contractor Internal Auditors, and Department officials have established a Steering Committee for the Cooperative Audit Strategy to address current issues and implement ongoing improvements.

2.3 Definitions.

- *Annual Audit Plan* is a plan submitted by the Internal Audit Activity by June 30 of each year of contract performance. This document identifies the planned internal audit activities for the next fiscal year. In preparing the plan, contractors consider the results of prior year audits as presented in the Annual Audit Report, the status of audit activities for the current year until the issuance of the Annual Audit Plan, and other factors such as risk assessments and emerging audit issues.
- *Annual Audit Report* of Internal Audit Activity is a report submitted by the Internal Audit Activity by January 31 of each year of contract performance. This

report summarizes audit activities undertaken during the previous fiscal year. The contracting officer, in conjunction with the Office of Inspector General and the Cognizant Chief Financial Officer, reviews and approves the report.

- *Internal Audit Activity* means an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps its corporate organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and corporate governing processes. Its duties include (1) conducting independent and objective reviews of the Statement of Costs Incurred and Claimed to assess the allowability of incurred contract costs in accordance with the applicable cost principles of the contract and (2) evaluating the efficiency and effectiveness of the contractor's system of controls and operations using standards promulgated by the Institute of Internal Auditors (IIA).
- *Internal Audit Implementation Design* means a plan provided by the contractor upon (1) contract award (2) at each 5th year of contract performance (3) the exercise of an option or (4) any contract extension to describe or design the overall Internal Audit Activity's goals, reporting structure within the contractor and parent organization, audit strategies, staffing requirements, use of government and external auditors, and other pertinent information to provide the Department assurance of independence, objectivity and comprehensive audit coverage during the contract performance.
- *Statement of Costs Incurred and Claimed (SCIC)* means the statement that reconciles contract costs incurred under the contract for the prior 12 month period. Contractors operating under integrated accounting are required to prepare and submit the SCIC to the contracting officer annually. Contractors operating under non-integrated accounting are required to provide a SCIC annually unless otherwise agreed by the contracting officer. The contracting officer is responsible for coordinating the review of the SCIC with the Office of Inspector General and the Cognizant Chief Financial Officer, including coordinating to ensure contractor readiness for review and that reviews are planned. Submission and processing of the SCIC is discussed in Section 2d (2) of Chapter 23 of the DOE Financial Management Handbook.
- *Chief Audit Executive (CAE)* means the senior position within the contractor's Internal Audit Activity. The CAE must possess relevant education and experience qualifications. The CAE is responsible for reporting internal audit activities to and follow-up of audit results with the contractor's senior management and the board of directors, audit committee, or an equivalent

corporate independent board. In managing the Internal Audit Activity, the CAE can employ an external service provider, a person or firm, independent of the contractor's organization that has special knowledge, skill, and experience in a particular discipline, necessary to assist the internal audit activities. External service providers may include, among others, actuaries, accountants, appraisers, environmental specialists, fraud investigators, lawyers, engineers, geologists, security specialists, statisticians, information technology specialists, external auditors, and other auditing organizations. In any event, the CAE is responsible for the accuracy and adequacy of the services provided.

2.4 Responsibilities.

- **Contracting Officer (CO):** The CO, in conjunction with the Office of Inspector General and the Cognizant Chief Financial Officer, is responsible for reviewing and approving (1) the Internal Audit Implementation Design; (2) the Annual Audit Plan; (3) the Annual Audit Report; and (4) the SCIC. The CO shall provide comments to the contractor for suggested or required revision. Most importantly, where the Internal Audit Implementation Design or any Annual Audit Plan fails to provide a sufficient basis for reliance on the SCIC as to costs incurred or management controls, the CO shall require the contractor to correct identified deficiencies. The CO shall use the Annual Audit Plan, the Annual Audit Report, and the copies of responses to audit reports and any other information in the administration of the contract and provide relevant information, as requested, to the Head of Contracting Activity (HCA) or site manager to aid in the oversight of the contract or other contracts. Should any of the parties who are signatories refuse to sign the SCIC, the CO shall undertake an effort to reconcile all parties. If the refusal to sign indicates a failure of contractor management systems, the CO shall take corrective actions appropriate to the circumstances that protect the Government's interest.
- **The Office of Inspector General (OIG):** The OIG develops audit policy for the Department's programs and operations. In that capacity, the OIG is the cognizant auditor for the Department's major facilities contractors. The OIG relies upon the contractors' Internal Audit Activities to support the Cooperative Audit Strategy. The OIG provides guidance to cognizant COs, HCAs, Department site or office managers, and Cognizant Chief Financial Officers on the sufficiency of the design and operation of Internal Audit Activities, particularly as they support the SCIC. Representatives of the OIG periodically evaluate the actions of the contractors' Internal Audit Activities and audits using the American Institute of Certified Public Accountants' Statement on Auditing Standard No. 65 or its successor. The OIG will coordinate these evaluations and audits with the

