DEPARTMENT OF ENERGY

48 CFR Chapter 9

RIN 1991–AC17

Department of Energy Acquisition Regulation (DEAR)

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or the Department) is publishing a final rule comprehensively revising its Acquisition Regulation in order to update and streamline the policies, procedures, provisions and clauses that are applicable to the Department's contracts. This rulemaking updates or eliminates coverage that is obsolete or that unnecessarily duplicates the Federal Acquisition Regulation (FAR) and retains only that coverage which either implements or supplements the FAR for the award and administration of the DOE's contracts. The rule adds several new clauses and amends several existing clauses in order to promote more uniform application of the DOE's contract award and administration policies.

DATES: This rule is effective December 13, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Jason Taylor, U.S. Department of Energy, Office of Management, Office of Acquisition Management at (301) 518–2257 or by email at *jason.taylor@hq.doe.gov.*

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I. Background

The Federal Acquisition Regulation (FAR), 48 CFR chapter 1, is the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds. The Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. 1702, authorizes the issuance of agency-specific acquisition regulations that implement or supplement the FAR. Pursuant to this authority, DOE and the National Nuclear Security Administration (NNSA) promulgated the Department of Energy Acquisition Regulation (DEAR), set forth at 48 CFR chapter 9, to provide uniform acquisition policies and procedures for DOE and NNSA. This final rule to update the DEAR is issued under that same authority.

Over the past decade, DOE has worked to improve the way it conducts business with its contractors by strengthening contract management policies and practices and implementing new processes throughout the Department complex. In the spirit of alleviating unnecessary regulatory burdens while remaining prudent stewards of taxpayer resources, DOE undertook a review of its acquisition framework, including the DEAR.

As a result of that process, DOE issued a notice of proposed rulemaking (NOPR) on October 26, 2023, proposing amendments to the DEAR to update or remove obsolete provisions, incorporate class deviations, streamline policies and procedures where appropriate, and implement ten new clauses which would standardize clause language and eliminate the need for various local clauses in current use (88 FR 73644). In response to comments received on the NOPR, DOE has made several changes to the proposed language, as discussed in more detail in section III of this document but left the majority of the proposed language unchanged. This final rule amends the DEAR to correct inconsistencies, remove provisions which unnecessarily duplicate coverage contained in the FAR, delete outdated information, and renumber DEAR provisions where required, in order to comport with the FAR numbering. The final rule includes revisions to 48 CFR parts 901, 902, 903, 904, 908, 909, 912, 915, 916, 917, 922, 923, 925, 926, 927, 931, 932, 933, 935, 936, 941, 942, 945, 951, 952, and 970.

II. Renumbering

As discussed in the proposed rule, DOE is renumbering existing and proposed DEAR sections that have section numbers containing two dashes (*e.g.,* section 915.404–4–70), in order to conform with the FAR numbering system as outlined at 48 CFR 1.105–2. DOE is also making conforming changes to other sections of the DEAR as necessary to implement the new numbering. Finally, DOE is also renumbering existing DEAR sections in subparts 923 and 970.23 as necessary to conform with the recent restructuring of FAR Part 23 accomplished under FAR Case 2022–006. Conforming changes have been made in other sections of the DEAR as necessary to implement the new numbering. The following table provides an overview of the redesignations:

Previous section	New section
Subpart 901.3:	
901.301.70	901.301–70
Subpart 915.4:	
915.404–2	915.404–2000
915.404–2–70	915.404–2700
915.404–4	915.404–4000
915.404–4–70	915.404–4700
915.404–4–70–1	915.404–4710
915.404–4–70–2	915.404–4720
915.404–4–70–3	915.404–4730
915.404–4–70–4	915.404–4740
915.404–4–70–5	915.404–4750
915.404–4–70–6	915.404–4760
915.404–4–70–7	915.404–4770
915.404–4–70–8	915.404–4780
915.404–4–71	915.404–4800
915.404–4–71–1	915.404–4810
915.404–4–71–2	915.404–4820
915.404–4–71–3	915.404–4830
915.404–4–71–4	915.404–4840
915.404–4–71–5	915.404–4850
915.404–4–71–6	915.404–4860
915.404–4–72	915.404–4900
Subpart 923.1:	
923.101	923.170
923.102	923.171
923.103	923.172
Subpart 923.5:	Subpart 926.5:
923.500	926.500
923.570	926.570
923.570–1	926.570–1
923.570–2	926.570–2
923.570–3	926.570–3
Subpart 923.9:	Subpart 923.4:
923.903	923.404
Subpart 927.2:	
927.206–1	927.202
927.206–2	927.202–5
927.207	927.203
927.207–1	927.203–1
Subpart 927.3:	
927.300	927.302
927.302	927.302–70
Subpart 927.4:	
927.402–2	927.402
927.404	927.404–70
927.404–70	927.404–71
Subpart 970.04:	
970.0407–1	970.0407–100
970.0407–1–1	970.0407–110
970.0407–1–2	970.0407–120
970.0407–1–3	970.0407–130
Subpart 970.15:	

Previous section	New section
970.1504–1	915.1504–100
970.1504–1–1	970.1504–101
970.1504–1–2	970.1504–102
970.1504–1–3	970.1504–103
970.1504–1–4	970.1504–104
970.1504–1–5	970.1504–105
970.1504–1–6	970.1504–106
970.1504–1–7	970.1504–107
970.1504–1–8	970.1504–108
970.1504–1–9	970.1504–109
970.1504–1–10 ..	970.1504–110
970.1504–1–11 ..	970.1504–111
970.1504–2	970.1504–200
970.1504–2–1	970.1504–201
970.1504–3	970.1504–300
970.1504–4	970.1504–400
Subpart 970.22:	
970.2201–1	970.2201–100
970.2201–1–1	970.2201–110
970.2201–1–2	970.2201–120
970.2201–1–3	970.2201–130
970.2201–2	970.2201–200
970.2201–2–1	970.2201–210
970.2201–2–2	970.2201–220
Subpart 970.23:	
970.2303–2–70 ..	970.2303–2
970.2305	970.2605
970.2305–1	970.2605–1
970.2305–2	970.2605–2
970.2305–3	970.2605–3
970.2305–4	970.2605–4
970.2306	970.2606
Subpart 970.31:	
970.3101–00–70	970.3101–1
970.3102–3–70 ..	970.3102–370
970.3102–05	970.3102–500
970.3102–05–4 ..	970.3102–504
970.3102–05–6 ..	970.3102–506
970.3102–05–18	970.3102–518
970.3102–05–19	970.3102–519
970.3102–05–22	970.3102–522
970.3102–05–28	970.3102–528
970.3102–05–30	970.3102–530
970.3102–05–30–70.	970.3102–531
970.3102–05–33	970.3102–533
970.3102–05–46	970.3102–546
970.3102–05–47	970.3102–547
970.3102–05–70	970.3102–570
Subpart 970.32:	
970.3200–1–1	970.3200–11
Subpart 970.42:	
970.4207–03–02	970.4207–302
970.4207–03–70	970.4207–370
970.4207–05–01	970.4207–501
Subpart 970.52:	
970.5223–3	970.5226–4
970.5223–4	970.5226–5

III. Discussion of Comments and Changes From the Proposed Rule

In response to the NOPR, DOE received twelve comments from the following individuals/entities:

(1) Ames National Laboratory (Ames)
(2) Argonne National Laboratory (Argonne)
(3) Battelle Memorial Institute, Pacific Northwest Division (Battelle)
(4) Beta Analytic, Inc. (Beta Analytic)
(5) Fermi Research Alliance, LLC (Fermi)
(6) Lawrence Berkeley National Laboratory (LBNL)
(7) Michael Ravnitzky
(8) National Technology & Engineering Solutions of Sandia, LLC (NTESS)
(9) Princeton Plasma Physics Laboratory (PPPL)
(10) Stanford University/SLAC National Accelerator Facility (Stanford)
(11) Thomas Jefferson National Accelerator Facility (TJNAF)
(12) Triad National Security, LLC (Triad)

DOE carefully reviewed the proposed regulation in light of the comments received during the public comment period and has attempted to address those requesting clarification or further detail through either revision to the text of the final rule or through clarification in this preamble discussion.

Every comment has been analyzed and the following discussion provides responses organized by issue.

General Support

Comment: Michael Ravnitzky offered general support for the proposed rule, particularly the efforts to streamline the DEAR and to use plain language. LBNL supported the inclusion of many of LBNL's Revolutionary Working Group (RWG) model contract provisions in the proposed rule. Likewise, SLAC appreciated the inclusion of SLAC's RWG model contract provisions in the proposed rule.

Response: DOE appreciates the support for this rulemaking.

Extension of Comment Period

Comment: LBNL, Stanford, and Argonne requested an extension to the time period for submitting comments.

Response: While DOE recognizes that the proposed rule was lengthy, DOE declines to reopen the comment period, given that DOE provided 60 days for comments on the NOPR.

Existing Deviations

Comment: LBNL and Stanford requested that applicable field elements' and contracting officers' discretion to maintain previously approved deviations be explicitly preserved in guidance implementing clauses revised by this rule.

Response: This final rule does not affect existing contractual language. Any modifications to individual contracts to incorporate the changes in clauses revised by this rule will require negotiation and agreement of the parties.

Contract Cost Principles and Procedures

Comment: In the NOPR, DOE proposed to add a new applicability section in subpart 970.31 (section 970.3101–00–71, renumbered section 970.3101–2 in this final rule) to clarify that the cost principles of FAR 31.2 and DEAR 970.31 apply regardless of entity type for an M&O contract. SLAC objected to the proposed addition because it would apply FAR subpart 31.2 cost principles applicable to ''commercial organizations'' to all M&O contracts regardless of entity type. The commenter suggests that DOE retain the discretion to enter into advance understandings and other contractual provisions on allowability that may deviate from the principles in FAR 31.2 if permitted by other parts of the FAR, such as when the contractor is otherwise subject to FAR 31.3. The commenter also asserts that there is no policy reason or justification for this addition to the DEAR, which may serve to significantly restrict DOE's pool of available contractors as well as limit DOE national laboratories' ability to attract talent through joint appointments with universities and nonprofits that provide benefits that are compliant with FAR 31.3.

Response: DOE makes no changes in response to this comment. The addition of the new section does not change any existing requirements for M&O contractors, but rather it clarifies the existing requirement that the cost principles of FAR 31.2 (and DEAR subpart 970.31) apply to M&O contracts, regardless of entity type. The DEAR currently requires DOE contracting officers to include (see DEAR 970.3270(a)(1)) DOE's M&O contract Payments and Advances clause (found at DEAR 970.5232–2) in all M&O contracts. Paragraph (j) of that clause requires contracting officers to determine allowable costs in accordance with FAR subpart 31.2 and DEAR subpart 970.31. The new section simply makes the existing requirement more apparent. DOE hopes that the placement of the section will help prevent confusion over the requirement in the future.

Conditional Payment of Fee

Comment: DOE's conditional payment of fee policy allows for a reduction in payment to a contractor if the contractor fails to meet a performance requirement relating to environment, safety and health or security or safeguarding of restricted data and other classified information. In the NOPR, DOE proposed to expand this to also allow a reduction in payment if the contractor fails to meet a performance requirement related to business and financial systems.

LBNL, Triad, Battelle, Fermi, and TJNAF objected to the proposed expansion of the conditional payment of fee evaluation criteria to include ''business and financial systems.'' The commenters' primary concern is that these systems are undefined and therefore not yet fully developed enough to provide DOE or any M&O contractor with certainty on what elements of a business and financial system will be reviewed and considered. The commenters also note that other existing contract mechanisms already exist to appropriately deal with contractor issues in these two areas.

Response: DOE agrees with both of these concerns and has removed the additional business and financial systems evaluation criteria from the final rule. Sections 942.7100, 952.242–71, 970.1504–1–3 (renumbered 970.1504–103), and 970.5215–3 have been updated to reflect this change.

Key Personnel Clause (952.215–70)

Comment: The ''Key Personnel'' clause requires contractors to notify the Contracting Officer reasonably in advance of removing, replacing or diverting any of the listed or specified personnel under the clause. In the NOPR, DOE proposed changing the ''reasonably in advance'' language to a Contracting Officer fill-in which would specify a minimum number of calendar days. Battelle objected to the proposed change in notice requirements from ''reasonably in advance'' to a defined minimum number of days, asserting that it has the potential to be administratively restrictive and may not give consideration for proper pacing and needed flexibility for recruitment/replacement of key personnel.

Response: DOE agrees that the change is unnecessarily restrictive and has retained the existing ''reasonably in advance'' language in this final rule.

Nuclear Hazards Indemnity Clause (952.250–70)

Comment: In the NOPR, DOE proposed various changes to the ''Nuclear Hazards Indemnity'' clause. Battelle commented that the level of indemnity in paragraph (d)(ii) for work outside the United States was not consistent with the Atomic Energy Act threshold stated at Section 170(d) of that Act and should be $500 million instead of $100 million.

Response: DOE agrees that the amount was incorrectly stated in the NOPR. However, under Public Law 118–47 (Further Consolidated Appropriations Act), the amount of such indemnification for nuclear incidents outside the United States was raised from $500 million to $2 billion (42 U.S.C. 2210(d)(5)). Accordingly, DOE will update the figure in the Nuclear Hazards Indemnity clause to $2 billion, rather than retain the previous figure of $500 million.

M&O Conflict of Interest Clause (970.5209–70)

Comments: DOE's conflict of interest policy resides in subpart 909.5 and section 970.0905 and is implemented in contracts (including M&O contracts) via a contract clause at section 952.209–72. In the NOPR, DOE proposed the addition of a new conflict of interest clause in Part 970 specific to M&O contracts. NTESS expressed concern that the proposed conflicts of interest (COI) nomenclature would be confusing to the workforce, and there was a risk of additional confusion about implementation of the clause in relation to the other organizational conflicts of interest (OCI) clauses found in M&O contracts and section 952.209–72. The commenter also noted that incorporation of the proposed clause would ''require unfunded substantive changes to existing OCI policies, training, systems and tools and additional workload on the OCI team and Legal.'' Stanford expressed overall support for the addition of the new clause but was concerned that portions of the clause could be overly prescriptive. Stanford and PPPL suggested clarifying in proposed paragraph (b) that the contractor's responsibility for potential conflicts of interest of affiliates and other entities under this clause is limited to conflicts of interest relating to activities under the M&O contract. Fermi, Stanford, and PPPL also proposed adding ''unless otherwise determined by the Contracting Officer'' to the end of paragraph (b)(1)(ii) (similar to paragraph (b)(1)(i)) because there may be occasions when it would be desirable and for the benefit of the government to allow the contractor to perform or participate in the work. The same three commenters proposed that with respect to proposed paragraph (c)(6), the Government should retain flexibility for situations in which partnerships between the parent entity and the Department's facilities are in the Government's interests. They explain that since in many cases the work of the facility is to perform fundamental research, the levels of restraint indicated in paragraph (c)(6) would be detrimental to the mission of the facility and may deter parent contractors from investing their own resources in supporting the Department's facilities. Finally, these commenters suggested that the proposed requirement in paragraph (d) to disclose all COIs that cannot be mitigated, including those of third parties, within 10 calendar days of identifying the COI should be changed to 30 days.

Response: While there was some support for the overall intent of the proposed new clause, DOE agrees with NTESS that its addition does pose a real risk of confusion regarding implementation in relation to the policy in subpart 909.5 and the clause at section 952.209–72. Resolution of these difficulties will require further analysis and consultation with stakeholders in a future effort. Accordingly, DOE has removed from this final rule the proposed new clause at section 970.5209–70, the associated prescription at section 970.0906, and the proposed revisions to the policy at section 909.507–2 and 970.0905. In the interest of clarity, DOE has added a sentence to the end of section 970.0905 which refers Contracting Officers to the policy in subpart 909.5.

Strategic Partnership Projects (970.5217–1)

Comment: In the NOPR, DOE proposed various changes to its ''Strategic Partnership Projects'' clause. While there were no comments on the specific changes proposed in the NOPR, NTESS suggested a change throughout the clause from use of the word ''proposal'' to agreement ''package'' as those words have meaning at both the General Terms & Conditions phase versus the funding Order phase for OFA SPP. Their context here could mean either.

Response: DOE has revised the clause to consistently reference ''SPP projects'' and eliminate the various terms such as ''proposal package'' and ''SPP proposal''. DOE believes this clarification should eliminate any confusion of the term ''proposal'' in other parts of the DEAR and address the commenter's concern.

Rights in Data—Technology Transfer (970.5227–2)

Comment: LBNL, Stanford, Battelle, NTESS, PPPL, TJNAF, and Triad objected to added language in paragraph (e)(1)(iv) regarding patent applications containing export-controlled information (ECI) such that a DOE funding program manager would need to approve adding such export-controlled information or require an export license. LBNL commented that the language may have been added by mistake. NTESS commented that the language will likely cause confusion and may conflict with State Department regulations and publications on filing patent applications. Stanford expressed

concern that obtaining program manager approval before filing a patent application that could contain ECI would protract patenting timelines. Triad expressed concern that delays caused by the provision would impact DOE's and M&O contractors' ability to provide benefit from Federal research to U.S. industrial competitiveness, in compliance with the National Competitiveness Technology Transfer Act of 1989. Similarly, Battelle expressed concern that the delay associated with the additional approval would put U.S. contractors at a competitive disadvantage with non-U.S. entities.

Response: Based on the statutory requirements governing the filing of U.S. patent applications and under the rules of the U.S. Patent and Trademark Office (USPTO), DOE agrees that patent applicants, including our M&O contractors, are legally permitted to include Export Controlled Information (ECI) in their U.S. origin patent applications and are not required to obtain a separate export license as long as they comply with regulations issued by the USPTO, unless the applicant seeks to export technical data exceeding that used to support the patent application in a foreign country. Accordingly, DOE has removed the language in paragraph (e)(1)(iv) requiring program manager approval from this final rule.

Comment: The current DEAR in paragraph (c)(2) recognizes that a contractor may assert copyright in accordance with either paragraph (d) or (e). In the proposed rule, paragraph (f), Open Source Software, was added to this list, so that the proposed language recognized that the contractor may assert copyright in accordance with ''either paragraph (d), (e), or (f).'' NTESS commented that using ''either paragraph'' implied that copyright assertion can only be one of these paths, not multiple of these paths.

Response: DOE agrees to remove the word ''either'' to make it clear that copyright assertion may occur under multiple paths in paragraphs (d) through (f).

Technology Transfer Mission (970.5227–3)

Comment: Paragraph (n) concerns technology transfer through cooperative research and development agreements (CRADAs), which are agreements established between Government-owned, contractor-operated laboratories and partners to perform cooperative research on topics of mutual interest. Under proposed paragraph (n)(5)(i), DOE requires the contractor operating a laboratory to assure that no employee of the contractor has a conflict of interest while the employee has a substantial role in negotiation, approval or performance of a CRADA. Battelle recommended that DOE clarify that paragraph (n)(5)(i) applies to ''active'' CRADAs since it would not apply if CRADA-derived IP is no longer obligated (*i.e.* option has been terminated or expired).

Response: DOE disagrees that any change is needed. As proposed, paragraph (n) concerns a conflict of interest in the initial preparation, negotiation, and approval of a CRADA, whereas the comment concerns the disposition of subject inventions and licensing after the CRADA has ended. No change is needed in paragraph (n) because the paragraph does not deal with the intellectual property derived from the performance of the CRADA. Any issues with licensing of intellectual property from a CRADA are covered under paragraph (d) of this clause.

Comment: Fermi suggested updating the definition of CRADA in paragraph (b) of this clause to reflect the authority for Laboratory contractors to enter into CRADAs with Federal entities, as permitted by DOE, by removing the phrase ''including at least one non-Federal party'' language.

Response: DOE agrees and has revised the definition to remove references to ''non-federal parties'' in this final rule.

Comment: LBNL noted that proposed paragraph (f) would require M&O contractors to give preference to U.S. businesses for licensing and assignments of all intellectual property, not just subject inventions, as contemplated by the Bayh-Dole Act and the ''Department of Energy Determination of Exceptional Circumstances under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Technologies'' (S&E DEC). LBNL recommended narrowing the scope of the paragraph to only cover patents and copyrights, rather than all intellectual property.

Response: DOE agrees with the commenter's suggestion and has revised the clause in this final rule to narrow it from ''intellectual property'' to ''subject inventions''. Other intellectual property (copyrights, trademarks, mask works, etc.) will not be included in this clause. The clause was also rewritten to address subject inventions when the S&E DEC applies under paragraph (1) while retaining much of the original provision for addressing U.S. industrial competitiveness when the S&E DEC doesn't apply (usually due to the funding source) under paragraph (2).

Patent Rights—M&O Contracts (970.5227–10)

Comment: LBNL, Battelle, PPPL, Stanford, Fermi, and TJNAF noted that paragraph (t)—U.S. Competitiveness appears to retain the pre-S&E DEC language that suspends all transactions pending DOE approval. That language was superseded for Office of Science laboratories by an Internal Patent Instruction (IPI) dated May 5, 2022, which substituted a notice mechanism instead of suspension. The commenters suggested that the notice mechanism from the IPI is preferable.

Response: DOE agrees to update this provision to reflect the guidance in the IPI to require a notice to DOE of change in foreign ownership rather than require suspension of the license until DOE approval. Additionally, a new paragraph (2) was added to better describe the administrative process of seeking a waiver of the requirements in paragraph (t)(1) (which is the requirement to substantially U.S. manufacture in compliance with the S&E DEC) with DOE approval. There are also provisions for transferring title to DOE if there is a breach of paragraph (t)(1) requirements to substantial U.S. manufacture.

Patent Rights—M&O for Profit, Patent Waiver (970.5227–12)

Comment: Triad noted that the proposed changes would make it more difficult to license technology since a licensee would not want to have its rights suspended when undergoing a liquidity event (*e.g.,* acquisition or large investment in exchange for equity). This could be particularly true in situations where the technology is the foundation of the company and is the basis for its business.

Response: DOE agrees to update this provision to reflect the guidance in the Internal Patent Instructions (IPI) issued by the Assistant General Counsel for Technology Transfer and Intellectual Property to require a notice to DOE of change in foreign ownership rather than require suspension of the license until DOE approval. Additionally, a paragraph (2) was added to better describe the administrative process of seeking a waiver of the requirements in paragraph (1) for DOE approval. There are also provisions for transferring title to DOE if there is a breach of paragraph (t)(1) requirements to substantial U.S. manufacture.

Comment: Proposed paragraph (b)(6)(iv) stated that ''[e]xceptional circumstances subject inventions are as set forth in the applicable patent waiver.'' NTESS commented that the proposed paragraph was inconsistent

with its current patent waiver, saying that the S&E DEC is specifically for Bayh-Dole entities and that NTESS is not governed under Bayh-Dole. NTESS's class waiver of patent rights is W(C)2017–002.

Response: DOE declines to make changes to paragraph (b)(6)(iv) in response to this comment. The S&E DEC is broader than only applying to Bayh-Dole entities. It applies to all entities receiving program funding under the DEC. The second part of paragraph (b)(6)(iv) allows DOE to unilaterally amend the contract for the purpose of defining DOE exceptional circumstance subject inventions. It is clear that DOE policy is to have the S&E DEC apply to for-profit entities by adding new paragraph (b)(6)(iii). However, the comment raises the issue about requiring greater rights determination under paragraph (b)(7) before publications. DOE is revising paragraph (b)(6)(iii) to state that the addition of the enhanced U.S. manufacturing requirements under the S&E DEC does not invoke the greater rights determination process in paragraph (b)(7) requiring DOE approval for each invention or publication on such inventions.

Comment: NTESS commented that proposed paragraph (b)(6)(viii) requires the contractor to obtain approval from DOE prior to any release or publication of information concerning an exceptional circumstance subject invention or any subject invention related to a treaty or international agreement. The commenter stated that this change would be very burdensome to patent counsel because almost all subject inventions now fall under an exceptional circumstance subject invention.

Response: DOE believes that NTESS is referring to paragraph (c)(2), which has this requirement. DOE agrees with the commenter's concern and has added the following sentence ''Notwithstanding the above, inventions subject to the S&E DEC do not require approval from Patent Counsel prior to any release or publication of information.'' The purpose of the S&E DEC (US Manufacture) is wholly different from the other DECs (national security or sensitive technology) so there is no need for review of purely S&E DEC material.

Property (970.5245–1)

Comment: In the NOPR, DOE proposed adding an ''application of regulations'' paragraph (a) to the ''Property'' clause which required compliance with 41 CFR chapters 102 and 109 as well as various minor editorial changes. Battelle, Fermi, and Stanford suggested that invoking the entirety of 41 CFR chapters 102 and 109 is too broad, and recommended it be narrowed to the ''applicable'' requirements in 41 CFR chapters 102 and 109. NTESS suggested modifying paragraph (a) by adding ''as prescribed or approved by OPMO/PA'' at the end to ensure that NNSA OPMO would continue to have flexibility to allow contractors to meet their programmatic needs while complying with requirements that are formally integrated into their contracts.

Response: DOE agrees with commenters that referencing the entirety of 41 CFR chapters 102 and 109 is too broad and has revised the language at section 970.5245–1(a) to only require the contractor to comply with ''applicable'' requirements in those chapters. DOE disagrees with NTESS's recommended change because the clause is applicable beyond NNSA contracts but believes that the change discussed above addresses NTESS's concern.

Comment: NTESS sought clarity on the regulatory references within the clause; specifically, why the general regulatory requirements added to the clause only reference 41 CFR chapter 102 (Federal Management Regulations) and 41 CFR chapter 109 (Department of Energy Property Management Regulations), whereas existing contractual coverage of the management of high risk property and classified materials reference 41 CFR chapter 101 (Federal Property Management Regulations) and 41 chapter 109 (Department of Energy Property Management Regulations).

Response: DOE agrees to also add a reference to 41 CFR chapter 101 in the new paragraph (a), as it still contains relevant requirements for real property and motor vehicles.

Other Comments

Comment: Michael Ravnitzky suggested adding a provision to the final rule allowing for prize contests to help address technological acquisition needs.

Response: DOE appreciates the suggested addition but considers it to be outside the scope of the current rule. DOE may consider addressing prize contests in a future rulemaking.

Comment: Michael Ravnitzky suggested adding an appendix to the DEAR that addresses the use of Other Transaction Authority (OTA), a special authority that allows DOE to enter into agreements with private-sector entities that are not subject to the same rules as standard government contracts or other traditional mechanisms.

Response: DOE appreciates the suggested addition but considers it to be outside the scope of the current rule. DOE may consider addressing OTAs in a future rulemaking.

Comment: Beta Analytic suggested adding direct biobased testing requirements and updating the FAR definition of ''biobased product''.

Response: DOE considers this suggestion to be outside the scope of the current rule.

Comment: Argonne suggested modifying the Contractor Purchasing System clause at 970.5244–1 by including language excepting ''shrink wrap'' click through terms for software agreements, excluding purchases under the micro-purchase threshold, and changing the approval level from the Head of Contracting Activity to the local Contracting Officer in consultation with local legal counsel.

Response: DOE considers this to be outside the scope of the current rule but will consider these suggestions in a future rulemaking.

Comment: Ames submitted comments in response to a DOE System of Records Notice (SORN) published on November 27, 2023.

Response: As the SORN notice is unrelated to this rule updating the DEAR, the comments are considered to be outside the scope of this rule.

Department of Energy Mentor-Protégé Program (919.70)

DOE proposed various changes to subpart 919.70 that were intended to update and streamline the DEAR coverage of the mentor-protégé program. DOE is now considering more substantive changes to its mentor-protégé program and has therefore decided to withdraw the changes proposed in the NOPR from this final rule. Additionally, proposed changes to section 952.219–70 that would have conformed the DOE Mentor-Protégé program clause with changes to subpart 919.70, are also not included in this final rule.

IV. Section-by-Section Analysis

- *Section 901.103:* Currently this section provides that the DEAR is issued and amended by the Senior Procurement Executive (SPE) and the National Nuclear Security Administration (NNSA). This final rule amends this section to clarify that (1) references throughout the DEAR to the SPE refers to both the DOE SPE and the NNSA SPE, unless otherwise indicated; (2) the SPEs may approve deviations to the DEAR both together and individually; and (3) except for those authorities designated as non-delegable,

the SPEs are delegated those authorities assigned to the Agency Head in the FAR.

• *Section 901.301–70:* Current section 901.301.70 states that DOE will maintain an Acquisition Guide. This final rule redesignates this section as 901.301–70 and removes the paragraph designation to conform to standard CFR formatting. The newly redesignated section is revised to update the website address to access the Acquisition Guide.

• *Subpart 901.4:* This final rule adds this new subpart to address deviations from the DEAR. The new subpart consists of section 901.401, which provides a definition for what constitutes a deviation from the DEAR; and sections 901.403 and 901.404, which provide instructions to acquisition personnel for preparing and submitting requests for individual deviations and class deviations respectively.

• *Section 901.602–3:* This final rule amends this section to increase the threshold for the ratification authority delegated to heads of contracting activity (HCAs) for unauthorized commitments of $250,000 or less. A threshold of $25,000 has been in the DEAR for decades and needs to be updated to account for inflation and associated increases in the Simplified Acquisition Threshold (SAT), which was the original basis for the $25,000 threshold.

• *Sections 901.603–1 and 901.603–70:* This final rule revises these sections to update references to two DOE orders.

• *Section 902.101:* Section 902.101 is revised to update the definition of Senior Procurement Executive in order to reflect a change in the name of the office held by the DOE SPE and the NNSA SPE.

• *Section 903.104–7:* This final rule amends this section to allow reviews to be conducted by the individual one level above the contracting officer. The regulations at FAR 3.104–7 provide for higher-level review and concurrence within DOE by an individual designated in accordance with agency procedures. For violations or possible violations, the Department decided that this review and concurrence was better undertaken by those with procurement authority and not legal counsel whose role is better aligned with providing advice to those conducting the review and concurrence. Nothing in these changes prevents access to counsel by those with procurement authority.

• *Section 903.1003:* Section 903.1003 is added in order to supplement the FAR subpart 3.10 coverage of Contractor Code of Business Ethics and Conduct. The new language articulates the need for contractors to identify themselves, particularly when communicating on behalf of DOE, to ensure that all parties know the status of individuals as contractor personnel.

• *Section 903.1004:* Section 903.1004 is revised to prescribe a new clause at 48 CFR 952.203–1, Identification of Contractor Employees, for all solicitations and contracts for services over the micro-purchase threshold. This clause requires contractors to use standard measures to ensure that contractors and their employees properly identify themselves as contractors in all DOE internal and external communications so that all parties are aware of their status as contractor personnel. Minor editorial changes have been made to the content of the section for the purpose of improving clarity and readability as well as updating the website address.

• *Section 904.401:* This final rule amends this section to (1) revise the definition of ''access authorization'' by including the citation to special nuclear material under the Atomic Energy Act, Executive Order 12968, and 10 CFR part 710 for more specificity; (2) add a definition of ''Counterintelligence'' previously located in part 970 but proposed to be relocated here because the term is included in revisions to other sections in this part; and (3) amend the definition of ''Classified Information'' for clarity to also include ''Classified National Security Information'' and ''Transclassified Foreign Nuclear Information'', and to update the reference to Executive Order 12958 with Executive Order 13526 which revoked and replaced Executive Order 12958.

• *Section 904.402:* This final rule amends this section to reorganize content to conform to the FAR numbering and to add a reference to the DOE Organization Act of 1977, as amended and update the reference to Executive Order 12958 with Executive Order 13526 which revoked and replaced Executive Order 12958. This final rule also relocates text about DOE's counterintelligence program from section 970.0404–2(b). Part 970 primarily concerns management and operating (M&O) contracts, but counterintelligence issues are equally applicable to M&O and non-M&O contracts. Additionally, revisions are made to the paragraph on conditional payment of fee in order to align with other changes proposed to the conditional payment of fee clauses in parts 952 and 970 which are discussed in the appropriate places below. Finally, this final rule adds a paragraph that points to part 927 for policies and procedures for safeguarding classified information in patent applications and patents.

• *Section 904.404:* This final rule amends section 904.404 to: (1) revise the prescription for the ''Security'' clause at section 952.204–2 to clarify that it is also required to be included in contracts awarded under simplified acquisition procedures, as well as National Security Program contracts under which access to proscribed information is required; (2) make minor editorial changes and add the title to DOE Order 142.3 to the paragraph that discusses the ''Sensitive Foreign Nation Controls'' clause at section 952.204–71; (3) delete the prescription for the clause at section 952.204–76, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health,'' because that clause, along with the clauses at sections 952.223–76 and 952.223–77, is proposed for removal with the content of those three clauses consolidated into a single new clause at section 952.242–71, which is prescribed elsewhere; and (4) add a prescription for the counterintelligence clause proposed to be located at section 952.204–74 (and previously at section 970.5204–1) because DOE has determined that counterintelligence policy is appropriate for both M&O and non-M&O contracts.

• *Section 904.7004:* Section 904.7004 is revised in paragraph (a) to update the name of the office that the Contracting Officer must consult in connection with ''Foreign Ownership, Control or Influence (FOCI)'' reviews prior to determining that award or continued performance of a contract by a contractor will not pose an undue risk to the common defense and security. The reference to the DOE Office of Safeguards and Security is proposed to be changed to the DOE Office of Environment, Health, Safety and Security.

• *Section 904.7102:* This final rule makes editorial revisions to streamline this section, in paragraph (e), by removing the following extraneous text: ''that has been developed by the Safeguards and Security Lead Responsible Office at the contracting activity.''

• *Subpart 904.73:* This final rule adds a new subpart on DOE Directives. The new subpart consists of section 904.7300, which provides general requirements and information, and section 904.7301, which prescribes a new DOE Directives clause at 48 CFR 952.204–78, along with background. Although contractor requirements documents (CRDs) have been integrated

into non-M&O contracts for a long time, adding the general information section, the new clause prescription, and the new clause will clarify the process of integrating the requirements of DOE Directives into non-M&O contracts on a bilateral basis.

- *Subpart 908.71:* This final rule revises subpart 908.71 in order to remove some out-of-date procedures for handling special items. Specifically, sections 908.7103, Office machines; 908.7115, Forms; 908.7116, Electronic data processing tape; and 908.7117, Tabulating machine cards, have been removed.
- *Section 909.403:* Section 909.403 is revised to reflect a change in the name of the offices held by the individuals designated as the DOE and NNSA Debarring Official and Suspending Official.
- *Section 909.405:* Section 909.405 is revised to replace references to the now defunct Excluded Parties List System (EPLS) with the new System for Award Management (SAM).
- *Section 909.407–3:* This final rule amends this section in paragraph (e)(1)(vii) to replace a reference to the now defunct EPLS with the new SAM.
- *Section 912.301:* This final rule adds a new section 912.301 to clarify those DEAR clauses that are also required to be included in solicitations and contracts for the acquisition of commercial items, in accordance with 48 CFR 12.301(f).
- *Subpart 915.4:* This final rule redesignates sections 915.404–2 through 915.404–4–72 as provided by the table in section II of this document to conform with the FAR numbering system. Cross-reference changes are made throughout the subpart to conform with the new numbering.
- *Section 915.404–4–70 (915.404–4700):* This final rule revises the text to clarify that DOE's structured profit and fee system for non-management and operating contracts comprises two approaches.
- *Section 915.404–4–70–2 (915.404–4720):* This final rule revises this section to correct the errors throughout the table in paragraph (d) by replacing ''items 4.a. thru 4.e.'' with ''items I.a. thru *I.e.*''.
- *Section 915.404–4–72 (915.404–4900):* This final rule revises paragraph (a) of this section to update the reference to fee policy for management and operating contracts from ''970.15404–4–8'' to ''970.1504–101 through 970.1504–300.''
- *Section 915.408–70:* Section 915.408–70 is revised to simplify the clause prescription for section 952.215–70, ''Key Personnel,'' and make minor editorial changes.
- *Section 915.606:* Section 915.606 is revised to replace a defunct postal address for the receipt of unsolicited proposals with a new email address.
- *Section 916.307:* Section 916.307 is revised to: (1) simplify the prescription for the DEAR ''Allowable Cost and Payment'' clause at section 952.216–7 in paragraph (a); and (2) remove the prescription for section 952.216–15, ''Predetermined Indirect Cost Rates,'' because the FAR clause at 48 CFR 52.216–15 is now considered to be adequate.
- *Section 916.504:* Section 916.504 is revised to redesignate paragraph (c) as paragraph (a)(1) to conform with the FAR coverage at 48 CFR 16.504(a)(1) that this language supplements.
- *Section 916.505:* Section 916.505 is revised to: (1) redesignate paragraph (b)(6) as paragraph (b)(8) to conform with the FAR coverage at 48 CFR 16.505(b)(8) that this language supplements and update the corresponding FAR citation accordingly; and (2) update the office name from ''Office of Procurement and Assistance Management'' to ''Office of Acquisition Management''.
- *Subpart 917.6:* This final rule makes several changes to this subpart. Editorial changes are made in sections 917.600(b) and 917.602(b) to remove obsolete references to ''performance-based management contracts''. Likewise, section 917.601, which defines ''performance-based management contract'' and ''performance-based contracting'' is also removed. Those terms and those references to performance-based management contracts are considered to be unnecessary since all management and operating contracts employ, to the maximum extent practicable, performance-based contracting concepts and methodologies. Editorial changes are also made in section 917.602(c) to streamline the content of that paragraph.
- *Section 917.7402:* This final rule makes revisions to paragraphs (b) and (c)(4) of this section to update the referenced DOE order from DOE Order 430.1B to the current DOE Order 430.1C.
- *Section 922.101–70:* This final rule adds a new section 922.101–70 to describe situations where labor policies applicable to M&O contracts may also apply to non-M&O contracts. DOE labor policies for M&O contracts are located at 48 CFR part 970, subpart 970.22. The policies therein are applicable to non-M&O contracts where the contract work had been previously performed under a DOE Management and Operating contract; and/or the Contractor is required to employ all or part of the former Contractor's workforce; or contracts designated by the Senior Procurement Executive. The labor policies at 48 CFR part 970, subpart 970.22, are reiterated here to highlight their application to certain non-M&O contracts.
- *Subpart 922.4:* This final rule adds new subpart 922.4 with content previously located in section 970.2204–1–1, but better placed in part 922 since it is applicable to both non-M&O and M&O contracts. The existing content is revised to update references to the Davis-Bacon Act with the Construction Wage Rate Requirements Statute (40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction)) as currently referenced in 48 CFR 22.403–1 and to remove information that unnecessarily duplicates content already set forth in 48 CFR 22.404 through 22.404–12.
- *Section 923.002:* Section 923.002 is removed. Paragraph (a) is removed because it conveys policy from revoked Executive Order 13423 and duplicates coverage in the FAR. The prescription at paragraph (b) is removed because revoked Executive Order 13423 was the basis for that prescription and for the clause at section 970.5223–6.
- *Section 923.101:* This final rule redesignates this section as section 923.170 to maintain consistency with FAR numbering and revise the content to align with current statutory, regulatory, and executive order requirements and to remove an out-of-date hyperlink.
- *Section 923.102:* This final rule redesignates this section as section 923.171 to maintain consistency with FAR numbering.
- *Section 923.103:* This final rule redesignates this section as section 923.172 to maintain consistency with FAR numbering and revises the content to: (1) make minor editorial changes; (2) remove the reference to Alternate I to section 952.223–78, as that alternate is removed as unnecessary as a result of a revision to the base clause; and (3) remove prescriptions to FAR clauses that are already prescribed in 48 CFR chapter 1, and are not necessary to be prescribed here.
- *Subpart 923.5:* This final rule redesignates subpart 923.5 consisting of sections 923.500, 923.570 and 923.570–1 through 923.570–3 as new subpart 926.5 consisting of sections 926.500, 926.570 and 926–570–1 through 926–570–3 respectively. These changes are necessary to align with recent FAR restructuring which moved ''Drug Free Workplace'' coverage from FAR 23.5 to FAR 26.5. Conforming changes are also made as necessary to update references

to the associated FAR coverage as well as to the referenced DEAR clauses which are appropriately redesignated.

• *Subpart 923.9:* This final rule redesignates subpart 923.9 consisting of section 923.903 as new subpart 923.4 consisting of section 923.404. These changes are necessary to align with a recent FAR restructuring which moved the Contractor Compliance with Environmental Management Systems coverage from FAR 23.9 to FAR 23.404. The newly redesignated section 923.404 is also revised to correctly state the clause number for the FAR Environmental Management Systems clause as ''52.223–19'', whereas the current text has ''52.223–XX''.

• *Section 923.7002:* Section 923.7002 is revised to: while retaining the current policy, state it more clearly and succinctly; update references to reflect new locations of clauses; add references to clause prescriptions; and update office titles.

• *Section 923.7003:* This final rule amends this section by: (1) in paragraph (a), updating the name of the office which the Contracting Officer is required to consult with in making a decision to include or not include environmental, safety, and health clauses and insert a reference to the appropriate coverage for M&O contracts; (2) consolidating paragraphs (f) and (g) into one paragraph (f) and revising it to state the prescription for the Conditional payment of fee clause more clearly and succinctly and updating the reference to the clause; and (3) redesignating paragraph (h) as paragraph (g).

• *Section 925.1001:* Section 925.1001 is revised to update the name of the ''Office of Procurement and Assistance Management'' to ''Office of Acquisition Management'' and the office name of the NNSA Deputy Associate Administrator from ''Acquisition and Project Management'' to ''Office of Partnership and Acquisition Services''.

• *Section 926.7001:* Section 926.7001 is revised to reflect the addition of Qualified HUBZone small business concerns to the list of Energy Policy Act 1992 target groups by the Small Business Reauthorization Act of 1997 (Pub. L. 105–135).

• *Section 926.7004:* This final rule revises this section by removing the outdated reference to Standard Industrial Classification (SIC) 8711 and adding in its place a reference to the North American Industry Classification System code 541330.

• *Section 926.7005:* Section 926.7005 is revised to reorganize the content to remove the separate paragraph on subcontracts as this content is unnecessarily duplicative of the prescriptions for solicitation provisions and contract clauses in section 926.7007.

• *Section 926.7006:* This final rule revises this section to reorganize and streamline content to remove obsolete and unnecessary reporting requirements.

• *Section 926.7007:* This final rule revises this section in the prescription for the clause at 952.226–72, ''Energy Policy Act Subcontracting Goals and Reporting Requirements'' to update the dollar threshold from $500,000 ($1M for construction) to $750,000 and ($1.5M for construction) to conform to the FAR threshold for requiring a subcontracting plan at 48 CFR 19.702.

• *Subpart 926.71:* This final rule amends this subpart by: (1) revising section 926.7101 to update the citation in the first sentence from 42 U.S.C. 7474h to 50 U.S.C. 2704(c)(2); (2) revising section 926.7103 to make the same update to the citation in the first sentence of paragraph (a); and (3) revising section 926.7104 to change the clause title to add the words ''Workforce Restructuring and'' before '' Displaced Employee Hiring Preference'' (in order to distinguish this from hiring preferences tied to the Service Contract Act) and revising the clause prescription to add a parenthetical that makes clear that the clause is for both M&O and non-M&O contracts.

• *Sections 927.200 and 927.201–1:* This final rule removes section 927.200 and adds the content of that section to section 927.201–1 to better conform with FAR numbering and section headings. Additionally, the proposed rule broadens the requirement in section 927.201–1 to consult with Patent Counsel regarding the use of the Patent and Copyright Infringement Liability clause, which includes the Authorization and Consent clause referenced currently, to fully address indemnity in contracts based on the work being performed. but instead requires consultation regarding the use of the Patent and Copyright Infringement Liability clause in certain situations.

• *Sections 927.202, 927.202–5, and 927.206:* This final rule removes section 927.206, ''Refund of Royalties,'' and redesignates sections 927.206–1, ''General,'' and 927.206–2, ''Clause for refund of royalties,'' as new sections 927.202, ''Royalties,'' and 927.202–5, ''Solicitation provisions and contract clause,'' respectively. These changes are made in order to conform to the FAR numbering and section headings which this coverage supplements.

• *Sections 927.203 and 927.203–1:* This final rule redesignates sections 927.207 and 927.207–1 as new sections 927.203 and 927.203–1 respectively and revises the section heading for section 927.203 (formerly section 927.207). These changes are made in order to correspond with the FAR numbering and section headings which this coverage supplements.

• *Section 927.302:* This final rule redesignates section 927.300 as section 927.302 and revises the section heading to correspond with the FAR numbering and section headings which this coverage supplements. The rule also makes minor reorganization and editorial changes to the content of new section 927.302 for the purpose of improving clarity and readability.

• *Section 927.302–70:* This final rule redesignates current section 927.302 as section 927.302–70 and revises the section heading in order to accommodate the changes to current section 927.300 previously described. In addition, a new paragraph (a) is added to include a definition of ''background patent'' similar to the definition found in the new Alternate I of section 952.227–13 for the purpose of improving clarity of the regulation. Current paragraphs (b) and (c) are replaced with a new paragraph (c) to reflect DOE's determination that the requirement of licensing background patents should only be permitted in certain situations approved by DOE Patent Counsel with concurrence of a DOE program official. This policy is implemented in new section 927.303(d)(5) by moving the paragraph regarding background patents from the clause at section 952.227–13 to an Alternate I so that it only applies to certain contracts.

• *Section 927.303:* This final rule revises section 927.303 to correspond with the FAR numbering and to make additions to instructions located in 48 CFR 27.303. The rule also adds paragraph (a)(4) to direct the Contracting Officer to subpart 970.27 for certain decontamination and decommissioning activities and the building and/or operations of other DOE facilities. Additionally, 48 CFR 27.303(d) provides that DOE will insert its specific patent rights clauses according to agency procedures. Therefore, section 927.303(d) outlines the use of the various patent clauses such as the clause at 48 CFR 952.227–13 or 37 CFR 401.14 depending on whether the contractor is a large or small business or university.

○ DOE provides in paragraph (d)(2) that contracts with domestic small business firms or nonprofit

organizations use the clause at 37 CFR 401.14 instead of the clause at 48 CFR 952.227–11 because DOE has not modified 48 CFR 48.952.227–11 to keep up with changes in the standard patent clause for these entities, while 37 CFR 401.14 is regularly updated. However, 37 CFR 401.14 has certain provisions requiring agency implementing regulations, which DOE addresses in a prescription for new Alternate I.

○ The most significant update is necessary to implement DOE's Declaration of Exceptional Circumstance that requires contractors, at any tier, to substantially manufacture any subject inventions in the United States. Alternate II for domestic small business firms or nonprofit organizations adds both the agency implementing regulations from Alternate I and the U.S. substantial manufacturing requirements. For 952.227–13, an Alternate II is used to implement the U.S. manufacturing requirement, as addressed in section 927.303(d)(6).

• *Section 927.304:* This final rule revises section 927.304 to make minor editorial changes and to replace the reference to the clause at section 952.227–11, which is also revised, with the clause at 37 CFR 401.14. The clause at section 952.227–11 is not regularly updated while the clause at 37 CFR 401.14 does receive regular updates.

• *Subpart 927.4:* This final rule revises the heading of subpart 927.4 to read ''Rights in Data and Copyrights'' to conform to the FAR heading at 48 CFR part 27, subpart 27.4, which this subpart supplements.

• *Section 927.401:* This final rule adds section 927.401 to provide a definition of ''technical data''. The regulations at 48 CFR 27.401 define ''data'' to include ''technical data'' and ''computer software.'' DOE wants to have a clear definition of what technical data encompasses since it relates directly to information sent to DOE's Office of Scientific and Technical Information.

• *Sections 927.402, 927.402–1, and 927.402–2:* This final rule removes sections 927.402 and 927.402–1, and redesignates section 927.402–2 as section 927.402 to conform to FAR numbering, which these sections supplement. The content of section 927.402–1 is added to new section 927.406 and revised for clarity. Finally, DOE also revises the introductory language of the newly redesignated section 927.402 to add a reference to scientific and technical information (STI) because this is the term used at the Office of Scientific and Technical Information (OSTI) where DOE's publicly available technical data is stored.

• *Section 927.403:* This final rule removes section 927.403, which outlines when DOE Contracting Officers and Patent Counsel make determinations as part of the acquisition and use of technical data, and adds its content to newly added section 927.406–4 for organizational purposes.

• *Sections 927.404 and 927.404–70:* This final rule:

○ Redesignates section 927.404–70 as section 927.404–71 for organizational purposes and revises the newly redesignated section to replace the reference to 48 CFR 927.409(a) with 48 CFR 52.227–14 to reflect changes to the prescription at 48 CFR 927.409(a);

○ Redesignates section 927.404 as section 927.404–70 for organizational purposes;

○ Revises the newly redesignated section 927.404–70 to update the instructions on when to use 48 CFR 52.227–14 as supplemented by this subpart, as well as the use of 48 CFR 52.227–16; and

○ Relocates paragraphs (g)(4), (l), and (m) of section 927.404–70 to portions of new section 927.406–4 and revised section 927.409.

• *Sections 927.406 and 927.406–4:* FAR 27.406 is for Acquisition of data with sections 27.406–1 through 27.406–3. This final rule adds section 927.406, Acquisition of data, and section 927.406–4, Acquisition and use of technical data, to conform with the numbering and headings of the FAR, which these sections supplement. Section 927.406–4(a) and (b) address several statutory changes that have been enacted, such as EPAct 2005 and the DOE Energy Research and Innovation Act. EPACT mandates that DOE maintain publicly available collection of Scientific Technical Information funded by the agency which is achieved by the Office of Scientific and Technical Information. DOE Energy Research and Innovation Act has a similar mandate for DOE to maintain a public database populated with information on unclassified research and development projects as well as relevant literature and patents. Additionally, this final rule relocates content formerly located at section 927.402–1(b) to new section 927.406–4(c) for organizational purposes and revises the text for clarity and to update references. Likewise, the final rule relocates content formerly located at section 927.403 to new section 927.406–4(d) for organizational purposes. And finally, this final rule relocates content formerly located at section 927.404(g)(4) and (l) to new section 927.406–4(e) and (f), respectively, for organizational purposes and revises the text for clarity and to update references.

• *Section 927.409:* This final rule revises section 927.409 by removing the contract clause at paragraph (a)(1), which permitted the DOE Patent Counsel to only approve copyright of software. In lieu of that clause, new paragraph (a) instructs the contracting officer to use the definitions at Alternate I of 52.227–14 and a new Alternate VIII of 48 CFR 952.227–14, Rights in Data—General, which allows DOE Patent Counsel to approve copyright of all technical data (including software) of a subcontractor. In addition, this final rule reorganizes the section so that paragraph (a)(2) is now a new paragraph (b) that outlines special treatment of certain data. Paragraph (b)(1)(i) requires Patent Counsel to insert a new Alternate I of 48 CFR 952.227–17 to change paragraph (c)(1)(ii) of 48 CFR 52.227–17, Rights in Data-Special Works, such that DOE Patent Counsel can approve the subcontractor to assert copyright in all technical data of subcontractor and transfer to the Government or other entity. Paragraphs (b)(1)(ii) through (vii) of the proposed section remain the same as current paragraphs (a)(2)(ii) through (vii) with some minor changes to streamline content and update references. However, Paragraph (b)(1)(viii) is added to contain an instruction located in current subcontract paragraph (a)(1) regarding the use of Alternate IV of 48 CFR 52.227–14, Rights in Data—General, to be used with educational institutions. The prohibition for use of Alternate IV for any software has been changed to allow for copyright assertion when creating open source software. Paragraph (b)(1)(ix) describes the use of Alternate VI, as provided at 48 CFR 952.227–14, Rights in Data—General. These instructions are being relocated from current section 927.404 (l) to section 927.409(b)(1)(ix) for organizational purposes and revised accordingly to give further guidance on when to require limited licensing of Limited Rights Data and Restricted Computer Software of the subcontractor. Finally, paragraph (b)(1)(x) contains instructions for using Alternate VII as provided at 48 CFR 952.227–14, Rights in Data—General, which are currently located at section 927.404(m) to limit the contractor's use of DOE restricted data. Section 927.409(d) is an expansion of the instructions located in current section 927.409(h) and 48 CFR 27.409(d). Lastly, the current paragraphs (s) and (t) of section 927.409 are relocated to paragraphs (m) and (n),

respectively, to conform with the numbering of 48 CFR 27.409.

• *Section 931.205–18:* This final rule makes minor editorial revisions to this section in order to improve clarity.

• *Section 931.205–47:* This final rule revises section 931.205–47 to update the citation in the definition of ''Employee whistleblower action'' from 42 U.S.C. 7239 to 50 U.S.C. 2702.

• *Section 932.970:* This final rule revises section 932.970 in paragraph (b) to clarify that: (1) Contracting Officers can specify accelerated payment dates upon making a written determination (on a case-by-case basis) that a shorter contract financing payment cycle

will be beneficial to the Government by reducing the contractor's working capital requirements; and (2) Whenever a contract specifies payment due dates that are sooner than those required under the relevant prompt payment requirements, the contract will permit the Contracting Officer to unilaterally authorize additional time for review of invoices if needed to perform an adequate review prior to payment. These changes are necessary to ensure that accelerated payments are only approved when doing so is determined to be beneficial to the Government, and adequate time for review of invoices is maintained.

• *Section 932.971:* This final rule adds this section concerning electronic submission of invoices/vouchers and prescribes a new clause at 48 CFR 952.232–7. These changes are intended to establish DOE's strong preference for electronic submission of vendor invoices and to provide standardized instructions for such submissions. While electronic submission is preferred, other methods of submission can be approved after consultation with the Office of the Chief Financial Officer.

• *Subpart 932.70:* This final rule removes subpart 932.70 in its entirety, as DOE Loan Guarantee Authority is regulated at 10 CFR part 609.

• *Section 933.103:* Section 933.103 is revised to: (1) reorganize and renumber the paragraphs to conform to the FAR numbering at 48 CFR 33.103 which this section supplements; (2) make minor editorial revisions for clarity; and (3) clarify that DOE does not accept or adjudicate protests from prospective subcontractors.

• *Section 933.104:* Section 933.104 is revised to reorganize content to conform to the FAR numbering at 48 CFR 33.104 which this section supplements, streamline content, and make minor editorial revisions for clarity.

• *Section 933.106:* Section 933.106 is revised to simplify the prescription for the solicitation provision at section 952.233–2 such that it is required to be inserted whenever the provision at 48 CFR 52.233–2 is included. In addition, this final rule removes the prescriptions for the provisions at sections 952.233–4 and 952.233–5 because the content of those provisions is being added to the provision at section 952.233–2.

• *Section 935.010:* This final rule makes minor editorial revisions to section 935.010 to improve clarity, and to add a sentence at the end of paragraph (c) that clarifies that STI products identified in DOE Order 241.1B are reportable to OSTI whether publicly releasable, controlled unclassified information or classified.

• *Section 935.070:* This final rule revises section 935.070 by making minor editorial revisions and removing the definition paragraph, since research misconduct is already defined in 10 CFR part 733.

• *Section 936.202–71:* This final rule removes section 936.202–71 because its basis (Executive Order 13514) has been revoked.

• *Section 941.201–70:* This final rule amends section 941.201–70 by: (1) revising the section heading to conform to 48 CFR 41.201 which this section supplements; (2) revising the text to add a reference to the Energy Policy Act of 2005 (25 U.S.C. 3502) and integrate new Office of Federal Energy Management Programs (FEMP) policy, given that DOE Order 430.2B has been rescinded.

• *Section 942.705–1:* Section 942.705–1 is revised to remove paragraph (a)(3) as its content is outdated.

• *Sections 942.705–3, 942.705–4, 942.705–5:* This final rule removes sections 942.705–3 through 942.705–5 as they only convey procedures internal to the agency that do not need to be covered in this regulation.

• *Subpart 942.71:* This final rule adds new subpart 942.71 to provide an explanation of the need for and the use of the new clause added at section 952.242–71, ''Conditional Payment of Fee, Profit, and Other Incentives,'' which is also discussed in sections 904.402, 923.7002, and 923.7003. The new clause's prescription is also added.

• *Section 945.000:* This final rule revises section 945.000 to account for situations where the personal property management policies in 41 CFR chapter 109 may also apply to certain non-M&O contracts.

• *Section 945.101:* This final rule removes section 945.101 as the definitions are either unnecessary or are already defined in the FAR.

• *Section 945.102–70:* This final rule removes section 945.102–70 as the FAR coverage is considered to be adequate.

• *Section 945.102–71:* This final rule removes section 945.102–71 as the FAR coverage is considered to be adequate.

• *Section 945.570–1:* This final rule revises section 945.570–1 to update the reference to the ''Personal Property Policy Division'' with the ''Office of Asset Management.''

• *Sections 945.602, 945.602–3, and 945.602–70:* This final rule removes these sections as their content is adequately addressed in 41 CFR chapters 102 and 109.

• *Section 945.603:* This final rule removes section 945.603 as its content is adequately addressed in 41 CFR chapters 102 and 109.

• *Section 945.670–1:* This final rule revises section 945.670–1 to update the currently incorrect reference (48 CFR 45.606–3) to 48 CFR 2.101.

• *Section 945.670–3:* This final rule removes section 945.670–3 because the content is adequately addressed in 41 CFR chapter 109.

• *Section 945.671:* This final rule revises section 945.671 to add a reference to ''41 CFR chapter 109'' in place of an outdated reference to ''41 CFR 109–45.50 and 45.51 or its successor''.

• *Section 951.102:* This final rule revises section 951.102, in paragraph (c)(1), to remove the obsolete reference to the Federal Standard Requisitioning and Issue Procedures (FEDSTRIP) and update the reference to the ''Office of Resource Management within the Headquarters procurement organization'' to the ''Systems Division within the Office of Acquisition Management.''

• *Section 952.203–1:* This final rule adds a new clause ''Identification of Contractor Employees'' to require contractors to use standard measures to ensure that contractors and their employees properly identify themselves as contractors in all DOE internal and external communications so that all parties are aware of their status as contractor personnel.

• *Section 952.204–2:* This final rule makes several amendments to the ''Security Requirements'' clause. Specifically, this final rule: (1) consolidates definitions previously located in separate paragraphs (c) through (g) into a single paragraph (a), and adds definitions of ''contracting officer'', ''contract'', ''contractor'', ''cyber system'' and ''special access program''; (2) makes minor editorial revisions and update references throughout; and (3) adds a reference in the last paragraph to clarify that facility clearance may be granted prior to award or after award of a subcontract in

accordance with the clause at 48 CFR 952.204–73, ''Facility Clearance''.

• *Section 952.204–70:* This final rule revises the ''Classification/Declassification'' clause by reorganizing its content, with definitions being brought together into a separate paragraph (a). Additionally, minor editorials changes were made to improve clarity.

• *Section 952.204–73:* This final rule amends the ''Facility Clearance'' clause to make minor editorial revisions throughout and, in paragraph (d), to include both a pre-award facility clearance process and an alternative post-award process. The current 48 CFR 952.204–73 requires a full Facility Clearance prior to the award of a contract requiring access to classified information, and prior to granting any Interim Access Authorizations to key management personnel. The section is revised to provide a process that permits contract award prior to granting a full Facility Clearance, and to permit contract award prior to granting Interim Access Authorizations to key management personnel. This alternate post-award process will enhance efficiencies in awarding contracts while ensuring security requirements are met.

• *Section 952.204–74:* This final rule relocates the ''Counterintelligence'' clause from section 970.5204–1 to this new section, as it is pertinent to both M&O and non-M&O contracts. This final rule also makes minor editorial revisions.

• *Section 952.204–76:* This final rule removes this clause, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information,'' to reflect that section 952.242–71, Conditional Payment of Fee, Profit or Incentives, a new clause, is added in its place. The new clause replaces three existing clauses (952.204–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, 952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health, and 952.223–77, Conditional Payment of Fee or Profit—Protection of Worker Safety and Health).

• *Section 952.204–77:* This final rule revises section 952.204–77, in the introductory text, to update the citation for the clause prescription and make minor editorial changes.

• *Section 952.204–78:* This final rule adds this new clause, ''DOE Directives'' in order to clarify the policy and procedures for integrating directives into non-M&O contracts.

• *Section 952.215–70:* This final rule revises the ''Key Personnel'' clause to make minor editorial changes to improve clarity.

• *Section 952.216–15:* This final rule removes the ''Predetermined Indirect Cost Rates'' clause as the corresponding FAR clause at 48 CFR 52.216–15 is considered to be adequate.

• *Section 952.223–71:* This final rule revises this section to add a non-M&O version of the ''Integration of Environment, Safety, and Health into Work Planning and Execution'' clause on the basis that the requirement is applicable to both non-M&Os and M&Os. The section language previously redirected the reader to a clause for M&O contracts.

• *Section 952.223–75:* This final rule revises this section in the introductory text to update the location of the clause prescription from section 923.7003(h) to section 923.7003(g).

• *Sections 952.223–76 and 952.223–77:* This final rule removes the ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' clause and the ''Conditional Payment of Fee or Profit—Protection of Worker Safety and Health'' clause to reflect that 952.242–71, Conditional Payment of Fee, Profit or Incentives, a new clause, is added in their place. The new clause replaces three existing clauses (section 952.204–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, section 952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health, and section 952.223–77, Conditional Payment of Fee or Profit—Protection of Worker Safety and Health).

• *Section 952.223–78:* This final rule revises the ''Sustainable Acquisition Program'' clause to streamline requirements, to obviate the need for Alternate I to the clause, and to eliminate outdated references and areas of redundancy with FAR coverage.

• *Section 952.226–70:* This final rule revises the ''Subcontracting Goals Under Section 3021(a) of the Energy Policy Act of 1992'' clause to reflect the addition of a fourth target group by the Small Business Reauthorization Act of 1997 (Pub. L. 105–135) and to make minor editorial revisions.

• *Section 952.226–71:* This final rule revises the ''Utilization of Energy Policy Act target entities'' clause by updating the citation for the clause prescription in the introductory text and replacing ''Energy Policy Act'' where it appears in the clause title and text with ''Energy Policy Act 1992'' or ''EPAct 1992'' in order to more clearly identify the source of these requirements. Additionally, minor editorial changes are made to paragraph (a) of the clause for streamlining purposes.

• *Section 952.226–72:* This final rule amends the ''Energy Policy Act of 1992 Subcontracting Goals and Reporting Requirements'' clause to reflect the addition of a fourth target group by the Small Business Reauthorization Act of 1997 (Pub. L. 105–135) as well as to replace references to the outdated Standard Form (SF) 294 and SF 295 with references to the Individual Subcontract Report and or Summary Subcontract Report in the Electronic Subcontracting Reporting System (ESRS).

• *Section 952.226–73:* This final rule revises the ''Energy Policy Act target group certification'' provision to revise the section heading and clause title and to reflect the addition of a fourth target group by the Small Business Reauthorization Act of 1997 (Pub. L. 105–135).

• *Section 952.226–74:* This final rule amends the ''Displaced employee hiring preference'' clause to revise the section heading and clause title by adding the words ''Workforce Restructuring and'' before ''Displaced Hiring Preference.'' This revision is intended to clearly tie this clause to workforce restructuring and distinguish it from other hiring preferences related to the Service Contract Act.

• *Section 952.227–9:* This final rule revises the ''Refund of Royalties'' clause to require contractors with contracts greater than five years in duration to furnish a statement of royalties paid or required to be paid in connection with performing the contract every five years, and to make minor editorial revisions.

• *Section 952.227–11:* Since 37 CFR 401.14, Standard Patent Rights, is updated regularly, DOE has decided to use that clause in preference to 48 CFR 52.227–11. However, 37 CFR 401.14 has sections requiring agency implementing regulations. Therefore, this final rule revises section 952.227–11 to replace the full clause text with two alternates. Alternate I is used to supplement the standard patent rights clause to include DOE's implementing regulations. For example, paragraph (g)(2) requires the Contracting Officer to direct whether to include this clause in certain subcontracts. Also, paragraph (l) requires reports to be uploaded into iEdison invention management system. DOE has recently issued a Declaration of Exceptional Circumstance (DEC) to require substantial US manufacture of

subject inventions funded by many DOE programs. Alternate II addresses the modifications and additions to 37 CFR 401.14 to implement this DEC by adding paragraphs (m) and (n).

- *Section 952.227–13:* This final rule amends the ''Patent Rights—Acquisition by the Government'' clause to update references and account for statutory changes. Paragraph (k) has been moved to a new alternate I to provide for a right to require licensing of third parties to background inventions only when deemed necessary. Also, a new Alternate II has been added to implement the U.S. Competitiveness requirement for DOE funding programs that require it.
- *Section 952.227–14:* This final rule amends the ''Rights in Data—General'' clause to add a new Alternate VIII which addresses the approval by DOE Patent Counsel of all types of data by subcontractors of the M&O Contractor. Minor editorial revisions and revisions to update references are also made.
- *Section 952.227–17:* This final rule adds a new ''Rights in Data—Special Works'' clause which supplements the FAR clause at 48 CFR 52.227–17 to permit Patent Counsel to direct the subcontractor to assert copyright and transfer to the Government or M&O Contractor.
- *Section 952.227–82:* This final rule removes the ''Rights to proposal data'' clause on the basis that the corresponding FAR clause at 48 CFR 52.227–23 is considered to be adequate.
- *Section 952.227–84:* This final rule amends the ''Notice of right to request patent waiver'' provision to revise the introductory text to correctly specify the location of the prescription and to revise the text in the third sentence to replace the reference to ''DEAR 952.227–11'' which has been removed, with ''37 CFR 401.14.''
- *Section 952.231–71:* This final rule revises the ''Insurance—Litigation and Claims'' clause, in paragraph (f)(2) to explicitly identify the property clause at 48 CFR 970.5245–1 that defines ''contractor's managerial personnel.''
- *Section 952.232–7:* As detailed in the description to section 932.971, DOE has added this new ''Electronic Submission of Invoices/Vouchers'' clause to ensure clarity on electronic invoicing and payment procedures.
- *Sections 952.233–2, 952.233–4, and 952.233–5:* This final rule revises the ''Service of Protest'' clause to add the provisions previously located at sections 952.233–4 and 952.233–5, since all three provisions had the same prescription and interrelated subject matter. Sections 952.233–4 and 952.233–5 have been removed.
- *Section 952.242–71:* This final rule adds a new ''Conditional Payment of Fee, Profit or Incentives'' clause to replace three existing clauses (section 952.204–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, section 952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health, and section 952.223–77, Conditional Payment of Fee or Profit—Protection of Worker Safety and Health). Like the previous clauses, the new clause provides for a reduction in payment to a contractor if the contractor fails to meet a performance requirement relating to environment, safety and health or security or safeguarding of restricted data and other classified information. The new clause also includes updated references and reflects revisions made for clarity.
- *Section 952.245–2:* This final rule revises section 952.245–2 to update the clause prescription to conform with the current FAR.
- *Section 952.245–5:* This final rule revises section 952.245–5 to update the clause prescription to conform with the current FAR.
- *Section 952.250–70:* This final rule revises the ''Nuclear Hazards Indemnity Agreement'' clause to correctly reflect the current underlying statute and to eliminate ''effective date'' considerations not germane to contracts awarded in 2020 and beyond. The clause has been updated to delete Note 1 in accordance with 2005 Pub. L. 109–58, sec. 610(b), which amended Atomic Energy Act (AEA) section 234A(d) to eliminate the exclusion from civil penalties for certain identified non-profit institutions. Prior to amendment, AEA section 234A(d) provided that the provisions of AEA section 234A on imposition of civil penalties would not apply to the University of Chicago for activities associated with Argonne National Laboratory; the University of California for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory; American Telephone and Telegraph Company and its subsidiaries for activities associated with Sandia National Laboratories; Universities Research Association, Inc. for activities associated with FERMI National Laboratory; Princeton University for activities associated with Princeton Plasma Physics Laboratory; the Associated Universities, Inc. for activities associated with the Brookhaven National Laboratory; and Battelle Memorial Institute for activities associated with Pacific Northwest Laboratory
- *Section 970.0100:* Section 970.0100 indicates that part 970 of the DEAR provides DOE policies, procedures, provisions, and clauses that implement and supplement the FAR and other parts of the DEAR for the award and administration of M&O contracts. This final rule revises this section to clarify that part 970 does not apply to non-M&O contracts, except as approved by the cognizant SPE, or as otherwise prescribed in the DEAR.
- *Section 970.0371–8:* Section 970.0371–8 requires that certain information be included in a written disclosure statement made by an employee of an M&O contractor. In this final rule, DOE requires each disclosure statement to include an acknowledgement that the employee has read and is familiar with DOE Order 486.1, Department of Energy Foreign Government Sponsored or Affiliated Activities. Additionally, section 970.0371–8 already requires that each disclosure statement include an acknowledgement that the employee has read and is familiar with the DOE publication entitled ''Reporting Results of Scientific and Technical Work Funded by DOE''. This final rule updates the title of that publication to reflect the publication's current title.
- *Section 970.0371–9:* Section 970.0371–9 requires a contracting officer to insert the clause at section 970.5203–3, Contractor's Organization, in all M&O contracts and provides that in paragraph (a) of that clause, the words ''and managerial personnel (see 970.5245–1(j))'' may be inserted after ''(see 952.215–70)''. This final rule updates the cross reference from ''970.5245–1(j)'' to ''970.5245–1(k)'' to reflect the new location of that paragraph.
- *Subpart 970.04:* This final rule redesignates sections 970.0407–1, 970.0407–1–1, 970.0407–1–2, and 970.0407–1–3 as provided by the table in section II of this document to conform with the FAR numbering system. A cross reference to section 970.0407–1–3 in section 970.5204–3 is updated to reflect the new numbering.
- *Section 970.0404–1:* Section 970.0404–1 provides definitions of several terms. This final rule removes that section because the definitions of those terms are provided in section 904.401 and duplication in this subpart is unnecessary.
- *Section 970.0404–2*
  - Paragraph (a) of section 970.0404–2 points to several places where the reader may find information about the National Industrial Security Program,

information concerning contractor ownership when national security or atomic energy information is involved, and information regarding contractor ownership involving national security program contracts. Paragraph (b) of section 970.0404–2 provides that all DOE elements should undertake the necessary precautions to ensure that DOE and covered contractor personnel, programs and resources are properly protected from foreign intelligence threats and activities. The regulations in 48 CFR part 904 contain DOE policies, definitions, provisions, and clauses associated with the safeguarding and security of classified information. In order to avoid unnecessary duplication, this final rule replaces the content of paragraphs (a) and (b) with a new paragraph (a) that points the reader to that part.

○ Paragraph (c) of section 970.0404–2 provides that for DOE M&O contracts and other contracts designated by the Senior Procurement Executive, or designee, the clause entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts'' implements the requirements of section 234B of the Atomic Energy Act regarding the use of a contract clause that provides for an appropriate reduction in the fee or amount paid to the contractor in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of restricted data or other classified information. This final rule makes minor editorial revisions to this text for streamlining purposes and redesignates the content as paragraph (b) of section 970.0404–2.

• *Section 970.0404–4:* Paragraph (a) of section 970.0404–4 requires a contracting officer to include the clause located at 48 CFR 5204–1 in certain contracts. Paragraph (b) of section 970.0404–4 points the contracting officer to sections 904.404 and 904.7103 for the prescription of solicitation provisions and contract clauses relating to safeguarding classified information and foreign ownership, control, or influence over contractors. This final rule removes section 970.0404–4 because (1) the requirement in paragraph (a) of that section has been relocated to paragraph (d)(7) of section 904.404 and (2) the references to sections 904.404 and 904.7103 are unnecessary and duplicative of those sections.

• *Section 970.0407–1–3 (970.0407–130):* This final rule amends this section to revise the prescription for the ''Access to and Ownership of Records'' clause to reflect the addition of a non-M&O version of the ''Integration of Environment, Safety, and Health into Work Planning and Execution'' clause and to make minor editorial changes.

• *Section 970.0801–2:* This final rule revises section 970.0801–2 to replace the reference to the Federal Property Management Regulation at 41 CFR part 101–43 with a reference to the Federal Management Regulation at 41 CFR chapter 102. This change is necessary because the General Services Administration (GSA) is phasing out the Federal Property Management Regulation and transitioning its sections to the Federal Management Regulation.

• *Section 970.0905:* This final rule revises section 970.0905 to add a sentence at the end referring Contracting Officers to the policy in subpart 909.5 which is also applicable to M&O contracts.

• *Section 970.1100–1:* This final rule amends section 970.1100–1 to more concisely state DOE policy. Accordingly, paragraphs (a) and (b) are streamlined and combined into paragraph (a). Paragraph (c) is redesignated as new paragraph (b). Paragraph (d) is removed, as its content is limited to internal procedures and does not need to be included in the regulation.

• *Section 970.1100–2:* This final rule removes this section as its content is limited to internal procedures and does not need to be included in the regulation.

• *Subpart 970.15:* This final rule redesignates sections 970.1504–1 through 970.1504–4 as provided by the table in section II of this document to conform with the FAR numbering system. Cross-reference changes are made in sections 970.5215–5, 970.3102–3–70, and 970.5244–1 to conform with the new numbering.

DOE's guidance in subpart 970.15 covers DOE's fee policy for its Management and Operating contracts. This final rule amends DOE's current guidance found in sections 970.1504–1–1 through 970.1504–5 by revising and reorganizing it (into sections 970.1504–100 through 970.1504–400) to simplify and state explicitly its construct, sequence for calculating, and step-by-step process for determining the total available fee for an M&O contract. These amendments reflect DOE's Contracting Officers' several decades of experience with the current articulation of the policy. They have found the policy satisfactory, have demonstrated a comprehensive understanding of its details, and have reflected their understanding in implementing the policy. Nonetheless, DOE's Contracting Officers have indicated it would be efficacious, for many reasons (training new procurement analysts, communicating with other offices, such as program, reviewing, and legal offices, etc.) if DOE's policy:

○ were reorganized and restated in a more straightforward, more ''plain English'' format;

○ was pruned of what has become unnecessary guidance for a number of reasons (for example, guidance covered adequately in the FAR, or DOE's internal guidance, such as DOE Acquisition Guide chapters);

○ reflected Contracting Offers' current practices in executing the policy;

○ included a detailed example of a fee calculation; and

○ conformed more tightly to the FAR's articulation of fee policy, fee constructs, fee definitions, and fee terms, to the extent appropriate.

The amendments provide a clearer articulation of the policy. DOE has: (1) deleted or revised entire sections and large portions of sections of the policy, sometimes without replacement, sometimes replacing the deleted or revised language with much more concise language; (2) reorganized the policy; and (3) added a detailed example. Often when replacing deleted or revised language with more concise language, different aspects of the topic addressed by the deleted or revised language appear more cogently stated in several sections of the policy (sometimes more than once in several sections).

In its amending of its guidance, DOE retained the current fee policy for M&O contracts and clarified it. There are no changes of any significance to the current fee policy, with two exceptions. The two exceptions that DOE has made are: eliminating the special considerations for determining fee for laboratory M&O contracts (which now appears in the current policy at section 970.1504–103); and raising the Classification Factor of for research and development at a laboratory (which now appears in the current policy at section 970.1504–109(e)(4)) from 1.25 to 1.5.

It is worth noting that one minor change to the current fee policy is the suggested order of the steps in determining the maximum total available fee for a one-year period and the use of the ''significant factors'' (in one of the steps) in calculating the maximum total available fee amount for a one-year period. The revisions—which reflect the current practice and DOE Contracting Officers' desire to formalize it—establish that suggested order and use. The new suggested order and use and the current suggested order and use both consider the fee base, fee

schedules, classification factors, and significant factors, and both orders and uses produce the same result. The revised suggested order and use require (for each type of effort) calculating an appropriate percentage derived from considering the significant factors (and applying it to the product of the maximum fixed fee and the classification factor). The current fee policy's suggested order and use—implied at sections 970.1504–1–5(c) and 970.1504–1–9(c)—require (for each type of effort) determining an appropriate fixed fee amount for each of the significant factors, summing those appropriate fixed fee amounts, and multiplying that sum by the classification factor.

The revised suggested order and process comprise considering the: magnitude of the effort (reflected by the total fee base for the year); type of effort (reflected by the allocation of the total fee base to the three fee schedules); nature, difficulty, complexity, and importance of the work (reflected by the choice of classification factors); and specific circumstances of the procurement (reflected by the appropriate percentages derived from considering significant factors). This order entails using (for each type of effort) the maximum amount of fixed fee from the fee schedule, multiplying it by the classification factor, and multiplying by the appropriate percentage (derived from considering the significant factors).

The current fee policy's suggested order and process comprise considering the: magnitude of the effort (reflected by the total fee base for the year); type of effort (reflected by the allocation of the total fee base to the three fee schedules); specific circumstances of the procurement (reflected by the determining an appropriate fee amounts for each of the significant factors and summing those amounts); and nature, difficulty, complexity, and importance of the work (reflected by the choice of classification factors). This order entails using (for each type of effort) the fixed fee that would have been calculated for a cost-plus-fixed-fee contract action (using the fee schedules and considering the significant factors) and multiplying that fixed fee by the classification factor.

A second minor change to the current fee policy is deleting cost reduction incentives, which are discussed in the current policy at sections 970.1504–1–4(f), 970.1504–5(c), and 970.5215–4. DOE no longer uses cost reduction incentives, using instead value engineering, which is covered in the DOE Acquisition Guide and the FAR.

A detailed breakdown of the changes to subpart 970.15 is provided below.

- *Section 970.1504–1–1 (970.1504–101):* DOE has revised this section for clarity.
- *Section 970.1504–1–2 (970.1504–102):* DOE has revised this section to reorganize and clarify the agency's fee policy for M&O contracts. Additionally, in some cases, this final rule revises and moves its coverage from other sections to this section. In other cases, this final rule revises its coverage in this section and moves it to other sections. In its amendments to this section, among other things, the current numbering of sections 970.1504–1–2(a) through (h) will become sections 970.1504–102(a) through (b).

○ *Paragraph (a)(1):* This final rule adds this paragraph to clarify DOE policy on fee for M&O contracts. DOE's policy on types of contracts and fee arrangements suitable to M&O contracts that was originally located at 48 CFR 970.1504–1–4(a)(1) and 970.1504–1–2(h) is revised for clarity and moved to this paragraph.

○ *Paragraph (a)(2):* This final rule adds this paragraph to reorganize and clarify DOE M&O contract fee policy to: (1) move the policy requiring that a cost-plus-fixed-fee contract only be used if approved in advance by the Senior Procurement Executive (SPE) or designee from current 48 CFR 970.1504–1–4(b) to this paragraph; and (2) add a mention of the limitation on the fee for a cost-plus-fixed-fee contract found at 48 CFR 15.404–4(c)(4)(i), which makes unnecessary the last sentence of current section 970.1504–1–2(d), which is deleted.

○ *Paragraph (a)(3):* This final rule adds this paragraph to reorganize and clarify DOE policy on the approval of base fee in a cost-plus-award-fee M&O contract. The policy requiring that a base fee amount may only be used if approved in advance by the SPE or designee has been revised and moved from 48 CFR 970.1504–1–4(c)(3) to this paragraph.

○ *Paragraph (a)(4):* In this final rule, DOE adds this paragraph to reorganize and clarify DOE policy that incentive fees allocated to evaluation periods under cost-reimbursement type contracts should, to the greatest extent appropriate, be tied to a specific portion of the maximum total available fee. In addition, this final rule revises and moves the policy described herein from 48 CFR 970.1504–1–2(b) to this paragraph.

○ *Paragraph (a)(5):* This final rule adds paragraph (a)(5) to reorganize and clarify DOE policy that: (1) the maximum total available fee amount may not exceed the fee derived from this section unless approved in advance by the SPE or designee; and (2) a request to allow a higher fee must be in writing and must clearly explain why the situation merits consideration. In addition, this final rule revises and moves the policy described herein from, in part, both 48 CFR 970.1504–1–2(d) and 970.1504–1–10 to this paragraph.

○ *Paragraph (a)(5)(i):* This final rule adds paragraph (a)(5)(i) to reorganize and clarify DOE policy that typically, only a situation where either unusually difficult objective performance incentives would be used or where successful performance would provide extraordinary value would merit consideration for allowing a higher fee. In addition, this final rule revises and moves the policy described herein from 48 CFR 970.1504–1–10 to this paragraph.

○ *Paragraph (a)(5)(ii):* This final rule adds paragraph (a)(5)(ii) to reorganize and clarify DOE policy that when a contract requires a contractor to use its own facilities, equipment, or other resources for contract performance (*e.g.,* when there is no letter-of-credit financing), consideration may be given, subject to approval by the SPE or designee, to allowing a maximum total available fee amount above the amount calculated by this section. In addition, this final rule revises and moves the policy described herein from 48 CFR 970.1504–1–2(g) to this paragraph.

○ *Paragraph (a)(6):* This final rule adds paragraph (a)(6) to reorganize and clarify DOE policy that each M&O contract must set forth in the contract (or in a Performance Evaluation and Measurement Plan (PEMP) or similar document) the methods that will be used to rate the contractor's performance and to determine the fee the contractor's performance will earn. The DOE Contracting Officer must ensure all important areas of contract performance are specified in the contract or in a PEMP (or similar document), even if such areas are not assigned a specific portion of the maximum total available fee the contractor might earn. In addition, this final rule revises and moves the policy described herein from 48 CFR 970.1504–1–9(h) and (j), in part, to this paragraph.

○ *Paragraph (a)(6)(i):* This final rule adds paragraph (a)(6)(i) to reorganize and clarify that an M&O contract is an ''incentive contract'' as that term is used in 48 CFR part 16, subpart 16.4, and that subpart 16.4 prohibits the use in a contract of other than cost incentives without also providing a cost incentive (or constraint). This paragraph is added to better align with the cost-plus-award-

fee contract policy in subpart 16.4, particularly 48 CFR 16.401(e).

○ *Paragraph (a)(6)(ii):* This final rule adds paragraph (a)(6)(ii) to clarify: (1) award fee not earned during the award fee cycle shall not be carried over to any future award fee cycle; (2) when the award fee cycle consists of one evaluation period, unearned award fee amounts may not be carried over from one evaluation period to the next; and (3) when the award fee cycle consists of two or more evaluation periods the Contracting Officer may make the decision that unearned award fee amounts may be carried over from one evaluation period to the next, if the periods are within the same award fee cycle. This paragraph is added to better align its cost-plus-award-fee contract policy with the cost-plus-award-fee contract policy in 48 CFR 16.401(e)(4).

○ *Paragraphs (b)(1) and (2):* This final rule reorganizes, revises, and moves the policy at section 970.1504–1–2(f) to this section to clarify: (1) that before issuing a competitive solicitation, the Head of the Contracting Activity (HCA) must coordinate the maximum total available fee amount with the SPE or designee; (2) a competitive solicitation must identify the greatest maximum total available fee amount the Government will accept and may invite offerors to propose a lower fee amount; and (3) before beginning to negotiate an extension to an existing contract, the HCA must coordinate the greatest maximum total available fee amount the HCA will accept and the maximum total available fee amount targeted for negotiation with the SPE or designee.

• *Section 970.1504–1–3 (970.1504–103):* First, this final rule deletes the policy describing special considerations for determining fee for laboratory M&O contracts in current sections 970.1504–1–3(a) through (c)(7). That policy required determining whether any fee is appropriate for laboratory M&O contracts; DOE's new policy is that a fee is appropriate. DOE believes, based upon its experience with the current policy, the new policy will encourage a larger potential group of entities to compete for DOE's laboratory M&O contracts, which will result in better outcomes for DOE. (This deletion of the laboratory M&O contracts fee policy is one of the two proposed changes of any significance to the current M&O contracts fee policy mention earlier, the other being the Classification Factor for research and development at a laboratory was increased.) Second, a better articulation of DOE's general policy for fee determination for M&O contracts is now added at sections 970.1504–103(a) through (f). DOE's general policy for fee determination has been and remains that: all M&O contracts are ''incentive fee'' contracts as described in 48 CFR part 16, subpart 16.4; and DOE will evaluate (per a contract's performance measures) the contractor's performance to determine the fee the contractor's performance has earned it. This is a long-standing policy, which, in essence, is strewn across several sections of the current fee policy, not necessary in ideal sequential order, or covered by the Federal Acquisition Regulation and not reiterated in the DEAR. Stated in more detail, the long-standing construct of fee policy for M&O contracts has been and will remain:

Objective performance measures are preferred to subjective ones and tying specific fee to specific outcomes should be accomplished whenever feasible. Consequently, fixed-price actions would be ideal (albeit the unlikelihood of their being feasible in M&O contracts) and cost-plus-fixed-fee actions (such as base fee in a cost-plus-award-fee action) are to be avoided whenever practical (and their use requires high level approval). The formula to determine the maximum total available fee is based on annual fee determinations using fees bases, fee schedules, classification factors, and appropriate percentages. More specifically, the maximum total available fee amount for an M&O contract is the sum of the maximum total available fee amounts of the contract's one-year periods. The maximum total available fee amount in a one-year period is based on the fee base of the one-year period. Calculating the maximum total available fee amount for a one-year period requires considering the: magnitude of the effort (reflected by the total fee base for the year); type of effort (reflected by the allocation of the total fee base to the three fee schedules); nature, difficulty, complexity, and importance of the work (reflected by the choice of classification factors); and specific circumstances of the procurement (reflected by the appropriate percentages derived from considering significant factors).

This better articulation of DOE's general policy for fee determination for M&O contracts reflects the construct of (and some pertinent details of) DOE's long-standing general policy for fee determination in more concise terms, in a more logical sequence, and in more congruence with the Federal Acquisition Regulation's articulation of the concept of contract types and fee arrangements. In essence, DOE is pulling and revising (sometimes integrating constructs, sometimes integrating and revising specific language, sometimes deleting unnecessary language, sometimes revising necessary language) policy guidance from the following sections and placing it in section 970.1504–103:

○ 970.1504–7(a) through (e)—Fee base;

○ 970.1504–1–6(a) and (b)—Calculating fixed fee;

○ 970.1504–1–9(a) through (j)—Special considerations: Cost-plus-award-fee;

○ 970.1504–1–5—General considerations and techniques for determining fixed fees;

○ 970.1504–1–2(i)—which addresses conditional payment of fee, profit, and other incentives;

○ 970.1504–1–4(e)—which addresses requirements if using multiple contract types;

○ 970.1504–1–4(f)—which addresses cost reduction incentives; this section is deleted without replacement because DOE determined its policy for value engineering (stated in its Acquisition Guide) was more appropriate;

○ 970.1504–1–4(g)—which addresses the responsibilities of operations and field offices in establishing contract types and fee arrangements;

○ 970.1504–1–2(c) and (d)—which discuss annual fee determination, maximum amount of annual fee, and the role of the Senior Procurement Executive;

○ 970.1504–1–2(b)(3)—which discusses preferences for fixed price awards, objective measures, and tying fee to specific portions of the fee pool;

○ 970.1504–1–4(c)(3) and (4)—which discuss risk, base fee, performance fee and its two components, and the preference for the objective fee component; and

○ 970.1504–1–4(d)—which addresses performance fee, measures and objectives, the preference for tying fee to outcomes, and the allocation of fee to outcomes.

(It should be noted that some of the pulled and revised language listed above appears more than once, that is, it appears not only in 970.1504–103(a) through (f) but also—for the purpose of improving readability—in other sections of DOE's revised fee policy.)

○ *Paragraphs (a) through (b)(6):* This final rule reorganizes, revises, and moves the policy currently located at sections 970.1504–7(a) through (e)—Fee base, sections 970.1504–1–6(a) and (b)—Calculating fixed fee, sections 970.1504–1–9(a) through (j)—Special considerations: Cost-plus-award-fee, and section 970.1504–1–5—General considerations and techniques for determining fixed fees to sections 970.1504–103(a) through (b)(6) to clarify

the construct of DOE's long-standing general policy for fee determination for M&O contracts. The guidance in the portions of general policy moved to section 970.1504–103 includes guidance regarding: magnitude of the effort; type of the effort; nature, difficulty, complexity, and importance of the work; specific circumstances of the procurement; maximum total available fee amount for the contract; annual fee bases; allocation of the maximum total available fee amount; the fee base in each of the one-year periods of the contract; allocating that total available fee to the evaluation periods of the contract based upon what best motivates the contractor's superior performance; allocating incentives in a manner that will result in reasonable contractor risk and provide the contractor with the greatest incentive; maximum total available fee amount equaling the sum of the maximum total available fee amounts in the contract's one-year periods; the maximum total available fee amount for a one-year period is based on the fee base for that one-year period; the fee base is an estimate of the allowable costs (with some exclusions) for that one-year period; the fee base is a basic component of the fee schedules, which link the fee base to fee; the amount of the fee base and the amount of fee in the fee schedules are annual amounts; calculating the maximum total available fee amount for a one-year period is based on the contract's one-year periods and their fee bases; usually the maximum total available fee amount for a one-year period is allocated to the same one-year period; when a maximum total available fee amount is established for longer than a year, it is subject to adjustment; the SPE's or designee's approval is required for evaluation periods other than one year; the Government's objective is to allocate incentives in a manner that will provide the contractor with the greatest incentive for efficient and economical performance; and occasions could occur where it would be appropriate to allocate the maximum total available fee amount for a year to a subsequent one-year evaluation period, an evaluation period of greater than a year, or to several evaluation periods.

○ *Paragraph (b)(7):* To clarify the construct of DOE's long-standing general policy for fee determination for M&O contracts, this final rule: (1) reorganizes and revises the policy currently located at sections 970.1504–1–2(b)(3), (c), and (d), sections 970.1504–1–4(c)(2) through (d), and sections 970.1504–1–9(b) and (h) and moves it to paragraph (b)(7); (2) repeats some of the M&O contract Total Available Fee contract clause's language and adds it to this paragraph, specifically the clause's language requiring the negotiations to establish the requirements for the year and the maximum total available fee that the contractor can earn for its performance must occur before the contract year begins, and the language requiring the maximum total available fee allocated to an evaluation period be apportioned among a base fee amount and a performance fee amount; and (3) rephrases some of the Federal Acquisition Regulation's discussion at 48 CFR part 16, subpart 16.4, regarding incentives, objective performance requirements, and subjective performance requirements, and award fee and adds it to this paragraph.