cognizant COs, HCAs, and Cognizant Chief Financial Officers in order to avoid duplication of effort and ensure that all issues are addressed.

- The Cognizant Chief Financial Officer (CFO): The Cognizant CFO offers expert counsel and guidance to COs, HCAs, and Department site or office managers on the adequacy of the contractor's financial management system to provide proper accounting in accordance with the Department's requirements. In this capacity, the Cognizant CFO assists the CO in the review of the (1) Internal Audit Implementation Design; (2) the Annual Audit Report; (3) the Annual Audit Plan; and (4) the SCIC. The Cognizant CFO approves plans for new financial management systems and/or subsystems and major enhancements and/or upgrades to the currently existing financial systems and/or subsystems and planned implementation of any substantial deviation.

2.5 Preparation and Submission of Documents by Internal Audit Activity.

2.5.1 Internal Audit Implementation Design. The contractor's Internal Audit Implementation Design must be submitted on time, include a detailed description of the design, and provide certain assurances.

2.5.1.1 Timely submission. DEAR 970.5232-3 requires, among other things, that the Contractor organize and maintain an internal audit activity. This requirement is manifested by the obligation of the contractor to submit the Internal Audit Implementation Design that is satisfactory to the CO, within 30 days of contract award, upon the exercise of an option, or any contract extension. (Additionally, while not explicitly stated in DEAR 970.5232-3, the contractor is obligated by the clear intent of DEAR 970.5232-3, sound contract administration precepts, and its responsibility to work hand-in-hand with the Department as a sound steward of taxpayer dollars, to submit the Internal Audit Implementation Design that is satisfactory to the CO at the 5th year of contract performance and upon any significant contract change.)

2.5.1.2 Description of design. The Internal Audit Implementation Design should include (1) the Internal Audit Activity's placement within the contractor's organization including reporting requirements; (2) its size and the experience and educational standards of the audit staff; (3) its relationship to the corporate parent(s) of the contractor; (4) the audit standards to be used; (5) an overall audit strategy for relevant performance period of the contract, considering particularly the method of auditing costs incurred in the performance of the contract; (6) the intended use of external audit resources; (7) the plan for pre-award and post-award audit of subcontracts; and (8) the schedule of peer review of Internal Audit Activity.

2.5.1.3 Assurances. To be acceptable, the contractor's Internal Audit

Implementation Design must provide assurance of independence, objectivity, and of systematic organizational resolution of issues that result from internal audits. The Internal Audit Implementation Design must also provide assurance of sufficient internal audit personnel and other resources to validate cost allowability and validate those management systems that underlie the SCIC. The Internal Audit Implementation Design must be comprehensive and have adequate evidence of discipline with professional standards. 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, plans for peer review of the contractor's internal audit activity, 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.

2.5.1.4 Organizational Independence and Objectivity. The contractor's Internal Audit Activity should be structured organizationally to be sufficiently independent so as to remove any impairment to fair and objective reporting. This includes the ability to make impartial and unbiased judgments concerning the conduct of audits without fear of management reprisal. The CAE should report functionally to the board of directors, audit committee, or equivalent corporate independent governing body. The Internal Audit Activity's unhindered access to and regular direct communication with the corporate governing authority is critical to its independence. Direct communication entails such things as (1) regular attendance and participation in corporate meetings that relate to the CAE's oversight responsibilities for auditing, financial reporting, corporate governing, and control; and (2) reporting privately (at least annually) to the corporate board or the committee to discuss audit related topics including status of that year's audit plan and management's corrective actions.

This direct communication should ensure that audit resources are appropriate, sufficient, and effectively deployed to achieve the approved plan. Such reporting includes review and approval of the annual risk assessment and audit plan, as well as any significant changes thereto; and providing input to (1) the appointment or removal of the CAE; (2) the CAE's performance appraisal; (3) staff size; and (4) budget.

In fulfilling the contractor's internal audit responsibilities, the CAE is responsible to assure that the Internal Audit Activity performs its work objectively and is not impaired in accomplishment of its charter.

In this context, objectivity means a mental attitude that allows an individual internal auditor to perform each audit assignment free from bias or impairment. Objectivity requires that internal auditors do not subordinate their personal judgment on audit matters to that of others, including the corporate entity of which they are a part.

In this context, impairment means any circumstance that would have a negative effect on a person's or organization's ability to render a fully informed and objective analysis of the audit

assignment. The term includes, among other considerations, personal conflicts of interest; inappropriate limitations on the scope of an audit; restrictions on access to records, personnel, and properties; or resource limitations (funding), intentional or unintentional, that has a negative impact on the work product of an internal audit or the internal audit activity.

2.5.1.5 Size, Experience, and Educational Requirements. The contractor's Internal Audit Activity must be of appropriate size and include trained professional auditors who meet standards established by the Institute of Internal Auditors (IIA). Auditors should receive at least 80 hours of continuing professional training every two years. To enhance the level of professionalism, certifications in internal audit, accounting, and other business-related areas should be encouraged for the internal audit staff and mandatory for the CAE. Appropriate staff size is dependent on numerous factors, including but not limited to: the mission of the contractor; the magnitude of the contract and the size and complexity of the contractor's organization; and the extent to which non-audit work is requested of internal audit staff.

2.5.1.6 Audit Standards. The Internal Audit Activity performs financial, financial-related, performance, and specific audits requested by the contractor's board or management or by the CO. Those audits must, at a minimum, meet the audit standards prescribed by the IIA.

2.5.1.7 Audit of Allowable Costs. The contractor's Internal Audit Activity should perform an audit of allowability of costs as claimed on the SCIC at least once a year unless the CO specifically approves otherwise. The risk assessment to determine the scope of the audit should cover all contractor incurred costs for the year. The audit should be comprehensive and performed in accordance with the audit program approved by the OIG. A sample audit program is included in the OIG Audit Manual Chapter 14 along with additional guidance for contractor internal audit departments and can be accessed at <http://www.energy.gov/sites/prod/files/2014/12/f19/DOE%20OIG%20Audit%20Manual%20%28Release%208%29%20-%202014.pdf>

Deviations from the OIG audit program must be approved by the CO after consultation with the OIG and the Cognizant CFO. The contractor's Internal Audit Activity should report any questioned costs, including those identified through other performance or compliance audits, to the CO, and those costs should be excluded from the SCIC and described in the Annual Audit Report.

The SCIC is the document used to validate the allowability and allocability of the contractor's costs in performance of each contract year. This document is not a voucher. It is a statement of annual costs that the contractor certifies, to the best of its knowledge and belief, are allowable under the terms of the contract. It must be countersigned by the Cognizant CFO, the cognizant OIG, and the CO. Each of these signatures is made in reliance upon a system of audit that

begins with the Internal Audit Activity of the contractor and other appropriate criteria. Should any of the parties who are signatories refuse to sign the SCIC, the CO shall undertake an effort to reconcile all DOE parties. If the refusal to sign indicates a failure of contractor management systems, the CO shall decide corrective actions appropriate to the circumstances that protect the Government's interest.

Certain major contractors may no longer file the SCIC. Where that is the case, Department field offices receive support from the DCAA for the audit of contract costs.