○ *Paragraph (b)(8):* This final rule reorganizes, revises, and moves the policy at currently located at sections 970.1504–1–2(b)(3) and (e) to this paragraph.

○ *Paragraph (c):* This final rule adds this paragraph because it repeats and emphasizes the fee determining sequence mentioned earlier. Paragraph (a) addressed the general requirements for determining fee, and paragraph (b) addressed the maximum total fee amount for the contract, which necessarily mentioned total available fee for each one-year period of the contract. Therefore, it adds to the readability of DOE's M&O contract fee policy to address determining the maximum total available fee for each one-year period of the contract at this point. (The next paragraph addresses conditional payment of fee, profit, and other incentives, which applies to paragraphs (a), (b), and (c).) Paragraph (c) alludes to base fee, fee schedules, classification factors, appropriate percentages derived from the significant factors, and the specific details for calculating the maximum total available fee one-year period and an example, subjects addressed comprehensively at sections 970.1504–105, 970.1504–106, 970.1504–107, 970.1504–108, and 970.1504–104, respectively.

○ *Paragraph (d):* This final rule reorganizes and revises the policy currently located at section 970.1504–1–2(i) and moves it to paragraph (d). DOE is taking this action to clarify the significance to the fee determining process of the performance requirements of the contract relating to environment, safety, and health (ES&H) and relating to safeguarding of Restricted Data and other classified information.

○ *Paragraph (e):* This final rule reorganizes and revises the policy on multiple contract types and fee arrangements at section 970.1504–1–4(e) and moves it to paragraph (e). This final rule removes the policy on cost reduction incentives at section 970.1504–1–4(f) and the associated clause at section 970.5215–4, which is prescribed at section 970.1504–5(c). DOE no longer uses the types of cost reduction incentives at section 970.1504–1–4(f), using instead value engineering, which is covered in the DOE Acquisition Guide and the Federal Acquisition Regulation.

○ *Paragraph (f):* This final rule reorganizes and revises the policy at section 970.1504–1–4(g) and moves it to paragraph (f).

• *Section 970.1504–1–4 (970.1504–104):* This final rule reorganizes and revises this section to simplify and state explicitly the construct underlying, the sequence for calculating, and the step-by-step process for determining the total available fee for an M&O contract and includes a numerical example for determining the total available fee for a one-year period of an M&O contract. While this section articulates the gist of the current fee policy, there is neither an exact parallel to this section in the current fee policy nor a direct link to specific language in the current fee policy. This section is based in large part on the current fee policy's sections on fee base, fee schedules, classification factors, and significant factors, which are found at sections 970.1504–107, 970.1504–106, 970.1504–109, 970.1504–105, respectively.

• *Section 970.1504–1–5 (970.1504–105):* This final rule revises and reorganizes the section to clarify DOE's policy on the calculation of fee base, which is the estimate of necessary allowable costs, with some exclusions. DOE's policy on fee base is moved here from 48 CFR 970.1504–1–7. In addition, the section was revised to align with the revised section 48 CFR 970.1504–1–4 (48 CFR 970.1504–104).

• *Section 970.1504–1–6 (970.1504–106):* This final rule revises and reorganizes the section to clarify DOE policy on the calculation of the M&O maximum total available fee amount, for a one-year period once the total fee base for the year is determined, including the use of the DOE M&O fee schedules (section 970.1504–1–6), which list the maximum amount of fixed fee. The DOE fee schedules that are based on three types of efforts (Production, research and development (R&D), environmental management (EM)). The section was revised to align with the revised section 970.1504–1–4 (48 CFR 970.1504–104). In addition, DOE has revised the section to better align the section with DOE

policy that an M&O contract is an ''incentive contract'' unless otherwise approved by the SPE.

• *Section 970.1504–1–7 (970.1504–107):* This final rule revises and reorganizes the section to clarify DOE policy on application of the DOE facility classification factors in the calculation of the maximum total available fee, to increase the Classification Factor for research and development conducted at a laboratory from 1.25 to 1.5, to add a Classification Factor (of 1) for efforts performed using a fixed fee, and to relocate the policy on application of facility classification factors from current 48 CFR 970.1504–1–9 to this section. In addition, the section has been revised to align with the revisions to 48 CFR 970.1504–1–4 (48 CFR 970.1504–104). This final rule increases the Classification Factor for research and development conducted at a laboratory because of the increased importance DOE places on such efforts. This final rule adds the Classification Factor for efforts performed using a fixed fee because, despite the rare use of fixed fee, use of a fixed fee is permitted by DOE's fee policy.

• *Section 970.1504–1–8 (970.1504–108):* This final rule revises and reorganizes the section to clarify DOE policy on consideration of the specific circumstances of the procurement in the calculation of the maximum total available fee, the application of DOE significant factors for each type of effort, and relocates the DOE policy on the consideration of significant factors from current 48 CFR 970.1504–1–5 to this section.

• *Section 970.1504–1–9 (970.1504–109):* This final rule revises the section to clarify the sequence for calculating, and the step-by-step process for determining, the maximum total available fee for an M&O contract. In addition, the section is revised to align with revisions to section 970.1504–1–4 (48 CFR 970.1504–104).

• *Section 970.1504–1–10 (970.1504–110):* This final rule revises the section to reorganize and clarify the policy for calculating the maximum total available fee for an M&O contract, the policy for the length of evaluation periods, the policy for allocating the maximum total available fee amount for a one-year period, and the policy for the use of evaluation periods greater than one year. The policy on the length of evaluation periods and the use of evaluation periods greater than one year is relocated from the current 48 CFR 970.1504–1–2(c) and (d) to this section.

• *Section 970.1504–1–11 (970.1504–111):* This final rule revises the section, which is simply a repetition of the last step in calculating the maximum total available fee for a contract. This section is aligned with the revisions in section 970.1504–1–4 (48 CFR 970.1504–104).

• *Section 970.1504–2–1 (970.1504–201):* This final rule amends this section to maintain its current guidance on cost or pricing data (relocated from current section 970.1504–3–1). This final rule also removes its current guidance: on the documentation of the fee prenegotiation objective (section 970.1504–1–11); and on the price negotiation (section 970.1504–2). The language in the deleted sections is unnecessary either because it is primarily procurement guidance adequately covered elsewhere (among other places, at 48 CFR 15.406–1 and 15.406–3 and internal DOE guidance) or primary funding guidance that should be addressed in the Office of Chief Financial Officer's guidance.

• *Section 970.1504–3 (970.1504–300):* This final rule moves the policy currently located at 48 CFR 970.1504–5 to this section. The revisions to the text of section 970.1504–5 include:

○ deleting references to the Total Available Fee clause's Alternates I through IV, currently found at 48 CFR 970.1504–5(a)(1) through (4) because elsewhere DOE is revising the Total Available Fee clause and eliminating its Alternates I through IV;

○ deleting the prescription for the Cost Reduction clause (currently found at 970.1504–5(c)) because DOE no longer uses cost reductions incentives (DOE is also eliminating the policy and clause for cost reductions incentives, found at sections 970.1504–1–4(f) and 970.5215–4, respectively, because DOE uses value engineering instead of cost reduction incentives);

○ deleting the references to the clause at 970.5215–3's Alternates I and II, found at 48 CFR 970.1504–5(b)(2) and (3) because elsewhere DOE is revising the clause to eliminate the need for the Alternates; and

○ revising for clarity DOE's policy on using the Limitation on Fee solicitation provision (found at 970.5215–5).

• *Section 970.1706–1:* This final rule amends this section to clarify the DOE policy on the award, renewal, and extension of M&O contracts.

○ *Paragraph (a):* This paragraph is revised to clarify the DOE policy that: (1) effective performance under an M&O contract is facilitated by the use of a relatively long contract term; (2) only the Secretary can authorize the use of an M&O contract; and (3) only the Secretary can renew the original authorization of an M&O contract.

○ *Paragraph (a)(1):* This paragraph is added to reorganize content and clarify DOE policy that an M&O contract shall provide for a base term not to exceed the lesser of five years or the maximum term the Secretary authorized.

○ *Paragraph (a)(2):* This paragraph is added to reorganize content and clarify DOE policy that: (1) the contract may include option terms provided no option term exceeds the lesser of five years or the maximum term the Secretary authorized; (2) the sum of base term and the option terms does not exceed the lesser of 10 years or the maximum term the Secretary authorized for the contract; (3) in addition to the base term and the option terms just described, an M&O contract for a national laboratory that is competitively awarded may provide for award term incentives provided none exceed the maximum term the Secretary authorized for each; and (4) the sum of base term, option terms, and award terms shall not exceed the lesser of 20 years or the maximum term the Secretary authorized for the contract.

○ *Paragraph (a)(3):* This paragraph is added to reorganize content and clarify DOE policy that after the Secretary's original authorization of the use of the M&O contract has expired, any continuation of work under an M&O contract must be preceded by the Secretary's renewal of the authorization for use of an M&O contract.

○ *Paragraph (a)(4):* This paragraph is added to reorganize content and clarify DOE policy that a sole source extension of an M&O contract to the incumbent must be justified under one of the statutory authorities listed in 48 CFR 6.302 and authorized by the Secretary.

○ *Paragraph (a)(5):* This paragraph is added to reorganize content and clarify DOE policy that the specific duration of the base term, option terms, and award terms of an M&O contract must be established concurrent with the Secretary's authorization (or renewal of his/her authorization) to use an M&O contract (for original use, sole source award to a new contractor, competitive award to a new contractor or to the incumbent, or sole source extension of the contract to the incumbent).

○ *Paragraph (b):* This paragraph is revised to clarify the DOE policy that the contracting officer's decision to exercise an option must be approved by the Senior Procurement Executive and the cognizant Assistant Secretary(s), and that in deciding to exercise the option, the contracting officer shall make the determinations required by 48 CFR 17.605.

○ *Paragraph (b)(1):* This paragraph is added to clarify DOE policy that for the exercise of an M&O option period, the contracting officer shall consider the

extent to which performance-based management contract provisions are present or can be negotiated into the contract.

○ *Paragraph (b)(2):* This paragraph is added to reorganize content and clarify DOE policy that for the exercise of an M&O option period, the contracting officer shall make the determinations required by 48 CFR 17.605 in the manner described therein. The content formerly located at paragraph (b) is moved here and provides that as part of the review required by 48 CFR 17.605(b), the contracting officer shall assess whether competing the contract will produce a more advantageous offer than exercising the option; the incumbent contractor's past performance under the contract; the extent to which performance-based management contract provisions are present, or can be negotiated into, the contract; and the impact of a change in a contractor on the Department's discharge of its programs. The contracting office shall address the considerations in 48 CFR 17.605 in the decision that the exercise of the option is in the Government's best interest. The new paragraph adds that the determination described in 48 CFR 17.207(d) and (e)(2) is not required, and because of the way in which the evaluation of cost to the Government is performed in the award of an M&O contract that includes options, the contracting officer need only determine the option was evaluated as part of the initial competition and contains a maximum fee. The contracting officer need not, for example: issue a new solicitation; informally analyze prices; or determine the option is the more advantageous offer.

• *Sections 970.1707–1, 970.1707–3, and 970.1707–4:* This final rule amends these sections to make minor editorial changes to update references and update policy to reflect the Department of Energy Research and Innovation Act (Pub. L. 115–246). In addition to referencing the Economy Act (31 U.S.C. 1535), 42 U.S.C. 7259a has been added as the authority for the Secretary to allow work to be performed at DOE laboratories ''on behalf of other departments and agencies of the Government, agencies of State and local governments, and private persons and entities''.

• *Sections 970.1708, 970.1708–1, 970.1708–2, and 970.1708–3:* This final rule adds these sections to integrate a new DOE policy on Agreements for Commercializing Technology (ACT) and prescribe a new clause at 48 CFR 970.5217–2. The rule adds new regulatory coverage that provides authorization for M&O contractors to conduct third party-sponsored research at the M&O contractor's risk under Agreements for Commercializing Technology. Whereas the requirements and policy for Agreements for Commercializing Technology are currently contained in DOE guidance and in special provisions included in contracts, this final rule will establish regulatory coverage and incorporate the requirements into a new clause at 48 CFR 970.5217–2. DOE is adding the new policy and clause to allow M&O contractors to engage with industry more flexibly on research and technology transfer projects. Through ACT, an M&O contractor can negotiate and accept financial and performance risks and accept terms and conditions more consistent with industry practice that are not permitted under Cooperative Research and Development Agreements and SPP agreements to advance technology transfer and the commercialization of technologies.

• *Section 970.1907–8:* This final rule adds this section to clarify that Contracting Officers should insert the clause at 48 CFR 5219–9, Small Business Subcontracting Plan, in all M&O solicitations and contracts and to prescribe a new clause that supplements the FAR clause at 48 CFR 970.5219, ''Small Business Subcontracting Plan''. The new clause incorporates a DOE policy concerning ''Management and Operating Contractor Subcontract Reporting Capability (MOSRC)'' to collect key information about M&O contractor first tier subcontracts for reporting to the Small Business Administration.

• *Subpart 970.22:* This final rule redesignates sections 970.2201–1 through 970.2201–2–2 as provided by the table in section II of this document to conform with the FAR numbering system. Cross references in sections 970.5222–1, 970.5222–2, and 970.5244–1 have been updated to reflect the new numbering.

• *Section 970.2201–1–1 (970.2201–110):* This final rule amends this section to identify situations with non-management and operating contracts where the applicability of management and operating contractor basic labor policies may apply.

• *Section 970.2201–1–2 (970.2201–120):* This final rule amends this section in several places to identify the basis for the policies presented by adding a citation to the underlying regulations. The amendments also include minor textual edits for clarity, including applicability to certain non-M&O contracts as described in section 970.2201–1–1 and limit the scope of this section to wages, salaries, and employee benefits under the collective bargaining agreement process. The final rule also transfers more general matters from this section to section 970.2201–140.

• *Section 970.2201–1–3 (970.2201–130):* This final rule revises this section to add language to expand the applicability of section 970.5222–1, Collective Bargaining Agreements—Management and Operating Contracts to certain non-M&O contracts (as described in section 970.2201–110) and require that it be flowed down to subcontracts for protective services or other services performed at a DOE-owned site that affect continuity of operations.

• *Section 970.2201–140:* This final rule adds this section to incorporate policy on critically skilled employees initially established in DOE Acquisition Letter 94–19 and to emphasize the connection to a contractor's compensation system and policies in the recruitment and retention of a critically skilled workforce. This section also emphasizes that costs in support of this policy must be reasonable and meet allowability requirements. Lastly, the discussion of wages, salaries, and employee benefits removed from section 970.2201–1–2 is relocated to this section.

• *Sections 970.2204, 970–2204–1, and 970–2204–1–1:* This final rule revises section 970.2204 to clarify that both non-management and operating contracts and management and operating contracts are subject to the same subpart 922.4 governing labor standards involving construction. Accordingly, the reader is pointed to the policy in subpart 922.4, and section 970.2204–1 is removed as duplicative. Section 970.2204–1–1 is relocated to subpart 922.4 as well.

• *Section 970.2210:* This final rule revises this section to update the reference to the Service Contract Act of 1965. The section heading is revised to read ''Service contract labor standards'' and the section text updates the reference to read ''The Service Contract Labor Standards, historically referred to as the Service Contract Act of 1965''.

• *Section 970.2270:* This final rule revises this section regarding unemployment compensation to better comport with existing federal and state unemployment compensation laws and eliminate inconsistencies.

• *Section 970.2270–2:* This final rule adds this prescription to ensure Contracting Officers include the clause at section 970.5222–4, Unemployment Compensation, in applicable solicitations and contracts and that fill-in data are also identified by the Contracting Officer.

• *Section 970.2301–1:* This final rule removes this section as its contents include an out-of-date hyperlink, reference to the requirements of a rescinded Executive order, and internal procedures that are not necessary to set forth in regulation.

• *Section 970.2301–2:* This final rule revises this section to: (1) add a prescription for the inclusion of the clause at section 952.223–78, ''Sustainable Acquisition Program''; (2) remove prescriptions for clauses that are proposed for removal (section 970.5223–6, which is removed because the Executive order that is its basis has been revoked and section 970.5223–7 which duplicates the clause at section 952.223–78); and (3) remove prescriptions for various FAR clauses as they are already prescribed in 48 CFR chapter 1 and it is unnecessary to prescribe them here.

• *Section 970.2303–2–70:* This final rule redesignates this section as section 970.2303–2 in order to conform with FAR numbering and revises the text of the section to update the office name in paragraph (c)(2)(ii).

• *Section 970.2305:* This final rule redesignates section 970.2305 consisting of sections 970.2305–1 through 970.2305–4 as 970.2605 consisting of sections 970.2605–1 through 970.2605–4 respectively. These changes are necessary to align with recent FAR restructuring which moved ''Drug Free Workplace'' coverage from FAR 23.5 to FAR 26.5. Conforming changes are also made as necessary to update references to the associated FAR coverage as well as to the referenced DEAR clauses which are appropriately redesignated.

• *Section 970.2306:* This final rule redesignates section 970.2306 as 970.2606. These changes are necessary to align with recent FAR restructuring which moved ''Drug Free Workplace'' coverage from FAR 23.5 to FAR 26.5. Conforming changes are also made as necessary to update references to the associated FAR coverage as well as to the referenced DEAR clauses which are appropriately redesignated.

• *Section 970.2672–3:* This final rule revises the section to clarify the applicability of 48 CFR 952.226–74 ''Workforce Restructuring and Displaced Employee Hiring Preference'' to both non-management and operating contracts and management and operating contracts pursuant to section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

• *Section 970.2673–2:* This final rule revises the section to change the prescription for the clause at section 970.5226–3, ''Community Commitment'', making it optional rather than mandatory.

• *Section 970.2701–1:* This final rule revises the section to clarify that subpart 970.27 applies to contracts for decontamination and decommissioning activities.

• *Sections 970.2702 and 970.2702–70:* This final rule makes several amendments to sections 970.2702 through 970.2702–6. Specifically, the rule: (1) revises the heading to section 970.2702 and section numbering to conform to the FAR subpart 27.2 which this subpart supplements; and (2) consolidates clause prescriptions formerly located in sections 970.2702–2 through 970.2702–6 into new section 970.2702–70.

• *Section 970.2703–1:* This final rule revises the section to streamline content by removing paragraphs (b)(1) through (5) as its content is adequately addressed elsewhere, and redesignating paragraph (c) as paragraph (b).

• *Section 970.2703–2:* This final rule revises the section to address more clearly when each of the patent clauses should be used based on the type of Contractor and patent waivers granted. In addition, paragraph (a)(2) addresses ''privately funded technology transfer'' activities that are authorized under Alternate I of 48 CFR 970.5227–3. Although there is no specific language prescribed by an Alternate in this clause, the instructions allow further changes to the patent clause if DOE or the Contractor requests to further define use of royalty funds, cost restrictions and liability related to privately funded licensing activities. Since DOE has replaced a DEAR clause for subcontracts to non-profit organization or small business firms with the FAR provision at 37 CFR 401.14, a new paragraph (h) is added to address the use of appropriate Alternates I or II for 48 CFR 952.227–11 to add agency implementing regulations and, if applicable, DOE's Declaration of Exceptional Circumstance for substantial U.S. manufacture.

• *Section 970.2704–2:* This final rule revises this section to: (1) add a sentence at the end of paragraph (a) that, in compliance with Government-wide mandates to make research results publicly available, references section 935.010 for R&D results conveyed in scientific and technical information and DOE Order 241.1B which addresses requirements for scientific and technical information that are stored in the Office of Scientific and Technical Information (OSTI); and (2) revises the last sentence of paragraph (e) to reflect the new standard of not requiring the Contractor to renew copyright exclusivity every five years, which was administratively burdensome and hampered long-term licensing activity, but to notify Patent Counsel and OSTI when commercial activity ceases.

• *Section 970.2704–3:* This final rule revises the section to add more clarity as to when to use either of the Rights in Data clauses in M&O Contracts.

• *Section 970.2770–2:* This final rule revises this section to reflect the addition of the new clause at section 970.5217–2, Agreements for Commercializing Technology (ACT), and require its inclusion in new awards for or extensions of existing DOE laboratory or weapon production facility M&O contracts. By authorizing the use of ACT, the Contractor may engage with third parties with more flexibility in terms, but the Contractor accepts greater risks in advance funding and liability.

• *Section 970.2803–1:* This final rule revises this section by updating the office name in paragraph (b)(1). Additionally, in paragraph (b)(3), this final rule establishes the Head of Contracting Activity as the official responsible for approving management and operating contractor employees' benefit plans because that individual is better situated to make these determinations.

• *Section 970.2803–2:* This section is revised to update the reference in the last sentence from ''(f)(3)(C)'' to ''(f)(1)(iii)(C)''.

• *Subpart 970.31:* This final rule redesignates sections 970.3101–00–70 through 970.3102–05–70 as provided by the table in section II of this document to conform with the FAR numbering system.

• *Section 970.3101–2:* This section is added to clarify that the cost principles of 48 CFR 31.2 and subpart 970.31 apply to M&O contracts, regardless of entity type.

• *Section 970.3102–3–70 (970.3102–370):* This section is revised to remove the parenthetical reference in paragraph (a)(3)(i) because DOE's fee policy no longer distinguishes between a contract for the management and operation of a laboratory and a contract for the management and operation of a non-laboratory.

• *Section 970.3102–05–6 (970.3102–506):* This final rule revises this section by removing the last sentence of paragraph (a)(6) which states ''For purposes of designating the threshold, total compensation includes only the employee's salary and cash bonus or incentive compensation.'' Removing this sentence increases DOE flexibility in this area to account for other things which should be included in the definition of total compensation, such

as deferred compensation. In addition, paragraph (p)(1) which references the Office of Federal Procurement Policy senior executive compensation benchmark is removed because that information is covered in the FAR. This final rule also adds a pointer to that coverage at the end of paragraph (a)(7)(ii).

• *Section 970.3200–1:* This final rule revises the section, in paragraph (c), by removing the words ''remedy coordination official'' and adding in their place ''Head of the Contracting Activity''. This change is intended to improve clarity since ''remedy coordination official'' is an undefined term that is not widely used whereas ''Head of the Contracting Activity'' is universally used and understood in the acquisition community.

• *Section 970.3200–1–1:* This final rule redesignates section 970.3200–1–1 as section 970.3200–11 to conform with the FAR numbering system. A cross reference in section 970.5232–1 is updated to reflect the new numbering.

• *Section 970.3270:* This section is revised by removing section 970.5203–1, ''Management Controls,'' from the list of standard financial management clauses at paragraph (a)(4) and redesignating paragraphs (a)(5) through (8) as paragraphs (a)(4) through (7). The management controls clause is prescribed elsewhere and does not need to be prescribed here as well.

• *Section 970.3501–1:* This section is revised to remove an obsolete reference.

• *Section 970.3501–2:* This final rule revises this section to update references and clarify that only a federal Contracting Officer can obligate the Government to place work on the contract and obligate the Government to reimburse the contractor under the contract.

• *Section 970.4102–1:* This final rule revises this section to update office names, remove references to a rescinded DOE Order, clarify that Federal Energy Management Program (FEMP) concurrence is not necessary for NNSA programs, and make minor editorial changes.

• *Subpart 970.42:* This final rule redesignates sections 970.4207–03–02, 970.4207–03–70, and 970.4207–05–01 as provided by the table in section II of this document to conform with the FAR numbering system. Cross references in sections 970.3101–10 and 970.5242–1 are updated to reflect the new numbering.

• *Section 970.4207–05–01(970.4207–501):* This section is revised, in paragraph (b)(4)(ii) to add the words ''if such costs have been the subject of a DOE audit'' to the end of the sentence. This change is made in order to clarify that the contracting officer cannot resolve any questioned costs that have been the subject of a DOE audit without first obtaining the opinion of the DOE's auditor on the allowability of such costs.

• *Section 970.4401–1:* This section is revised to remove Balanced Scorecard metrics as a means of evaluating purchasing systems and allow for other metrics to be used. This change is made because the Balanced Scorecard program does not include metrics for evaluating M&O contractor purchasing systems.

• *Section 970.4402–1:* This final rule revises this section to add a new paragraph (c) which states that the M&O contractor's purchasing performance, including compliance with its approved system and methods, will be evaluated against the performance criteria and measures set forth in 48 CFR part 44, subpart 44.3, using the procedures articulated in DOE policies including DOE guidance on oversight of M&O Contractor's Purchasing Systems.

• *Section 970.4501–1:* This final rule amends this section by revising the section heading to read ''Applicability'' and replacing the existing section text (moved to new section 970.4501–2) with language that clarifies the applicability of this subpart to M&O contractors and on-site environmental management and other major prime contractors as designated by the SPE. A reference to 41 CFR chapter 109 is also added.

• *Section 970.4501–2:* This final rule adds this section with text taken from the former section 970.4501–1. Paragraph (a) is modified by adding ''and environmental management, and other major prime contractors located at DOE sites'' to the end of the first sentence; removing the second sentence; and updating the reference to managerial personnel in the third sentence from ''paragraph (j)'' to ''paragraph (k)''.

• *Section 970.5203–1:* This final rule amends the ''Management Controls'' clause, in the introductory text, by removing the words ''and 970.3270(a)(4)'' before the words ''insert the following clause:''. It is only necessary to prescribe this clause in one location, and the second prescription located at section 970.3270(a)(4) was therefore removed (as described above).

• *Section 970.5204–1:* This final rule removes the ''Counterintelligence'' clause from part 970 and relocates it to section 952.204–74, as this requirement pertains to both M&O and non-M&O contractors.

• *Section 970.5204–3:* This final rule revises the ''Access to and Ownership of Records'' clause to incorporate a class deviation. Paragraph (b) is revised to delete the parenthetical instruction to Contracting Officers in the second sentence as well as the last sentence of paragraph (b)(1), which lists examples of employee-related systems of record. Paragraph (g) is revised to replace the automatic flow down requirement based on the presence of the ''Integration of environment, safety, and health into work planning and execution'' clause currently at section 970.5223–1 with language that requires the contractor to flow down the clause (or maintain the applicable records themselves) whenever the subcontract scope of work could result in potential exposure to radioactive or other toxic substances that can cause long term health impacts.

• *Section 970.5215–1:* This final rule revises the ''Total available Fee: Base Fee Amount and Performance Fee Amount'' clause to make minor editorial revisions throughout to improve clarity.

• *Section 970.5215–3:* This final rule revises the ''Conditional Payment of Fee, Profit, and other Incentives—Facility Management Contracts'' clause to: update references; make revisions for clarity; remove Alternate I (it addressed contracts without security requirements; its requirements are now combined with the basic clause); and remove Alternate II (it addressed contracts awarded on a cost plus award fee basis; it is no longer necessary).

• *Section 970.5215–4:* This final rule removes the ''Cost Reduction'' clause. Because the Department has a value engineering policy for M&O contracts, a cost reduction clause is not necessary.

• *Section 970.5215–5:* This final rule revises the ''Limitation on Fee'' clause by updating the reference for the clause prescription in the introductory text and making minor editorial changes for clarity in paragraph (b).

• *Section 970.5217–1:* This final rule revises the ''Strategic Partnership Projects Program (Non-DOE Funded Work)'' clause to incorporate the Research and Innovation Act and Master Scope of Work requirements, which reduce the transactional approvals by DOE for previously approved groups of projects. In paragraph (d)(3), DOE has modified its requirements for requiring intellectual property indemnity to allow the contractor to reserve the provision when the sponsor is a federally-funded entity (DOE accepting liability to promote Government funded research) or a state or local government or public university, which may be prohibited from indemnifying others by state law. Minor editorial changes have also been made, to include consistently

referencing ''SPP projects'' rather than ''agreement package''.

• *Section 970.5217–2:* This final rule adds a new ''Agreements for Commercializing Technology'' clause in order to integrate a new DOE policy that was developed to allow M&O contractors to engage with industry more flexibly on research and technology transfer projects. Through ACT, an M&O contractor can negotiate and accept financial and performance risks and accept terms and conditions more consistent with industry practice that are not permitted under Cooperative Research and Development Agreements and SPP agreements. Whereas the requirements and policy for Agreements for Commercializing Technology are currently contained in DOE guidance and in special provisions included in contracts, this final rule will establish regulatory coverage and incorporate the requirements into this new clause.

• *Section 970.5219:* This final rule adds a new ''Small Business Subcontracting Plan'' clause, in order to integrate a new DOE policy concerning the ''Management and Operating Contractor Subcontract Reporting Capability (MOSRC)'', a DOE system, and associated processes to collect key information about M&O contractor first tier subcontracts for reporting to the Small Business Administration.

• *Section 970.5222–4:* This final rule adds a new ''Unemployment Compensation'' clause to address situations where a contractor, under federal and state unemployment rules are permitted to opt out of paying the state unemployment insurance tax and permitted to instead reimburse the state for actual claims paid out to its former employees. This section requires notification to the Government of its election and asserts governments right to review such changes to assess budgetary and programmatic risks when opting out.

• *Section 970.5223–3:* This final rule redesignates the provision entitled ''Agreement regarding Work-place Substance Abuse Programs at DOE sites'' as 970.5226–4 and makes conforming changes to the prescription in the introductory text. These changes are necessary to align with recent restructuring of FAR Part 23 which moved the corresponding ''Drug Free Workplace'' coverage from FAR 23.5 to FAR 26.5.

• *Section 970.5223–4:* This final rule redesignates the ''Workplace Substance Abuse Programs at DOE sites'' clause as 970.5226–5 and makes conforming changes to the prescription in the introductory text. These changes are necessary to align with recent restructuring of FAR Part 23 which moved the corresponding ''Drug Free Workplace'' coverage from FAR 23.5 to FAR 26.5.

• *Section 970.5223–6:* This final rule removes the ''Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management'' clause because Executive Order 13423 has been rescinded.

• *Section 970.5223–7:* This final rule removes the ''Sustainable Acquisition Program'' clause on the basis that it duplicates the clause at section 952.223–78, which is prescribed in section 923.172.

• *Section 970.5226–1:* This final rule revises the ''Diversity Plan'' clause to incorporate the more current terminology of ''Diversity, Equity, Inclusion, and Accessibility'' (DEIA) and make minor editorial revisions. This update will better align the DOE clause with current Administration initiatives and will clarify the broader scope of recent DEIA initiatives.

• *Section 970.5227–1:* This final rule revises the ''Rights in Data-Facilities'' clause to add new definitions of Assistant General Counsel for Technology Transfer and Intellectual Property, Department of Energy, and Patent Counsel for clarity. The revisions also add a new paragraph (b)(4) requiring the Contractor to deposit technical data at the Office of Scientific and Technical Information per the DOE Order 241.1. Paragraph (c)(3) is added to allow the Government to instruct the Contractor to assert copyright in technical data or software and transfer title to the Government for licensing and distribution if necessary. Paragraph (d) is modified to allow Patent Counsel to determine what Alternates are appropriate to data rights clauses in subcontracts. In order to allow for competitive solicitations, Alternate II is added to include a provision in the Limited Rights Notice to allow for the use of contractor's proprietary data in solicitations for government facilities being constructed, modified or decontaminated and decommissioned.

• *Section 970.5227–2:* This final rule revises the ''Rights in Data-Technology Transfer'' clause to add several new definitions of Assistant General Counsel for Technology Transfer and Intellectual Property, Department of Energy, Open Source Software, and Patent Counsel for clarity. Paragraph (b) was broadened to allow the lab to assert copyright from just articles to ''works'' such as drawings, chapters in books, workshop documents, datasets, etc. that are released to the public. This allows control of the content when the public uses or references this copyright work, but still satisfies DOE's duty to disseminate the results of its research. Also, Office of Scientific and Technical Information requirements are updated in this section to comply with DOE Order 241.1. Added paragraph (c)(3) allows the government to direct the Contractor to assert copyright and transfer title to the Government for further control and distribution of technical data and software. As part of the broadening of copyright assertion without DOE Patent Counsel approval, paragraph (d) expands the type of data that the Contractor can protect for control without commercializing and adds a shorter notice to the publisher if necessary. Since paragraph (d) expanded the type of data, paragraph (e) is revised to require DOE Patent Counsel approval when the Contractor needs to control distribution to advance the goals of the technology transfer mission through commercialization. When the Contractor is granted permission to assert copyright, the five-year renewal periods have been changed to a period of commercialization activities since software can be useful for decades and licensees are reluctant to commercialize for only five years if DOE Patent Counsel rejected any extensions of time. The government may distribute copies to the public of the copyrighted work after the period of commercialization has ended. Paragraph (f) is added to address copyright assertion and distribution in open source software (OSS). The Contractor must notify the funding program that the Contractor intends to distribute the software as OSS and the program has two weeks to object. DOE Patent Counsel can supply that approval if a funding program doesn't exist. This section also provides the requirements that the Contractor to retain records, distribute OSS such as the type of OSS licenses used and allow the public free access to software. Paragraph (g), Subcontracting, has been revised to allow DOE Patent Counsel to approve the use of 48 CFR 52.227–14, Rights in Data-General, or 48 CFR 52.227–17, Rights in Data-Special Works. The definitions in section 927.409(a) have been removed to use Alternate I of 48 CFR 52.227–14. The paragraph (d)(3) in section 927.409 has been replaced with Alternate VIII of 48 CFR 952.227–14 to allow DOE Patent Counsel to approve copyright requests. Similarly, Alternate I of 48 CFR 952.227–17 permits DOE Patent Counsel to direct a subcontractor to assert copyright in technical data and transfer to the Government or a third party such as the Contractor. This will allow the

Laboratory to consolidate copyright title if portions are generated by subcontractors. Alternate II of this clause is added to include a provision for Limited Rights Data in the Notice for government facilities being constructed, modified or decontaminated and decommissioned.

• *Section 970.5227–3:* This final rule revises the ''Technology Transfer Mission'' clause to address the M&O Contractor's use of Trademark and Service marks with regards to the Laboratory names and facilities. In paragraph (a), statutory updates are included to comply with the Laboratory Modernization and Technology Transfer Act. Paragraph (b) includes, for clarity, new definitions for Bailment, Assignment, Strategic Partnership Projects (SPP), Agreements for Commercializing Technology (ACT), Master Scope of Work, and Joint Work Statement. Paragraph (d), Conflicts of Interest—Technology Transfer, has been modified in paragraph (d)(8) to include more information when the Contractor requests for approval of some exclusive licenses or assignments of technology to third parties. In addition, paragraph (d)(10) is revised to better define when the DOE is to be notified of potential conflicts when evaluating proposals on behalf of the program. In paragraph (f), U.S. Industrial Competitiveness, DOE has narrowed that applicability of this clause from intellectual property to only subject inventions. The Exceptional Circumstance Determination for U.S. Competitiveness (substantial U.S. manufacturing) when licensing contractor technology is added to this clause. After many years of experience, DOE has determined that a less cumbersome procedure, which involves relying on information available from United States Trade Representative (USTR) websites, can be utilized for obtaining the relevant information to assist in the consideration by the M&O contractor in determining whether the potential foreign licensee or assignee of laboratory inventions has similar protections for intellectual property in that foreign country. Paragraph (g), Indemnity-Product Liability, was amended to exclude CRADA (Cooperative Research and Development Agreements) and SPP requirements for product liability indemnity because it is covered under guidance for those agreements. Paragraph (l) was amended to allow the annual technology transfer plan to be included in the Annual Laboratory Plan. Paragraph (n)(3)(iii) was added to require the CRADA Final Report required in DOE Order 483.1 to be submitted to OSTI. Paragraph (n)(5) conflict of interest was changed from ''preparation, negotiation, or approval'' to ''negotiation, approval or performance'' of CRADAs since preparing the agreements would include support staff with no control over the content and performance is added to capture the principal investigator's role. When requirements for providing a Technology Partnership Ombudsman was added to the Contract, it was accidently added to Alternate I. To correct this error, paragraph (p) was added to move the Technology Partnership Ombudsman from Alternate I into the contract clause. Alternate I was revised to remove the ombudsman provision.

• *Section 970.5227–4:* This final rule revises the ''Authorization and Consent'' clause in paragraphs (c)(1) through (3) to replace $100,000 with ''simplified acquisition threshold'' so that when the simplified acquisition threshold limit is increased, this clause does not have to update the dollar value.

• *Section 970.5227–5:* This final rule revises the ''Notice and Assistance Regarding Patent and Copyright Infringement'' clause, in paragraph (c) to replace $100,000 with ''simplified acquisition threshold'' so that when the simplified acquisition threshold limit is increased, this clause does not have to update the dollar value.

• *Sections 970.5227–6 through 970.5227–9:* This final rule revises the introductory text of each of these sections to reflect a new cross reference to 970.2702–70.

• *Sections 970.5227–10 and 970.5227–12:* This final rule revises the clauses at section 970.5227–10, ''Patent Rights-Management and Operating Contracts, Nonprofit Organization or Small Business Firm Contractor,'' and section 970.5227–12, ''Patent Rights-Management and Operating Contracts, For-Profit Contractor,'' in order to reflect statutory changes and addition of approved determinations of exceptional circumstance (DEC). Paragraph (a) of both clauses adds definitions of Initial Patent Application and Statutory Period for clarity. Paragraph (b)(3) of the clause at section 970.5227–10 (previously located at paragraph (b)(2)) and paragraph (b)(6) of the clause at section 970.5227–12 (previously located at paragraph (b)(5)) have been modified to clarify when the Contractor may elect title to inventions that are covered under a DEC. Paragraph (c) of both clauses has been revised to allow electronic reporting using the Government's iEdison or similar system along with certain information such as award numbers. Both clauses have changed the requirement for ''publication approval'' to ''publication review'' requiring the Contractor Invention Identification Procedures to address notification to DOE instead of approval. In paragraph (g) of both clauses, the reference to 48 CFR 925.227–11 has been replaced with 37 CFR401.14 because 48 CFR 952.227–11 has been revised with Alternates I and II for agency implementation of the DEC. In paragraph (j), March-in Rights, both clauses were modified to remove the four reasons where DOE can exercise this right by referencing the statute (for nonprofit organization or small business firm contractors) or patent waiver (for For-Profit Contractors.) Both clauses have added paragraph (t), U.S. Competitiveness, in compliance with the Determination of Exceptional Circumstance for Domestic Manufacture of DOE Science and Energy Technologies. Lastly, both clauses added a final paragraph on Unauthorized Access to require the Contractor to adequately protect materials related to inventions and notify DOE of a breach.

• *Section 970.5227–11:* This final rule revises the ''Patent Rights-Management and Operating Contracts, For-profit Contractor Non-Technology Transfer'' clause in a few ways. First, the clause title is changed to remove ''Non-Technology Transfer'' and add ''No Patent Waiver'' in its place. Second the final rule adds a definition of Department of Energy to paragraph (a) for clarity. Additional changes are made to reflect statutory changes. Furthermore, paragraph (c)(2)(vii) requires not only the B&R code but related information such as funding announcements or SPP/CRADA numbers to make it easier to identify inventions from other sources and paragraph (c)(5) is modified to include reporting inventions to Government electronic reporting systems instead of the contracting officer or patent counsel. Finally, this final rule adds an ''Unauthorized Access'' paragraph (o) to require the Contractor to adequately protect materials related to inventions and notify DOE of a breach.

• *Section 970.5232–2:* This final rule revises the ''Payments and Advances'' clause to: (1) re-organize and re-number the paragraphs; (2) make editorial changes to streamline and simplify content to improve clarity and update references; and (3) add a paragraph concerning ''provisional fee,'' which DOE has never addressed in the DEAR, to Alternate II. Although DOE has issued internal guidance that defines provisional fee, articulates when it might be useful, and specifies how to

use it, neither the FAR nor the DEAR define or addresses it. Consequently, DOE has concluded it would be prudent to heighten awareness of DOE's view of provisional fee by including some discussion of it in DEAR.

- *Section 970.5232–3:* This final rule revises the ''Accounts, Records, and Inspection'' clause to clarify (in paragraph (c)) the contractor's responsibility to either perform a sufficient amount of audit work of its subcontractors' incurred costs or arrange for an audit of its subcontractors' incurred costs. Minor editorial changes for clarity are also made.
- *Section 970.5232–5:* This final rule revises the ''Liability with Respect to Cost Accounting Standards'' clause, in the introductory text, by updating the citation for the clause prescription.
- *Section 970.5232–6:* This final rule revises the ''Strategic Partnership Project Funding Authorization'' clause, in the introductory text, by updating the citation for the clause prescription.
- *Section 970.5232–7:* This final rule revises the ''Financial Management System'' clause to: (1) reorganize and number the paragraphs; (2) clarify that contractors must maintain and administer a financial management system that is in accordance with Generally Accepted Accounting Principles (GAAP) for Federal Entities as defined by the Federal Accounting Standards Advisory Board and implemented by the DOE Financial Management Handbook and other implementing policies; and (3) make minor editorial changes for clarity.
- *Section 970.5235–1:* This final rule revises the ''Federally Funded Research and Development Center Sponsoring Agreement'' clause to make minor editorial revisions and to clarify that only the Contracting Officer can place work on the contract and obligate the Government to reimburse the Contractor for the work.
- *Section 970.5244–1:* This final rule revises the ''Contractor Purchasing System'' clause to: (1) clarify the Contactor's obligations regarding: maintaining documentation; providing audit or a sufficient amount of audit work; and for which subcontracts the Contractor must provide audit or a sufficient amount of audit work; (2) change the approval level for subcontractor indemnification requests from the SPE to the HCA in consultation with local legal counsel in paragraph (l) in order to give flexibility for local level approval of routine, low risk indemnity; (3) add seven clauses to the list of required subcontract flowdown requirements in paragraph (x); and (4) update references and make minor editorial changes for clarity.
- *Section 970.5245–1:* This final rule revises the ''Property'' clause to add references to 41 CFR chapters 102 and 109 and make minor editorial changes for clarity.

V. Regulatory Review

A. Review Under Executive Orders 12866, 13563, and 14094

Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011), and amended by E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to the Office of Information and Regulatory Affairs (OIRA) for review. This final rule has been determined to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Accordingly, this rule was reviewed under that Executive order by OIRA of the Office of Management and Budget (OMB).

Consistent with Executive Orders 12866, 13563 and 14094, DOE issues this final rule only on a reasoned determination that the benefits of the rule justify its costs, and, in choosing among alternative regulatory approaches, DOE has selected those approaches that maximize net benefits. DOE is undertaking a broad but largely procedural revision of its acquisition regulation to update and streamline the policies, procedures, provisions, and clauses that are currently applicable to its contracts.

This final rule updates, clarifies, and eliminates coverage that is unclear, obsolete, or unnecessarily duplicates the FAR; incorporates class deviations into the coverage; streamlines the coverage's policies and procedures where appropriate (taking into account DOE's and its contractors' actual experiences); and adds several new minor clauses in order to standardize local clause language throughout the department by eliminating the multiple versions of local clauses in current use. While this final rule does include several minor policy revisions, none of the revisions are substantial and in total they will have negligible impact on DOE's operations, its contractors, or the economy. The revisions do not in any specific case, or in total, substantially change the existing DEAR or how DOE and DOE contractors adhere to the DEAR. Most of these proposed changes will not generate any additional costs.

Nonetheless, DOE is highlighting several changes to the DEAR that raise potential cost burden concerns and discuss the expected impacts of these changes.

First, this final rule includes a revision of the Facility Clearance clause and associated policy coverage to incorporate a pre-award Interim Access procedure and allow for final Facility Clearance post-award. This change is not expected to result in any increased costs and is intended to benefit the Government by leveraging interim access authorizations for key contractor personnel and improving efficiencies in the timeliness of contract awards, and in contract management.

Additionally, DOE is revising the M&O fee policy to simplify the explanation of fee calculations, delete outdated requirements, and raise the classification factor for R&D laboratory from 1.25 to 1.5. These changes should not result in any increased costs. Most of the changes are editorial in nature, and are internal procedures directed to DOE contracting officers who will benefit from the simplified explanation of fee calculations. The change in classification factor is not expected to result in any cost increase since DOE expects no change to the total available fees under these contracts. The revisions are intended to reduce the administrative burden associated with routine requests to the SPE to exceed

the total available fees calculated using the existing classification factor.

Furthermore, DOE is adding several new contract clauses. Four of these (Agreements for Commercializing Technology; Small Business Subcontracting Plan; Conditional Payment of Fee, Profit, and Other Incentives; Identification of Contractor Employees) are substantially similar to clauses already widely used in DOE contracts. As a result, these four changes will not result in any added burden or costs but would benefit the Department and its contractors by standardizing these clauses across contracts.

The entirely new clauses are:

• A clause to address situations where a M&O contractor is permitted under federal and state unemployment rules to opt out of paying the state unemployment insurance tax and instead reimburse the state for actual claims paid out to its former employees. The new clause requires notification to the government of the contractor's election and asserts the government's right to review such changes to assess budgetary and programmatic risks when opting out. This clause only applies to M&O contracts and the notification required poses no significant burden or cost.

• A clause to clarify the policy and procedures for integrating DOE Directives into non-M&O contracts. Contractor requirements documents (CRDs), attached to DOE Directives, have been integrated into non-M&O contracts as needed for a long time. The addition of the new clause, along with the general information section and clause prescription is simply intended to codify the existing process of integrating the requirements of DOE Directives into non-M&O contracts on a bilateral basis and imposes no additional burden or cost.

Finally, many of the changes included in this final rule will result in benefits to the public. Because the DEAR has not had a comprehensive update in decades, it contains outdated and unused content. Additionally, it has citations to outdated laws and regulations and contains sections that are duplicative of the FAR or that are more appropriate for internal procedures and policies. The new changes will streamline the DEAR, make it easier to read, and reflect current practice and requirements.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. The Department has made its procedures and policies available on the Office of General Counsel's website: *www.energy.gov/gc/office-general-counsel*.

The DEAR governs all DOE acquisitions which obligate appropriated funds. Using data from its Integrated Data Warehouse, DOE estimates that it currently has approximately 3,200 prime contractors whose contracts are governed in part by the DEAR and that approximately 2,000 of those contractors are small entities under the RFA. Due to limitations in subaward reporting it is difficult to accurately estimate the number of small entity subcontractors. However, based on data from the Federal Subaward Reporting System (FSRS) and DOE's M&O Subcontract Reporting Capability (MOSRC) system, DOE estimates that it has approximately 15,300 subcontractors. Of those, approximately 9,000 were designated as small businesses. Therefore, DOE has reason to believe that this final rule, which is a comprehensive update of the DEAR, could affect a substantial number of small entities.

However, DOE expects that this rule will not have a significant economic impact on those small entities. In fact, DOE expects that the overall impacts of the rule will benefit small entities because the rule revises or removes outdated information and citations, removes extraneous procedural information that applies only to DOE's internal procedures, and removes policy or procedures duplicative of FAR requirements.

Moreover, the changes that are not merely technical or procedural primarily apply to DOE's twenty-three M&O contracts. An M&O contract is an agreement by which a private sector entity operates a DOE facility, such as a national laboratory. None of DOE's M&O contracts are held by small entities, and therefore changes to those contracts do not directly impact small entities.

Furthermore, even if M&O contractors could be considered small entities under the RFA, the changes in the rule that will only pact M&O contracts are not economically significant.

• DOE's changes to the M&O fee policy sections will simplify and state explicitly the methodology Contracting Officers are to utilize for determining the total available fee for an M&O contract. The revisions are primarily intended to reduce the administrative burden for Contracting Officers. For instance, this rule clarifies that the maximum total available fee amount for an M&O contract may not exceed the fee derived from calculations included in the policy unless approved in advance by the SPE or designee. Additionally, the rule includes an increase in the classification factor for R&D laboratory from 1.25 to 1.5. This change will impact 16 M&O contractors who currently operate national laboratories (all of which are managed and operated by large entities) but should not have a significant economic impact because DOE does not anticipate an increase in the total available fees approved for these contracts.

• DOE is adding a clause at section 970.5222–4 to address situations where a M&O contractor is permitted under Federal and state unemployment rules to opt out of paying the state unemployment insurance tax and instead reimburse the state for actual claims paid out to its former employees. The clause requires notification to the government of the contractor's election and asserts the government's right to review such changes to assess budgetary and programmatic risks when opting out. DOE does not believe that the notification will result in any economic impact.

• DOE is adding two clauses specific to M&O contractors: Agreements for Commercializing Technology at section 970.5217–2 and Small Business Subcontracting Plan at section 970.1907–8. These clauses are substantially similar to clauses already widely used in DOE contracts and will therefore not have a significant economic impact.

Finally, the remaining substantive revisions in the rule that are applicable to non-M&O contracts will not have a significant economic impact.

• The rule includes a revision of the Facility Clearance provision at section 952.204–73, which is required in all solicitations for which the contract work is anticipated to require access to classified information or special nuclear material. The current provision requires a full Facility Clearance prior to the award of a contract requiring access to classified information, and prior to granting any Interim Access Authorizations to key management

personnel. The revision provides a process that permits contract award prior to granting a full Facility Clearance, and permit contract award prior to granting Interim Access Authorizations to key management personnel. There is no change to the processes themselves, only to the timing of the processes.

• DOE adds a clause to clarify the policy and procedures for integrating DOE Directives into non-M&O contracts. Contractor requirements documents (CRDs), attached to DOE Directives, have been integrated into non-M&O contracts as needed for a long time. The addition of the clause, along with the general information section and clause prescription is intended to codify the existing process of integrating the requirements of DOE Directives into non-M&O contracts on a bilateral basis and imposes no additional burden or cost to the contractors.

• The rule includes two new clauses: Conditional Payment of Fee, Profit, and Other Incentives at section 952.242–71 and Identification of Contractor Employees at section 952.203–1. These clauses are substantially similar to clauses already widely used in DOE contracts and will therefore not have a significant economic impact.

Accordingly, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for the Office of Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

This rulemaking imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*) Existing information collections imposed by the Department of Energy Acquisition Regulation are covered by OMB Control Number 1910–4100.

D. Review Under the National Environmental Policy Act of 1969

DOE analyzed this final rule in accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that the rule fits within the following categorical exclusion listed in appendix A to subpart D of part 1021: A6 (Procedural rulemakings, including rulemaking under 48 CFR chapter 9 establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services). Therefore, this rule does not require the preparation of either an environmental impact statement or environmental assessment pursuant to NEPA.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has determined that this final rule does not limit the policymaking discretion of the States. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met, or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (This policy is also available at: *www.energy.gov/gc/guidance-opinions* under ''Guidance & Opinions'' (Rulemaking)). DOE examined this final rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

The Department has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this final rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

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

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at: *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf*.

DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This final rule, which revises and updates DOE's acquisition regulation, would not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that the rule does not meet the criteria set forth in 5 U.S.C. 804(2).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

48 CFR Parts 901, 902, 909, 912, 915, 916, 926, and 951

Government procurement.

48 CFR Part 903

Antitrust, Conflict of interest, Government procurement.

48 CFR Part 904

Classified information, Government procurement.

48 CFR Part 908

Government procurement, Motor vehicles, Printing, Utilities.

48 CFR Part 917

Government procurement, Reporting and recordkeeping requirements, Research.

48 CFR Part 922

Equal employment opportunity, Government procurement, Labor, Reporting and recordkeeping requirements.

48 CFR Part 923

Drug abuse, Government procurement, Radiation protection.

48 CFR Part 925

Foreign trade, Government procurement.

48 CFR Part 927

Copyright, Government procurement, Inventions and patents.

48 CFR Part 931

Accounting, Government procurement.

48 CFR Part 932

Accounting, Government procurement, Loan programs—energy, Loan programs—National defense.

48 CFR Part 933

Administrative procedure and practice, Government procurement.

48 CFR Part 935

Government procurement, Research.

48 CFR Parts 936 and 952

Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 941

Government procurement, Utilities.

48 CFR Part 942

Accounting, Government procurement.

48 CFR Part 945

Government procurement, Government property.

48 CFR Part 970

Accounting, Classified information, Drug abuse, Government procurement, Insurance, Labor, Minority businesses, Reporting and recordkeeping requirements, Small businesses, Surety bonds, Taxes, Whistleblowing, Women.

Signing Authority

This document of the Department of Energy was signed on October 9, 2024, by William J. Quigley, Deputy Associate Administrator, Partnership and Acquisition Services, National Nuclear Security Administration, pursuant to delegated authority from the Administrator, National Nuclear Security Administration, and Berta L. Schreiber, Director, Office of Acquisition Management, Department of Energy, pursuant to delegated authority from the Secretary of Energy. These documents with the original signature and date are maintained by DOE/NNSA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in

electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 10, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE amends chapter 9 of title 48 of the Code of Federal Regulations as set forth below:

PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 1. The authority citation for part 901 continues to read as follows:

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

■ 2. Section 901.103 is revised to read as follows:

901.103 Authority.

The DEAR and amendments thereto are issued by the Senior Procurement Executives (SPEs) of the Department of Energy (DOE) and the National Nuclear Security Administration (NNSA). The SPEs may also approve deviations from the DEAR, together and individually. The DOE SPE delegation is pursuant to a delegation from the Secretary of Energy in accordance with the authority of section 644 of the Department of Energy Organization Act (42 U.S.C. 7254), section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 121(c)(2)), and other applicable laws. The NNSA SPE delegation is pursuant to a delegation from the Administrator of the NNSA, in accordance with section 3212 of the National Nuclear Security Administration Act (50 U.S.C. 2402), section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 121(c)(2)), and other applicable laws. Except for the authorities designated as non-delegable, the SPEs are delegated the authorities assigned to the Agency Head in the FAR. A reference to the SPE refers to the DOE SPE and the NNSA SPE, unless otherwise indicated.

901.301.70 [Redesignated as 901.301–70]

■ 3. Section 901.301.70 is redesignated as section 901.301–70.

■ 4. Newly redesignated section 901.301–70 is revised to read as follows:

901.301–70 Other issuances related to acquisition.

In addition to the FAR and DEAR, there are other issuances which deal with acquisition. Among these are the Federal Property Management Regulation (41 CFR chapter 101), the Federal Management Regulation (41 CFR chapter 102), the DOE Property Management Regulation (41 CFR chapter 109), and DOE Directives. The Department also maintains the DOE Acquisition Guide (''the Guide''), which has procedural guidance for the acquisition community. The DOE Acquisition Guide serves this purpose by identifying relevant internal standard operating procedures to be followed by both procurement and program personnel who are involved in various aspects of the acquisition process. The Guide also is intended to be a repository of best practices found throughout the agency that reflect specific illustrations of techniques which might be helpful to all readers. The Guide is at *https://www.energy.gov/management/articles/department-energy-acquisition-guide*.

■ 5. Subpart 901.4 is added to read as follows:

Subpart 901.4—Deviations from the DEAR

Sec.
901.401 Definition.
901.403 Individual deviations.
901.404 Class deviations.

Subpart 901.4—Deviations From the DEAR

901.401 Definition.

A deviation from the DEAR is defined as the issuance or use of a policy, procedure, solicitation provision, contract clause, method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the DEAR.

901.403 Individual deviations.

Requests for individual deviations from the FAR or the DEAR shall be submitted to the cognizant Senior Procurement Executive (SPE), that is DOE or NNSA, (or designee) for approval. Requests shall cite the specific part of the FAR or DEAR from which it is desired to deviate, shall set forth the nature of the proposed deviation(s), and shall give the reasons for the action requested.

901.404 Class deviations.

Requests for class deviations from the FAR or the DEAR shall be submitted to the cognizant SPE, that is DOE or NNSA, (or designee) for processing in accordance with FAR 1.404 and this section. Requests shall include the same information prescribed in 901.403 for individual deviations.

■ 6. Amend section 901.602–3 by revising paragraph (b)(3) to read as follows:

901.602–3 Ratification of unauthorized commitments.

(b) * * *

(3) The ratification authority of the DOE and NNSA Senior Procurement Executives in paragraph (b)(2) of this section is delegated to the Head of the Contracting Activity (HCA) for individual unauthorized commitments of $250,000 or under. The ratification authority of the HCA is nondelegable.

901.603–1 [Amended]

■ 7. Amend section 901.603–1 by removing the text ''DOE Order 361.1B'' and adding in its place ''DOE Order 361.1''.

901.603–70 [Amended]

■ 8. Amend section 901.603–70 by removing the text ''DOE Order 541.1B'' and adding in its place ''DOE Order 541.1''.

PART 902—DEFINITIONS OF WORDS AND TERMS

■ 9. The authority citation for part 902 continues to read as follows:

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

■ 10. Amend section 902.101 by revising the definition of ''Senior Procurement Executive'' to read as follows:

902.101 Definitions.

* * * * *

Senior Procurement Executive means for the Department of Energy, the Director, Office of Acquisition Management and for the National Nuclear Security Administration, the Deputy Associate Administrator for the Office of Partnership and Acquisition Services.

PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 11. The authority citation for part 903 continues to read as follows:

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

■ 12. Section 903.104–7 is revised to read as follows:

903.104–7 Violations or possible violations.

(a) Except for Headquarters activities, the individual within DOE responsible for fulfilling the requirements of FAR

3.104–7(a)(1) and (2), relative to contracting officer conclusions on the impact of a violation or possible violation of subsections 27 (a), (b), (c) or (d) of the Office of Federal Procurement Policy Act, shall be the individual who has procurement authority and is one supervisory level above the Contracting Officer. The legal counsel is the Chief Counsel for the Operations Offices or the Federal Energy Technology Center; the Counsel, or the Chief Counsel, for the Support Offices or the Naval Reactors Offices; the General Counsel for National Nuclear Security Administration (NNSA), and the General Counsel for the Power Administrations. For Headquarters activities, the individual designated to perform the responsibilities in FAR 3.104–7(a)(1) and (2) regarding questions of disclosure of proprietary or source selection information is the Assistant General Counsel for Procurement and Financial Assistance. The designated individual for other questions regarding FAR 3.104–7(a)(1) and (2) for Headquarters activities, or for any other office that does not have authority through procurement operations, is the Agency Ethics Official (Designated Agency Ethics Official).

■ 13. Section 903.1003 is added to read as follows:

903.1003 Requirements.

In accordance with FAR subpart 7.5, DOE does not contract for inherently governmental functions. However, DOE may contract for services that can require contractors to perform duties that require regular contact with DOE and the public related to DOE's mission. To ensure that all parties know the status of individuals as contractor personnel, contractors and their employees must properly identify themselves as contractors in all DOE internal and external communications and meetings.

■ 14. Section 903.1004 is revised to read as follows:

903.1004 Contract clauses.

(a) The Contracting Officer shall insert the DOE website address *https://www.energy.gov/sites/prod/files/2017/05/f34/HotlinePoster.pdf* in paragraph (b)(3)(ii) of the clause at FAR 52.203–14, Display of Hotline Poster(s).

(b) The Contracting Officer shall insert the clause at 952.203–1, Identification of Contractor Employees, in all solicitations and contracts for services over the micro-purchase threshold.

PART 904—ADMINISTRATIVE MATTERS

■ 15. The authority citation for part 904 continues to read as follows:

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

■ 16. Amend section 904.401 by:
■ a. Revising the definition of ''Access authorization'';
■ b. Removing the definition of ''Classified information'' and adding the definition ''Classified information or Classified National Security Information'' in its place; and
■ c. Adding in alphabetical order a definition for ''Counterintelligence''.

The revision and additions read as follows:

904.401 Definitions.

Access authorization means an administrative determination that an individual is eligible for access to classified information or is eligible for access to, or control over, special nuclear material under the Atomic Energy Act of 1954; Executive Order 12968, Access to Classified Information, dated August 2, 1995; or 10 CFR part 710.

* * * * *

Classified information or *Classified National Security Information* mean information officially determined to be Restricted Data, Formerly Restricted Data, or Transclassified Foreign Nuclear Information under the Atomic Energy Act of 1954, as amended, or information determined to require protection under Executive Order 13526, Classified National Security Information, dated December 29, 2009.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communication security programs.

* * * * *

■ 17. Section 904.402 is revised to read as follows:

904.402 General.

(b) The basis of Department of Energy's (DOE) industrial security requirements is the Atomic Energy Act of 1954, as amended, the DOE Organization Act of 1977, as amended, and Executive Orders 13526 and 12829.

(3) DOE has established a counterintelligence program. All DOE elements and contractors managing DOE-owned or leased facilities that require access authorizations, should undertake the necessary precautions to ensure that DOE and covered contractor personnel, programs and resources are properly protected from foreign intelligence threats and activities.

(4) DOE security regulations concerning restricted data are codified at 10 CFR part 1045.

(5) Section 234B of the Atomic Energy Act (42 U.S.C. 2282b) requires that DOE contracts include a clause providing for appropriate reductions in fees or amounts paid to the contractor under the contract in the event of violations of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause is required for all DOE prime contracts that involve any possibility of contractor access to Restricted Data or other classified information. The clause specifies various degrees of violations and the amount of reduction attributable to each degree. The clause at 952.242–71, Conditional Payment of Fee, Profit, or Other Incentives, shall be used to comply with 42 U.S.C. 2282b (unless the clause at 970.5215–3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts is used). See 942.71(d) for the clause's prescription.

(e) Part 927 contains policies and procedures for safeguarding classified information in patent applications and patents.

■ 18. Amend section 904.404 by revising paragraphs (d)(1), (3), (6), and (7) to read as follows:

904.404 Solicitation provision and contract clause.

(d) * * *

(1) *Security, 952.204–2.* This clause is required in contracts and subcontracts, the performance of which involves or is likely to involve classified information, access to special nuclear materials or the provision of protective services. This includes contracts awarded under simplified acquisition procedures, as well as National Security Program contracts, under which access to proscribed information is required. Although DOE utilizes the National Industrial Security Program, DOE's security authority is derived from the Atomic Energy Act which contains specific language not found in other agencies' authorities. For this reason, DOE contracts must contain the clause at 952.204–2 rather than the clause at FAR 52.204–2 and Contracting Officers must incorporate DOE Form 470.1 or equivalent.

* * * * *

(3) *Sensitive foreign nation controls, 952.204–71.* This clause is required in unclassified research contracts which may involve sharing unclassified information about nuclear technology with certain sensitive foreign nations. The contractor shall be provided at the time of award the listing of nations referenced in DOE Order 142.3, Unclassified Foreign Visits and Assignments Program, or its successor. (The attachment referred to in the clause shall set forth the applicable requirements of the DOE regulations on dissemination of unclassified published and unpublished technical information to foreign nations.)

* * * * *

(6) *Computer Security, 952.204–77.* This clause is required in contracts in which the contractor may have access to computers owned, leased or operated on behalf of the Department of Energy.

(7) *Counterintelligence.* The Contracting Officer shall include the clause at 952.204–74, Counterintelligence, in all contracts that include the clauses at 952.204–2, Security Requirements, and 952.204–70, Classification/Declassification.

■ 19. Amend section 904.7004 by revising the first sentence of paragraph (a) to read as follows:

904.7004 Findings, determination, and contract award or termination.

(a) Based on the information disclosed by the offeror(s) or contractor, and after consulting with the DOE Office of Environment, Health, Safety and Security, the contracting officer must determine that award of a contract to an offeror(s) or continued performance of a contract by a contractor will not pose an undue risk to the common defense and security. * * *

* * * * *

■ 20. Amend section 904.7102 by revising paragraph (e) to read as follows:

904.7102 Waiver by the Secretary.

* * * * *

(e) Any request for a waiver under this subpart shall be accompanied by the information required by the clause at 952.204–73, Facility Clearance.

■ 21. Subpart 904.73 is added to read as follows:

Subpart 904.73—Department of Energy Directives

Sec.
904.7300 General.
904.7301 Contract clause.

904.7300 General.

The contractor is required to comply with the requirements of applicable Federal, State, and local laws and regulations, unless relief has been granted by the appropriate authority. Additionally, the Department of Energy (DOE) Directives Program is a system of instructions, including orders, notices, manuals, guides, and standards, for DOE elements. In certain circumstances, DOE will apply requirements contained in these directives to a contract. In these circumstances, program and requirements personnel will be responsible for identifying the requirements that are applicable to the contract and for providing a list of applicable requirements to the Contracting Officer for inclusion in the contract.

904.7301 Contract clause.

The Contracting Officer shall insert the clause at 952.204–78, DOE Directives, in non-management and operating contracts where the work will be performed on a DOE site and the contract will be subject to the requirements of DOE Directives. This includes information technology or cybersecurity work, as well as other work program officials identify as requiring the clause.

PART 908—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 22. The authority citation for part 908 continues to read as follows:

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

908.7103 and 908.7115 through 908.7117 [Removed and Reserved]

■ 23. Sections 908.7103 and 908.7115 through 908.7117 are removed and reserved.

PART 909—CONTRACTOR QUALIFICATIONS

■ 24. The authority citation for part 909 continues to read as follows:

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

909.104–1 [Amended]

■ 25. Amend section 909.104–1 in paragraph (h) by removing the phrase ''accordance with 970.5223–3'' and adding the phrase ''accordance with 970.5226–4'' in its place.

■ 26. Amend section 909.403 by revising the definition of ''Debarring and suspending official'' to read as follows:

909.403 Definitions.

* * * * *

Debarring and suspending official, for the DOE, the designees are:

(1) *Debarring Official* means the Debarring Official for DOE contracts is the Director, Office of Acquisition Management, DOE, or designee. The debarring Official for NNSA contracts is the Deputy Associate Administrator for the Office of Partnership and Acquisition Services, or designee.

(2) *Suspending Official* means the Suspending Official for DOE contracts is the Director, Office of Acquisition Management, DOE, or designee. The suspending Official for NNSA contracts is the Deputy Associate Administrator for the Office of Partnership and Acquisition Services, or designee.

■ 27. Amend section 909.405 by revising paragraphs (f), (g), and (h) to read as follows:

909.405 Effect of listing.

* * * * *

(f) DOE or NNSA may disapprove or not consent to the selection (by a contractor) of an individual to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is listed in the System for Award Management (SAM) exclusions.

(g) DOE or NNSA shall not conduct business with an agent or representative of a contractor if the agent's or representative's name has an active exclusion in SAM.

(h) DOE or NNSA shall review SAM before conducting a pre-award survey or soliciting proposals, awarding contracts, renewing or otherwise extending the duration of existing contracts, or approving or consenting to the award, extension, or renewal of subcontracts.

909.407–3 [Amended]

■ 28. Amend section 909.407–3 in paragraph (e)(1)(vii) by removing the text ''EPLS'' and adding in its place the text ''SAM exclusion''.

PART 912—ACQUISITION OF COMMERCIAL ITEMS

■ 29. The authority citation for part 912 continues to read as follows:

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

■ 30. Section 912.301 is added to read as follows:

912.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

(f) The Contracting Officer shall supplement the clauses prescribed at FAR 12.301—

(1) In all cases, with 952.232–7, Electronic Submission of Invoices/Vouchers; and

(2) In appropriate cases, following prescriptions elsewhere in this chapter, with the following:

(i) 952.204–74, Counterintelligence.

(ii) 952.204–77, Computer Security.

(iii) 952.211–71, Priorities and allocations for energy programs (clause).

PART 915—CONTRACTING BY NEGOTIATION

■ 31. The authority citation for part 915 continues to read as follows:

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

915.404–2 [Redesignated as 915.404–2000]

■ 32. Section 915.404–2 is redesignated as section 915.404–2000.

915.404–2000 [Amended]

■ 33. Newly redesignated section 915.404–2000 is amended in paragraph (c)(1) by removing ''915.404–2–70'' and adding in its place ''915.404–2700''.

915.404–2–70 [Redesignated as 915.404–2700]

■ 34. Section 915.404–2–70 is redesignated as section 915.404–2700.

915.404–4 [Redesignated as 915.404–4000]

■ 35. Section 915.404–4 is redesignated as section 915.404–4000.

915.404–4–70 [Redesignated as 915.404–4700]

■ 36. Section 915.404–4–70 is redesignated as section 915.404–4700.

■ 37. Newly redesignated section 915.404–4700 is revised to read as follows:

915.404–4700 DOE structured profit and fee system.

(a) This section implements FAR 15.404–4(b) and (d).

(b) DOE's structured profit and fee system for non-management and operating contracts comprises two approaches: a weighted guidelines system for all but construction contracts, construction management contracts, and special equipment purchases; and a fee schedules-based system for construction contracts, construction management contracts, and special equipment purchases. The former is covered at 915.404–4720 through 915.404–4780; the latter is covered at 915.404–4800 through 915.404–4860. Both approaches use the procedures at 915.404–4900 for cost-plus-award-fee contracts.

915.404–4–70–1 [Redesignated as 915.404–4710]

■ 38. Section 915.404–4–70–1 is redesignated as section 915.404–4710.

915.404–4–70–2 [Redesignated as 915.404–4720]

■ 39. Section 915.404–4–70–2 is redesignated as section 915.404–4720.

■ 40. Amend newly redesignated section 915.404–4720 as follows:

■ a. In paragraph (a), remove ''915.404–4–70–8'' and add in its place ''915.404–4780'';

■ b. In paragraph (b) remove ''915.404–4–70–4'' and add in its place ''915.404–4740''; and

■ c. In the table in paragraph (d) revise entries II, IV.b., V, and VI to read as follows:

915.404–4720 Weighted guidelines system.

* * * * *

(d) * * *

Profit factors	Weight ranges (percent)
* * * * * * *	
II. Contract Risk (type of contract-weights applied to total cost of items I.a. thru *I.e.*)	0 to 8.
* * * * * * *	
IV. * * *	
b. Developed items employed (Weights applied to total of profit $ for items I.a. thru *I.e.*)	0 to 20.
V. Special Program Participation (Weights applied to total of Profit $ for items I.a. thru *I.e.*)	−5 to +5.
VI. Other Considerations (Weights applied to total of Profits $ for items I.a. thru *I.e.*)	−5 to +5.
* * * * * * *	

915.404–4–70–3 [Redesignated as 915.404–4730]

■ 41. Section 915.404–4–70–3 is redesignated as section 915.404–4730.

915.404–4–70–4 [Redesignated as 915.404–4740]

■ 42. Section 915.404–4–70–4 is redesignated as section 915.404–4740.

915.404–4–70–5 [Redesignated as 915.404–4750]

■ 43. Section 915.404–4–70–5 is redesignated as section 915.404–4750.

915.404–4–70–6 [Redesignated as 915.404–4760]

■ 44. Section 915.404–4–70–6 is redesignated as section 915.404–4760.

915.404–4–70–7 [Redesignated as 915.404–4770]

■ 45. Section 915.404–4–70–7 is redesignated as section 915.404–4770.

■ 46. Amend newly redesignated section 915.404–4770 as follows:

■ a. In paragraph (a) remove ''915–404–4–71'' and add in its place ''915.404–4800''; and

■ b. In paragraph (b) remove ''915–404–4–70–2(d)'' and add in its place ''915.404–4720(d)''.T

915.404–4–70–8 [Redesignated as 915.404–4780]

■ 47. Section 915.404–4–70–8 is redesignated as section 915.404–4780.

915.404–4–71 [Redesignated as 915.404–4800]

■ 48. Section 915.404–4–71 is redesignated as section 915.404–4800.

915.404–4–71–1 [Redesignated as 915.404–4810]

■ 49. Section 915.404–4–71–1 is redesignated as section 915.404–4810.

915.404–4–71–2 [Redesignated as 915.404–4820]

■ 50. Section 915.404–4–71–2 is redesignated as section 915.404–4820.

915.404–4–71–3 [Redesignated as 915.404–4830]

■ 51. Section 915.404–4–71–3 is redesignated as section 915.404–4830.

915.404–4830 [Amended]

■ 52. Amend newly redesignated section 915.404–4830 as follows:
■ a. In paragraph (a) remove ''915.404–4–71–1(a) and add in its place ''915.404–4810(a)'';
■ b. In paragraph (d) remove ''915.404–4–71–3(a), (b), and (c)'' and add in its place ''paragraphs (a), (b), and (c) of this section''.

915.404–4–71–4 [Redesignated as 915.404–4840]

■ 53. Section 915.404–4–71–4 is redesignated as section 915.404–4840.

915.404–4840 [Amended]

■ 54. Amend newly redesignated section 915.404–4840 in paragraph (a) by removing ''915.404–4–71–3 of this section'' and adding in its place ''915.404–4840''.

915.404–4–71–5 [Redesignated as 915.404–4850]

■ 55. Section 915.404–4–71–5 is redesignated as section 915.404–4850.

915.404–4850 [Amended]

■ 56. Amend newly redesignated section 915.404–4850 as follows:
■ a. In the first sentence of paragraph (a) remove ''915.404–4–71–6'' and add in its place ''915.404–4860'';
■ b. In the last sentence of paragraph (a) remove ''915.404–4–71–6(c) and 915.404–4–71–6(d)'' and add in its place ''915.404–4860(c) and (d)'';
■ c. In the last sentence of paragraph (e)(1) remove ''915.404–4–71–4(b)'' and add in its place ''915.404–4840(b)'';
■ d. In paragraph (e)(3) remove ''915.404–4–71–4(c)'' in the first and last sentences and add in their place in both instances ''915.404–4840(c)''.

915.404–4–71–6 [Redesignated as 915.404–4860]

■ 57. Section 915.404–4–71–6 is redesignated as section 915.404–4860.

915.404–4860 [Amended]

■ 58. Amend newly redesignated section 915.404–4860 in paragraph (c) by removing ''915.404–4–71–5(h)'' and adding in its place ''915.404–4850(h)''.

915.404–4–72 [Redesignated as 915.404–4900]

■ 59. Section 915.404–4–72 is redesignated as section 915.404–4900.

915.404–4900 [Amended]

■ 60. Amend newly redesignated section 915.404–4900 as follows:
■ a. In the second sentence of paragraph (a) remove ''915.404–4–71–5'' and ''970.15404–4–8'', and add in their place ''915.404–4850'' and ''970.1504–101 through 970.1504–300'', respectively;
■ b. In the first sentence of paragraph (a)(1) remove ''915.404–4–71'' and add in its place ''915.404–4800''; and
■ c. In paragraph (b) remove ''915.404–4–72(a)(3)'' and add in its place ''paragraph (a)(3) of this section''.

■ 61. Section 915.408–70 is revised to read as follows:

915.408–70 Key personnel clause.

The Contracting Officer shall insert the clause at 952.215–70, Key Personnel, in solicitations and contracts under which successful performance is largely dependent on the expertise of specific key personnel.

■ 62. Section 915.606 is revised to read as follows:

915.606 Agency procedures.

(b) Unless otherwise specified in a notice of program interest, all unsolicited proposals must be submitted to the Unsolicited Proposal Manager at *DOEUSP@netl.doe.gov.* If the proposer has ascertained the cognizant program office through preliminary contacts with program staff, the proposal may be submitted directly to that office. In such instances, the proposer should separately send a copy of the proposal cover letter to the unsolicited proposal coordinator to assure that the proposal is logged in the Department's automated tracking system for unsolicited proposals.

PART 916—TYPES OF CONTRACTS

■ 63. The authority citation for part 916 continues to read as follows:

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

■ 64. Section 916.307 is revised to read as follows:

916.307 Contract clauses.

When using the clause at FAR 52.216–7, Allowable Cost and Payment, supplement the clause with 952.216–7, Allowable Cost and Payment.

916.504 [Amended]

■ 65. Amend section 916.504 by redesignating paragraph (c) as paragraph (a)(1).

916.505 [Amended]

■ 66. Amend section 916.505 by:
■ a. Redesignating paragraph (b)(6) as paragraph (b)(8); and
■ b. In newly redesignated paragraph (b)(8)(i):
■ i. Removing the words ''Office of Procurement and Assistance Management'' and adding in their place the words ''Office of Acquisition Management''; and
■ ii. Removing ''48 CFR 16.505(b)(6)'' and adding in its place ''FAR 16.505(b)(8)''.

PART 917—SPECIAL CONTRACTING METHODS

■ 67. The authority citation for part 917 continues to read as follows:

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

■ 68. Amend section 917.600 by revising paragraph (b) to read as follows:

917.600 Scope of subpart.

* * * * *

(b) The requirements of this subpart apply to any Department of Energy management and operating contract.

917.601 [Removed]

■ 69. Section 917.601 is removed.

■ 70. Amend section 917.602 by revising paragraphs (b) and (c) to read as follows:

917.602 Policy.

* * * * *

(b) It is the policy of the Department of Energy to provide for full and open competition in the award of management and operating contracts.

(c) A management and operating contract may be extended at the completion of its term without providing for full and open competition only when such extension is justified under one of the statutory authorities identified in FAR 6.302 and only when authorized by the Secretary.

917.7402 [Amended]

■ 71. Amend section 917.7402 in paragraphs (b) and (c)(4) by removing ''DOE Order 430.1B'' and adding in its place ''DOE Order 430.1C''.

PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

■ 72. The authority citation for part 922 continues to read as follows:

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

■ 73. Section 922.101–70 is added to read as follows:

922.101–70 General (applicability of Management and Operating contractor basic labor policies to certain non-Management and Operating contracts).

(a) The policies and associated contract clauses in 970.2201 apply to the award and administration of non-Management and Operating contracts if:

(1) The contract work had been previously performed under a DOE

Management and Operating contract; and/or

(2) The Contractor is required to employ all or part of the former Contractor's workforce; or

(3) The contract has been specifically designated by the Senior Procurement Executive.

(b) The non-M&O contracts described by paragraph (a) of this section may include, but are not limited to, contracts whose work is for:

(1) Environmental remediation;

(2) Decontamination and decommissioning;

(3) Environmental restoration;

(4) Infrastructure services for the site;

(5) Site closure at a current or former M&O contract site or facility; or

(6) Protective forces that provide physical security of sites at a current or former M&O contract site.

■ 74. Subpart 922.4 is added to read as follows:

Subpart 922.4—Labor Standards for Contracts Involving Construction

Sec.

922.406 Administration and enforcement.

922.406–1 Policy.

922.406 Administration and enforcement.

922.406–1 Policy.

This section sets forth additional controls and criteria for the application of the Construction Wage Rate Requirements Statute (40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), formerly known as the Davis-Bacon Act) (Statute) in the Department of Energy's operational or maintenance activities. The policy included in this subpart applies to M&O contracts.

(c) *Categorical exemptions.* The two categories of work discussed in paragraphs (c)(1) and (2) of this section would normally be covered by the Statute. However, in limited circumstances, these types of work will be classified as non-covered by the Statute. These exceptions are to be narrowly construed and used only when clearly applicable. Any decision on the two categorical exemptions from Statute coverage shall be made by the Head of the Contracting Activity, without power of delegation.

(1) Work for which continuity of operations is mission-essential (*i.e.,* when life, property, or DOE operating requirements are confronted with material risks).

(2) Emergency work to combat the effects of fire, flood, earthquake, military or terrorist attacks, technological emergencies, infectious disease/pandemic influenza threats, equipment failure, accident, or other casualties, and to restart the operational activity following the casualty. This exemption will generally apply only to work directly related to restarting the activity or work.

(d) *Particular exemptions.* Work items meeting one of the following criteria normally will be classified as non-covered by the Statute:

(1) *Individual work items estimated to cost $2,000 or less.* The total dollar amount of a contract is not the determining factor; rather, consider the cost of individual work items classified as construction, alteration and/or repair, including painting and decorating. However, no item of work, the cost of which is estimated to be in excess of $2,000, shall be artificially divided into portions less than $2,000 for the purpose of avoiding the application of the Statute.

(2) *General operational and maintenance activities.* Service-type work that is a part of general operational and maintenance activities, including cyclic, routine, and recurring programs, or which, being very closely and directly involved therewith, are more in the nature of operational activities than construction, alteration, and or repair work.

(3) *Assembly, modification, setup, installation, replacement, removal, rearrangement, connection, testing, adjustment, and calibration of machinery and equipment.* Note: If these activities are a logical part of the construction of a facility, or where there is more than incidental construction work, relative to the overall effort involved, they are Statute covered.

(4) *Experimental development of equipment, processes, or devices, including assembly, fitting, installation, testing, reworking, and disassembly.* This refers to equipment, processes, and devices that are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment may be such that the professional personnel who are responsible for the test or experiment and/or data to be derived therefrom must, by necessity, participate in the assembly and interconnections. The following types of experiments are not Statute covered:

(i) *Set-up of devices and processes associated with the experiment, within established facilities, usually require utility connections.* Such set-ups are generally not covered by the Statute. (However, set-up requiring structural changes or modifications of basic utility services, as distinguished from connections thereto, is covered by the Statute.)

(ii) *Assembly of piping and equipment, including adaptation and modification within existing hot cell facilities.* Assembly of piping and equipment, including adaptation and modification thereof, within existing hot cell facilities to prove out conceptual designs of chemical processing units or remotely controlled machining equipment.

(iii) *Assembly of materials and equipment for thermonuclear experiments.* Assembly of materials and equipment for particular aspects of thermonuclear experiments to explore feasibility and to study other ramifications of the concept of high energy and to collect data thereon.

(iv) *Assembly, erection, modification, and disassembly of a loop set-up.* A loop facility differs from a loop set-up in that it is of a more permanent character. (Note that preparatory work for a loop set-up or facility requiring structural changes or modifications of basic utility services, as distinguished from connections thereto, is covered by the Statute. Similarly, material and equipment that are installed for a loop set-up that is a permanent part of the facility, or used for a succession of experimental programs are similarly covered by the Statute.)

(v) *Reactor component experiments involving the insertion of experimental components within reactor systems without the use of a loop assembly.* Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding to permit work on the reactor to proceed following a short period of power interruption. (Note: Although the erection and on-site assembly of such a reactor facility is covered by the Statute, the set-up of components whose characteristics are under study are excluded from Statute coverage.)

(5) *Decontamination.* Decontamination includes washing, scrubbing, and scraping to remove contamination; removal of contaminated soil or other material (except asbestos); and painting or other resurfacing, provided that such painting or resurfacing is an integral part of the decontamination activity. Except to the extent section 1804 of the Atomic Energy Act of 1954 (as amended by Title XI of the Energy Policy Act of 1992), 42 U.S.C. 2297g–3, applies to the work at issue. Section 1804 requires all laborers and mechanics performing decontamination or decommissioning of DOE uranium enrichment facilities are paid prevailing wages.

(6) *Burial of contaminated soil waste or contained liquid.* Note, however, that the initial preparatory work readying the burial ground for use (*e.g.,* any grading or excavating that is a part of initial site preparation, fencing, drilling wells for continued monitoring of contamination, construction of guard or other office space) is covered by the Statute. Work performed subsequent to burial that involves the placement of concrete or other like activity is also covered by the Statute.

(e) *Statute-covered experimental development work.* Notwithstanding the exceptions in paragraph (d)(4) of this section, the following experimental development work is Statute covered: building construction, structural changes, drilling, tunneling, excavation, back-filling, modifications to utility services, as distinguished from temporary connections thereto, and set-up of equipment to be used for continuous testing (*e.g.,* a machine to be continuously used for testing the tensile strength of structural members).

(f) *Different work categories may have differing Statute coverage.* For instance, a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as not Statute covered, since it may be necessary to separate work that should be classified as Statute covered. Therefore, the Contracting Officer shall establish and maintain controls for the careful scrutiny of proposed work assignments under such contracts.

(1) Contractors whose contracts do not contemplate the performance of work covered by the Statute with the contractor's employees are not authorized to perform such work within the scope of the Statute, unless the Contracting Officer, in compliance with FAR subpart 22.4, modifies the contract.

(2) Determinations of Statute applicability are the responsibility of the HCA on a case-by-case basis. However, the HCA may delegate to the Contracting Officer, if consistent with DOE's responsibilities as described in this subsection, the authority to prescribe, from time to time, classes of work as to which applicability or non-applicability of the Statute is clear.

(g) *Contracting Officer responsibilities.* The Contracting Officer shall comply with the procedures for requesting wage determinations set forth in FAR 22.404, as necessary.

(h) *Construction site contiguous to an established manufacturing facility.* As DOE-owned property sometimes encompasses several thousand acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a period of years, and established manufacturing activities may be regularly carried on at one site at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly, and reconditioning of components and equipment that in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is not covered by the Statute, the installation of any such manufactured items on a construction job is covered by the Statute if the installation includes more than incidental construction work relative to the overall effort involved.

PART 923—ENVIRONMENT, SUSTAINABLE ACQUISITION, AND MATERIAL SAFETY

■ 75. The authority citation for part 923 continues to read as follows:

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

■ 76. Revise the heading for Part 923 to read as set forth above.

923.002 [Removed]

■ 77. Section 923.002 is removed.

923.101 [Redesignated as 923.170]

■ 78. Section 923.101 is redesignated as section 923.170.

■ 79. Newly redesignated section 923.170 is revised to read as follows:

923.170 Policy.

The Department of Energy's (DOE) policy is to promote sustainable acquisition by acquiring products and services that are energy-efficient, contain recycled or biobased content, and have other environmentally preferable attributes, as specified in applicable statutory, regulatory, and Executive Order based requirements. *See* FAR 2.101 for applicable definitions. More information on environmentally preferable products and services is available from the DOE Sustainable Acquisition Program.

923.102 [Redesignated as 923.171]

■ 80. Section 923.102 is redesignated as section 923.171.

923.103 [Redesignated as 923.172]

■ 81. Section 923.103 is redesignated as section 923.172.

■ 82. Newly redesignated section 923.172 is revised to read as follows:

923.172 Contract clauses.

Insert the clause at 952.223–78, Sustainable Acquisition Program, in all contracts under which the contractor operates Government-owned facilities or motor vehicle fleets, or significant portions thereof, or performs construction at a Government-owned facility.

Subpart 923.5 [Redesignated as Subpart 926.5]

■ 83. Redesignate subpart 923.5, consisting of sections 923.500, 923.570, 923.570–1, 923.570–2, and 923.570–3 as Subpart 926.5, consisting of sections 926.500, 926.570, 926.570–1, 926.570–2, and 926.570–3 respectively.

Subpart 923.9 [Redesignated as Subpart 923.4]

■ 84. Redesignate subpart 923.9, consisting of section 923.903, as subpart 923.4, consisting of section 923.404.

■ 85. In newly redesignated section 923.404, remove ''52.223–XX'' and add ''52.223–19'' in its place wherever it appears.

■ 86. Section 923.7002 is revised to read as follows:

923.7002 Worker safety and health.

(a) The Atomic Energy Act mandates that DOE shall either pursue civil penalties, as implemented at 10 CFR part 851, for a violation under 42 U.S.C. 2282c, or a contract fee reduction, but not both. For a contract fee reduction—

(1) The clause prescribed at §§ 942.71(d) and 923.7003(f), which is 952.242–71, Conditional Payment of Fee, Profit, or Other Incentives, addresses contract fee reductions (for both non-management and operating contracts and management and operating contracts; for the latter, §§ 942.71(d) and 923.7003(f) refer to clause prescribed in 970.1504–3(b)).

(2) The clause provides, among other things, for an appropriate reduction to the fee, profit, or other incentives under the contract in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker safety and health concerns.

(3) When reviewing performance failures that would warrant a reduction of otherwise earned fee, the Contracting Officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. The mitigating factors are specified in the clause.

(4) The Contracting Officer must obtain the concurrence of the Head of the Contracting Activity: prior to effecting any reduction of fee, profit or other incentives otherwise payable under the clause at 952.942–71, Conditional Payment of Fee, Profit, or Other Incentives; and prior to determining that no reduction is warranted for performance failure(s) that would otherwise warrant a reduction.

(b) In the event of a violation by the contractor or any contractor employee of any Department regulation relating to worker safety and health concerns, before deciding to pursue a contract fee reduction, the Contracting Officer must coordinate with the Office of Nuclear Safety within the Office of Enforcement in the Office of Enterprise Assessments (or designated successor office).

■ 87. Amend section 923.7003 by:

■ a. Revising paragraphs (a), (f), and (g); and

■ b. Removing paragraph (h).

The revisions read as follows:

923.7003 Contract clauses.

(a) A decision to include or not include environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in consultation with appropriate personnel within the Office of Environment, Health, Safety and Security (or designated successor office). For M&O contracts see 970.2303–3 and insert the clause at 970.5223–1.

* * * * *

(f) Unless the clause for management and operating contracts is prescribed (see § 970.1504–3(b)), insert the clause at 952.242–71, Conditional Payment of Fee, Profit, and Other Incentives, in all contracts that contain the clause at 952.204–2, Security Requirements, the clause at 952.250–70, Nuclear Hazards Indemnity Agreement, or both clauses.

(g) The contracting officer shall insert the clause at 952.223–75, Preservation of Individual Occupational Radiation Exposure Records, in contracts containing 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, or 952.223–72, Radiation Protection and Nuclear Criticality.

PART 925—FOREIGN ACQUISITION

■ 88. The authority citation for part 925 continues to read as follows:

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

■ 89. Amend section 925.1001 by revising paragraph (b) to read as follows:

925.1001 Waiver of right to examination of records.

(b) *Determination and findings.* A determination and findings required by FAR 25.1001(b) shall be forwarded to either the Director, Office of Contract Management, Office of Acquisition Management, or for the National Nuclear Security Administration (NNSA), to the Deputy Associate Administrator for the Office of Partnership and Acquisition Services, for coordination of the Secretary's approval.

PART 926—OTHER SOCIOECONOMIC PROGRAMS

■ 90. The authority citation for part 926 continues to read as follows:

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

■ 91. Newly redesignated section 926.500 is revised to read as follows:

926.500 Scope of subpart.

For contracts performed at DOE sites, in lieu of subpart 26.5 of this title, contracting activities shall use 926.570, Workplace Substance Abuse Programs at DOE sites.

■ 92. Newly redesignated section 926.570–2 is revised to read as follows:

926.570–2 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 970.5226–4, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 926.570–1, Applicability.

(b) The contracting officer shall insert the clause at 970.5226–5, Workplace Substance Abuse Programs at DOE Sites, in contracts where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 926.570–1, Applicability.