2.5.1.8 Audit of Subcontracts. The Internal Audit Implementation Design should indicate the process for pre-award and post-award audit of subcontractors. To accomplish the audits, the contractor may (1) use its internal auditors or contract auditors; (2) make a request through the CO for DCAA assistance; or (3) make a request through the CO for audit assistance utilizing the audit support Blanket Purchase Agreement (BPA) administered by the Field Assistance and Oversight Division (MA-621). The current audit support BPA is with CohnReznick, LLP. In the event an M&O contractor would like to utilize the BPA to obtain audit support to audit one of its subcontractors, it should contact the CO at its site. Only a CO is authorized to place orders against the BPA. Independent contract audit support acquired by the M&O contractor to audit its subcontracts must be conducted by qualified auditors and must meet the Institute of Internal Auditors standards.

2.5.1.9 Peer Review. The purposes of peer review are primarily to (1) evaluate the Internal Audit Activity's compliance with the Standards for the Professional Practice of Internal Auditing; (2) appraise the quality of the Internal Audit Activity; and (3) make recommendations for improvement. Secondly, peer reviews serve as a factor in the OIG's determination as to the degree of reliance on the work done by the Internal Audit Activity.

Peer reviews are conducted every five years by a team that is led by (1) the CAE of a non-affiliated contractor and staffed with internal auditors from other DOE contractor Internal Audit Activities or (2) independent external reviewers. A Steering Committee of DOE Contactor Internal Audit Directors oversees the process.

Peer reviews are not intended to duplicate or eliminate the need for DOE evaluations of the contractor's Internal Audit Activities. However, the OIG and Department field elements should consider the outcome of a peer review in evaluating the efficiency and effectiveness of a contractor's Internal Audit Activity. The contractor should provide the OIG and the DOE field element a copy of its peer review report when it becomes available.

2.5.2 Annual Audit Plan. DEAR 970.5232-3 requires that by June 30 of each contract performance period, the contractor submit to the CO an Annual Audit Plan that reflects

the activities to be undertaken during the next fiscal year. This plan should generally be consistent with the Internal Audit Implementation Design, but must be updated annually to reflect identified high-risk areas such as findings by the Government Accountability Office or OIG or other developments that have occurred since the previous plan. The Annual Audit Plan should also consider high risk issues specified in the OIG Annual Audit Guidance Memorandum provided by February 1st of each year. The Annual Audit Plan will be evaluated by the cognizant IG office, the Cognizant CFO, and the CO to establish that results of prior audits are used to determine the need for additional audits in specific areas, or continue audit activities in areas of ongoing high risk. The CO shall coordinate review of the Annual Audit Plan with the Cognizant CFO and the OIG by July 15th of each year.

The Annual Audit Plan must include programs that sufficiently test the contractor's internal controls over costs to ensure that costs incurred in operation of the Department's facilities are allowable under the terms of the contract and applicable acquisition regulations. The Plan should be coordinated with the OIG to avoid duplication of planned OIG and other audits of the contractor's financial and management functions by Government activities. Furthermore, annual audits of incurred costs and other audits conducted during the year must establish the sufficiency of the contractor's SCIC representing the allowability of costs incurred under the contract. The audit program must describe the statistical sampling methodology that will be employed to evaluate incurred costs for allowability.

2.5.3 Annual Audit Report. The contractor's Internal Audit Activity is required to submit an Annual Audit Report by January 31st that describes and summarizes the results of the activities undertaken pursuant to the previous fiscal year's Annual Audit Plan. The Annual Audit Plan should include the Contractor's plans for addressing the findings disclosed during the fiscal year and summaries of specific contractor practices that resulted in unallowable costs. It should describe the allowability of costs audit methodology. The Annual Audit Plan is distributed to the CO and the HCA with a copy to the cognizant OIG office. The Annual Audit Report should include the dollar value of the cost element or audit population, the dollar value of the sample, and the dollar value of the projected questioned costs.

Review of Management Contractors Purchasing Systems Purchase Card Considerations

References

Title

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

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.

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.

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.

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.

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.

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

Guiding Principles

- Use of the model M&O research subcontract will benefit the DOE complex as well as the university research community.