926.570–3 [Amended]

■ 93. Newly redesignated section 926.570–3 is amended by:

■ a. Removing ''FAR 23.506'' and adding ''FAR 26.505'' in its place wherever it appears;

■ b. Removing ''970.5223–4'' and adding ''970.5226–5'' in its place wherever it appears.

■ 94. Amend section 926.7001 by revising paragraphs (a) and (b) to read as follows:

926.7001 Policy.

(a) Section 3021(a) of the Energy Policy Act of 1992, as amended, specifies that the Department of Energy (DOE) shall, to the extent practicable, provide that not less than 10 percent of the total combined amounts obligated for competitively awarded contracts and subcontracts under the Energy Policy Act be expended with—

(1) Small business concerns controlled by socially and economically disadvantaged individuals or by women;

(2) Historically Black colleges and universities;

(3) Colleges and universities having a student body in which more than 20 percent of the students are Hispanic Americans or Native Americans; or

(4) Qualified HUBZone small business concerns, as defined at FAR 2.101.

(b) The four groups in paragraph (a) of this section are collectively referred to in this section as ''Energy Policy Act target groups.''

* * * * *

■ 95. Section 926.7004 is revised to read as follows:

926.7004 Size standard for Energy Policy Act procurements.

The size standard for Energy Policy Act engineering services procurements shall be Exception 2 under North American Industry Classification System code 541330, Engineering Services.

■ 96. Section 926.7005 is revised to read as follows:

926.7005 Preferences under the Energy Policy Act.

Solicitations for all competitive Energy Policy Act procurements not for 8(a) firms and in excess of the simplified acquisition threshold shall provide for an evaluation preference for offers received from entities from among the Energy Policy Act target groups. The evaluation criteria shall provide that in instances in which two or more proposals being considered for final selection are ranked as essentially equal after consideration of all technical and cost evaluation factors, and if one of these proposals is from an offeror from among an Energy Policy Act target group that offeror will be selected for award.

■ 97. Amend section 926.7006 by revising paragraph (a) to read as follows:

926.7006 Goal measurement and reporting requirements.

(a) *General.* The following types of contract awards for Energy Policy Act procurements shall be counted toward

achievement by DOE of the 10 percent goal—

(1) Any award set-aside for small, disadvantaged business;

(2) Any competitive section 8(a) award;

(3) Any competitive award to one of the four target groups under an unrestricted procurement;

(4) Any award to one of the four target groups conducted under simplified acquisition procedures in excess of the micro-purchase threshold; and

(5) Any competitively awarded subcontract to one of the four target groups under a prime award.

* * * * *

■ 98. Amend section 926.7007 by revising paragraph (c) to read as follows:

926.7007 Solicitation provisions and contract clauses.

* * * * *

(c) The contracting officer shall insert the clause at 952.226–72, Energy Policy Act Subcontracting Goals and Reporting Requirements, in contracts for Energy Policy Act requirements with an award value in excess of $750,000 ($1,500,000 in the case of construction).

* * * * *

926.7101 [Amended]

■ 99. Amend section 926.7101 by removing the word ''Section'', wherever it appears, and the phrase ''42 U.S.C. 7474h(c)(2)'' and adding in their places the word ''section'' and the phrase ''50 U.S.C. 2704(c)(2)'', respectively.

926.7103 [Amended]

■ 100. Amend section 926.7103 in paragraph (a) by removing the phrase ''42 U.S.C. 7474h'' and adding in its place the phrase ''50 U.S.C. 2704(c)(2)''.

■ 101. Section 926.7104 is revised to read as follows:

926.7104 Contract clause.

The contracting officer shall insert the clause at 952.226–74, Workforce Restructuring and Displaced Employee Hiring Preference, in contracts (both non-management and operating contracts and management and operating contracts), except for contracts for commercial items, pursuant to 41 U.S.C. 403, that exceed $500,000.

PART 927—PATENTS, DATA, AND COPYRIGHTS

■ 102. The authority citation for part 927 continues to read as follows:

Authority: Atomic Energy Act of 1954, as amended (42 U.S.C. 2168, 2182, 2201); Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1987 (42 U.S.C. 7261a.); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); National Nuclear Security Administration Act (50 U.S.C. 4201 *et seq.*)

927.200 [Removed]

■ 103. Section 927.200 is removed.

■ 104. Section 927.201–1 is revised to read as follows:

927.201–1 General.

For the purposes of this subpart, ''research and development (R&D)'' includes ''research, development, and demonstration.'' In certain contracting situations, such as those involving research, development, or demonstration projects, consideration should be given to the impact of third party-owned patents covering technology that may be incorporated in the project if the patents may ultimately affect widespread commercial use of the project results. In such situations, Patent Counsel shall be consulted to determine what modifications, if any, are to be made to the utilization of the Patent and Copyright Infringement Liability and Patent Indemnity provisions or clauses or what other action might be deemed appropriate.

927.206 [Removed]

■ 105. Section 927.206 is removed.

927.206–1 [Redesignated as 927.202]

■ 106. Section 927.206–1 is redesignated as section 927.202.

927.202 Royalties.

■ 107. Amend newly redesignated section 927.202 by revising the section heading to read as above.

927.206–2 [Redesignated as 927.202–5]

■ 108. Section 927.206–2 is redesignated as section 927.202–5.

927.202–5 Solicitation provisions and contract clause.

■ 109. Amend newly redesignated section 927.202–5 by revising the section heading to read as above.

927.207 [Redesignated as 927.203]

■ 110. Section 927.207 is redesignated as section 927.203.

927.207–1 [Redesignated as 927.203–1]

■ 111. Section 927.207–1 is redesignated as section 927.203–1.

■ 112. Newly redesignated section 927.203 is revised to read as follows:

927.203 Security requirements for patent applications containing classified subject matter.

927.302 [Redesignated as 927.302–70]

■ 113. Section 927.302 is redesignated as section 927.302–70.

927.300 [Redesignated as 927.302]

■ 114. Section 927.300 is redesignated as section 927.302.

■ 115. Newly redesignated section 927.302 is revised to read as follows:

927.302 Policy.

(a) *Introduction.* (1) A primary mission of the Department of Energy (DOE) is to conduct research, development, and demonstration leading to the ultimate commercialization of efficient sources of energy. To accomplish this mission, DOE must work in cooperation with industry in the development of new energy sources and achieve the ultimate goal of widespread commercial utilization of those energy sources in the shortest practicable time. To this end, Congress has provided DOE with the authority to invoke an array of incentives to secure the commercialization of new technologies developed for DOE. One such important incentive is provided by the patent system.

(2) Another primary mission of DOE is to manage the Nation's nuclear weapons programs and other classified programs, where research and development procurements are directed toward processes and equipment not available to the public. To support DOE programs for bringing private industry into these and other special programs to the maximum extent permitted by national security and policy considerations, the technology developed in these programs should be made available for use in the particular fields of interest and under controlled conditions by properly cleared industrial and scientific research institutions. To ensure such availability and control, the granting of waivers in these programs may be more limited, either by the imposition of field of use restrictions or national security measures, than in other DOE programs.

(b) *Government right to receive title.* Pursuant to 42 U.S.C. 2182 and 5908, DOE takes title to all inventions conceived or first actually reduced to practice in the course of or under contracts with large, for-profit companies, foreign organizations, and other entities that are not beneficiaries of 35 U.S.C. 200 *et seq.* Regulations dealing with Department's authority to waive its title to subject inventions,

including the relevant statutory objectives, exist at 10 CFR part 784. Pursuant to that section, DOE may waive the Government's patent rights in appropriate situations at the time of contracting to encourage industrial participation, foster commercial utilization and competition, and make the benefits of DOE activities widely available to the public. In addition to considering the waiver of patent rights at the time of contracting, DOE will also consider the incentive of a waiver of patent rights upon the reporting of an identified invention when requested by such entities or by the employee-inventor with the permission of the contractor. These requests can be made whether or not a waiver request was made at the time of contracting. Waivers for identified inventions will be granted where it is determined that the patent waiver will be a meaningful incentive to achieving the development and ultimate commercial utilization of inventions. Where DOE grants a waiver of the Government's patent rights, either at the time of contracting or after an invention is made, certain minimum rights and obligations will be required by DOE to protect the public interest.

■ 116. Newly redesignated section 927.302–70 is revised to read as follows:

927.302–70 Additional policy.

(a) In this section and 927.303, *background patent* means a U.S. patent covering an invention or discovery that is not a subject invention (as defined at 35 U.S.C. 201(e)) and that is owned or controlled by the Contractor at any time through the completion of the contract:

(1) Which the Contractor, but not the Government, has the right to license to others without obligation to pay royalties thereon; and

(2) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this contract.

(b) Except for contracts with organizations that are beneficiaries of Public Law 96–517, the United States, as represented by DOE, shall normally acquire title in and to any invention or discovery conceived or first actually reduced to practice in the course of or under the contract, allowing the contractor to retain a nonexclusive, revocable, paid-up license in the invention and the right to request permission to file an application for a patent and retain title to any ensuing patent in any foreign country in which DOE does not elect to secure patent rights. DOE may approve the request if it determines that such approval would be in the national interest. The contractor's nonexclusive license may be revoked or modified by DOE only to the extent necessary to achieve expeditious practical application of the invention pursuant to any application for and the grant of an exclusive license in the invention to another party.

(c) Normally, contracts will not include background patent and background data provisions. Under special circumstances, however, to provide heightened assurance of commercialization, a provision providing for a right to require licensing to third parties of background inventions, limited rights data or restricted computer software may be included (*see* 927.303(d)(5)). Inclusion of such a provision will be done only with the written concurrence of the DOE program official setting forth the need for such assurance. A contract may include the right to license the Government and third-party contractors for special Government purposes when future availability of the technology would also benefit the Government. The scope of any such background patent or data licensing is subject to negotiation.

(d) The Assistant General Counsel for Technology Transfer and Intellectual Property shall:

(1) Determine whether reported inventions are subject inventions under the patent rights clause of the contract;

(2) Determine whether and where patent protection will be obtained on inventions;

(3) Represent DOE before domestic and foreign patent offices;

(4) Accept assignments and instruments confirmatory of the Government's rights to inventions; and

(5) Represent DOE in patent, trademark, technical data, copyright, and other intellectual property matters not specifically reserved to the Head of the Agency or designee under this part.

■ 117. Section 927.303 is revised to read as follows:

927.303 Contract clauses.

(a)(1) Insert a patent rights clause in all solicitations and contracts for experimental, research, developmental, or demonstration work as prescribed in this section.

(2) [Reserved]

(3) [Reserved]

(4) For M&O contracts, certain decontamination and decommissioning activities and the building and/or operation of other DOE facilities, see subpart 970.27.

(d) The Contracting Officer shall use the clause at 952.227–13, Patent Rights—Ownership by the Government, except for—

(1) *Contracts for construction work or architect-engineer services.* When the services can be expected to involve only ''standard types of construction'' such as involving previously developed equipment, methods, and processes as described in FAR 27.303(a)(3), the Contracting Officer shall not include a patent clause;

(2) *Contracts with domestic small business firms or nonprofit organizations (see FAR 27.301).* In such cases, the Contracting Officer shall use the clause at 37 CFR 401.14, Standard Patent Rights, and Alternate I of 952.227–11 that includes the agency implementing regulations specific for DOE, suitably modified to identify the parties, in all contracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, unless the work is subject to an Exceptional Circumstances Determination by DOE or another exception (see 37 CFR 401.3(a)). If the Determination of Exceptional Circumstances under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies executed by DOE on June 7, 2021 (S&E DEC) or any other Determination of Exceptional Circumstances under the Bayh-Dole Act (DEC) is applicable, the Contracting Officer shall include the clause at 37 CFR 401.14 and Alternate II of 952.227–11;

(3) *Waivers of rights.* In cases where DOE grants an advance waiver or waives its rights in an identified invention pursuant to 10 CFR part 784, Contracting Officers shall consult with patent counsel on appropriate clauses;

(4) *Contracts for the design, construction, operation, or management (or the integration of a collection of contracts for the same purpose) of a Government-owned research, development, demonstration or production facility.* In such cases, the Government must be accorded certain rights, applicable to further use of the facility by or on behalf of the Government after contract termination or completion. For such contracts, the Contracting Officer shall include Alternate II with the clause at 952.227–13;

(5) *Background patent rights.* For contracts involving DOE background patent rights, the Contracting Officer shall use Alternate I to the clause at 952.227–13. Alternate I may be modified with the concurrence of Patent

Counsel in order to reflect the equities of the contracting parties in particular situations; or

(6) *U.S. Competitiveness.* If the funding program is subject to the S&E DEC, then the Contracting Officer shall use Alternate II to the clause at 952.227–13 when Patent Counsel has determined that the S&E DEC applies to the Contractor's funding and should be included in the contract.

■ 118. Amend section 927.304 by:

■ a. In the first sentence, removing ''952.227–11'' and adding in its place ''37 CFR 401.14''; and

■ b. Revising the second sentence.

The revision reads as follows:

927.304 Procedures.

* * * This section supplements FAR 27.304–1(c).

Subpart 927.4—Rights in Data and Copyrights

■ 119. The heading for subpart 927.4 is revised to read as above.

■ 120. Section 927.401 is added to read as follows:

927.401 Definitions.

Technical data means data (other than computer software) of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer database (see appendix A to subpart D of 2 CFR part 910).

927.402 and 927.402–1 [Removed]

■ 121. Sections 927.402 and 927.402–1 are removed.

927.402–2 [Redesignated as 927.402]

■ 122. Section 927.402–2 is redesignated as section 927.402.

■ 123. Amend newly redesignated section 927.402 by revising the introductory text to read as follows:

927.402 Policy.

The technical data and scientific and technical information (STI) policies are directed toward achieving the following objectives:

* * * * *

927.403 [Removed]

■ 124. Remove section 927.403.

927.404 and 927.404–70 [Redesignated as 927.404–70 and 927.404–71]

■ 125. Sections 927.404 and 927.404–70 are redesignated as sections 927.404–70 and 927.404–71, respectively.

■ 126. Newly redesignated section 927.404–70 is revised to read as follows:

927.404–70 Rights in technical data in subcontracts.

(a) Prime contractors and higher-tier subcontractors, in meeting their obligations with respect to contract data, must obtain from their subcontractors the rights in, access to, and delivery of such data on behalf of the Government. Accordingly, subject to the policy set forth in this subpart and subject to the approval of the Contracting Officer, where required, prime contractors or higher-tier subcontractors must select appropriate technical data provisions for their subcontracts.

(1) In many, but not all instances, use of the clause at FAR 52.227–14, Rights in Data—General, as supplemented pursuant to this subpart, in a subcontract will provide for sufficient Government rights in and access to technical data. The inspection rights afforded in Alternate V to the clause at FAR 52.227–14 normally should be obtained only in first-tier subcontracts for research, development, or demonstration work or the furnishing of supplies for which there are substantial technical data requirements as reflected in the prime contract.

(2) If a subcontractor refuses to accept technical data provisions affording rights in and access to technical data on behalf of the Government, the Contractor shall so inform the Contracting Officer in writing and not proceed with the subcontract award without written authorization of the Contracting Officer.

(3) In prime contracts or higher-tier subcontracts that contain the clause at FAR 52.227–16, Additional Data Requirements, the Contractor or higher-tier subcontractor must determine whether inclusion of such clause in a subcontract is required to satisfy technical data requirements of the prime contract or higher-tier subcontract.

(b) As is the case for DOE in its determination of technical data requirements, the clause at FAR 52.227–16, Additional Data Requirements, should not be used at any subcontracting tier where the technical data requirements are fully known. Normally, the clause will be used only in subcontracts having as a purpose the conduct of research, development, or demonstration work. Prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the subcontractor's limited rights data or restricted computer software for their private use, and they shall not acquire rights to limited rights data or restricted computer software on behalf of the Government for standard commercial items without the prior approval of Patent Counsel.

■ 127. Amend newly redesignated section 927.404–71 by revising the fourth sentence to read as follows:

927.404–71 Statutory programs.

* * * Generally, such clauses will be based upon the clause at FAR 52.227–14, Rights in Data-General, with appropriate modifications to define and protect the ''protected data'' in accordance with the applicable statute. * * *

■ 128. Sections 927.406 and 927.406–4 are added to read as follows:

927.406 Acquisition of data.

927.406–4 Acquisition and use of technical data.

To meet the objectives stated in 927.402, DOE has extensive technical data needs.

(a) Section 982 of the Energy Policy Act of 2005 (EPAct 2005, 42 U.S.C. 16352) mandates that the Secretary of Energy, through the Office of Scientific and Technical Information, shall maintain within the Department publicly available collections of STI resulting from research, development, demonstration, and commercial-applications activities supported by DOE.

(b) Section 105 of the DOE Energy Research and Innovation Act (Pub. L. 115–246) further mandates that DOE establish and maintain a public database populated with information on unclassified research and development projects, as well as relevant literature and patents.

(c) The legal rights in technical data acquired by the Government through DOE contracts, other than management and operating (M&O) contracts (*see* 970.2704), or contracts involving the production of data necessary for DOE sites/facilities management or operations, are set forth in the clause at FAR 52.227–14, Rights in Data—General, as supplemented in accordance with this subpart. However, those clauses do not obtain for the Government delivery of any data whatsoever. Rather, known technical data delivery requirements shall be set forth as part of the contract. For Research and Development contracting, requirements for results (conveyed as STI) are addressed in 935.010 and should be set forth in the contract.

(d) Contracting Officers shall contact Patent Counsel assisting their contracting activity or the Assistant General Counsel for Technology Transfer and Intellectual Property for assistance in selecting, negotiating, or

approving appropriate data and copyright clauses in accordance with the procedures set forth in this subpart and FAR subpart 27.4. In particular, Contracting Officers shall seek the advice of Patent Counsel regarding any situation not in conformance with this subpart, including the inclusion or modification of alternate paragraphs of the clause at FAR 52.227–14, as supplemented pursuant to this subpart, the exclusion of specific items from that clause, the exclusion of the clause at FAR 52.227–16, Additional Data Requirements, and the inclusion of any special provisions in a particular contract. Deviations shall follow the requirements in FAR subpart 1.4 and subpart 901.4.

(e) Contractors are required by Alternate VIII of the clause at 952.227–14, as supplemented pursuant to this subpart, to acquire permission from DOE Patent Counsel to assert copyright in any data including computer software first produced in the performance of the contract. This requirement reflects DOE's established software distribution program, and DOE's statutory dissemination obligations. When a contractor requests permission to assert copyright, Patent Counsel shall predicate its decision on the considerations reflected in paragraph (e) of the clause at 970.5227–2, Rights in Data—Technology Transfer.

(f) In many situations the achievement of DOE's objectives would be frustrated if the Government, at time of award, did not obtain on behalf of responsible third parties and itself limited license rights in and to limited rights data or restricted computer software, or both. Such rights are necessary for the practice of subject inventions or data first produced or delivered under the contract. When the contract is for research, development, or demonstration, Contracting Officers should consult with program officials and Patent Counsel to determine whether such rights should be acquired. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of such organizations have been authorized in accordance with 35 U.S.C. 202(f). In all cases when the Contractor has agreed to include a provision assuring commercial availability of background patents, consideration should be given to securing for the Government and responsible third parties at reasonable royalties and under appropriate restrictions, co-extensive license rights for data, which are limited rights data and restricted computer software.

■ 129. Section 927.409 is revised to read as follows:

927.409 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at FAR 52.227–14, Rights in Data-General, and supplement it with Alternates I and V of FAR 52.227–14 and Alternate VIII of FAR 952.227–14, Rights in Data-General, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract. Generally, a contract should contain only one data rights clause. However, where more than one is needed as prescribed in paragraph (b) of this section, the contact should distinguish the portion of contract performance to which each pertains.

(b)(1) However, the rights in data in specific situations will be treated as described, where the contract is—

(i) For the production of special works of the type set forth in FAR 27.405–1, the Patent Counsel shall insert the clause at FAR 52.227–17, Rights in Data-Special Works, including Alternate I. The clause at FAR 52.227–14, Rights in Data-General, may be included in the contract and made applicable to data other than special works, as appropriate (see paragraph (e) of FAR 27.409);

(ii) For the acquisition of existing data works, as described in FAR 27.405–2 (see paragraph (f) of FAR 27.409);

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case agencies may prescribe different clauses (see paragraph (i) of FAR 27.409);

(iv) For architect-engineer services or construction work, in which case the Patent Counsel shall utilize the clause at FAR 52.227–17, Rights in Data-Special Works, including Alternate I;

(v) A Small Business Innovation Research contract (see paragraph (h) of FAR 27.409);

(vi) For management and operation of a DOE facility (see 970.2704) or other contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, certain decontamination and decommissioning activities, or the building and/or operation of other DOE facilities, after consultation with Patent Counsel (see 927.402–1(b));

(vii) Awarded pursuant to a statute expressly providing authority for the protection of data first produced thereunder from disclosure or dissemination. (see 927.404–70);

(viii) For basic or applied research with educational institutions (other than those in which software is specified for delivery unless the software will be released as open source software or other special circumstances exist), the Patent Counsel may use the clause at FAR 52.227–14 with its Alternate IV instead of Alternate VIII of the clause at FAR 952.227–14, Rights in Data-General;

(ix)(A) Requiring license rights that are deemed necessary, the Patent Counsel should supplement the clause at FAR 52.227–14, Rights in Data—General, with Alternate VI, as provided at 952.227–14, Rights in Data—General, which will normally be sufficient to cover limited rights data and restricted computer software for items and processes used in the contract and necessary to ensure widespread commercial use or practical utilization of a subject of the contract. The phrase ''subject of the contract'' in Alternate VI is intended to limit licensing to the fields of technology specifically contemplated under the contract; the phrase may be replaced by a more specific statement of the fields of technology intended to be covered in the manner described in the clause at 952.227–13, Patent Rights—Ownership by the Government.

(B) Where limited rights data and restricted computer software are the main purpose or basic technology of the research, development, or demonstration effort of the contract (rather than subcomponents, products, or processes ancillary to the contract effort), the limitations in paragraphs (k)(1) through (4) of Alternate VI of the clause at 952.227–14 should be supplemented or deleted. Paragraph (k) of Alternate VI further provides that limited rights data or restricted computer software may be specified in the contract as being excluded from or not subject to the licensing requirements. This exclusion is implemented by limiting the applicability of the provisions of paragraph (k) of Alternate VI to only those classes or categories of limited rights data and restricted computer software determined essential for licensing. Although contractor licensing may be required under paragraph (k) of Alternate VI, the final resolution of questions regarding the scope of such licenses and the terms thereof, including provisions for confidentiality, and reasonable royalties, is left to the negotiation between the contractor and the Contracting Officer; or

(x) Where the contractor has access to certain categories of DOE-owned Category C–24 restricted data, as set forth in 10 CFR part 725, Alternate VII of 952.227–14, Rights in Data-General, shall be used. DOE has reserved the right to receive reasonable

compensation for the use of its inventions and discoveries, including its related data and technology. In addition, in any other types of contracting situations in which the contractor may be given access to restricted data owned by DOE, appropriate limitations on the use of such data must be specified.

(d) The contracting officer shall insert the clause at FAR 52.227–16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less.) See FAR 27.406–2. Patent Counsel may use the clause at FAR 52.227–16, Additional Data Requirements, along with the clause at FAR 52.227–14, Rights in Data—General, to require the contractor to furnish additional technical data, in instances where technical data requirements were not known at the time of award. There is, however, a built-in limitation on the kind of technical data that a contractor may be required to deliver under either the contract or the Additional Data Requirements clause. This limitation is in the withholding provision of paragraph (g) of FAR 52.227–14, Rights in Data—General, which provides that the contractor need not furnish limited rights data or restricted computer software. Unless Alternate II or III to the clause at FAR 52.227–14 is used, the Additional Data Rights clause is specifically intended that the contractor may withhold limited rights data or restricted computer software even though a requirement for technical data specified in the contract or called for delivery (pursuant to the clause at FAR 52.227–16) would otherwise require the delivery of such data.

(m) Contracting officers shall incorporate the solicitation provision at FAR 52.227–23, Rights to Proposal Data (Technical), in all requests for proposals.

(n) Contracting officers shall include the solicitation provision at 952.227–84 in all solicitations involving research, developmental, or demonstration work.

PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 130. The authority citation for part 931 continues to read as follows:

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

■ 131. Section 931.205–18 is revised to read as follows:

931.205–18 Independent research and development and bid and proposal costs.

(c)(1) Independent research and development (IR&D) costs are recoverable under DOE contracts to the extent they are reasonable, allocable, not otherwise unallowable, and they have potential benefit or relationship to the DOE program. The term ''DOE program'' encompasses the DOE total mission and its objectives. Bid and proposal (B&P) costs are recoverable under DOE contracts to the extent they are reasonable, allocable, and not otherwise unallowable.

(2) [Reserved]

931.205–47 [Amended]

■ 132. Amend section 931.205–47 in paragraph (h)(1), in the definition of ''Employee whistleblower action'', by removing ''42 U.S.C. 7239'' and adding in its place ''50 U.S.C. 2702''.

PART 932—CONTRACT FINANCING

■ 133. The authority citation for part 932 continues to read as follows:

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

■ 134. Amend section 932.970 by revising paragraph (b) to read as follows:

932.970 Implementing DOE policies and procedures.

* * * * *

(b) *Accelerated payments to limit contractor working capital requirements.* Contracting Officers may specify payment due dates that are less than the standard under the Prompt Payment Act when a determination is made, in writing, on a case-by-case basis, that a shorter contract financing payment cycle will be beneficial to the Government by reducing the contractor's working capital requirements. In such cases, the Contracting Officer should coordinate with the finance and program officials that will be involved in the payment process to ensure that the contract payment terms to be specified in solicitations and resulting contract awards will provide sufficient time for officials to perform an appropriate review of the invoices before they are paid. Consideration should be given to geographical separation, workload, contractor ability to submit a proper request, and other factors that could affect timing of payment. However, payment due dates that are less than 7 days for progress payments or less than 14 days for interim payments on cost-type contracts are not authorized. In all cases whereby the contract specifies payment due dates that are sooner than those required under the relevant prompt payment requirements, the contract will permit the Contracting Officer to unilaterally authorize additional time for review of invoices if needed to perform an adequate review of those invoices prior to payment.

■ 135. Section 932.971 is added to read as follows:

932.971 Electronic submission of invoices/vouchers.

In general, Contracting Officers should insert the clause at 952.232–7, Electronic Submission of Invoices/Vouchers, in contracts. However, after consultation with the Office of the Chief Financial Officer, the Contracting Officer may approve alternate methods of submission.

Subpart 932.70 [Removed]

■ 136. Subpart 932.70, consisting of 932.7002 through 932.7004–3, is removed.

PART 933—PROTESTS, DISPUTES, AND APPEALS

■ 137. The authority citation for part 933 continues to read as follows:

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

■ 138. Section 933.103 is revised to read as follows:

933.103 Protests to the agency.

(a) *Reference.* The Department of Energy (DOE) does not accept or adjudicate protests from prospective subcontractors.

(c) The Department of Energy encourages direct negotiations between an offeror and the contracting officer, including alternative dispute resolution (ADR) techniques. A protest requesting a decision at the Headquarters level shall state whether the protester is willing to utilize ADR techniques such as mediation or nonbinding evaluation of the protest by a neutral party. Both the protester and the Department must agree that the use of such techniques is appropriate. If the parties do not mutually agree to utilize ADR techniques to resolve the protest, the protest will be processed in accordance with the procedures set forth in paragraphs (f) and (g) of this section.

(f)(5) Upon receipt of a protest filed against DOE, the contracting officer shall prepare a report similar to that discussed in FAR 33.104(a)(3)(iv).

(6) Protests filed with the contracting officer before or after award shall be decided by the HCA except for the following cases, which shall be decided by the Senior Procurement Executive:

(i) The protester requests that the protest be decided by the Senior Procurement Executive;

(ii) The HCA is the contracting officer of record at the time the protest is filed, having signed either the solicitation where the award has not been made, or the contract, where the award or nomination of the apparent successful offeror has been made;

(iii) The HCA concludes that one or more of the issues raised in the protest have the potential for significant impact on Department of Energy (DOE) acquisition policy; or

(iv) The SPE elects to decide the protest.

(g) The official identified in paragraph (f)(6) of this section will render a decision on a protest within 35 calendar days, unless a longer period of time is deemed necessary.

■ 139. Section 933.104 is revised to read as follows:

933.104 Protests to GAO.

The GAO does not have jurisdiction over protests from subcontractors.

(a)(2) The contracting officer shall provide the notice of protest.

(b)(1) The finding required under FAR 33.104(b)(1) shall be concurred upon by the local DOE counsel with cognizance over the underlying procurement and the Senior Program Official, and approved by the SPE before the HCA authorizes a contract award. The finding shall also address the likelihood that the protest will be sustained by the GAO.

(c)(2) The finding required by FAR 33.104(c)(2) shall be concurred upon by the local DOE counsel with cognizance over the underlying procurement and the Senior Program Official, and approved by the SPE before the HCA authorizes contract performance.

(g) *Notice to GAO.* DOE's policy is to comply promptly with the recommendations in Comptroller General decisions unless compelling reasons exist. Any decision to not comply shall be substantiated by the HCA making the award, after approval by the SPE. The report to the GAO regarding a decision to not comply with the GAO's recommendation shall be transmitted to the GAO by the HCA making the award or, if a DOE-wide policy issue is involved, the report shall be provided by the SPE.

■ 140. Section 933.106 is revised to read as follows:

933.106 Solicitation provisions and contract clauses.

(a) When using the provision at FAR 52.233–2, Service of Protest, the Contracting Officer shall insert the provision at 952.233–2, Service of Protest.

PART 935—RESEARCH AND DEVELOPMENT CONTRACTING

■ 141. The authority citation for part 935 continues to read as follows:

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

■ 142. Section 935.010 is revised to read as follows:

935.010 Scientific and technical reports.

(c) For purposes of section 982 of the Energy Policy Act of 2005 (42 U.S.C. 16322), the research results, referred to as scientific and technical information (STI), are derived from management and operation (M&O), research and development (R&D), facility management, and non-major site/facility management type contracts. STI must be documented, managed, and electronically submitted to the Department of Energy (DOE), Office of Scientific and Technical Information (OSTI), using the DOE Energy Link System. DOE Order 241.1B, Scientific and Technical Information Management, or successor, sets forth requirements for STI management and the types of STI products to be announced and submitted to DOE OSTI. STI products identified in DOE Order 241.1B are reportable to OSTI whether publicly releasable, controlled unclassified information or classified.

(d) The Contracting Officer shall ensure that the requirements for STI management, as prescribed in DOE Order 241.1B, or its successor version, are included in accordance with the attendant Contractor Requirements Document or in the statement of work.

■ 143. Section 935.070 is revised to read as follows:

935.070 Research misconduct.

The policy on research misconduct, set forth at 10 CFR part 733, applies to individuals who propose, perform or review research of any kind for the Department of Energy pursuant to a contract. The regulations in 10 CFR part 733 apply regardless of where the research or other activity is conducted or by whom.

PART 936—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 144. The authority citation for part 936 continues to read as follows:

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

936.202–71 [Removed]

■ 145. Section 936.202–71 is removed.

PART 941—ACQUISITION OF UTILITY SERVICES

■ 146. The authority citation for part 941 continues to read as follows:

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

■ 147. Section 941.201–70 is revised to read as follows:

941.201–70 Policy.

Utility services shall be acquired in accordance with part 41 of this title and the Energy Policy Act of 2005 (EPAct 2005) (25 U.S.C. 3502). Pursuant to EPAct 2005, the requirement must be publicized appropriately, and pricing may not exceed prevailing market prices for energy. For Department of Energy (DOE) programs, Acquisition Plans for utility services shall be submitted to DOE's Federal Energy Management Program (FEMP) for review, technical input, and concurrence. For NNSA programs, FEMP review and technical input may be obtained, but FEMP concurrence is not required.

PART 942—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 148. The authority citation for part 942 continues to read as follows:

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

942.705–1 [Amended]

■ 149. Amend section 942.705–1 by removing paragraph (a)(3).

942.705–3 through 942.705–5 [Removed]

■ 150. Sections 942.705–3 through 942.705–5 are removed.

■ 151. Subpart 942.71 is added to read as follows:

Subpart 942.71—Conditional Payment of Fee, Profit, and Other Incentives

Sec.

942.7100 Conditional payment of fee, profit, and other incentives.

942.7100 Conditional payment of fee, profit, and other incentives.

(a) If the contractor does not meet the contract's requirements relating to environment, safety and health (ES&H) (see subpart 923.70), or security or safeguarding of Restricted Data and other classified information (see subpart 904.4), the Contracting Officer may unilaterally reduce otherwise earned fee, fixed fee, profit, or other incentives in accordance with the clause at 952.242–71, Conditional Payment of Fee, Profit, and Other Incentives.

(b) When reviewing performance failures that would warrant a reduction

of otherwise earned fee, the Contracting Officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. The mitigating factors are specified in the clause. The Contracting Officer must obtain the concurrence of the Head of the Contracting Activity—

(1) Prior to effecting any reduction of fee, profit or other incentives otherwise payable under the clause at 952.242–71, Conditional Payment of Fee, Profit, or Other Incentives; and

(2) Prior to determining that no reduction is warranted for performance failure(s) that would otherwise warrant a reduction.

(c) Before pursuing a reduction in the event of a violation by the contractor or any contractor employee of any Department regulation relating to worker safety and health concerns, the Contracting Officer must coordinate with the Office of Enforcement within the Office of Enterprise Assessments (or designated successor office).

(d) Unless the clause for management and operating contracts is prescribed (see 970.1504–3(b)), insert the clause at 952.242–71, Conditional Payment of Fee, Profit, and Other Incentives, in all contracts that contain the clause at 952.204–2, Security Requirements, the clause at 952.250–70, Nuclear Hazards Indemnity Agreement, or both clauses.

PART 945—GOVERNMENT PROPERTY

■ 152. The authority citation for part 945 continues to read as follows:

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

■ 153. Section 945.000 is revised to read as follows:

945.000 Scope of part.

This part and FAR part 45 are not applicable to the management of property by management and operating contractors or other on-site contractors designated in 41 CFR chapter 109, unless otherwise stated in the applicable contract.

945.101, 945.102–70, and 945.102–71 [Removed]

■ 154. Sections 945.101, 945.102–70, and 945.102–71 are removed.

945.570–1 [Amended]

■ 155. Amend section 945.570–1 in paragraph (g) by removing the words ''Personal Property Policy Division'' and adding in their place the words ''Office of Asset Management''.

945.602, 945.602–3, 945.602–70, and 945.603 [Removed]

■ 156. Sections 945.602, 945.602–3, 945.602–70, and 945.603 are removed.

945.670–1 [Amended]

■ 157. Amend section 945.670–1 by removing ''48 CFR 45.606–3'' and adding in its place ''FAR 2.101''.

945.670–3 [Removed]

■ 158. Section 945.670–3 is removed.

945.671 [Amended]

■ 159. Amend section 945.671 by removing ''41 CFR 109–43.5 and 45.41, or its successor and 48 CFR 45.302'' and adding in its place ''41 CFR chapter 109 and FAR 45.302''.

PART 951—USE OF GOVERNMENT SOURCES BY CONTRACTORS

■ 160. The authority citation for part 951 continues to read as follows:

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

■ 161. Amend section 951.102 by revising paragraph (c)(1) to read as follows:

951.102 Authorization to use Government supply sources.

* * * * *

(c)(1) The DOE central point of contact for the assignment, correction, or deletion of activity address codes is the Systems Division, within the Office of Acquisition Management.

* * * * *

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 162. The authority citation for part 952 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*

■ 163. Section 952.203–1 is added to read as follows:

952.203–1 Identification of contractor employees.

As prescribed at 903.1004, insert the following clause:

Identification of Contractor Employees [December 2024]

Contractors and their employees shall be properly identified in communications (*e.g.,* email communications, texts, video and teleconference calls, etc.) and in meetings so that all participants can differentiate between Federal employees and contractor employees.

(End of clause)

■ 164. Section 952.204–2 is revised to read as follows:

952.204–2 Security requirements.

As prescribed in 904.404(d)(1), insert the following clause:

Security Requirements [December 2024]

(a) *Definitions. Classified Information* means information that is classified as Restricted Data or Formerly Restricted Data or Transclassified Foreign Nuclear Information under the Atomic Energy Act of 1954, or information identified as National Security Information and therefore determined to require protection against unauthorized disclosure under E.O. 13526, Classified National Security Information, as amended, or prior or successive Executive orders.

Contracting Officer means the DOE Contracting Officer.

Contract, when this clause is used in a subcontract, means subcontract.

Contractor, when this clause is included in a subcontract, means subcontractor.

Cyber system means any combination of facilities, equipment, personnel, procedures, and communications integrated to provide cyber services; examples include business systems, control systems, and access control systems (National Infrastructure Protection Plan, 2009).

Restricted Data means all data concerning design, manufacture, or utilization of atomic weapons; production of special nuclear material; or use of special nuclear material in the production of energy, but excluding data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954 (42 U.S.C. 2162).

Formerly Restricted Data means information removed from the Restricted Data category based on a joint determination by DOE or its predecessor agencies and the Department of Defense (DoD) that the information—

(1) Relates primarily to the military utilization of atomic weapons; and

(2) Can be adequately protected as National Security Information. However, such information is subject to the same restrictions on transmission to other countries or regional defense organizations that apply to Restricted Data.

National Security Information means information that has been determined, pursuant to E.O. 13526, Classified National Security Information, as amended, or any predecessor or successor order, to require protection

against unauthorized disclosure, and that is marked to indicate its classified status when in documentary form.

Special Access Program means any program that is established to control access, distribution, and to provide protection for particularly sensitive classified information beyond that normally required for RESTRICTED DATA, TOP SECRET, SECRET, or CONFIDENTIAL information.

Special nuclear material means—

(1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material that, pursuant to section 51 of the Atomic Energy Act of 1954 (42 U.S.C. 2071) has been determined to be special nuclear material, but does not include source material; or

(2) Any material artificially enriched by any of the foregoing, but does not include source material.

(b) *Responsibility.* The Contractor shall, in accordance with DOE security regulations and requirements, be responsible for protecting all classified information and all classified matter (including documents, material and special nuclear material) which are in the Contractor's possession in connection with the performance of work under this contract against sabotage, espionage, loss or theft. Except as otherwise expressly provided in this contract, the Contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter or special nuclear material in the possession of the Contractor or any person under the Contractor's control in connection with performance of this contract. If retention by the Contractor of any classified matter is required after the completion or termination of the contract, the Contractor shall identify the items and classification levels and categories of matter proposed for retention, the reasons for the retention, and the proposed period of retention. If the retention is approved by the Contracting Officer, the security provisions of the contract shall continue to be applicable to the classified matter retained. Special nuclear material shall not be retained after the completion or termination of the contract.

(c) *Regulations.* The Contractor shall comply with all security and classification regulations and contract requirements of DOE.

(d) *Access authorizations of personnel.* (1) The Contractor shall not permit any individual to have access to any classified information, special nuclear material, or Special Access Program (SAP) information, except in accordance with the Atomic Energy Act of 1954, as amended, and the DOE's regulations and contract requirements applicable to the particular level and category of classified information or particular category of special nuclear material.

(2) The Contractor shall conduct a thorough review or background review, as defined at 48 CFR 904.401, of any uncleared applicants or employees, and must test individuals for illegal drugs prior to selecting them for positions requiring DOE access authorizations.

(i) The review must—(A) Verify applicant's or employee's educational backgrounds, including any high school diplomas obtained within the past five years, and degrees or diplomas granted by an institution of higher learning;

(B) Contact listed employers for the last three years and listed personal references;

(C) Conduct local law enforcement checks when such checks are not prohibited by state or local law or regulation and when the uncleared applicant or uncleared employee resides in the jurisdiction where the Contractor is located; and

(D) Conduct a credit check and other checks as appropriate.

(ii) For DOE access authorization, contractor reviews are not required for applicants who possesses a current access authorization from DOE or another Federal agency, or whose access authorization may be reapproved without a federal background investigation pursuant to Executive Order 12968 of August 2, 1995, as amended, Access to Classified Information, sections 3.3(c) and (d).

(iii) In collecting and using this information to make a determination as to whether it is appropriate to select an uncleared applicant or uncleared employee to a position requiring an access authorization, the Contractor must comply with all applicable laws, regulations, and Executive orders, including those—

(A) Governing the processing and privacy of an individual's information, such as the Fair Credit Reporting Act, Americans with Disabilities Act Amendments Act of 2008 (ADAAA), and Health Insurance Portability and Accountability Act; and

(B) prohibiting discrimination in employment, such as under the Genetic Information Nondiscrimination Act of 2008, ADAAA, Title VII and the Older Workers Benefit and Protection Act of 1990, including with respect to pre- and post-offer of employment disability related questioning.

(iv) In addition to a review, each candidate for a DOE access authorization must be tested to demonstrate the absence of any illegal drug, as defined in 10 CFR 707.4. All positions requiring access authorizations are deemed *testing designated positions* in accordance with 10 CFR part 707. All employees possessing access authorizations are subject to applicant, random or for cause testing for use of illegal drugs. DOE will not process candidates for a DOE access authorization unless their tests confirm the absence from their system of any illegal drug.

(v) When an uncleared applicant or uncleared employee receives an offer of employment for a position that requires a DOE access authorization, the Contractor shall not place that individual in such a position prior to the individual's receipt of a DOE access authorization, unless an approval has been obtained from the head of the cognizant local DOE security office. If the individual is hired and placed in the position prior to receiving an access authorization, the uncleared employee may not be afforded access to classified information or matter or special nuclear material (in categories requiring access authorization) until an access authorization has been granted.

(vi) The Contractor must maintain a record of information concerning each uncleared applicant or uncleared employee who is selected for a position requiring an access authorization. Upon request only, the following information will be furnished to the head of the cognizant local DOE Security Office:

(A) The date(s) each Review was conducted;

(B) Each entity that provided information concerning the individual;

(C) A certification that the review was conducted in accordance with all applicable laws, regulations, and Executive orders, including those governing the processing and privacy of an individual's information collected during the review;

(D) A certification that all information collected during the review was reviewed and evaluated in accordance with the Contractor's personnel policies; and

(E) The results of the test for illegal drugs.

(vii) *Criminal liability.* It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to protect any classified information, special nuclear material, or other Government property that may come to the Contractor or any person under the Contractor's control in connection with work under this contract, may subject the Contractor, its agents, employees, or Subcontractors to

criminal liability under the laws of the United States (see the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.;* 18 U.S.C. 793 and 794).

(e) *Foreign ownership, control, or influence (FOCI).* (1) The Contractor shall immediately provide the cognizant security office written notice of any change in the extent and nature of FOCI over the Contractor which would affect any answer to the questions presented in the Standard Form (SF) 328, *Certificate Pertaining to Foreign Interests,* executed prior to award of this contract. The Contractor will submit the FOCI information in the format directed by DOE. When completed, the Contractor must sign the SF 328 and submit it to the Contracting Officer. In addition, any notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice, shall also be furnished concurrently to the Contracting Officer and to the cognizant security office.

(2) If a Contractor has changes involving FOCI, DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, DOE will consider proposals made by the Contractor to avoid or mitigate foreign influences.

(3) If the cognizant security office at any time determines that the Contractor is, or is potentially, subject to FOCI, the Contractor shall comply with such instructions as the Contracting Officer shall provide in writing to protect any classified information or special nuclear material.

(4) The Contracting Officer may terminate this contract for default either if the Contractor fails to meet obligations imposed by this clause or if the Contractor creates a FOCI situation in order to avoid performance or a termination for default. The Contracting Officer may terminate this contract for convenience if the Contractor becomes subject to FOCI for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem.

(f) *Employment announcements.* When placing announcements seeking applicants for positions requiring access authorizations, the Contractor shall include in the written vacancy announcement, a notification to prospective applicants that reviews, and tests for the absence of any illegal drug as defined in 10 CFR 707.4, will be conducted by the employer and a background investigation by the Federal Government may be required to obtain an access authorization prior to employment, and that subsequent reinvestigations may be required. If the position is covered by the Counterintelligence Evaluation Program regulations at 10 CFR part 709, the announcement should also alert applicants that successful completion of a counterintelligence evaluation may include a counterintelligence-scope polygraph examination.

(g) *Flow down to subcontracts.* The Contractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph and related DOE policies, in all subcontracts that will require subcontractor employees to possess access authorizations.

Additionally, the Contractor must require such subcontractors to have an existing DOD or DOE facility clearance or submit a completed SF 328, *Certificate Pertaining to Foreign Interests,* as required in title 48 of the CFR consistent with the clause at 48 CFR 952.204–73, Facility Clearance, and obtain a foreign ownership, control and influence determination prior to award of a subcontract. Facility clearance may be granted prior to award or after award of a subcontract in accordance with the clause at 48 CFR 952.204–73, Facility Clearance. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the Contracting Officer.

(End of clause)

■ 165. Section 952.204–70 is revised to read as follows:

952.204–70 Classification/Declassification.