[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
SUBCONTRACT (EDUCATIONAL
INSTITUTION or NONPROFIT
ORGANIZATION)

CONTRACTOR)

NAME

[FOR UNCLASSIFIED WORK]

ADDRESS

NO.
(DEPARTMENT OF ENERGY M&O

Subcontractor:

Attention:
Address
City, State, Zip
Phone:
E-Mail:

Fax:

Contractor's Procurement Representative
[Contract Administrator]:

Proc. Rep Title:
Phone #:
Fax#:
E-Mail:

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.

[SUBCONTRACTOR NAME)

By:
Name:
Title:
Date:

[M&O CONTRACTOR NAME)

By:
Name:
Title:
Date:

Attachment 1

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Attachment 1

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:

Attachment 1

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

Attachment 1

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:

Attachment 1

- 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.]

Attachment 1

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

- A. 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.
- B. 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 Subcontract 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.

Attachment 1

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 (DEC 2007) 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.

Attachment 1

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 (1) 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/cgi/t/text/text-idx?sid=802fadefc0bf18e947d936c6ef6ec328&c=ecfr&tp!=!ecfrbrowseiTitle48/48tab02.tpl>

As used in the clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean the Subcontractor; the term "subcontractor" shall mean the Subcontractor's subcontractor, and the terms

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"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.

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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:

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 52.222-21	PROHIBITION OF SEGREGATED FACILITIES
FAR 52.222-26	EQUAL OPPORTUNITY
FAR 52.222-50	COMBATING TRAFFICKING IN PERSONS
FAR 52.222-54	EMPLOYMENT ELIGIBILITY VERIFICATION
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.
FAR 52.225-13	RESTRICTIONS ON CERTAIN FOREIGN PURCHASES
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)(l) 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 52.227-23	RIGHTS TO PROPOSAL DATA (TECHNICAL). Applies if the Subcontract is based upon a technical proposal.
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

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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)(1), (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	ACQUISITION 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.
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APPLICABLE IF THE SUBCONTRACT EXCEEDS \$150,000:

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.
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APPLICABLE IF THE SUBCONTRACT EXCEEDS \$700,000:

FAR 52.219-9	SMALL BUSINESS SUBCONTRACTING PLAN. Applies unless there are no subcontracting possibilities.
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APPLICABLE IF THE SUBCONTRACT EXCEEDS \$750,000:

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)

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

Guiding Principles

- Contracting officers should take advantage of all of the resources DOE provides to ensure their M&O contractors meet FAR's requirements for their purchasing systems.

[References: [FAR Part 44](#), [DEAR Part 970.44](#)]

1.0 **Summary of Latest Changes**

This is a new Acquisition Guide chapter.

2.0 **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.

2.1 **FAR Requirements.**

2.1.1 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.

2.1.2 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 contractor 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 44.202-2 and FAR 44.303):

Is the contractor--

- 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?

2.2 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.

2.3 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 contractor purchasing system review is necessary (and obtain one if one is necessary);
- Requiring the contracting officer to obtain a contractor 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’s thirteen “considerations” (FAR 44.202-2) and eleven “special attention” areas (FAR 44.303), 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.

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

2.4.1 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 contractor 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.

2.4.2 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.

2.4.3 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 44.202-2;
- Gives "special attention" to the eleven areas listed in FAR 44.303(a) through FAR 44.303(k); and
- Takes into account DOE's unique utilization of the M&O contractor's expertise.

2.4.4 DOE Unique Utilization of M&O Contractor Expertise. DOE takes advantage of its M&O contractors' 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.

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

GUIDING PRINCIPLE

- Lessons learned should be identified, analyzed, and shared across the complex to inform future acquisition planning efforts.

[References: [FAR 7.103\(t\)](#) and Acquisition 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.

2.0 Background

This chapter further implements the requirement at FAR 7.103(t) 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.

3.0 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 ([AG 70.1706-1](#)) for any DOE/NNSA site that is currently operated through an M&O contract.

Template for a Case Study Description**I. Background**

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

II. 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

III. 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).

IV. 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?