As prescribed in 904.404(d)(2), the following clause shall be included in all contracts which involve classified information:

Classification/Declassification [December 2024]

(a) *Definitions. Classified information* means information that is classified as Restricted Data, Formerly Restricted Data or Transclassified Foreign Nuclear Information under the Atomic Energy Act of 1954, or information identified as National Security Information and therefore determined to require protection against unauthorized disclosure under E.O. 13526, Classified National Security Information, as amended, or prior or successive Executive orders.

Contractor, as used in this clause, includes subcontractors.

Document means any recorded information, regardless of the nature of the medium or the method or circumstances of recording (*e.g.,* email).

Information means facts, data, or knowledge itself.

Material means a product or substance that contains or reveals information, regardless of its physical form or characteristics.

(b) The Contractor shall comply with all provisions of DOE's regulations and DOE directives applicable to work involving the classification and declassification of information, documents, or material. (Note: The decision to classify or declassify information is considered an inherently Governmental function. As such, only Government personnel may serve as Federal Government original classifiers. Both Government and Contractor personnel may serve as derivative classifiers; this involves making decisions based upon classification guidance and, where authorized by DOE directives, portion marked source documents that reflects the decisions of Federal Government. Both Government and Contractor personnel may also serve as derivative declassifiers; this involves making decisions based only on classification guidance).

(c) The Contractor shall ensure that any document or material that may contain classified information is reviewed by either a derivative classifier, or in the case of documents intended for public release, a classification officer or a specifically designated DC, in accordance with classification regulations, and DOE directives. In accordance with DOE directives DCs must use classification/declassification guidance furnished to the Contractor by the DOE or a portion marked source document, when authorized to determine whether it contains classified information prior to dissemination. For information not addressed in classification/declassification guidance, but whose sensitivity appears to warrant classification, the Contractor shall ensure it is reviewed by a Federal Government original classifier or the Director, Office of Classification in accordance with classification directives or regulations.

(d) The Contractor shall ensure that existing classified documents (containing either Restricted Data, Formerly Restricted Data, Transclassified Foreign Nuclear Information, or National Security Information) in its possession or under its control are periodically reviewed by a Federal Government or Contractor derivative declassifier in accordance with classification regulations, DOE directives and classification/declassification guidance furnished to the Contractor by DOE to determine if

the documents are no longer appropriately classified. Priorities for declassification review of classified documents shall be based on the degree of public and researcher interest and the likelihood of declassification upon review. Documents that no longer contain classified information are to be declassified. Declassified documents then shall be reviewed to determine if they are publicly releasable. Documents that are declassified and determined to be publicly releasable are to be made available to the public in order to maximize the public's access while minimizing security costs.

(e) *Subcontracts.* The Contractor shall insert this clause in any subcontract that involves or may involve access to classified information.

(End of clause)

■ 166. Section 952.204–73 is revised to read as follows:

952.204–73 Facility clearance.

As prescribed in 904.404(d)(5), insert the following provision in all solicitations and contracts which require the use of Standard Form 328, Certificate Pertaining to Foreign Interests, for contracts or subcontracts subject to the provisions of subpart 904.70:

Facility Clearance [December 2024]

Notices to Offerors and the Contract Requirements of the Successful Offeror (Contractor) Section 2536 of title 10, United States Code, prohibits the award of a contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract unless a waiver is granted by the Secretary of Energy. In addition, a Facility Clearance and foreign ownership, control and influence information are required when the contract or subcontract to be awarded is expected to require employees to have access authorizations.

An offeror who has either a Department of Defense or a Department of Energy Facility Clearance generally need not resubmit the following foreign ownership, control and influence information unless specifically requested to do so. Instead, provide your DOE Facility Clearance code or your DOD assigned commercial and government entity (CAGE) code. If uncertain, consult the office that issued this solicitation.

(a) *Use of Certificate Pertaining to Foreign Interests, Standard Form 328.* (1) The contract work to be performed by the successful offeror anticipated by this solicitation will require access to classified information or special nuclear material. Such access will require a Facility Clearance for the Contractor's (that is, the successful offeror's) organization and access authorizations (security clearances) for Contractor personnel working with the classified information or special nuclear material. To obtain a Facility Clearance the Contractor must submit the Standard Form 328, Certificate Pertaining to Foreign Interests, and all required supporting documents to form a complete Foreign Ownership, Control or Influence (FOCI) Package. The Contractor must submit the FOCI Package in the format directed by DOE. After the FOCI Package is completed, the Contractor must print and sign one copy of the SF 328 and submit it to the Contracting Officer.

(2) Information submitted by the offeror in the Standard Form 328 will be used solely for the purposes of evaluating foreign ownership, control or influence and will be treated by DOE, to the extent permitted by law, as business or financial information submitted in confidence.

(3) Following submission of a Standard Form 328 and prior to contract award, the successful offeror/Contractor shall immediately submit to the Contracting Officer written notification of any changes in the extent and nature of FOCI information it submitted that could affect its answers to the questions in Standard Form 328. Following award of a contract, the Contractor must immediately submit to the cognizant security office written notification of any changes in the extent and nature of FOCI information it submitted that could affect its answers to the questions in Standard Form 328. Notice of changes in FOCI information that are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice must also be reported concurrently to the cognizant security office.

(b) *Definitions.* (1) *Foreign Interest* means any of the following—

(i) A foreign government, foreign government agency, or representative of a foreign government;

(ii) Any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its possessions and trust territories; and

(iii) Any person who is not a citizen or national of the United States.

(2) *Foreign Ownership, Control, or Influence (FOCI)* means the situation where the degree of ownership, control, or influence over a Contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may result.

(c) *Facility Clearance* means an administrative determination that a facility is eligible to access, produce, use or store classified information, or special nuclear material. A Facility Clearance is based upon a determination that satisfactory safeguards and security measures are carried out for the activities being performed at the facility. It is DOE policy that all Contractors or Subcontractors requiring access authorizations be processed for a Facility Clearance at the level appropriate to the activities being performed under the contract. Approval for a Facility Clearance shall be based upon—

(1) A favorable foreign ownership, control, or influence (FOCI) determination based upon the Contractor's response to the ten questions in Standard Form 328 and any required, supporting data provided by the Contractor;

(2) A contract or proposed contract containing the appropriate security clauses;

(3) Approved safeguards and security plans which describe protective measures appropriate to the activities being performed at the facility;

(4) An established Reporting Identification Symbol code for the Nuclear Materials Management and Safeguards Reporting System if access to nuclear materials is involved;

(5) A survey conducted no more than 6 months before the Facility Clearance date, with a composite facility rating of satisfactory, if the facility is to possess classified matter or special nuclear material at its location;

(6) Appointment of a Facility Security Officer, who must possess or be in the process of obtaining an access authorization equivalent to the Facility Clearance; and, if applicable, appointment of a Materials Control and Accountability Representative; and

(7) Access authorizations for key management personnel who will be determined on a case-by-case basis, and who possess or are in the process of obtaining access authorizations equivalent to the level of the Facility Clearance.

(d) *Facility Clearance and Employees Requiring Access Authorizations Prior to DOE's Granting Facility Clearance.*

(1) A Facility Clearance is required for this contract, although not necessarily prior to contract award. A favorable FOCI determination for this contract is required prior to contract award. It must

be rendered by the responsible cognizant security office. The Contracting Officer may require the offeror to submit additional information as deemed pertinent to this determination.

(i) The DOE must determine that awarding this contract to the offeror will not pose an undue risk to the common defense and security as a result of its access to classified information or special nuclear material in the performance of the contract. The Contracting Officer may require the offeror to submit such additional information as deemed pertinent to this determination.

(ii) Before contract award, after obtaining a favorable FOCI determination, the successful offeror/Contractor may be eligible to obtain a Facility Clearance.

(iii) If the successful offeror/Contractor does not obtain a Facility Clearance before contract award, after contract award the Contractor shall submit the necessary information to obtain a Facility Clearance and to obtain personnel Interim Access Authorizations in accordance with Departmental policies and procedures.

(2) The DOE may grant certain of the Contractor's Key Management Personnel and the Contractor's Facility Security Officer Interim Access Authorization. If granted Interim Access Authorization, the Contractor's Key Management Personnel and the Contractor's Facility Security Officer will have access to classified information or special nuclear material.

(e) A Facility Clearance is required even for contracts that do not require the Contractor's corporate offices to receive, process, reproduce, store, transmit, or handle classified information or special nuclear material, but that require DOE access authorizations for the Contractor's employees to perform work at a DOE location. This type of facility is identified as a non-possessing facility.

(f) Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall insert provisions similar to the foregoing in all subcontracts and purchase orders (or vendors for purchase orders) requiring access authorizations for access to classified information or special nuclear material. Subcontractors shall be directed to provide responses to the questions in Standard Form 328, Certificate Pertaining to Foreign Interests, directly to the prime Contractor or the Contracting Officer for the prime contract.

Notice to Offerors—Contents Review (Please Review Before Submitting)

Prior to submitting the Standard Form 328, required by paragraph (a)(1) of this clause, the offeror should review the FOCI submission to ensure that:

(1) The Standard Form 328 has been signed and dated by an authorized official of the offeror;

(2) If publicly owned, the Contractor's most recent annual report, and its most recent proxy statement for its annual meeting of stockholders; or, if privately owned, the audited, consolidated financial information for the most recently closed accounting year has been attached;

(3) A copy of the company's articles of incorporation and an attested copy of the company's by-laws, or similar documents filed for the company's existence and management, and all amendments to those documents are provided;

(4) A list identifying the organization's owners, officers, directors, and executive personnel, including their names, social security numbers, citizenship, titles of all positions they hold within the organization, and what clearances, if any, they possess or are in the process of obtaining, and identification of the government agency(ies) that granted or will be granting those clearances; and

(5) A summary FOCI data sheet is provided.

Note: A FOCI submission must be attached for each tier parent organization (*i.e.,* ultimate parent and any intervening levels of ownership). If any of these documents are missing, award of the contract cannot be completed.

(End of provision)

■ 167. Section 952.204–74 is added to read as follows:

952.204–74 Counterintelligence.

As prescribed in 904.404(d)(7), insert the following clause:

Counterintelligence [December 2024]

(a) The Contractor shall take all reasonable precautions in performing the work under this contract to protect Department of Energy (DOE) programs, facilities, technology, personnel, unclassified sensitive information and classified matter from foreign intelligence threats and activities conducted for governmental or industrial purposes, in accordance with the current version of DOE Order 475.1, Counterintelligence Program; E.O. 12333 of December 4, 1981, U.S. Intelligence Activities; and other applicable national and DOE counterintelligence requirements.

(b) The Contractor shall appoint qualified employees to function as contractor counterintelligence officers. A contractor counterintelligence officer is responsible for conducting defensive counterintelligence briefings and debriefings of employees traveling to foreign countries or interacting with foreign nationals; providing thoroughly documented written reports relative to targeting, suspicious activity and other matters of counterintelligence interest; immediately reporting targeting, suspicious activity and other counterintelligence concerns to the DOE Headquarters Counterintelligence Division; and providing assistance to other elements of the U.S. Intelligence Community as stated in E.O. 12333, DOE Order 475.1, and other applicable national and DOE counterintelligence requirements.

(End of clause)

952.204–76 [Removed]

■ 168. Section 952.204–76 is removed.

■ 169. Section 952.204–77 is amended by revising the introductory text to read as follows:

952.204–77 Computer security.

As prescribed in 904.404(d)(6), insert the following clause:

* * * * *

■ 170. Section 952.204–78 is added to read as follows:

952.204–78 DOE Directives.

As prescribed in 904.7301, insert the following clause:

DOE Directives [December 2024]

(a) In performing work under this contract, the Contractor shall comply with the requirements of Department of Energy Directives, or parts thereof, identified in the List of Applicable Directives appended to this contract, identified in the Statement of Work or identified in a special clause within this contract. The Contracting Officer may revise the list of applicable Directives by bilateral modification to the contract. Prior to the modification, the Contracting Officer shall notify the Contractor in writing of DOE's intent and provide the contractor with the opportunity to: assess the impact on cost, funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days of being notified, the Contractor shall advise the Contracting Officer in writing of the potential impact of the modification.

The Contracting Officer and Contractor shall decide whether or not to proceed with the modification. Before executing the modification, they must agree to any appropriate changes to other contract terms and conditions, including cost and schedule, pursuant to the clause of this contract entitled ''Changes.''

(b) Regardless of the performer of the work, the Contractor is responsible for compliance with the requirements of this clause. The Contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(End of clause)

■ 171. Section 952.215–70 is revised to read as follows:

952.215–70 Key personnel.

As prescribed in 915.408–70, the contracting officer shall insert the following clause:

Key Personnel [December 2024]

(a) The personnel listed below or elsewhere in this contract [Insert cross-reference, if applicable] are considered essential to the work being performed under this contract. Before removing, replacing, or diverting any of the listed or specified personnel, the Contractor must:

(1) Notify the Contracting Officer reasonably in advance and submit justification including resumes for any proposed substitutions; and

(2) Obtain the Contracting Officer's written approval. Notwithstanding the foregoing, the Contractor may immediately remove or suspend any key person if necessary to maintain satisfactory standards of employee competency, conduct, and integrity under the clause at 48 CFR 970.5203–3, Contractor's Organization, although the Contractor must notify Contracting Officer prior to or concurrently with such action.

(b) The list of personnel may, with the consent of the contracting parties, be amended from time to time during the course of the contract to add or delete personnel. The Contractor must provide written notice to the cognizant security office if changes to the list of personnel affect key personnel connected to a facility clearance.

[*Insert List of Key Personnel by position/title, reflecting the actual position title of the top-level key personnel, such as Program Manager, Laboratory Director, Project Manager, etc. unless listed elsewhere in the contract*]

(End of clause)

952.216–15 [Removed]

■ 172. Section 952.216–15 is removed.

■ 173. Section 952.223–71 is revised to read as follows:

952.223–71 Integration of environment, safety, and health into work planning and execution.

As prescribed in 923.7003, insert the following clause:

Integration of Environment, Safety, and Health Into Work Planning and Execution [December 2024]

(a) *Definitions.* ''Employees'' means both contractor and subcontractor employees.

''Safety'' encompasses environment, safety and health, including pollution prevention and waste minimization.

(b) In performing work under this contract, the Contractor shall perform work safely, in a manner that ensures adequate protection for employees, the public, and the environment, and shall be accountable for the safe performance of work. The Contractor shall exercise a degree of care commensurate with the work and the associated hazards. The Contractor shall ensure that management of environment, safety and health (ES&H) functions and activities becomes an integral but visible part of the Contractor's work planning and execution processes. The Contractor shall, in the performance of work, ensure that:

(1) Line management is responsible for the protection of employees, the public, and the environment. Line management includes those Contractor and subcontractor employees who manage or supervise employees.

(2) Clear lines of authority and responsibility for ensuring ES&H are established and maintained at all organizational levels.

(3) Personnel possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities.

(4) Resources are effectively allocated to address ES&H, programmatic, and operational considerations. Protecting employees, the public, and the environment is a priority whenever activities are planned and performed.

(5) Before work is performed, the associated hazards are evaluated and an agreed-upon set of ES&H standards and requirements are established that, if properly implemented, provide adequate assurance that employees, the public, and the environment are protected from adverse consequences.

(6) Administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and associated hazards. Emphasis should be on designing the work and/or controls to reduce or eliminate the hazards and to prevent accidents and unplanned releases and exposures.

(7) The conditions and requirements to be satisfied for operations to be initiated and conducted are established and agreed-upon by DOE and the Contractor. These agreed-upon conditions and requirements are requirements of the contract and binding upon the Contractor. The extent of documentation and level of authority for agreement shall be tailored to the complexity and hazards associated with the work and shall be established in a Safety Management System.

(c) The Contractor shall manage and perform work in accordance with a documented Safety Management System that, at a minimum, fulfills all conditions in paragraph (b) of this clause. Documentation of this system shall describe how the Contractor will—

(1) Define the scope of work;

(2) Identify and analyze hazards associated with the work;

(3) Develop and implement hazard controls;

(4) Perform work within controls; and

(5) Provide feedback on adequacy of controls and continue to improve safety management.

(d) The system shall describe how the Contractor will establish, document, and implement safety performance objectives, performance measures, and commitments in response to DOE program and budget execution guidance while maintaining the integrity of the system. The system shall also describe how the Contractor will measure system effectiveness.

(e) The Contractor shall submit to the Contracting Officer documentation of its system for review and approval. Dates for submittal, discussions, and revisions to the system will be established by the Contracting Officer. Guidance on the preparation, content, review, and approval of the system will be provided by the Contracting Officer. On an annual basis, the Contractor shall review and update, for DOE approval, its safety performance objectives, performance measures, and commitments consistent with and in response to DOE's program and budget execution guidance and direction. Resources shall be identified and allocated to meet the safety objectives and performance commitments as well as maintain the integrity of the entire System. Accordingly, the system shall be integrated with the Contractor's business processes for work planning,

budgeting, authorization, execution, and change control.

(f) The Contractor shall comply with, and assist the Department of Energy in complying with, ES&H requirements of all applicable laws and regulations, and applicable directives in accordance with the DOE Directives clause. The Contractor shall cooperate with Federal and non-Federal agencies having jurisdiction over ES&H matters under this contract.

(g) The Contractor shall promptly evaluate and resolve any noncompliance with applicable ES&H requirements and the System. If the Contractor fails to provide resolution or if, at any time, the Contractor's acts or failure to act causes substantial harm or an imminent danger to the environment or health and safety of employees or the public, the Contracting Officer may issue an order stopping work in whole or in part. Any stop work order issued by a contracting officer under this clause (or issued by the Contractor to a subcontractor in accordance with paragraph (i) of this clause) shall be without prejudice to any other legal or contractual rights of the Government. In the event that the Contracting Officer issues a stop work order, an order authorizing the resumption of the work may be issued at the discretion of the Contracting Officer. The Contractor shall not be entitled to an extension of time or additional fee or damages by reason of, or in connection with, any work stoppage ordered in accordance with this clause.

(h) Regardless of the performer of the work, the Contractor is responsible for compliance with the ES&H requirements applicable to this contract. The Contractor is responsible for flowing down the ES&H requirements applicable to this contract to subcontracts at any tier to the extent necessary to ensure the Contractor's compliance with the requirements.

(i) *Subcontracts.* The Contractor shall include a clause substantially the same as this clause in subcontracts involving complex or hazardous work on site at a DOE-owned or-leased facility. Such subcontracts shall provide for the right to stop work under the conditions described in paragraph (g) of this clause. Depending on the complexity and hazards associated with the work, the Contractor may choose not to require the subcontractor to submit a Safety Management System for the Contractor's review and approval.

(End of clause)

952.223–75 [Amended]

■ 174. Amend section 952.223–75 in the introductory text by removing ''923.7003(h)'' and adding in its place ''923.7003(g)''.

952.223–76 and 952.223–77 [Removed]

■ 175. Sections 952.223–76 and 952.223–77 are removed.

■ 176. Section 952.223–78 is revised to read as follows:

952.223–78 Sustainable acquisition program.

As prescribed in 923.172, insert the following clause:

Sustainable Acquisition Program [December 2024]

(a) Pursuant to DOE policy, as specified in 48 CFR 923.170, the Contractor shall maintain a sustainable acquisition program that ensures procurement of environmentally preferable products and services as required of DOE by statute, regulation and Executive order. This program shall apply to all products and services acquired in performance of this contract, including first-tier subcontracts, which have reasonable opportunities for environmentally preferable purchasing, consistent with the requirements specified above.

(b) The Contractor shall coordinate its sustainable acquisition activities and submit any required annual reports at the end of the Government fiscal year, through their Sustainability Coordinator (or equivalent), or as otherwise directed by the Contracting Officer. Reporting under this paragraph is only required if the contract offers subcontracting opportunities exceeding the simplified acquisition threshold in any contract year.

(c) *Subcontracts.* These provisions shall be flowed down only to first-tier subcontracts exceeding the simplified acquisition threshold that support operation of the DOE facility and offer significant subcontracting opportunities for energy-efficient or environmentally sustainable products or services. When this clause is included in a subcontract, the word ''Contractor'' will be understood to mean ''Subcontractor.''

(End of clause)

■ 177. Section 952.226–70 is revised to read as follows:

952.226–70 Subcontracting goals under section 3021(a) of the Energy Policy Act of 1992.

As prescribed in 926.7008(b)(1), insert the following provision:

Subcontracting Goals Under Section 3021(A) of the Energy Policy Act of 1992 (Pub. L. 102–486) [December 2024]

(a) *Definition.* Energy Policy Act (EPAct 1992) target groups, as used in this provision, has the meaning conveyed in 48 CFR 926.7002.

(b) Section 3021 of the EPAct 1992 establishes a goal of award of 10 percent of the contract dollar value for prime and subcontract EPAct 1992 awards to EPAct 1992 target groups.

(c) The Offeror, if other than one of the three groups specified in paragraph (a) of this clause, shall submit, as part of its business management proposal or, if this solicitation requires the submission of a Small Business Subcontracting Plan, then as part of that plan, unless otherwise stated in the proposal preparation instructions, individual subcontracting goals for each of the EPAct 1992 target groups. Individual goals shall be expressed in terms of a percentage of the Offeror's proposed contract dollar value. In addition, the Offeror shall provide a description of the nature of the effort to be performed by each of the three groups, and, if possible, the identity of the contemplated subcontractor(s).

(d) Unless otherwise stated, such goals shall be considered in the evaluation of the Business Management Proposal as discussed in Section M of this solicitation or, if applicable, as part of the evaluation of the Small Business Subcontracting Plan.

(End of provision)

■ 178. Section 952.226–71 is revised to read as follows:

952.226–71 Utilization of Energy Policy Act target entities.

As prescribed in 926.7008(b)(2), insert the following clause:

Utilization of Energy Policy Act 1992 Target Entities [December 2024]

(a) *Definition.* Energy Policy Act (EPAct 1992) target groups, as used in this clause, has the meaning conveyed in 48 CFR 926.7002.

(b) *Obligation.* In addition to its obligations under the clause of this contract entitled Utilization of Small Business Concerns (48 CFR 52.219–8), the contractor, in performance of this contract, agrees to provide its best efforts to competitively award subcontracts to entities from among the EPAct 1992 target groups.

(End of clause)

■ 179. Section 952.226–72 is revised to read as follows:

952.226–72 Energy Policy Act subcontracting goals and reporting requirements.

As prescribed in 926.7008(c), insert the following clause:

Energy Policy Act 1992 Subcontracting Goals and Reporting Requirements [December 2024]

(a) *Definition.* Energy Policy Act (EPAct 1992) target groups, as used in this clause, has the meaning conveyed in 48 CFR 926.7002.

(b) *Goals.* The Contractor, in performance of this contract, agrees to provide its best efforts to award subcontracts to the following classes of entities—

(1) Small business concerns controlled by socially and economically disadvantaged individuals or by women: * * * percent;

(2) Historically Black colleges and universities: * * * percent;

(3) Colleges or universities having a student body in which more than 20 percent of the students are Hispanic Americans or Native Americans: * * * percent;

(4) Qualified HUBZone small business concerns: * * * percent.

[* * * These goals are stated in a percentage reflecting the relationship of estimated award value of subcontracts to the value of this contract and appear elsewhere in this contract.]

(c) *Reporting requirements.* (1) The Contractor agrees to report, on an annual Federal Government fiscal year basis, its progress against the goals by providing the actual annual dollar value of subcontract payments for the preceding 12-month period, and the relationship of those payments to the incurred contract costs for the same period. Reports submitted pursuant to this clause must be received by the Contracting Officer (or designee) not later than 45 days after the end of the reporting period.

(2) If the contract includes reporting requirements under 48 CFR 52.219–9, Small Business Subcontracting Plan, the Contractor's progress against the goals stated in paragraph (b) of this clause shall be included as an addendum to the Individual Subcontract Report and/or the Summary Subcontract Report using the Electronic Subcontracting Reporting System (available at *https://www.esrs.gov/*) for the period that corresponds to the end of the Federal Government fiscal year.

(End of clause)

■ 180. Amend section 952.226–73 by revising the section heading, introductory text, clause heading and date, and paragraph (a) to read as follows:

952.226–73 Energy Policy Act target group representation.

As prescribed in 926.7008(a)(1), insert the following provision:

Energy Policy Act of 1992 Target Group Representation [December 2024]

(a) The Offeror is:

(1) _____ An institution of higher education that meets the requirements of 34 CFR 600.4(a), and has a student enrollment that consists of at least 20 percent—

(i) Hispanic Americans, *i.e.,* students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof; or

(ii) Native Americans, *i.e.,* American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) _____ An institution of higher learning determined to be a Historically Black College and University by the Secretary of Education pursuant to 34 CFR 608.2; or

(3) _____ A small business concern, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that is owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women; or

(4) Qualified HUBZone small business concerns, as defined at 48 CFR 2.101.

* * * * *

■ 181. Amend section 952.226–74 by revising the section heading and clause heading and date to read as follows:

952.226–74 Workforce restructuring and displaced employee hiring preference.

* * * * *

Workforce Restructuring and Displaced Employee Hiring Preference [December 2024]

* * * * *

■ 182. Amend section 952.227–9 by:

■ a. Revising the introductory text and clause date;

■ b. In paragraph (b), adding a heading and revising the first sentence; and

■ c. Adding a sentence at the end of paragraph (c).

The revisions and addition read as follows:

952.227–9 Refund of royalties.

As prescribed in 927.202–5, insert the following clause:

Refund of Royalties [December 2024]

* * * * *

(b) *Definition.* ''Royalties'' means any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this contract or any subcontract here-under. * * *

(c) * * * For contracts greater than five years in duration, the contractor shall furnish the statement to the Contracting Officer every five years.

* * * * *

■ 183. Section 952.227–11 is revised to read as follows:

952.227–11 Patent rights—retention by the contractor.

Alternate I [December 2024] As prescribed at 970.2703–2(a), insert the most recent Standard Patent Rights clause at 37 CFR 401.14 with the following modifications:

Replace the heading (''Standard Patent Rights'') with ''37 CFR 401.14 Standard Patent Rights with Alternate I of 48 CFR 952.227–11 Patent rights—retention by the contractor''.

Replace paragraphs (g)(1) and (2) with the following:

(g) Subcontracts

(1) The contractor will include this clause, suitably modified to identify the parties, in all subawards, regardless of tier, for experimental, developmental or research work to be performed by a domestic small business firm or nonprofit organization. The subcontractor will retain all rights provided for the contractor in this clause, and the contractor will not, as part of the consideration for awarding the subaward, obtain rights in the subcontractor's subject inventions.

(2) The contractor will include in all other subawards, regardless of tier, for experimental developmental or research work the patent rights clause directed by the Contracting Officer.

Replace paragraph (l), Communications, with the following:

(l) Communication

Unless otherwise directed by DOE Patent Counsel, all reports and notifications required by this clause shall be submitted via the iEdison invention management system.

(End of alternate)

Alternate II [December 2024] As prescribed at 970.2703–2(a), insert the most recent Standard Patent Rights clause at 37 CFR 401.14 with the following modifications when the Determination of Exceptional Circumstances (DEC) under 35 U.S.C. 202(a) applies:

Replace the heading (''Standard Patent Rights'') with ''37 CFR 401.14 Standard Patent Rights with Alternate II of 48 CFR 952.227–11 Patent Rights-Retention by the Contractor

(DETERMINATION OF EXCEPTIONAL CIRCUMSTANCES)''.

Add the following paragraph:

(d)(3) Upon breach of paragraph (n) of this Patent Rights clause.

Replace paragraphs (g)(1) and (2) with the following:

(g) Subcontracts

(1) The contractor will include this clause, suitably modified to identify the parties, in all subawards, regardless of tier, for experimental, developmental or research work to be performed by a domestic small business firm or nonprofit organization. The subcontractor will retain all rights provided for the contractor in this clause, and the contractor will not, as part of the consideration for awarding the subaward, obtain rights in the subcontractor's subject inventions.

(2) The contractor will include in all other subawards, regardless of tier, for experimental developmental or research work the patent rights clause directed by the Contracting Officer.

Replace paragraph (l), Communications, with the following:

(l) Communication

Unless otherwise directed by DOE Patent Counsel, all reports and notifications required by this clause shall be submitted via the iEdison invention management system.

Add the following paragraphs (n) and (o):

(n) The Contractor agrees that any products embodying any subject invention or produced through the use of any subject invention will be manufactured substantially in the United States unless the Contractor can show to the satisfaction of DOE that it is not commercially feasible. In the event DOE agrees to foreign manufacture, there will be a requirement that the Government's support of the technology be recognized in some appropriate manner, *e.g.,* alternative binding commitments to provide an overall net benefit to the U.S. economy. The Contractor agrees that it will not license, assign or otherwise transfer any subject invention to any entity, at any tier, unless that entity agrees to these same requirements. In the event that the Contractor or other such entity receiving rights in the Subject Invention undergoes a change in ownership amounting to a controlling interest, the Contractor or other such entity receiving rights shall ensure continual compliance with the requirements of this paragraph (n) and shall inform DOE, in writing, of the change in ownership within six months of the change. The Contractor and any successor assignee will convey to DOE, upon written request from DOE, title to any subject invention, upon a breach of this paragraph (n). The Contractor will include this paragraph (n) in all subawards/contracts, regardless of tier, for experimental, developmental or research work.

(o) The requirements, rights and administration of paragraph (n) are further clarified as follows:

1. Waivers. The Contractor (or any entity subject to paragraph (n)) may request a waiver or modification of paragraph (n). Such waivers or modifications may be granted when DOE determines that (1) the Contractor (or any entity subject to paragraph (n)) has demonstrated, with quantifiable data, that manufacturing in the United States is not commercially feasible and (2) a waiver or modification would best serve the interests of the United States and the general public.

2. Final determination of breach of paragraph (n). If DOE determines the Contractor is in breach of paragraph (n), the Department may issue a final written determination of such breach. If such determination includes a demand for title to the subject inventions under the award, the demand for title will cause an immediate conveyance and assignment of all rights to all subject inventions under the award to the United States Government, including all pending U.S. and foreign patent applications and all U.S. and foreign patents that cover any subject invention, without compensation. Any such final determination shall be signed by the cognizant DOE Contracting Officer with the concurrence of the Assistant General Counsel for Technology Transfer & Intellectual Property. Advanced notice will be provided for comment to the Contractor before any final written determination by DOE is issued.

3. Pursuant to Contractor's agreement in paragraph (n) to not license, assign or otherwise transfer rights to subject inventions at any tier unless the entity agrees to paragraph (n): any such license, assignment, or other transfer of right to any subject invention developed under the award shall contain paragraph (n) suitably modified to properly identify the parties. If a licensee, assignee, or other transferee of rights to any subject invention is finally determined by DOE in writing to be in breach of paragraph (n), the applicable license, assignment or other transfer shall be deemed null and void. Advanced notice will be provided for comment to the non-complying party before any final written determination by DOE is made.

4. For clarity, if the forfeiture of title to any subject invention is due to a breach of paragraph (n), the Contractor shall not be entitled to any compensation, or to a license to the subject invention including the reserved license in paragraph (e)(1), unless DOE grants a license through a separately agreed upon licensing agreement.

5. Authority. The requirements and administration of paragraph (n) is in accordance with the Determination of Exceptional Circumstances (DEC) under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies executed by DOE on June 7, 2021, or any other applicable DEC. A copy of the DEC is available at *https://www.energy.gov/gc/determination-exceptional-circumstances-decs.* By accepting or acknowledging the award, the Contractor is also acknowledging that it has received a copy of the DEC through the foregoing link. As set forth in 37 CFR 401.4, any nonprofit organization or small business firm as defined by 35 U.S.C. 201 affected by any DEC has the right to appeal the imposition of the DEC within thirty (30) working days from the Contractor's acceptance or acknowledgement of this award.

(End of alternate)

■ 184. Amend 952.227–13 by:

■ a. Revising the introductory text, clause date, and paragraphs (b)(2)(iii), (e)(2), (e)(3)(i), and (h)(1);

■ b. Removing paragraph (k);

■ c. Redesignating paragraphs (l) and (m) as paragraphs (k) and (l);

■ d. Revising the introductory text of newly redesignated paragraph (l)(2) and the last sentence of newly redesignated paragraph (l)(3); and

■ e. Adding Alternates I and II at the end of the section following ''(End of clause)''.

The revisions and additions read as follows:

952.227–13 Patent rights—acquisition by the Government.

As prescribed at 927.303(d), insert the following clause:

Patent Rights—Acquisition by the Government [December 2024]

* * * * *

(b) * * *

(2) * * *

(iii) Not less than sixty (60) days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application.

* * * * *

(e) * * *

(2) Unless otherwise directed by DOE Patent Counsel, the Contractor shall disclose each subject invention to DOE

through the iEdison invention management system within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Contractor. The disclosure to DOE shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Contractor shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor. The report should also include any request for a greater rights determination in accordance with paragraph (b)(2) of this clause. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Contractor contends in writing at the time the invention is disclosed that it was not so made.

(3) * * *

(i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing all subject inventions during that period, and including a statement that all subject inventions have been disclosed (or that there are not such inventions), and that such disclosure has been made in accordance with the procedures required by paragraph (e)(1) of this clause.

* * * * *

(h) * * *

(1) The contractor shall include the clause at 37 CFR 401.14 (suitably modified to identify the parties) in all subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the subcontract is subject to an Exceptional Circumstances Determination by DOE or another exception in 37 CFR 401.3(a). In all other subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the contractor shall include this clause (suitably modified to identify the parties). The contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

* * * * *

(l) * * *

(2) However, the Contractor shall not forfeit rights in a subject invention if, within the time specified in paragraph (l)(1) of this clause, the Contractor:

* * * * *

(3) * * * The forfeiture provision of this paragraph (l) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

* * * * *

Alternate I [December 2024]. As prescribed in 927.303(d)(5), insert Alternate I under special circumstances to provide for a right to require licensing of third parties to background inventions:

(m) *Background patents.* (1) *Background patent* means a domestic patent covering an invention or discovery which is not a subject invention, and which is owned or controlled by the Contractor at any time through the completion of this contract:

(i) Which the contractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this contract.

(2) The Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any background patent for purposes of practicing a subject of this contract by or for the Government in research, development, and demonstration work only.

(3) The Contractor also agrees that upon written application by DOE, it will grant to responsible parties, for purposes of practicing a subject of this contract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the Contractor believes that exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Contractor.

(4) Notwithstanding paragraph (m)(3) of this clause, the contractor shall not be obligated to license any background patent if the Contractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(i) A competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or

(ii) The Contractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

(End of alternate)

Alternate II [December 2024]. As prescribed in 927.303(d), the following modifications must be made when the ''Department of Energy Determination of Exceptional Circumstances under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies'' applies:

The Contracting Officer shall insert the phrase ''or upon a breach of paragraph (n) of this clause'' after ''fails to disclose the subject invention within the times specified in paragraph (e)(2) of this clause'' in the first sentence of paragraph (d)(1).

The Contracting Officer shall insert the following paragraph (n):

(n) *U.S. Competitiveness.* With regard to the license granted in paragraph (d)(1) of this clause, the Contractor agrees that any products embodying any subject invention or produced through the use of any subject invention will be manufactured substantially in the United States unless the Contractor can show to the satisfaction of DOE that it is not commercially feasible. In the event DOE agrees to foreign manufacture, there will be a requirement that the Government's support of the technology be recognized in some appropriate manner, *e.g.,* alternative binding commitments to provide an overall net benefit to the U.S. economy. The Contractor agrees that it will not license, assign or otherwise transfer any subject invention to any entity, at any tier, unless that entity agrees to these same requirements. Should the Contractor or other such entity receiving rights in the invention(s):

(1) Undergo a change in ownership amounting to a controlling interest, or

(2) Sell, assign, or otherwise transfer title or exclusive rights in the invention(s), then the assignment, license, or other transfer of rights in the subject invention(s) is/are suspended until approved in writing by DOE. The Contractor and any successor assignee will convey to DOE, upon written request from DOE, title to any subject invention, upon a breach of this paragraph. The Contractor will include this paragraph in all subawards/contracts, regardless of tier, for experimental, developmental or research work.

(End of alternate)

■ 185. Section 952.227–14 is revised to read as follows:

952.227–14 Rights in data-general.

Alternate VI [December 2024] As prescribed at 927.409(b)(1)(ix), insert Alternate VI to require the contractor to license data regarded as limited rights data or restricted computer software to the Government and third parties at reasonable royalties upon request by the Department of Energy.

(k) *Contractor licensing.* Except as may be otherwise specified in this contract as data not subject to this paragraph, the contractor agrees that upon written application by DOE, it will grant to the Government and responsible third parties, for purposes of practicing a subject of this contract, a nonexclusive license in any limited rights data or restricted computer software on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the contractor shall not be obliged to license any such data if the contractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(1) Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this contract;

(2) Such data, in the form of results obtained by their use, have a commercially competitive alternate available or readily introducible from one or more other sources;

(3) Such data, in the form of results obtained by their use, are being supplied by the contractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the contractor or its licensees have taken effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or

(4) Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the contract results.

(End of alternate)

Alternate VII [December 2024] As prescribed in 927.409(b)(1), substitute the following for paragraph (b)(2)(i) of the clause at FAR 52.227–14:

(b)(2)(i) Assert copyright in data first produced in the performance of this contract (except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology) to the extent provided in paragraph (c)(1) of this clause.

(End of alternate)

Alternate VIII [December 2024] As prescribed in 927.409(a), substitute the following for paragraph (c)(1)(i) of the clause at FAR 52.227–14:

(c) *Copyright*—(1) Data first produced in the performance of this contract. (i) Unless provided otherwise in paragraph (d) of this clause, the Contractor may, without prior approval of the Contracting Officer, assert copyright in scientific and technical articles based on or containing data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings, or similar works. The prior, express written permission of the DOE Patent Counsel is required to assert copyright in all other data first produced in the performance of this contract. When such permission is granted, the DOE Patent Counsel shall specify appropriate terms, conditions, and submission requirements to assure utilization, dissemination, and commercialization of the data. The Contractor, when requested, shall promptly deliver to Patent Counsel a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled.

(End of alternate)

■ 186. Section 952.227–17 is added to read as follows:

952.227–17 Rights in data-special works.

Alternate I [December 2024] As prescribed at 927.409(b)(1), substitute the following for paragraph (c)(1)(ii) of the clause at FAR 52.227–17:

(c)(1)(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in paragraph (c)(1)(i) of this clause, the DOE Patent Counsel may direct the Contractor to assign (with or without registration), or obtain the assignment of, the copyright to the Government or its designated assignee.

(End of alternate)

952.227–82 [Removed]

■ 187. Section 952.227–82 is removed.

■ 188. Amend section 952.227–84 by revising the introductory text, clause date, and third sentence of the clause to read as follows:

952.227–84 Notice of right to request patent waiver.

As prescribed in 927.409(n), insert this provision:

Right To Request Patent Waiver [December 2024]

* * * Domestic small businesses and domestic nonprofit organizations normally will receive the patent rights clause at 37 CFR 401.14 which permits the contractor to retain title to such inventions, except under contracts for management or operation of a Government-owned research and development facility or under contracts involving exceptional circumstances or intelligence activities. * * *

■ 189. Amend section 952.231–71 by revising the introductory text, clause date, and paragraph (f)(2) to read as follows:

952.231–71 Insurance-litigation and claims.

As prescribed in 931.205–19(f), insert the following clause in applicable non-management and operating contracts:

Insurance—Litigation and Claims [December 2024]

* * * * *

(f) * * *

(2) The term ''contractor's managerial personnel'' is defined in the Property clause in 970.5245–1 in this contract.

* * * * *

■ 190. Section 952.232–7 is added to read as follows:

952.232–7 Electronic submission of invoices/vouchers.

As prescribed at 932.971, insert the following clause:

Electronic Submission of Invoices/Vouchers [December 2024]

Contractors shall submit vouchers electronically through the Oak Ridge Financial Service Center's (ORFSC) Vendor Inquiry Payment Electronic Reporting System (VIPERS). VIPERS allows vendors to submit vouchers, attach supporting documentation and check the payment status of any

voucher submitted to the DOE. Instructions concerning contractor enrollment and use of VIPERS can be found at *https://vipers.doe.gov.*

(End of clause)

■ 191. Section 952.233–2 is revised to read as follows:

952.233–2 Service of protest.

As prescribed in 933.106, insert the following provision:

Service of Protest [December 2024]

(c) Another copy of a protest filed with the Government Accountability Office shall be furnished to the following address within the time periods described in paragraph (b) of this clause: U.S. Department of Energy, Assistant General Counsel for Procurement and Financial Assistance (GC–61), 1000 Independence Avenue SW, Washington, DC 20585, or email: *gaobidprotest@hq.doe.gov.*

(d) *Notice of Protest File Availability.* (1) If a protest of this procurement is filed with the GAO in accordance with 4 CFR part 21, any actual or prospective offeror may request the Department of Energy (DOE) to provide it with reasonable access to the protest file pursuant to 33.104(a)(3)(ii). Such request must be in writing and addressed to the Contracting Officer for this procurement.

(2) Any offeror who submits information or documents to DOE for the purpose of competing in this procurement is hereby notified that information or documents it submits may be included in the protest file that will be available to actual or prospective offerors in accordance with the requirements of 48 CFR 33.104(a)(3)(ii). DOE will be required to make such documents available unless they are exempt from disclosure pursuant to the Freedom of Information Act. Therefore, offerors should mark any documents as to which they would assert that an exemption applies (see 10 CFR part 1004).

(e) *Protests to the Agency.* The DOE's agency protest procedures are in 48 CFR 933.103. Potential protesters should discuss their concerns with the Contracting Officer prior to filing a protest. In the event that an interested party believes a protest is necessary, efforts should be made to resolve the protest at the lowest level possible.

(End of provision)

952.233–4 and 952.233–5 [Removed]

■ 192. Sections 952.233–4 and 952.233–5 are removed.

■ 193. Section 952.242–71 is added to read as follows:

952.242–71 Conditional payment of fee, profit, and other incentives.

As prescribed at 923.7003(f) and 942.71(d), insert the following clause: (Note: If the clause at 952.204–2, Security Requirements, is not included in the contract, the security or safeguarding of Restricted Data and other classified information requirements of the clause do not apply; if the clause at 952.250–70, Nuclear Hazards Indemnity Agreement, is not included in this contract, the environment, safety and health requirements of the clause do not apply.)

Conditional Payment of Fee, Profit, and Other Incentives [December 2024]

(a) *Definitions.*

(1) *Amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for a period* means the quantity the Contracting Officer or fee determining official determines the Contractor is due for its performance prior to a separate determination that the Contractor did not comply with a term or condition of the contract or experienced a failure relating to: environment, safety, and health or security or safeguarding of Restricted Data and other classified information.

(i) If the contract includes incentives allocable to more than one period, the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for a period includes the allocable amount of payment for each such incentive for otherwise earned fee, fixed fee, profit, or other incentives. Unless stated otherwise, the allocable amount is the total amount divided by the number of periods the incentive covered.

(2) *Amount actually payable to the Contractor for a period* means: (the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for the period) less (the amount of any reduction under this clause and the amount of any reductions under other clauses to the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for the period).

(b) *General.*

(1) (*Note:* If the clause at 952.204–2, Security Requirements, is not included in this contract, the security or safeguarding of Restricted Data and other classified information requirements of this clause do not apply; if the clause at 952.250–70, Nuclear Hazards Indemnity Agreement, is not included in this contract, the environment, safety and health requirements of this clause do not apply.)

The amount of payment of otherwise earned fee, fixed fee, profit, or other incentives for any period under this contract is dependent upon the Contractor's and the Contractor's employees' compliance during the period with the performance requirements of this contract relating to:

(i) environment, safety and health (ES&H), which includes worker safety and health (WS&H); and

(ii) security or safeguarding of Restricted Data and other classified information.

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including in some cases a DOE approved contractor (Integrated Safety Management System (ISMS) or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) The security or safeguarding of Restricted Data and other classified information performance requirements of this contract are set forth in the clause of this contract entitled, ''Security requirements,'' the clause (if it is included) of this contract entitled ''Laws, Regulations, and DOE Directives,'' and in other terms and conditions.

(4) If the Contractor does not, in any period, meet the performance requirements of this contract relating to ES&H or security or the safeguarding of Restricted Data and other classified information, the Contracting Officer may, per this clause, reduce the amount of payment of otherwise earned fee, fixed fee, profit or other incentives.

(c) *Amount of Reduction.*

(1) If in any period (see paragraph (c)(5) of this clause) the Contractor does not meet the performance requirements of this contract relating to ES&H or security or the safeguarding of Restricted Data and other classified information, the Contracting Officer will unilaterally determine the amount of reduction to the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for the period based on the severity of the performance failure pursuant to the degrees of failure specified in paragraphs (e) and (f) of this clause. The percent reduction for each performance failure will be: not less than 26% nor more than 100% for a first degree failure; not less than 11% nor more than 26% for a second degree failure; and no more than 11% for a third degree failure.

(2) For a reduction allocable to more than one period, the Government will make the allocation at the end of the period in which it determines the total amount of the reduction. Unless stated otherwise, the allocable amount is the total reduction amount divided by the number of periods the reduction covered.

(3) The Government will reduce the payment of otherwise earned fee, fixed fee, profit, or other incentives as soon as practicable after the end of the period in which the performance failure occurs. If the Government is not aware of the failure when it occurs, it will make the reduction as soon as practical after becoming aware.

(4) In determining the reduction to the amount of payment and the applicability of mitigating factors, the Contracting Officer must consider the Contractor's overall performance in meeting the ES&H or security or safeguarding of Restricted Data and other classified information performance requirements of the contract. Such consideration must include performance against any specific performance criteria/requirements that provide additional definition, guidance for the amount of reduction, or guidance for the applicability of mitigating factors. In all cases, the Contracting Officer must consider mitigating factors that may warrant a reduction below the reduction that would be appropriate absent mitigating factors. Mitigating factors include, but are not limited to, the following (paragraphs (c)(4)(v), (vi), (vii) and (viii) of this clause apply to ES&H only).

(i) Degree of control the Contractor had over the event or incident.

(ii) Efforts the Contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor's self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of: ES&H and compliance in related areas and safeguarding Restricted Data and other classified information and compliance in related areas.

(v) Contractor's demonstration to the Contracting Officer's satisfaction that the principles of industrial ES&H standards are routinely practiced.

(vi) Event caused by ''Good Samaritan'' act by the Contractor (*e.g.,* offsite emergency response).

(vii) Contractor's demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.,* policy, ES&H programs).

(viii) Contractor's demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(5) The Contracting Officer will, for purposes of this clause, at the time of contract award or as soon as possible after contract award, allocate the total amount of fee, profit, and other incentives that is available under the contract to equal periods of [insert 6 or 12] months to run sequentially for the term of the contract, including options. The amount to be allocated to each period shall equal: (the average monthly amount available during the term of the contact) multiplied by (the number of months for each period).

(d) *Reductions to the amount of payments the Contractor has received for earned fee, fixed fee, profit, or other incentives under this and other clauses.*

(1) The amount of the reduction under this clause, in combination with the amount of any reduction under any other clause, shall not exceed the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for the period.

(2) If at any time during the contract any reductions under this clause or other clauses result in the sum of the amount of payments the Contractor has received for earned fee, fixed fee, profit, or other incentives to exceed the sum of the amounts of actually payable to the Contractor, the Contractor shall immediately return the excess to the Government.

(3) At the end of the contract—

(i) The Government will pay the Contractor the amount by which the sum of amounts actually payable to the Contractor exceeds the sum of the payments the Contractor has received; or

(ii) The Contractor shall return to the Government the amount by which the sum of the payments the Contractor has received exceeds the sum of the amounts actually payable to the Contractor.

(e) *Environment, Safety and Health (ES&H).* Performance failures occur if the Contractor does not comply with the contract's ES&H terms and conditions, including applicable ES&H laws, regulations, DOE directives, and DOE approved Contractor ISMS. The degrees of performance failure under which reductions of earned or fixed fee, profit, or other incentives will be determined are:

(1) First Degree: Performance failures that are most adverse to ES&H. They include:

(i) Failure to develop and obtain required DOE approval of an ISMS, if an ISMS is required.

(The Government will perform necessary reviews in a timely manner and not unreasonably withhold approval.)

(ii) Performance failures determined, per applicable ES&H laws, regulations, or DOE directives to have resulted in, or that could reasonably be expected to result in, serious injury or death to a worker.

(iii) Occurrence of any accident or event that meets the criteria of Appendix A of DOE Order 225.1B (or successor Order) and results in a determination to conduct a Federal Accident Investigation Board.

(2) Second Degree: Performance failures that are significantly adverse to ES&H. They include:

(i) Failures to comply with an approved ISMS, if an ISMS is required.

(ii) Failures that have been determined, per applicable ES&H laws, regulations, or DOE directives, to have resulted in, or could reasonably be expected to result in, an actual injury, exposure, or exceedance that occurred or nearly occurred but had minor practical long-term health consequences.

(iii) A breakdown of the Integrated Safety Management System.

(iv) Non-compliance with applicable ES&H laws, regulations, or DOE directives actually resulting in an accident that meets the criteria of Appendix A of DOE Order 225.1B (or successor Order) but not resulting in a determination to conduct a Federal Accident Investigation Board.

(v) Non-compliance with applicable ES&H laws, regulations, or DOE directives that results in a near miss of an accident or event that could have resulted in an adverse effect and a determination to conduct a Federal Accident Investigation Board. (A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, that does not result in an adverse effect.)

(3) Third Degree: Performance failures that have been determined per applicable ES&H laws, regulations, or DOE directives to reflect a lack of focus on improving ES&H. They include:

(i) Non-compliance with applicable ES&H laws, regulations, or DOE directives actually resulting in potential breakdown of the Integrated Safety Management System. The following performance failures or performance

failures of similar import will be considered third degree:

(A) Failure to implement effective corrective actions to address deficiencies/non-compliances documented through external (*e.g.,* Federal) oversight and/or reported per DOE Order 231.B (or successor Order) requirements; internal oversight of 10 CFR parts 830, 835, 850, and 851; or DOE Orders 227.1A and 436.1 (or successor Order) requirements.

(B) Multiple similar non-compliances identified by external (*e.g.,* Federal) oversight that in aggregate indicate a significant programmatic breakdown.

(C) Non-compliances that: have, or that may have, significant negative impacts to the worker, the public, or the environment; or indicate a significant programmatic breakdown.

(D) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(f) *Security or Safeguarding Restricted Data and Other Classified Information.* Performance failures occur if the Contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failure under which reductions of fee, profit, or other incentives occur will be determined are as follows:

(1) First Degree: Performance failures that have been determined, in accordance with applicable law, DOE regulation, or directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in an SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in an SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) Second Degree: Performance failures that have been determined, in accordance with applicable law, DOE regulation, or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Secret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other classified information regardless of classification (except for information covered by paragraph (f)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other classified information classified as Secret.

(3) Third Degree: Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. This category includes performance failures that result from a lack of Contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions that if identified and corrected early would prevent serious incidents. The following are examples of performance failures or performance failures of similar import that will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the Contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures that unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the Contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of clause)

■ 194. Section 952.245–2 is revised to read as follows:

952.245–2 Government property (fixed-price contracts).

Modify FAR 52.245–2 by adding ''and the DOE Acquisition Regulation subpart 945.5,'' at the end of paragraph (d) of the clause.

■ 195. Section 952.245–5 is revised to read as follows:

952.245–5 Government property (cost-reimbursement, time-and-materials, or labor-hour contracts).

Modify FAR 52.245–1 by adding ''and DOE Acquisition Regulation subpart 945.5'' at the end of the first sentence in paragraphs (e)(1) and (2) of the clause.

■ 196. Section 952.250–70 is revised to read as follows:

952.250–70 Nuclear hazards indemnity agreement.

Insert the following clause in accordance with 950.7006:

Nuclear Hazards Indemnity Agreement [December 2024]

(a) *Definitions.* Except as otherwise specified within this clause, all definitions set forth in the Atomic Energy Act of 1954, as amended

(hereinafter called the Act), shall apply to this clause.

''Extraordinary nuclear occurrence'' means an event that DOE has determined to be such an occurrence, as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR part 840.

''Public liability,'' referred to below, is public liability as defined in the Act, which (1) arises out of or in connection with the activities under this contract, including transportation; and (2) arises out of or results from a nuclear incident or precautionary evacuation.

(b) *Authority.* This clause is incorporated into this contract pursuant to the authority contained in subsection 170d. of the Act.

(c) *Financial protection.* Except as hereafter permitted or required in writing by DOE, the Contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (a) of this clause. DOE may, however, at any time require in writing that the Contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the Contractor by DOE.

(d) *Indemnification.* To the extent that the Contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE, DOE will indemnify the Contractor and other persons indemnified against (i) claims for public liability as described in paragraph (a) of this clause; and (ii) such legal costs of the Contractor and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170e(1)(B) of the Act in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or $2,000,000,000 in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(e)(1) *Waiver of defenses.* In the event of a nuclear incident (as defined in the Act) arising out of nuclear waste activities (as defined in the Act), the Contractor, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence that—

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility; or

(ii) Arises out of, results from, or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility; or

(iii) Arises out of or results from the possession, operation, or use by the Contractor or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the Contractor, on behalf of itself and other persons indemnified, agrees to waive—

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to negligence, contributory negligence, assumption of risk, or unforeseeable intervening causes, whether involving the conduct of a third person or an act of God;

(B) Any issue or defense as to charitable or governmental immunity; and any issue or defense based on any statute of limitations, if suit is instituted within three years of the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) For the purposes of making a determination of whether or not there has been an extraordinary nuclear occurrence, ''offsite,'' as used in 10 CFR part 840, means ''away from the contract location,'' a phrase that means any DOE facility, installation, or site at which contractual activity under this contract is being carried out, and any contractor-owned or controlled facility, installation, or site at which the Contractor is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth in paragraph (e) of this clause—

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to any injury or damage to a claimant (or claimant's property) that is intentionally sustained by the claimant, or that results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this clause and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim not within the protection afforded under (A) the limit of liability provisions under subsection 170e. of the Act, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) *Notification and litigation of claims.* The Contractor shall give immediate written notice to DOE of any known action or claim filed or made against the Contractor or other person indemnified for public liability as defined in paragraph (a) of this clause. Except as otherwise directed by DOE, the Contractor shall furnish promptly to DOE copies of all pertinent papers received by the Contractor or filed with respect to such actions or claims. DOE shall have the right to, and may collaborate with, the Contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to:

(1) Require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder; and

(2) Appear through the Attorney General on behalf of the Contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement

or defense of any such action or claim is undertaken by DOE, the Contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) *Continuity of DOE obligations.* The obligations of DOE under this clause shall not be affected by any failure on the part of the Contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the Contractor, or by the completion, termination or expiration of this contract.

(h) *Effect of other clauses.* The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the Disputes clause, provided, however, that this clause is subject to the clauses at 48 CFR 52.203–5, Covenant Against Contingent Fees, and 970.5232–3, Accounts, Records, and Inspection, and any provisions later added to this contract, as required by applicable Federal law, including statutes, Executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) *Civil penalties.* The Contractor and its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to civil penalties, pursuant to section 234A of the Act, for violations of applicable DOE nuclear-safety related rules, regulations, or orders, and pursuant to section 234C of the Act, for violations of applicable DOE worker safety and health related rules, regulations, and orders. If the Contractor is a not-for-profit contractor, as defined by section 234Ad.(2), the total amount of civil penalties paid shall not exceed the total amount of fees paid within any one-year period (as determined by the Secretary) under this contract.

(j) *Criminal penalties.* Any individual director, officer, or employee of the Contractor or of its subcontractors and suppliers indemnified under the provisions of this clause are subject to criminal penalties, pursuant to section 223(c) of the Act, for knowingly and willfully violating the Act, and applicable DOE nuclear safety-related rules, regulations or orders for which violation results in, or if undetected, would have resulted in a nuclear incident.

(k) *Inclusion in Subcontracts.* The Contractor shall insert this clause in any subcontract that may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (a) of this clause. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under the subcontract.

Effective date:

( ) See note II below for instructions related to this section on Effective Date.

Relationship to general indemnity

( ) See note III below for instructions related to this section on Relationship to General Indemnity.

(End of clause)

Note I

(1) For contracts with an award date after August 16, 2012, do not include an effective date provision.

(2) For contracts with an award date before August 16, 2012—

(i) If the contract contains the Nuclear Hazards Indemnity Agreement clause (June 1996 or prior version), replace the clause at 952.250–70 with this clause and use the EFFECTIVE DATE title and language, as follows:

''Effective Date. This contract was awarded on or after August 8, 2005, and at contract award contained the clause at 952.250–70 (JUN 1996) or prior version. That clause has been deleted and replaced with this clause. The Price-Anderson Amendments Act of 2005, described by this clause, controls the indemnity for any nuclear incident that occurred on or after August 8, 2005. The Contractor's liability for civil penalties for violations of the Atomic Energy Act of 1954 under this contract is described by paragraph (i) of this clause.

(ii) If the contract was awarded prior to August 8, 2005, and contains the Nuclear Hazards Indemnity Agreement clause, dated June 1996 or prior version, add this clause in addition to the clause at 952.250–70 or prior version and use the EFFECTIVE DATE title and language, as follows:

''Effective Date. This contract was in effect prior to August 8, 2005, and contains the clause at 952.250–70 (JUN 1996) or prior version. The indemnity of paragraph (d)(1) is limited to the indemnity provided by the Price-Anderson Amendments Act of 1988 for any nuclear incident to which the indemnity applies that occurred before August 8, 2005.

The indemnity of paragraph (d)(1) of this clause applies to any nuclear incident that occurred on or after August 8, 2005. The Contractor's liability for violations of the Atomic Energy Act of 1954 under this contract is that in effect prior to August 8, 2005.

Note II

The following alternate will be added to the above Nuclear Hazards Indemnity Agreement clause for all contracts that contain a general authority indemnity pursuant to 950.7101. Caution: Be aware that for contracts that will have this provision added, but that do not contain an effective date provision, this paragraph shall be marked (1). In the event an Effective Date provision has been included, it shall be marked (m).

''( ) To the extent that the Contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of public liability by an order or orders limiting same, pursuant to 170e of the Act, the provisions of the clause providing general authority indemnity shall not apply.''

(End of note)

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

■ 197. The authority citation for part 970 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*

■ 198. Amend section 970.0100 by adding a sentence at the end of the section to read as follows:

970.0100 Scope of part.

* * * This part does not apply to contracts not designated as M&O contracts by the Secretary of Energy, except as approved by the cognizant Senior Procurement Executive (SPE) or as otherwise prescribed in the DEAR.

■ 199. Amend section 970.0371–8 by revising paragraph (a)(1) to read as follows:

970.0371–8 Employee disclosure concerning other employment services.

(a) * * *

(1) Acknowledge that the employee has read and is familiar with:

(i) The requirements and restrictions prescribed in this section;

(ii) Current version of DOE Order 486.1, Department of Energy Foreign Government Sponsored or Affiliated Activities;

(iii) Current version of DOE Order 241.1, Scientific and Technical Information Management; and

(iv) The requirements of the contractor's contract with DOE relating to patents.

* * * * *

■ 200. Section 970.0371–9 is amended by revising the last sentence of the section to read as follows:

970.0371–9 Contract clause.

* * * In paragraph (a), the words ''and managerial personnel (see 970.5245–1(k))'' may be inserted after ''(see 952.215–70)''.

970.0404–1 [Removed]

■ 201. Section 970.0404–1 is removed.

■ 202. Section 970.0404–2 is revised to read as follows:

970.0404–2 General.

(a) DOE policies, definitions, provisions, and clauses associated with safeguarding and security of classified information are in part 904.

(b) For DOE management and operating contracts and other contracts designated by the Senior Procurement Executive or designee, the clause at 970.5215–3, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' implements the requirements of section 234B of the Atomic Energy Act (42 U.S.C. 2282b) that provide for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of classified information, including Restricted Data.

970.0404–4 [Removed]

■ 203. Section 970.0404–4 is removed.

970.0407–1 [Redesignated as 970.0407–100]

■ 204. Section 970.0407–1 is redesignated as section 970.0407–100.

970.0407–1–1 [Redesignated as 970.0407–110]

■ 205. Section 970.0407–1–1 is redesignated as section 970.0407–110.

970.0407–1–2 [Redesignated as 970.0407–120]

■ 206. Section 970.0407–1–2 is redesignated as section 970.0407–120.

970.0407–1–3 [Redesignated as 970.0407–130]

■ 207. Section 970.0407–1–3 is redesignated as section 970.0407–130.

■ 208. Newly redesignated section 970.0407–130 is revised to read as follows:

970.0407–130 Contract clause.

The contracting officer shall insert the clause at 970.5204–3, Access to and Ownership of Records, in management and operating contracts and other contracts that contain:

(a) The Integration of Environment, Safety, and Health into Work Planning and Execution clause located at either 952.223–71 or 970.5223–1; or

(b) The clause at 952.223–72, Radiation Protection and Nuclear Criticality.

■ 209. Section 970.0801–2 is revised to read as follows:

970.0801–2 Policy.

The provisions of FAR subpart 8.1, 41 CFR chapter 102, and 41 CFR part 109–43 apply to DOE's management and operating contracts.

■ 210. Amend section 970.0905 by adding a sentence at the end of the section to read as follows:

970.0905 Organizational and consultant conflicts of interest.

* * * Contracting Officers should refer to Subpart 909.5.

■ 211. Section 970.1100–1 is revised to read as follows:

970.1100–1 Performance-based contracting.

(a) Each management and operating (M&O) contract must contain a performance work statement that describes, in general terms, work planned and/or required to be performed and expectations in terms of outcome, results, or final work products, as opposed to methods, processes, or design.

(b) Contract performance requirements and expectations should be consistent with the Department's strategic planning goals and objectives, as made applicable to the site or facility through Departmental programmatic and financial planning processes. Measurable performance criteria, objective measures, and where appropriate, performance incentives, shall be structured to correspond to the performance requirements established in the statement of work and other documents used to establish work requirements.

970.1100–2 [Removed]

■ 212. Section 970.1100–2 is removed.

■ 213. Subpart 970.15 is revised to read as follows:

Subpart 970.15—Contracting by Negotiation

Sec.

970.1504 Contract pricing.
970.1504–100 Price analysis.
970.1504–101 Fees for management and operating contracts.
970.1504–102 Fee policy.
970.1504–103 Fee determination.
970.1504–104 Calculating the maximum total available fee amount for a one-year period.
970.1504–105 Fee base.
970.1504–106 Fee schedules.
970.1504–107 Classification factors.
970.1504–108 Determining the appropriate percentage by considering the significant factors.
970.1504–109 Adding the fee subtotals for a one-year period.
970.1504–110 Allocating the maximum total available fee amount for a one-year period to one or more of the contract's evaluation periods.
970.1504–111 The maximum total available fee amount for a contract.
970.1504–200 Documentation.
970.1504–201 Cost or pricing data.
970.1504–300 Solicitation provision and contract clauses.
970.1504–400 Special cost or pricing areas.

Subpart 970.15—Contracting by Negotiation

970.1504 Contract pricing.

970.1504–100 Price analysis.

970.1504–101 Fees for management and operating contracts.

This subsection sets forth the Department's policies on fees for management and operating (M&O) contracts.

970.1504–102 Fee policy.

(a) *Basic principles.* (1) M&O contracts are typically cost-reimbursement type contracts with incentive fees. An M&O contract, however, may be of any contract type or combination of types (for example, firm-fixed-price, cost-plus-award-fee, cost-plus-incentive-fee, multiple-incentive, etc.). Regardless of contract type, an M&O contract may contain work elements using different incentives.

(2) A cost-plus-fixed-fee contract shall only be used if approved in advance by the Senior Procurement Executive (SPE) or designee. The fee for a cost-plus-fixed-fee contract may not exceed the limits at FAR 15.404–4(c)(4)(i).

(3) A base fee amount may only be used if approved in advance by the SPE or designee.

(4) Incentive fees allocated to evaluation periods under cost-reimbursement type contracts should, to the greatest extent appropriate, be tied to a specific portion of the maximum total available fee.

(5) The maximum total available fee amount may not exceed the fee derived from this subsection unless approved in advance by the SPE or designee. A request to allow a higher fee must be in writing and must clearly explain why the situation merits consideration.

(i) Typically, only a situation where either unusually difficult objective performance incentives would be used or where successful performance would provide extraordinary value would merit consideration.

(ii) When a contract requires a contractor to use its own facilities, equipment, or other resources for contract performance (*e.g.,* when there is no letter-of-credit financing), consideration may be given, subject to approval by the SPE or designee, to allowing a maximum total available fee amount above the amount calculated by this subsection.

(6) Each M&O contract must set forth in the contract (or in a Performance Evaluation and Measurement Plan (PEMP) or similar document) the methods that will be used to rate the contractor's performance and to determine the fee the contractor's performance will earn. The DOE Contracting Officer must ensure all important areas of contract performance are specified in the contract or in a PEMP (or similar document), even if such areas are not assigned a specific portion of the maximum total available fee the contractor might earn.

(i) An M&O contract is an ''incentive contract'' as that term is used in FAR subpart 16.4. FAR subpart 16.4 prohibits the use in a contract of other than cost incentives without also providing a cost incentive (or constraint).

(ii) Award fee not earned during the award fee cycle shall not be carried over to any future award fee cycle. Consequently—

(A) When the award fee cycle consists of one evaluation period, unearned award fee amounts may not be carried over from one evaluation period to the next.

(B) When the award fee cycle consists of two or more evaluation periods, at the sole discretion of the Contracting Officer, unearned award fee amounts may be carried over from one evaluation period to the next, so long as the periods are within the same award fee cycle.

(b) C*oordination requirements.* (1) Before issuing a competitive solicitation, the Head of the Contracting Activity (HCA) must coordinate the greatest maximum total available fee amount the HCA will accept with the SPE or designee. A competitive solicitation must identify the greatest maximum total available fee amount the Government will accept and may invite offerors to propose a lower fee amount.

(2) Before beginning to negotiate an extension to an existing contract, the HCA must coordinate the greatest maximum total available fee amount the HCA will accept, and the maximum total available fee amount targeted for negotiation with the SPE or designee.

970.1504–103 Fee determination.

(a) *General.* Determining the fee of an M&O contract requires considering the:

(1) Magnitude of the effort;

(2) Type of the effort;

(3) Nature, difficulty, complexity, and importance of the work; and

(4) Specific circumstances of the procurement.

(b) *Maximum total available fee amount for the contract, annual fee bases, and allocation of the maximum total available fee amount.* (1) Determining the maximum total available fee amount of an M&O contract, which is based upon the fee base (among other things) in each of the one-year periods of the M&O contract, is a separate action from allocating that amount to the evaluation periods of the contract, which is based upon what best motivates the M&O contractor's superior performance. The Government's objective is to allocate incentives in a manner that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.

(2) The maximum total available fee amount in an M&O contract is the sum of the maximum total available fee amounts in the contract's one-year periods. (See 970.1504–104 for a complete explanation of the calculation of the maximum total available fee amount for a one-year period and an example.)

(3) The maximum total available fee amount for a one-year period is based on the fee base for that one-year period. The fee base is an estimate of the allowable costs (with some exclusions) for that one-year period.

(4) The fee base is a basic component of the fee schedules, which link the fee base to fee. A fundamental aspect of fee calculations is the amount of the fee base and the amount of fee in the fee schedules are annual amounts. Calculating the maximum total available fee amount for a one-year period starts with determining the fee base for the one-year period. Consequently, a contract's maximum total available fee amount is based on the contract's one-year periods and their fee bases.

(5) Usually (but not necessarily) once the maximum total available fee amount for a one-year period is calculated, it is allocated (that is, made available to be earned by the M&O contractor) to the same one-year period. Additionally, when a maximum total available fee amount is established for longer than a year, it is subject to adjustment in the event of a significant change (greater than plus or minus ten percent or a lesser percent if appropriate) to the budget or work scope.

(6) In summary, while the maximum total available fee amount for a one-year period is based on the fee base for the one-year period, the evaluation period in which the contractor may earn all, or part of that fee need not be the same one-year period or even a single evaluation period. Usually, the length of an evaluation period is one year, mirroring the one-year period used in the calculation of the maximum total available fee amount for a one-year period. In fact, the SPE's or designee's approval is required to do otherwise. Nonetheless, the Government's objective is to allocate incentives in a manner that will provide the contractor with the greatest incentive for efficient and economical performance. Consequently, there may be occasions where after calculating the maximum total available fee amount for a year, part or all of it should be allocated to a subsequent one-year evaluation period, an evaluation period of greater than a year, or to several evaluation periods.

(7) Before each year (or other appropriate period), at any time before the year (or period), including as early as the time of contract award, the Contracting Officer and M&O contractor will enter negotiations to establish the requirements for the year (or other appropriate period), including evaluation areas, individual requirements, and the maximum total available fee that the contractor can earn for its performance. If the parties cannot agree, the Contracting Officer will unilaterally establish the requirements and the maximum total available fee. The maximum total available fee allocated to an evaluation period must be apportioned among a base fee amount (which is usually zero) and a performance fee amount. The performance fee amount may consist of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both. Both performance fee components are ''incentives'' per FAR subpart 16.4 and both are performance based. The performance fee must be tied to objective measures to the maximum extent appropriate. Performance incentive fee is preferable to performance award fee because it uses objective performance requirements rather than subjective performance requirements. Performance fee that is award fee may be used when: objective measures are not feasible (that is, when it is not feasible to devise effective predetermined objective measures applicable to cost, technical performance, or schedule); and the likelihood of meeting acquisition objectives will be enhanced by using incentives that effectively motivate the contactor toward exceptional

performance and provide the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved.

(8) Within the maximum total available fee, Contracting Officer may include a type of incentive fee component, often labeled ''performance based incentive (PBI),'' that includes a target fee for a target level of performance. Each PBI must be tied to a specific portion of the total available fee pool. PBIs may only be used when—

(i) A target level of performance can be established that the contractor can reasonably be expected to reach;

(ii) Factors likely to impede the target performance are clearly within the control of the contractor; and

(iii) The contract indicates clearly a level below which performance is not acceptable.

(c) *Determining the maximum total available fee for each one-year period of the contract.* (1) Determining the maximum total available fee for each one-year period of the contract is a function of the:

(i) Magnitude of the effort (reflected by the total fee base for the year; see 970.1504–105);

(ii) Type of the effort (reflected by the allocation of the total fee base to the three fee schedules—production, research and development, and environmental restoration; see 970.1504–106);

(iii) Nature, difficulty, complexity, and importance of the work (reflected by the choice of classification factors; see 970.1504–107); and

(iv) Specific circumstances of the procurement (reflected by the appropriate percentages derived from considering significant factors; see 970.1504–108).

(2) Calculating the maximum total available fee for a one-year period entails determining the total fee base for the year, allocating it to the fee schedules based on the type of effort, using the fee schedules to determine a fee subtotal for each type of effort, multiplying those fee subtotals by classification factors, multiplying the resulting products by appropriate percentages, and summing those products. (See 970.1504–104 for a complete explanation and an example.)

(d) *Conditional payment of fee, profit, and other incentives.* (1) In addition to other performance requirements specified in their contracts, M&O contractors are subject to performance requirements relating to: environment, safety, and health (ES&H), including worker safety and health (WS&H) and safeguarding of Restricted Data and other classified information. Performance requirements relating to ES&H will be set forth in the contract's ES&H terms and conditions, including a DOE-approved Integrated Safety Management System (ISMS), or similar document. Performance requirements relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of the contract at 952.204–2, ''Security Requirements,'' and 970.5204–2, ''Laws, Regulations, and DOE Directives,'' as well as in other terms and conditions that prescribe requirements for the safeguarding of Restricted Data and other classified information. (If the contract does not include the clause at 952.204–2, ''Security Requirements,'' the safeguarding of Restricted Data and other classified information requirements of the clause at 970.5215–3, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' do not apply.)

(2) If the contractor does not meet the performance requirements of the contract relating to ES&H or to the safeguarding of Restricted Data and other classified information, otherwise earned fee, fixed fee, profit, or other incentives may be unilaterally reduced by the Contracting Officer in accordance with the clause at 970.5215–3, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.''

(3) The clause at 970.5215–3, entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' provides for reductions of earned fee, fixed fee, profit, or other incentives under the contract depending upon the severity of the contractor's performance failure relating to ES&H requirements, and relating to the safeguarding of Restricted Data and other classified information. When reviewing performance failures that would otherwise warrant a reduction of earned fee, fixed fee, profit, or other incentives, the Contracting Officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are included in the clause.

(4) The Contracting Officer must obtain the concurrence of the cognizant Program Secretarial Officer—

(i) Prior to effecting any reduction; and

(ii) Prior to determining that a reduction is not warranted for a particular performance failure or a group of performance failures.

(5) The Contracting Officer must coordinate with the Office of Enforcement within the Office of Enterprise Assessments (or with any designated successor office) before pursuing a contract fee reduction in the event of a violation by the contractor or any contractor employee of any DOE regulation relating to worker safety and health concerns. See 970.2303–2.

(e) *Types of contracts and fee arrangements.* (1) Contracts that are a combination of types or include work elements with fee arrangements that are a combination of contract types must—

(i) Conform to the requirements of parts 915 and 916 and FAR parts 15 and 16; and

(ii) Where appropriate to the type, be supported by:

(A) Negotiated costs subject to the requirements of the 41 U.S.C. chapter 35;

(B) A pre-negotiation memorandum; and

(C) A plan describing how each contract type or fee arrangement will be administered.

(2) [Reserved]

(f) *Establishing contract type.* Operations and field offices shall take the lead in establishing the most appropriate contract type for their requirements. Before establishing contract types and fee arrangements, operations and field offices must ensure the necessary resources exist within the contractor's and the Government's organizations to administer them.

970.1504–104 Calculating the maximum total available fee amount for a one-year period.

(a) The maximum total available fee amount for a contract is the sum of the maximum total available fee amounts of the contract's one-year periods. The maximum total available fee amount in a one-year period is based on the fee base of the one-year period. Calculating the maximum total available fee amount for a one-year period requires considering the: magnitude of the effort (reflected by the total fee base for the year); type of effort (reflected by the allocation of the total fee base to the three fee schedules); nature, difficulty, complexity, and importance of the work (reflected by the choice of classification factors); and specific circumstances of the procurement (reflected by the appropriate percentages derived from considering significant factors).

(b) To calculate the maximum total available fee amount for a year, the Contracting Officer takes the following steps:

(1) *Step 1.* Determines the total fee base for the year (see 970.1504–105);

(2) *Step 2.* Allocates the total fee base for the year as appropriate to the three

types of efforts reflected by the three fee schedules (if there is only one type of effort, all of the total fee base is allocated to the fee schedule appropriate for the effort);

(3) *Step 3.* Using the portion of the total fee base allocated to the schedule in paragraph (b)(2) of this section (step 2), determines a fee subtotal for each type of effort (see 970.1504–106);

(4) *Step 4.* Multiplies each of the fee subtotals in paragraph (b)(3) of this section (step 3) by the appropriate classification factor (see 970.1504–107);

(5) *Step 5.* Multiplies each of the products produced in paragraph (b)(4) of this section (step 4) by the appropriate percentage, which is determined by considering the significant factors (see 970.1504–108); and

(6) *Step 6.* Adds the products of paragraph (b)(5) of this section (step 5).

(c) An example of calculating the maximum total available fee for a one-year period follows in paragraphs (c)(1) through (6) of this section. The assumptions are: total fee base is 50,000,000 (comprising 10,000,000 of Production efforts, 15,000,000 of Research and Development (R&D) efforts, and 25,000,000 of Environmental Management (EM) efforts), classification factors are 3.0, 1.5, and 2.0, and appropriate percentages are 90%, 85%, and 75%.

(1) *Step 1.* Determination of the total fee base: 50,000,000.

(2) *Step 2.* Allocation of the total fee base in paragraph (c)(1) of this section (step 1) to the three fee schedules (based on the types of effort in the total fee base):

(i) 10,000,000 to Production;

(ii) 15,000,000 to R&D; and

(iii) 25,000,000 to EM.

(3) *Step 3.* Determination of the fee subtotal for each type of effort using the applicable fee schedules:

(i) 578,726 for Production;

(ii) 957,250 for R&D; and

(iii) 1,236,340 for EM.

(4) *Step 4.* Multiplication of the fee subtotal in paragraph (c)(3) of this section (step 3) for each type of effort by the appropriate classification factor:

(i) $578,726 \times 3.0 = 1,736,178$ for Production;

(ii) $957,250 \times 1.5 = 1,435,875$ for R&D; and

(iii) $1,236,340 \times 2.0 = 2,472,680$ for EM.

(5) *Step 5.* Multiplication of each of the products of paragraph (c)(4) of this section (step 4) by the appropriate percentage for the type of work (determined by considering the significant factors (see 970.1504–108)):

(i) $1,736,178 \times .9 = 1,562,560$ for Production;

(ii) $1,435,875 \times .85 = 1,220,494$ for R&D; and

(iii) $2,472,680 \times .75 = 1,854,510$ for EM.

(6) *Step 6.* Addition of the products of paragraph (c)(5) of this section (step 5):

(i) 1,562,560.

(ii) 1,220,494.

(iii) 1,854,510.

(iv) 4,637,564.

(d) In summary, the maximum total available fee amount for a contract is the sum of the maximum total available fee amounts of the contract's one-year periods. Calculating the maximum total available fee amount for a one-year period entails determining the total fee base, allocating it to the fee schedules, using the fee schedules to determine fee subtotals, multiplying the fee subtotals by classification factors, multiplying the resulting products by appropriate percentages, and summing those products. (Allocating the amount of maximum total available fee for a one-year period to an evaluation period or periods is a separate action.)

970.1504–105 Fee base.

(a) The total fee base for a one-year period (see step 1 located at 970.1504–104(b)(1)) is an estimate of the allowable costs for the one-year period, with some exclusions. (Estimates for Strategic Partnership Projects may be included in the total fee base, where appropriate.) The total fee base excludes estimates of allowable costs for: source and special nuclear materials; land, buildings, and facilities (whether they are to be leased, purchased or constructed); depreciation of Government facilities; and efforts for which a separate fee is to be negotiated.

(b) In addition to the exclusions in paragraph (a) of the section, the total fee base excludes:

(1) Any part of the estimated allowable cost of capital equipment that the contractor procures by subcontract and other similar costs that are of such magnitude or nature as to distort the technical and management effort required of the contractor;

(2) At least 20% of the estimated allowable cost of subcontracts and other major contractor procurements, with the excluded amount increasing as the contractor's estimated required management effort decreases;

(3) Estimates of allowable home office or corporate general and administrative expenses that will be reimbursed;

(4) Any cost of work funded with uncosted balances previously included in a fee base of this or any other contract performed by the contractor;

(5) Cost of rework attributable to the contractor; and

(6) State taxes.

(c) The total fee base does not reflect any fee or compensation for unusual architect-engineer or construction services provided by the M&O contractor. Architect-engineer and construction services are normally covered by special agreements based on the policies applying to architect-engineer or construction contracts. The fees for such services shall be calculated per 915.404–4800 and added to the fees calculated using the production, R&D, and EM schedules. The total fee base also does not reflect any fee or compensation for special equipment purchases. The fees for special equipment purchases shall be calculated per 915.404–4800 and added to the fees calculated using the production, R&D, and EM schedules.

(d) No fee schedule may be used more than once in calculating the maximum total available fee amount for a one-year period.

970.1504–106 Fee schedules.

(a) In calculating the amount of maximum total available fee amount for a one-year period (see 970.1504–104), once the total fee base for the year is determined it is allocated to one or more of the three fee schedules based upon the type of effort. The three types of efforts are: Production; R&D; and EM. Each fee schedule provides a fee subtotal (see steps 2 and 3 in 970.1504–104(b)(2) and (3)).

(b) The three schedules are:

TABLE 1 TO PARAGRAPH (b)

Fee base (dollars)	Fee dollars	Fee (percent)	Incr. (percent)
PRODUCTION EFFORTS SCHEDULE			
Up to $1 Million			7.66
1,000,000	$76,580	7.66	6.78

TABLE 1 TO PARAGRAPH (b)—Continued

Fee base (dollars)	Fee dollars	Fee (percent)	Incr. (percent)
3,000,000	212,236	7.07	6.07
5,000,000	333,670	6.67	4.90
10,000,000	578,726	5.79	4.24
15,000,000	790,962	5.27	3.71
25,000,000	1,161,828	4.65	3.35
40,000,000	1,663,974	4.16	2.92
60,000,000	2,247,076	3.75	2.57
80,000,000	2,761,256	3.45	2.34
100,000,000	3,229,488	3.23	1.45
150,000,000	3,952,622	2.64	1.12
200,000,000	4,510,562	2.26	0.61
300,000,000	5,117,732	1.71	0.53
400,000,000	5,647,228	1.41	0.45
500,000,000	6,097,956	1.22	.....
Over $500,000,000	6,097,956	.....	0.45

TABLE 2 TO PARAGRAPH (b)

Fee base (dollars)	Fee dollars	Fee (percent)	Incr. (percent)
RESEARCH AND DEVELOPMENT EFFORTS SCHEDULE			
Up to $1 Million	.....	.....	8.42
1,000,000	$84,238	8.42	7.00
3,000,000	224,270	7.48	6.84
5,000,000	361,020	7.22	6.21
10,000,000	671,716	6.72	5.71
15,000,000	957,250	6.38	4.85
25,000,000	1,441,892	5.77	4.22
40,000,000	2,075,318	5.19	3.69
60,000,000	2,813,768	4.69	3.27
80,000,000	3,467,980	4.33	2.69
100,000,000	4,006,228	4.01	1.69
150,000,000	4,850,796	3.23	1.14
200,000,000	5,420,770	2.71	0.66
300,000,000	6,083,734	2.03	0.58
400,000,000	6,667,930	1.67	0.50
500,000,000	7,172,264	1.43	.....
Over $500,000,000	7,172,264	.....	0.50

TABLE 3 TO PARAGRAPH (b)

Fee base (dollars)	Fee dollars	Fee (percent)	Incr. (percent)
ENVIRONMENTAL MANAGEMENT EFFORTS SCHEDULE			
Up to $1 Million	.....	.....	7.33
1,000,000	$73,298	7.33	6.49
3,000,000	203,120	6.77	5.95
5,000,000	322,118	6.44	5.40
10,000,000	592,348	5.92	4.83
15,000,000	833,654	5.56	4.03
25,000,000	1,236,340	4.95	3.44
40,000,000	1,752,960	4.38	3.29
60,000,000	2,411,890	4.02	3.10
80,000,000	3,032,844	3.79	2.49
100,000,000	3,530,679	3.53	1.90
150,000,000	4,479,366	2.99	1.48
200,000,000	5,2197924	2.61	1.12
300,000,000	6,337,250	2.11	0.88
400,000,000	7,219,046	1.80	0.75
500,000,000	7,972,396	1.59	0.58
750,000,000	9,423,463	1.26	0.55
1,000,000,000	10,786,788	1.08	.....
Over $1 Billion	10,786,788	.....	0.55

970.1504–107 Classification factors.

(a) There are five classification factors. They are tied to facility/task categories. Step 4 in calculating the maximum total available fee amount for the one-year period (see 970.1504–104(b)(4)) is to multiply the fee subtotal in step 3 for each type of effort by the appropriate classification factor. The classification factors and their corresponding facility/task categories are:

TABLE 1 TO PARAGRAPH (a)

Facility/task category	Classification factor
A	3.0
B	2.5
C	2.0
D	1.5
E	1.0

(b) The Contracting Officer shall select the Facility/Task Category after considering the following:

(1) *Facility/Task Category A.* The main focus of effort performed is related to—

(i) The manufacture, assembly, retrieval, disassembly, or disposal of nuclear weapons with explosive potential;

(ii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals with consideration given to the degree the nature of the work advances state-of-the-art technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is significantly demanding when compared to similar industrial/DOE settings (*i.e.,* nuclear energy processing, industrial environmental cleanup);

(iii) Construction of facilities such as nuclear reactors, atomic particle accelerators, or complex laboratories or industrial units especially designed for handling radioactive materials;

(iv) R&D directly supporting paragraph (b)(1)(i), (ii), or (iii) of this subsection and not conducted in a DOE laboratory; or

(v) As designated by the SPE, or designee. (Classification factor 3.0)

(2) *Facility/Task Category B.* The main focus of effort performed is related to—

(i) The safeguarding and maintenance of nuclear weapons or nuclear material;

(ii) The manufacture or assembly of nuclear components;

(iii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals or other substances that pose a significant threat to the environment or the health and safety of workers or the public, if the nature of the work uses state-of-the-art technologies or applications in such operations and/or the inherent difficulty or risk of the work is more demanding than that found in similar industrial/DOE settings (*i.e.,* nuclear energy, chemical or petroleum processing, industrial environmental cleanup);

(iv) The detailed planning necessary for the assembly/disassembly of nuclear weapons/components;

(v) Construction of facilities involving operations requiring a high degree of design layout or process control;

(vi) R&D directly supporting paragraph (b)(2)(i), (ii), (iii), (iv), or (v) of this subsection and not conducted in a DOE laboratory; or

(vii) As designated by the SPE or designee. (Classification factor 2.5)

(3) *Facility/Task Category C.* The main focus of effort performed is related to—

(i) The physical cleanup, processing, or storage of nuclear radioactive or toxic chemicals if the nature of the work uses routine technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is similar to that found in similar industrial/DOE settings (*i.e.,* nuclear energy, chemical processing, industrial environmental cleanup);

(ii) Plant and facility maintenance;

(iii) Plant and facility security (other than the safeguarding of nuclear weapons and material);

(iv) Construction of facilities involving operations requiring normal processes and operations; general or administrative service buildings; or routine infrastructure requirements;

(v) R&D directly supporting paragraph (b)(3)(i), (ii), (iii), or (iv) of this subsection and not conducted in a DOE laboratory; or

(vi) As designated by the SPE or designee. (Classification factor 2.0)

(4) *Facility/Task Category D.* The main focus of the effort performed is R&D conducted at a DOE laboratory. (Classification factor 1.5)

(5) *Facility/Task Category E.* Efforts performed using a fixed fee. (Classification factor 1.0)

(c) Where the SPE or designee has approved a base fee, the Classification Factors shall be reduced, as approved by the SPE or designee.

(d) Any risks that are indemnified by the Government (for example, risks under the Price-Anderson Act) will not be considered as risks to the contractor.

970.1504–108 Determining the appropriate percentage by considering the significant factors.

(a) In calculating the maximum total available fee for a one-year period (see 970.1504–104), step 5 (970.1504–104(b)(5)) is to consider the specific circumstances of the procurement using the following significant factors for each type of effort, determine the appropriate percentage for the type of work, and apply it to the subtotals of fee from step 4 (970.1504–104(b)(4)). An appropriate percentage of 100% would be applied to work of maximum difficulty and/or complexity; lesser percentages would be applied to work less difficult or complex. The significant factors are:

(1) The relative difficulty of work, including specific performance objectives, environment, safety and health concerns, and the technical and administrative knowledge, and skill necessary for work accomplishment and experience;

(2) Management risk relating to performance, including—

(i) Composite risk and complexity of principal work tasks required to do the job; and

(ii) Advance planning, forecasting and other such requirements;

(3) Size and operation (number of locations, plants, differing operations, etc.);

(4) The nature and relative complexity of subcontracted efforts, subcontractor management, and complexity of integration with other contractors;

(5) Other special considerations, including support of Government programs such as those relating to small and minority business subcontracting, energy conservation, etc.; and

(6) The presence or absence of financial risk, including the type and terms of the contract.

(b) [Reserved]

970.1504–109 Adding the fee subtotals for a one-year period.

In calculating the maximum total available fee amount for a one-year period (see 970.1504–104), step 6 (970.1504–104(b)(6)) is to add the products of step 5 (970.1504–104(b)(5).

970.1504–110 Allocating the maximum total available fee amount for a one-year period to one or more of the contract's evaluation periods.

Usually, the length of an evaluation period is one year, mirroring the one-year period used in calculating the maximum total available fee amount for a one-year period. The SPE's or designee's approval is required to do otherwise. Nonetheless, the Government's objective is to allocate incentives in a manner that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. Consequently, there may

be occasions where after calculating the maximum total available fee amount for a one-year period, part or all of it should be allocated to a subsequent one-year evaluation period, an evaluation period of greater than a year, or to several evaluation periods.

970.1504–111 The maximum total available fee amount for a contract.

The maximum total available fee amount for a contract is the sum of the maximum total available fee amounts of the contract's one-year periods.

970.1504–200 Documentation.

970.1504–201 Cost or pricing data.

(a) The certification requirements of FAR 15.406–2 are not applied to DOE cost- reimbursement M&O contracts.

(b) The Contracting Officer shall ensure that M&O contractors and their subcontractors obtain certified cost or pricing data prior to the award of a negotiated subcontract or modification of a subcontract in accordance with FAR 15.406–2, if required by FAR 15.403–4, and incorporate appropriate contract provisions similar to those set forth at FAR 52.215–10 and 52.215–11 that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of the submission of defective cost or pricing data by a subcontractor at any tier.

(c) The clauses at FAR 52.215–12 and 52.215–13 shall be included in M&O contracts.

970.1504–300 Solicitation provision and contract clauses.

(a) The Contracting Officer shall insert the clause at 970.5215–1, Total Available Fee: Base Fee Amount and Performance Fee Amount, in M&O contracts.

(b) The Contracting Officer shall insert the clause at 970.5215–3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts, in M&O contracts. (Note: The clause states if the contract does not include the Security Requirements clause (952.204–2), the requirements of the clause related to security or safeguarding of Restricted Data and other classified information do not apply.)

(c) The Contracting Officer shall insert the provision at 970.5215–5, Limitation on Fee, in solicitations for M&O contracts.

970.1504–400 Special cost or pricing areas.

■ 214. Amend section 970.1706–1 by revising paragraphs (a) and (b) to read as follows:

970.1706–1 Award, renewal, and extension.

(a) *Contract term.* Effective performance under an M&O contract is facilitated by the use of a relatively long contract term. Only the Secretary can authorize the use of an M&O contract and only the Secretary can renew the original authorization of an M&O contract.

(1) An M&O contract shall—after the Secretary has authorized its original use (either by a competitive award or by a sole source award), its maximum term, and any other limits on its terms (options or other terms)—provide for a base term not to exceed the lesser of five years or the maximum term the Secretary authorized.

(2) The contract may include option terms provided no option term exceeds the lesser of five years or the maximum term the Secretary authorized (for options or the contract) and the sum of base term and the option terms does not exceed the lesser of 10 years or the maximum term the Secretary authorized for the contract. In addition to the base term and the option terms just described, an M&O contract for a national laboratory that is competitively awarded may provide for award term incentives provided none exceed the maximum term the Secretary authorized for each. The sum of base term, option terms, and award terms shall not exceed the lesser of 20 years or the maximum term the Secretary authorized for the contract.

(3) After the Secretary's original authorization of the use of the M&O contract has expired, any continuation of work under an M&O contract must be preceded by the Secretary's renewal of his/her authorization for use of an M&O contract. Whether work is to be continued by a competitive award to a new contractor or to the incumbent, by a sole source award to a new contractor, or by a sole source extension of the contract to the incumbent, the Secretary's renewal of his/her authorization for use of an M&O contract to perform the work is required before work may continue.

(4) In addition to requiring the Secretary's renewal of his/her authorization for use of an M&O contract, a sole source extension of an M&O contract to the incumbent must be justified under one of the statutory authorities listed in FAR 6.302 and authorized by the Secretary.

(5) The specific duration of the base term, option terms, and award terms of an M&O contract must be established concurrent with the Secretary's authorization (or renewal of his/her authorization) to use an M&O contract (for original use, sole source award to a new contractor, competitive award to a new contractor or to the incumbent, or sole source extension of the contract to the incumbent).

(b) *Exercise of option.* The contracting officer's decision to exercise an option (if the Secretary's authorization to use an M&O contract covers the option period) must be approved by the Senior Procurement Executive and the cognizant Assistant Secretary(s). In deciding to exercise the option, the contracting officer shall:

(1) Consider the extent to which performance-based management contract provisions are present or can be negotiated into the contract.

(2) Make the determinations required by FAR 17.605 in the manner described therein. As part of the review required by FAR 17.605(b), the Contracting Officer shall assess whether competing the contract will produce a more advantageous offer than exercising the option. The incumbent contractor's past performance under the contract, the extent to which performance-based management contract provisions are present, or can be negotiated into the contract, and the impact of a change in a contractor on the Department's discharge of its programs are considerations that shall be addressed in the Contracting Officer's decision that the exercise of the option is in the Government's best interest. The Contracting Officer's decision shall be approved by the Senior Procurement Executive and the cognizant Assistant Secretary(s). The determinations described in FAR 17.207(d) and (e)(2) are not required, and because of the way in which the evaluation of cost to the Government is performed in the award of an M&O contract that includes options, the Contracting Officer need only determine the option was evaluated as part of the initial competition and contains a maximum fee. The Contracting Officer need not, for example: issue a new solicitation; informally analyze prices; or determine the option is the more advantageous offer.

* * * * *

■ 215. Section 970.1707–1 is revised to read as follows:

970.1707–1 Scope.

Pursuant to 42 U.S.C. 2053 and 7259a, DOE is authorized to make its facilities available to other Federal and non-Federal entities (sponsors) for the conduct of certain research and development and training activities. Pursuant to 31 U.S.C. 1535 and 42 U.S.C. 7259a, or other applicable authority, other Federal entities may

request DOE to conduct work. DOE has implemented these and other statutory authorities and requirements in its Strategic Partnership Projects Program.

■ 216. Amend section 970.1707–3 by:
■ a. Revising paragraph (a);
■ b. Adding the word ''and'' at the end of paragraph (b)(2);
■ c. Removing paragraph (b)(3) and redesignating paragraph (b)(4) as paragraph (b)(3); and
■ d. Revising paragraph (c)(1).

The revisions read as follows:

970.1707–3 Terms governing strategic partnership projects.

(a) DOE's internal review and approval procedural requirements for strategic partnership projects agreements are set forth in the current version of DOE Order 481.1, and such other guidance as may be issued by DOE.

* * * * *

(c) * * *

(1) The interagency agreement with DOE complies with the Economy Act of 1932 (31 U.S.C. 1535) or other applicable statutory authorities and FAR 6.002, which prohibits the use of an Interagency Agreement for the purpose of avoiding the competition requirements of the Federal Acquisition Regulation (48 CFR chapter 1); and

* * * * *

■ 217. Section 970.1707–4 is revised to read as follows:

970.1707–4 Contract clause.

Insert the clause at 970.5217–1, Strategic Partnership Projects Program (Non-DOE Funded Work), in any contract that may involve work under the Strategic Partnership Projects Program.

■ 218. Sections 970.1708, 970.1708–1, 970.1708–2, and 970.1708–3 are added to read as follows:

Sec.
970.1708 Agreements for commercializing technology (ACT).
970.1708–1 Scope.
970.1708–2 General.
970.1708–3 Contract clause.

970.1708 Agreements for commercializing technology (ACT).

970.1708–1 Scope.

The scope of this subpart is to provide authorization for the M&O contractor to conduct third party-sponsored research at the M&O contractor's risk.

970.1708–2 General.

M&O contractors may elect to enter into agreements directly with non-Federal sponsors to conduct research at the facility the M&O contractor is responsible for managing and operating so long as the work does not present, or minimizes, any apparent COI, as well as avoiding or neutralizing any actual COI as a result of the agreement. This research is conducted at the M&O contractor's risk and the M&O contractor may obtain compensation beyond full-cost recovery for accepting the risk of performance.

970.1708–3 Contract clause.

The Contracting Officer shall insert the clause at 970.5217–2, Agreements for Commercializing Technology (ACT), in any contract that may involve ACT pursuant to 970.1708.

■ 219. Section 970.1907–8 is added to read as follows:

970.1907–8 Contract clauses.

(a) In accordance with FAR 19.708(b)(1), the Contracting Officer shall insert the clause FAR 52.219–9, Small Business Subcontracting Plan, in all M&O solicitations and contracts.

(b) The Contracting Officer shall supplement the clause at FAR 52.219–9 with the clause at 970.5219, Small Business Subcontracting Plan, in M&O solicitations and contracts, except for those for the Ames Laboratory and Princeton Plasma Physics Laboratory. The Contracting Officer may tailor the clause as needed.

970.2201–1 [Redesignated as 970.2201–100]

■ 220. Section 970.2201–1 is redesignated as section 970.2201–100.

970.2201–1–1 [Redesignated as 970.2201–110]

■ 221. Section 970.2201–1–1 is redesignated as section 970.2201–110.

■ 222. Newly redesignated section 970.2201–110 is revised to read as follows:

970.2201–110 General.

Contracting officers shall, in appropriate circumstances, follow the requirements in FAR subpart 22.1, as supplemented in this section, in the award and administration of:

(a) Management and operating (M&O) contracts;

(b) Contracts the Senior Procurement Executive designates; and

(c) Non-M&O contracts where the current contract's work was previously performed under an M&O contract and the current Contractor was required to, and did, employ the former Contractor's legacy workforce. These non-M&O contracts may include, but are not limited to, contracts whose work is for:

(1) Environmental remediation;

(2) Decontamination and decommissioning;

(3) Environmental restoration;

(4) Infrastructure services for the site;

(5) Site closure at a current or former M&O contract site or facility; or

(6) Protective forces that provide physical security of sites at a current of former M&O contract site or facility.

970.2201–1–2 [Redesignated as 970.2201–120]

■ 223. Section 970.2201–1–2 is redesignated as section 970.2201–120.

■ 224. Newly redesignated section 970.2201–120 is revised to read as follows:

970.2201–120 Policies.

(a) The extent of Government ownership of the nation's energy plant and materials, and the overriding concerns of national defense and security, impose special conditions on personnel and labor relations in the energy program. Such special conditions include the need for continuity of vital operations at DOE installations; retention by DOE of absolute authority on all questions of security in accordance with 10 CFR 706.40; and DOE review of labor expenses under management and operating (M&O) contracts (and certain other contracts) to assure judicious expenditure of public funds. It is the intent of DOE that personnel and labor policies throughout the energy program reflect the best experience of American industry in aiming to achieve the type of stable labor-management relations that are essential to the proper development of the energy program. The following enunciates the principles upon which the DOE policy is based:

(1) *Employment standards.* (i) M&O contractors (and certain other non-M&O contractors and subcontractors as described in 970.2201–110) are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, age, disability, or national origin. Contractors are required to take affirmative action to achieve these objectives as required by, among other things, the clause at FAR 52.222–26.

(ii) When the clause at 952.204–2, Security Requirements, is applicable (see 904.404), the Contracting Officer will obtain adequate assurance that the Contractor performed the required review of an uncleared applicant's or of an uncleared employee's background in its determination to select an individual

for a position requiring a DOE access authorization.

(2) *Security.* In accordance with 10 CFR 706.40, on all matters of security at its facilities, DOE retains absolute authority. Neither the regulations or policies pertaining to security, nor their administration, are matters for collective bargaining between the contractor's management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible, DOE will consult with representatives of the contractor's management and labor when formulating security regulations and policies that may affect the collective bargaining process.

(3) *Wages, salaries, and employee benefits.* The aspects of wages, hours, and working conditions which are the substance of collective bargaining in normal organized industries will be left to the orderly processes of negotiation and agreement between contractor management and employee representatives with maximum possible freedom from Government interference and consistent with paragraph (a)(5) of this section and 970.2201–140.

(4) *Employee relations.* The handling of employee relations on contract work, including such matters as the conduct and discipline of the work force and the handling of employee grievances, is part of the normal management responsibility of the contractor.

(5) *Collective bargaining.* (i) DOE review of collective bargaining practices will be premised on the view that management's trusteeship for the operation of the Government facilities includes the duty to adopt practices (which experience has shown) that are fundamental to the equitable resolution of disputes and promote orderly collective bargaining relationships. Practices inconsistent with this view may be objected to if not found to be otherwise clearly warranted.

(ii) Consistent with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at DOE-owned facilities should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For purposes of this paragraph (a)(5)(ii), each collective bargaining agreement entered into during the period of performance of this contract should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operation for the term of the collective bargaining agreement.

(iii) DOE expects its management and operating contractors and the unions representing the contractor's employees to cooperate fully with the Federal Mediation and Conciliation Service.

(6) *Personnel training.* DOE encourages and supports personnel training programs aimed at improving work efficiency or developing needed skills which are not otherwise obtainable.

(7) *Working conditions.* Accident, fire, health, and occupational hazards associated with DOE activities should be held to a practical minimum level and controlled in the interest of maintenance of health and prevention of accidents. Subject to DOE control, to the extent set forth in the terms and conditions of the contract, contractors are required to:

(i) Maintain comprehensive continuous preventive and protective programs appropriate to the particular activities throughout all operations.

(ii) Provide appropriate financial protection in case of occupational disability to employees.

(b) Title to payroll and associated records under certain contracts (see 970.0407–120) for the management and operation of DOE facilities, and for necessary miscellaneous construction incidental to the function of these facilities, shall vest in the Government. Such records are to be disposed of in accordance with the clause at 970.5232–3, Accounts, Records, and Inspection, and other DOE directions. For such contracts, the Solicitor of Labor has granted a tolerance from the Department of Labor regulations to omit from the prescribed labor clauses the requirement for the retention of payrolls and associated records for a period of three years after completion of the contract. Under this tolerance, the records retention requirements for all labor clauses in the contract and the Fair Labor Standards Act are satisfied by disposal of such records in accordance with applicable DOE directives.

970.2201–1–3 [Redesignated as 970.2201–130]

■ 225. Section 970.2201–1–3 is redesignated as section 970.2201–130.

■ 226. Newly redesignated section 970.2201–130 is revised to read as follows:

970.2201–130 Contract clause.

In addition to the clause at FAR 52.222–1, Notice to the Government of Labor Disputes, the contracting officer shall insert the clause at 970.5222–1, Collective Bargaining Agreements—Management and Operating Contracts, in all M&O contracts and certain other non-M&O contracts as described in 970.2201–110. The substance of the clause at 970.5222–1, Collective Bargaining Agreements, shall be included in any subcontract for protective services or other services performed on the DOE-owned site which will affect the continuity of operations of the facility.

■ 227. Section 970.2201–140 is added to read as follows:

970.2201–140 Wages, salaries, and employee benefits.

(a) It is DOE policy that contractors facilitate the retention of certain critically skilled employees for: the management and operation of laboratories and other national defense and security site facilities; contracts designated by the Senior Procurement Executive; and certain other non-M&O contracts as described in 970.2201–100. Critically skilled employees are those employees whose specific recognized technical skills, knowledge, and experience in a specific field are critical to the operations or strategy of a contractor, and whose loss from the DOE contractor's workforce system would cause a significant negative impact on achieving and supporting national research, environmental, defense, and security objectives.

(b) Wages, salaries, and employee benefits shall be administered in a manner designated to adapt the normal practices and conditions of industry or institutions of higher education to the contract work, and to provide for appropriate review by DOE.

(c) The contractor's compensation systems and supporting policies should support the effective recruitment and retention of a highly skilled, motivated, and experienced workforce at a reasonable cost. For a cost to be allowable it must comply with each of the five requirements for allowability stated in FAR 31.201–2. Some of the specific details of the allowable costs for compensation for personal services are discussed at FAR 31.205–6, as supplemented by, 970.3102–506, and other pertinent parts of the DEAR and DOE directives and policies.

970.2201–2 [Redesignated as 970.2201–200]

■ 228. Section 970.2201–2 is redesignated as section 970.2201–200.

970.2201–2–1 [Redesignated as 970.2201–210]

■ 229. Section 970.2201–2–1 is redesignated as section 970.2201–210.

970.2201–2–2 [Redesignated as 970.2201–220]

■ 230. Section 970.2201–2–2 is redesignated as section 970.2201–220.

■ 231. Section 970.2204 is revised to read as follows:

970.2204 Labor standards for contracts involving construction.

The policy in 922.406–1 applies to M&O contracts.

970.2204–1 and 970.2204–1–1 [Removed]

■ 232. Sections 970.2204–1 and 970.2204–1–1 are removed.

■ 233. Section 970.2210 is revised to read as follows:

970.2210 Service contract labor standards.

The Service Contract Labor Standards, historically referred to as the Service Contract Act of 1965, is not applicable to contracts for the management and operation of DOE facilities, but it is applicable to subcontracts under such contracts (see 970.5244–1(x)).

■ 234. Section 970.2270 is revised to read as follows:

970.2270 Unemployment compensation.

(a) Each state has its own unemployment compensation system to provide payments to workers who become unemployed involuntarily and through no fault of their own. These claims are payable by employers through the state unemployment insurance tax. Some entities such as nonprofits may be permitted to either pay in or opt out. These claims are payable either through the state unemployment insurance tax (pay in) or by reimbursing the state for actual claims paid out to former employees (opt out).

(b) The predictability of paying claims through the state unemployment insurance tax is preferred and highly encouraged. However, an M&O contractor may choose to opt out. A contractor before deciding to opt out, generally performs an analysis of its workforce including size and stability of the workforce, historical turnover rate and historical payout data. This information may also be provided to state regulators who are interested in ensuring that employers who opt out establish an adequate reserve fund to reimburse the state for the claims that are processed for the company's former employees.

(c) When an M&O contractor opts out of paying for claims through the state's unemployment insurance tax, as permitted and in accordance with state laws, regulations and guidelines, the reimbursement by DOE, in any given year, should generally be limited to the actual incurred cost, but no more than what would have been incurred had the contractor chosen to pay in.

■ 235. Section 970.2270–2 is added to read as follows:

970.2270–2 Contract clause.

The Contracting Officer shall insert the clause at 970.5222–4, Unemployment Compensation, in all solicitations for an M&O contract and in all M&O contracts awarded to a nonprofit entity. When this is included in a contract or solicitation, the Contracting Officer shall fill in the appropriate number of calendar days.

■ 236. Revise the heading for subpart 970.23 to read as follows:

970.23 Environment, Sustainable Acquisition, and Material Safety

970.2301–1 [Removed and Reserved]

■ 237. Section 970.2301–1 is removed and reserved.

■ 238. Section 970.2301–2 is revised to read as follows:

970.2301–2 Contract clauses.

The Contracting Officer shall insert the clause at 952.223–78, Sustainable Acquisition Requirements, in all management and operating (M&O) contracts in accordance with 923.172.

970.2303–2–70 [Redesignated as 970.2303–2]

■ 239. Section 970.2303–2–70 is redesignated as section 970.2303–2.

970.2303–2 [Amended]

■ 240. Amend newly redesignated section 970.2303–2 in paragraph (c)(2)(ii) by removing the text ''the Office of Price Anderson Enforcement within the Office of the Assistant Secretary for Health, Safety and Security'' and adding in its place ''the Office of Enforcement within the Office of Enterprise Assessments''.

970.2305, 970.2305–1, 970.2305–2, 970.2305–3, 970.2305–4, and 970.2306 [Redesignated as 970.2605, 970.2605–1, 970.2605–2, 970.2605–3, 970.2605–4, and 970.2606]

■ 241. Redesignate sections 970.2305, 970.2305–1, 970.2305–2, 970.2305–3, 970.2305–4, and 970.2306 as sections 970.2605, 970.2605–1, 970.2605–2, 970.2605–3, 970.2605–4, and 970.2606 respectively.

970.2605–2 [Amended]

■ 242. Amend newly redesignated section 970.2605–2 in paragraph (b) by removing ''48 CFR subpart 23.5'' and adding ''48 CFR subpart 26.5'' in its place.

970.2605–4 [Amended]

■ 243. Amend newly redesignated section 970.2605–4 as follows:

■ a. In paragraph (a) remove ''970.5223–3'' and add ''970.5226–4'' in its place; and

■ b. In paragraph (b) remove ''970.5223–4'' and add ''970.5226–5'' in its place.

970.2606 [Amended]

■ 244. Amend newly redesignated section 970.2606 as follows:

■ a. In paragraph (a) remove ''48 CFR 23.506'' and add ''48 CFR 26.505'' in its place;

■ b. In paragraph (a) remove ''970.5223–4'' and add ''970.5226–5'' in its place; and

■ c. In paragraph (b) removing ''970.5223–3'' and add ''970.5226–4'' in its place wherever it appears.

■ 245. Section 970.2672–3 is revised to read as follows:

970.2672–3 Contract clause.

(a) The contracting officer shall insert the clause at 970.5226–2, Workforce Restructuring under section 3161 of the National Defense Authorization Act for Fiscal Year 1993, in contracts for the management and operation of Department of Energy Defense Nuclear Facilities and, as appropriate, in other contracts that include site management responsibilities at a Department of Energy Defense Nuclear Facility.

(b) The contracting officer shall insert the clause at 952.226–74, Workforce Restructuring and Displaced Employee Hiring Preference, in contracts and subcontracts at any tier (except for contracts for commercial items, pursuant to 41 U.S.C. 403) which exceed $500,000 in value.

■ 246. Section 970.2673–2 is revised to read as follows:

970.2673–2 Contract clause.

The contracting officer may insert the clause at 970.5226–3, Community Commitment, in management and operating contracts where community involvement will be required of the contractor.

■ 247. Section 970.2701–1 is revised to read as follows:

970.2701–1 Applicability.

This subpart applies to negotiation of patent rights, rights in technical data provisions and other related provisions for the Department of Energy contracts for the management and operation of DOE's major sites or facilities, including the conduct of research and development and nuclear weapons production, and contracts which involve major, long-term or continuing

activities conducted at a DOE site, including decontamination and decommissioning activities.

■ 248. Section 970.2702 is revised to read as follows:

970.2702 Patent and copyrights.

970.2702–1 through 970.2702–6 [Removed]

■ 249. Sections 970.2702–1 through 970.2702–6 are removed.

■ 250. Section 970.2702–70 is added to read as follows:

970.2702–70 Solicitation provision and contract clauses.

(a) *Authorization and consent.* Contracting officers must include the clause at 970.5227–4, Authorization and Consent, instead of the clause at FAR 52.227–1.

(b) *Notice and assistance regarding patent and copyright infringement.* Contracting Officers must include the clause at 970.5227–5, Notice and Assistance Regarding Patent and Copyright Infringement, instead of the clause at FAR 52.227–2.

(c) *Patent indemnity.* (1) Contracting Officers must include the clause at 970.5227–6, Patent Indemnity-Subcontracts, to assure that subcontracts appropriately address patent indemnity.

(2) Normally, the clause at FAR 52.227–3 would not be appropriate for an M&O contract; however, if there is a question, such as when the mission of the contractor involves production, the Contracting Officer must consult with DOE patent counsel and use the clause where appropriate.

(d) *Rights to proposal data.* Contracting Officers must include the clause at FAR 52.227–23, Rights to Proposal Data (Technical), in all solicitations and contracts for the management and operation of DOE sites and facilities.

(e) *Notice of right to request patent waiver.* Contracting Officers must include the provision at 970.5227–9 in all solicitations for contracts for the management and operation of DOE sites or facilities.

(f) *Royalties.* Contracting Officers must include the solicitation provision at 970.5227–7, Royalty Information, and the clause at 970.5227–8, Refund of Royalties, instead of the provision at FAR 52.227–6 and the clause at FAR 52.227–9, respectively.

970.2703–1 [Amended]

■ 251. Amend section 970.2703–1 by:

■ a. Removing paragraph (b); and

■ b. Redesignating paragraph (c) as paragraph (b).

■ 252. Amend section 970.2703–2 by revising paragraphs (a), (b), and (c) and adding paragraph (h) to read as follows:

970.2703–2 Patent rights clause provisions for management and operating contractors.

(a) *Allocation of principal rights: Bayh-Dole provisions.* (1) If the M&O contractor is a nonprofit organization or small business firm as defined by 35 U.S.C. 201, the clause at 970.5227–10 must be inserted into the M&O contract, except when the M&O contract is for the operation of a DOE facility primarily dedicated to naval nuclear propulsion or weapons related programs. The patent rights clause at 970.5227–10 allows the contractor to elect to retain title to inventions conceived or first actually reduced to practice in performance of work under the contract in accordance with 35 U.S.C. 200 *et seq.* (the Bayh-Dole Act).

(2) If the M&O contractor is conducting privately funded technology transfer activities, involving the use of private funds to conduct licensing and marketing activities related to inventions made under the contract in accordance with the Bayh-Dole Act, DOE may modify the clause at 970.5227–10 to address issues such as the disposition of royalties earned under the privately funded technology transfer program, the transfer of patent rights to a successor contractor, allowable cost restrictions concerning privately funded technology transfer activities, and the Government's freedom from any liability related to licensing under the contractor's privately funded technology transfer program.

(b) *Allocation of principal rights: Government title.* (1) The clause at 970.5227–11 must be incorporated into the M&O contract:

(i) For any the M&O contractor that does not qualify as a nonprofit organization or small business firm as defined by 35 U.S.C. 201 and for which DOE has not granted a patent waiver pursuant to 10 CFR part 784; or

(ii) If, without regard to the type of contractor, the M&O contract is for the operation of a DOE facility primarily dedicated to naval nuclear propulsion or weapons related programs.

(2) The clause at 970.5227–11 requires the contractor to assign the Government title to inventions conceived or first actually reduced to practice in the course of or under an M&O contract in accordance with 42 U.S.C. 2182 and 5908 (the Atomic Energy of 1954 and the Federal Nonnuclear Energy Act of 1974).

(c) *Allocation of principal rights: Contractor right to elect title under a patent waiver.* DOE may grant a patent waiver for an M&O contractor that does not qualify as a nonprofit organization or a small business firm pursuant to 10 CFR part 784. The patent waiver would allow the contractor to elect to retain title to inventions made in the course of or under the M&O contract. When a patent waiver is granted that covers the M&O contractor, the clause at 970.5227–12 must be inserted into the M&O contract, instead of using the clause at 970.5227–11. The clause at 970.5227–12 may be modified by applicable patent. If the M&O contractor is conducting privately funded technology transfer activities, involving the use of private funds to conduct licensing and marketing activities related to inventions made under the contract, DOE may modify the patent rights clause to address issues such as the disposition of royalties earned under the privately funded technology transfer program, the transfer of patent rights to a successor contractor, allowable cost restrictions concerning privately funded technology transfer activities, and the Government's freedom from any liability related to licensing under the contractor's privately funded technology transfer program.

* * * * *

(h) *Allocation of principal rights: Subcontractor rights to elect title under Bayh-Dole provisions.* When the M&O contractor is issuing a subcontract to a nonprofit organization or small business firm as defined by 35 U.S.C. 201, the subcontractor retains all rights provided in the patent rights clause at 37 CFR 401.3(a) and 401.14 and adding Alternate I of 48 CFR 952.227–11, Patent Rights-Retention by the Contractor, that includes the agency implementing regulations specific for DOE. If the S&E DEC, or any other related DEC to substantial U.S. manufacturing policy, is applicable, the Contractor shall include Alternate II of 48 CFR 952.227–11, Patent Rights-Retention by the Contractor. Alternate II modifies 37 CFR 401.14 to:

(1) Reflect DOE required subcontracting instructions pursuant to 37 CFR 401.5(a) as well as the deletion of the definition of contractor that does not apply based on the subcontracting instructions; and

(2) Include the U.S. competitiveness provision pursuant to the Determination of Exceptional Circumstances under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies executed by DOE on June 7, 2021.

■ 253. Amend section 970.2704–2 by revising paragraphs (a), (c)(2), and (e) to read as follows:

970.2704–2 Procedures.

(a) The clauses at 970.5227–1, Rights in Data—Facilities, and 970.5227–2, Rights in Data—Technology Transfer, both provide generally for Government ownership and for unlimited rights in the Government for all data first produced in the performance of the contract and unlimited rights in data specifically used in the performance of the contract. Both clauses provide that, subject to patent, security, and other provisions of the contract, the contractor may use contract data for its private purposes. The contractor, under either clause, must treat any data furnished by DOE or acquired from other Government agencies or private entities in the performance of their contracts in accordance with any restrictive legends contained therein. For Research and Development Contracting, requirements for R&D results conveyed in scientific and technical information are addressed in 935.010 and should be set forth as part of the contract. These contractual requirements are further addressed in DOE Order 241.1B, or its successor version, which sets forth requirements for scientific and technical information.

* * * * *

(c) * * *

(2) Where, however, a subcontract is to be awarded by the management and operating contractor in connection with a program, as discussed at 927.404–71, which provides statutory authority to protect from public disclosure, data first produced under contracts awarded pursuant to the program, contracting officers shall ensure that the management and operating contractor includes in that subcontract the rights in data clause provided by DOE Patent Counsel, consistent with any accompanying guidance.

* * * * *

(e) The Rights in Data—Technology Transfer clause at 970.5227–2 differs from the clause at 970.5227–1, Rights in Data—Facilities, in the context of its more detailed treatment of copyright. In management and operating contracts that have technology transfer as a mission, the right to assert copyright in data first produced under the contract will be a valuable right, and commercialization of such data, including computer software, will assist the management and operating contractor in advancing the technology transfer mission of the contract. The clause at 970.5227–2, Rights in Data—Technology Transfer, provides for DOE approval of DOE's taking a limited copyright license during the period in which the copyrighted data is being commercialized. The contractor must notify DOE (Patent Counsel and Office of Scientific and Technical Information (OSTI)) when commercial activity ceases.

* * * * *

■ 254. Section 970.2704–3 is revised to read as follows:

970.2704–3 Contract clauses.

(a) The contracting officer shall insert the clause at 970.5227–1, Rights in Data—Facilities, in management and operating contracts which do not contain the clause at 970.5227–2, Rights in Data—Technology Transfer. The Contracting Officer may insert, with concurrence of Patent Counsel, the clause at 970.5227–1, Rights in Data—Facilities, in other contracts where Government facilities are being constructed, modified, or in decontamination and decommissioning. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors. The Contracting Officer shall include the clause with its Alternate II in contracts where Government facilities are being constructed, modified, or in decontamination and decommissioning, and it is anticipated that further solicitation may be required to complete the project.

(b) The contracting officer shall insert the clause at 970.5227–2, Rights in Data—Technology Transfer, in management and operating contracts which contain the clause at 970.5227–3, Technology Transfer Mission. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors. The Contracting Officer shall include the clause with its Alternate II in contracts where Government facilities are being constructed, modified, or in decontamination and decommissioning, and it is anticipated that further solicitation may be required to complete the project.

■ 255. Amend section 970.2770–2 by adding a sentence after the first sentence to read as follows:

970.2770–2 Policy.

* * * All new awards for or extensions of existing DOE laboratory or weapon production facility M&O contracts shall include authorization for the M&O contractor to engage directly with third parties in Agreements for Commercializing Technology, under section 107 of the Department of Energy Research and Innovation Act, Public Law 115–246, by using 970.5217–2, Agreements for Commercializing Technology. * * *

■ 256. Amend section 970.2803–1 by revising the subject heading and paragraph (b) to read as follows:

970.2803–1 Workers' compensation insurance.

* * * * *

(b) *Assignment of responsibilities.* (1) Office of Acquisition Management, other officials, and the Heads of Contracting Activities, consistent with their delegations of responsibility, shall assure management and operating contracts are consistent with the policies and requirements of paragraph (a) of this section.

(2) In discharging assigned responsibility, the Heads of Contracting Activities shall—

(i) Periodically review workers' compensation insurance programs of management and operating contractors in the light of applicable workers' compensation statutes to assure conformance with the requirements of paragraph (a) of this section;

(ii) Evaluate the adequacy of coverage of ''self-insured'' workers'' compensation programs; and

(iii) Provide arrangements for the administration of any existing ''employees'' benefit plans until such plans'' are terminated.

(3) Heads of Contracting Activities are responsible for approving management and operating contractor ''employees' benefit plans.''

■ 257. Amend section 970.2803–2 by revising the second sentence to read as follows:

970.2803–2 Contract clause.

* * * Paragraphs (f)(1)(iii)(C) and (g)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

970.3101–00–70 [Redesignated as 970.3101–1]

■ 258. Section 970.3101–00–70 is redesignated as section 970.3101–1.

■ 259. Section 970.3101–2 is added to read as follows:

970.3101–2 Applicability.

The cost principles of FAR subpart 31.2 and this subpart apply regardless of entity type for the M&O contract.

970.3101–10 [Amended]

■ 260. Amend section 970.3101–10 by removing ''970.4207–03–02'' and adding

in its place ''970.4207–302'' wherever it appears

970.3102–3–70 [Redesignated as 970.3102–370]

■ 261. Section 970.3102–3–70 is redesignated as section 970.3102–370.

■ 262. In newly redesignated section 970.3102–370 revise paragraph (a) introductory text and paragraph (a)(3)(i) to read as follows:

970.3102–370 Home office expenses.

(a) For on-site work, DOE's fee for management and operating contracts, determined under the policy of and calculated per the procedures in 970.1504–103, generally provides adequate compensation for home or corporate office general and administrative expenses incurred in the general management of the contractor's business as a whole.

* * * * *

(3) * * *

(i) Fee in addition to its normal fee; or

* * * * *

970.3102–05 [Redesignated as 970.3102–500]

■ 263. Section 970.3102–05 is redesignated as section 970.3102–0500.

970.3102–05–4 [Redesignated as 970.3102–504]

■ 264. Section 970.3102–05–4 is redesignated as section 970.3102–504.

970.3102–05–6 [Redesignated as 970.3102–506]

■ 265. Section 970.3102–05–6 is redesignated as section 970.3102–506.

■ 266. Newly redesignated section 970.3102–506 is revised to read as follows:

970.3102–506 Compensation for personal services.

(a)(6) In determining the reasonableness of compensation, the compensation of each individual contractor employee normally need not be subjected to review and approval. Generally, the compensation paid individual employees should be left to the judgment of contractors subject to the limitations of DOE-approved compensation policies, programs, classification systems, and schedules, and amounts of money authorized for wage and salary increases for groups of employees. However, the contracting officer shall designate a compensation threshold appropriate for the particular situation. The contract shall specifically provide that contracting officer approval is required for compensating an individual contractor employee above the threshold if a total of 50 percent or more of such compensation is reimbursed under DOE cost-type contracts.

(7)(i) Reimbursable costs for compensation for personal services are to be set forth in the contract. This compensation shall be set forth using the principles and policies of FAR 31.205–6, Compensation for personal services, as supplemented by this section, and other pertinent parts of the DEAR. Costs that are unallowable under other contract terms shall not be allowable as compensation for personnel services.

(ii) The contract sets forth, in detail, personnel costs and related expenses allowable under the contract and documents personnel policies, practices and plans which have been found acceptable by the contracting officer. The contractor will advise DOE of any proposed changes in any matters covered by these policies, practices, or plans which relate to personnel costs. Types of personnel costs and related expenses addressed in the contract are as follows: Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; welfare benefits and retirement programs; paid time off, and salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee above an annual rate as specified in the contract. Allowable costs of employee compensation shall be determined pursuant to FAR 31.205–6(p).

970.3102–05–18 [Redesignated as 970.3102–518]

■ 267. Section 970.3102–05–18 is redesignated as section 970.3102–518

970.3102–05–19 [Redesignated as 970.3102–519]

■ 268. Section 970.3102–05–19 is redesignated as section 970.3102–519.

970.3102–05–22 [Redesignated as 970.3102–522]

■ 269. Section 970.3102–05–22 is redesignated as section 970.3102–522.

970.3102–05–28 [Redesignated as 970.3102–528]

■ 270. Section 970.3102–05–28 is redesignated as section 970.3102–528.

970.3102–05–30 [Redesignated as 970.3102–530]

■ 271. Section 970.3102–05–30 is redesignated as section 970.3102–530.

970.3102–05–30–70 [Redesignated as 970.3102–531]

■ 272. Section 970.3102–05–30–70 is redesignated as section 970.3102–531.

970.3102–05–33 [Redesignated as 970.3102–533]

■ 273. Section 970.3102–05–33 is redesignated as section 970.3102–533.

970.3102–05–46 [Redesignated as 970.3102–546]

■ 274. Section 970.3102–05–46 is redesignated as section 970.3102–546.

970.3102–05–47 [Redesignated as 970.3102–547]

■ 275. Section 970.3102–05–47 is redesignated as section 970.3102–547.

970.3102–05–70 [Redesignated as 970.3102–570]

■ 276. Section 970.3102–05–70 is redesignated as section 970.3102–570.

970.3200–1 [Amended]

■ 277. Amend section 970.3200–1 in paragraph (c) by removing ''remedy coordination official'' and adding in its place ''Head of the Contracting Activity''.

970.3200–1–1 [Redesignated as 970.3200–11]

■ 278. Section 970.3200–1–1 is redesignated as section 970.3200–11.

970.3270 [Amended]

■ 279. Amend section 970.3270 by removing paragraph (a)(4) and redesignating paragraphs (a)(5) through (8) as paragraphs (a)(4) through (7), respectively.

■ 280. Amend section 970.3501–1 by:

■ a. Removing the period at the end of paragraph (c)(1) and adding a semicolon in its place; and

■ b. Revising paragraph (c)(2).

The revision reads as follows:

970.3501–1 Sponsoring agreements.

* * * * *

(c) * * *

(2) The plan for the identification, use, and disposition of retained earnings, if applicable;

* * * * *

■ 281. Section 970.3501–2 is revised to read as follows:

970.3501–2 Using an FFRDC.

The contractor may only accept work from a non-sponsor (as defined in FAR 35.017) in accordance with the

requirements of the current DOE approved mechanisms for engaging with a non-sponsor (*e.g.,* Strategic Partnership Projects, Cooperative Research and Development Agreements, and Agreements for Commercializing Technology). Only a Federal Contracting Officer can obligate the Government to place work on the contract and obligate the Government to reimburse the contractor under the contract.

■ 282. Amend section 970.4102–1 by revising paragraphs (b) and (c) to read as follows:

970.4102–1 Policy.

* * * * *

(b) Where it is determined to be in the best interest of the Government, a DOE contracting activity may authorize a management and operating contractor for a facility to acquire such utility service for the facility, after requesting and receiving concurrence to make such an authorization from the DOE Federal Energy Management Program (FEMP). Any request for such concurrence should be included in the Utility Acquisition Plan. Alternatively, it may be made in a separate document submitted to the FEMP Utility Program Manager early in the acquisition cycle. Any request shall set forth why it is in the best interest of the DOE to acquire utility service(s) by subcontract, *i.e.,* low performance risk and cost risk. For NNSA programs, FEMP review and technical input may be obtained, but FEMP concurrence is not necessary.

(c) The requirements of FAR part 41 and this section shall be applied to a subcontract level acquisition for furnishing utility services to a facility owned or leased by DOE.

970.4207–03–02 [Redesignated as 970.4207–302]

■ 283. Section 970.4207–03–02 is redesignated as section 970.4207–302.

970.4207–03–70 [Redesignated as 970.4207–370]

■ 284. Section 970.4207–03–70 is redesignated as section 970.4207–370.

970.4207–05–01 [Redesignated as 970.4207–501]

■ 285. Section 970.4207–05–01 is redesignated as section 970.4207–501.

■ 286. Amend newly redesignated section 970.4207–501 by revising paragraph (b)(4)(ii) to read as follows:

970.4207–501 Contracting officer determination procedure.

(b) * * *

(4) * * *

(ii) The opinion of the Department of Energy's auditor on the allowability of such costs if such costs have been the subject of a DOE audit.

* * * * *

■ 287. Amend section 970.4401–1 by revising paragraph (b)(4) to read as follows:

970.4401–1 General.

* * * * *

(b) * * *

(4) Ensure that periodic appraisals of the contractor's management of all facets of the purchasing function, including compliance with the contractor's approved system and methods, are performed by the contracting officer.

* * * * *

■ 288. Amend section 970.4402–1 by adding paragraph (c) to read as follows:

970.4402–1 Policy.

* * * * *

(c) The M&O contractor's purchasing performance, including compliance with the contractor's approved system and methods, will be evaluated against the performance criteria and measures set forth in FAR subpart 44.3, using the procedures articulated in DOE policies including DOE guidance on oversight of M&O Contractors' Purchasing Systems.

■ 289. Section 970.4501–1 is revised to read as follows:

970.4501–1 Applicability.

This subpart is applicable to management and operating (M&O) contractors, and on-site environmental management and other major prime contractors as designated by the Senior Procurement Executive, or designee. This subpart supplements 41 CFR part 109.

■ 290. Section 970.4501–2 is added to read as follows:

970.4501–2 Contract clause.

(a) The contracting officer shall insert the clause at 970.5245–1, Property, in management and operating contracts and environmental management, and other major prime contractors located at DOE sites. Specific managerial personnel may be listed in paragraph (k) of the clause at 970.5245–1, provided their listing is consistent with the clause and the DEAR.

(b) The contracting officer shall insert the basic clause at 970.5245–1 with its Alternate I in contracts with nonprofit contractors.

■ 291. Amend section 970.5203–1 by revising the introductory text to read as follows:

970.5203–1 Management controls.

As prescribed in 970.0370–2(a), insert the following clause:

* * * * *

970.5204–1 [Removed]

■ 292. Section 970.5204–1 is removed.

■ 293. Amend section 970.5204–3 by revising the introductory text, clause date, and paragraphs (b) and (g) to read as follows:

970.5204–3 Access to and ownership of records.

As prescribed in 970.0407–130, insert the following clause:

Access to and Ownership of Records [December 2024]

* * * * *

(b) *Contractor-owned records.* The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.

(1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, except those records described by the contract as being operated and maintained by the Contractor in Privacy Act system of records.

* * * * *

(g) *Subcontracts.*

(1) The contractor shall include the requirements of this clause in all subcontracts that contain the Radiation Protection and Nuclear Criticality clause at 48 CFR 952.223–72, or whenever an on-site subcontract scope of work:

(i) Could result in potential exposure to:

(A) Radioactive materials;

(B) Beryllium; or

(C) Asbestos; or

(ii) Involves a risk associated with chronic or acute exposure to toxic chemicals or substances or other hazardous materials that can cause adverse health impacts, in accordance with 10 CFR part 851. In determining its flow-down responsibilities, the Contractor shall include the requirements of this clause in all on-site subcontracts where the scope of work is performed in:

(A) Radiological areas and/or radioactive materials areas (as defined at 10 CFR 835.2);

(B) Areas where beryllium concentrations exceed or can reasonably be expected to exceed action levels specified in 10 CFR part 850;

(C) An asbestos regulated area (as defined at 29 CFR 1926.1101 or 1910.1001); or

(D) A workplace where hazard prevention and abatement processes are implemented in compliance with 10 CFR 851.21 to specifically control potential exposure to toxic chemicals or substances or other hazardous materials that can cause long term health impacts.

(2) The Contractor may elect to take on the obligations of the provisions of this clause in lieu of the subcontractor and maintain records that would otherwise be maintained by the subcontractor.

(End of clause)

■ 294. Section 970.5215–1 is revised to read as follows:

970.5215–1 Total available fee: Base fee amount and performance fee amount.

As prescribed in 970.1504–3(a), insert the following clause.

Total Available Fee: Base Fee Amount and Performance Fee Amount [December 2024]

(a) *Total available fee.* Total available fee, consisting of a base fee amount (which may be zero) and a performance fee amount (consisting of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both) determined in accordance with the provisions of this clause, is available for payment in accordance with the clause of this contract entitled, ''Payments and advances.''

(b) *Fee negotiations.* For any fee negotiations under this contract, at any time prior to the beginning of the evaluation period the negotiations cover, the Contracting Officer and Contractor shall attempt to reach agreement on: the requirements for the evaluation period including, if appropriate, the evaluation areas and individual requirements subject to incentives; the total available fee amount of the evaluation period; and the allocation of the total available fee amount. If agreement is reached prior to the beginning of the evaluation period, the Contracting Officer shall modify the contract to reflect the agreement. If agreement is not reached prior to the beginning of the evaluation period, the Contracting Officer will, prior to the beginning of the evaluation period, unilaterally determine: the requirements of the evaluation period including, if appropriate, the evaluation areas and individual requirements subject to incentives, the total available fee amount, and the allocation of the total available fee amount. The Contracting Officer shall modify the contract to reflect the determination.

(c) *Determination of total available fee amount earned.* (1) The Department of Energy (DOE) shall, at the conclusion of each specified evaluation period, evaluate the Contractor's performance of all requirements, and determine the total available fee amount earned. At DOE's discretion, if the contact established specific incentivized requirements and a schedule for their completion and the Contractor completes them during the evaluation period, DOE may evaluate the Contractor's performance upon the requirements' completion. The Contractor agrees the determination of the total available fee amount earned is a unilateral determination made by the Fee Determining Official (FDO). DOE will identify the FDO. The FDO will be the DOE Operations/Field Office Manager, or another DOE official designated by the Assistant Secretary or equivalent (not delegable).

(2) If the award fee cycle consists of one evaluation period, award fee not earned during the evaluation period shall not be allocated to future evaluation periods. At the sole discretion of DOE, if the award fee cycle consists of more than one evaluation period, award fee not earned during the evaluation period may be allocated to future evaluation periods within the same award fee cycle.

(3) Following each evaluation period, the Contractor [insert may or shall] submit a self-assessment within [insert number] calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct them and avoid their recurrence. The FDO will review the Contractor's self-assessment as part of the evaluation of the Contractor's performance during the period.

(4) The FDO will evaluate the Contractor's performance in accordance with the Performance Evaluation and Measurement Plan (PEMP) described in paragraph (d) of this clause unless otherwise set forth in the contract. The Contractor shall be promptly advised in writing of the total available fee amount earned determination and the basis of the determination.

(d) *PEMP.* To the extent not set forth elsewhere in the contract:

(1) DOE shall establish a PEMP upon which the determination of the total available fee amount earned shall be based. The PEMP will address all of the requirements of contract performance specified in the contract directly or by reference. The Contracting Officer shall provide the Contractor with a copy of the PEMP before the start of an evaluation period.

(2) The PEMP will set forth the criteria upon which the Contractor will be evaluated relating to any technical, schedule, management, and/or cost objectives selected for evaluation. The PEMP will include, per 48 CFR 16.402–1, a cost incentive (or constraint). The criteria in the PEMP should be objective but may also include subjective criteria. The PEMP will set forth the method by which the total available fee amount will be allocated, and the total available fee amount earned will be determined.

(3) The PEMP may be revised, either unilaterally (by DOE) or bilaterally, during the evaluation period. If it is revised, the Contracting Officer shall notify the contractor—

(i) Of unilateral revisions (unless they are urgent and high priority) at least ninety calendar days prior to the end of the evaluation period and at least thirty calendar days prior to the effective date of the revision;

(ii) Of bilateral revisions (unless they are urgent and high priority) at least sixty calendar days prior to the end of the evaluation period;

(iii) Of urgent and high priority revisions, whether made unilaterally or bilaterally, at least thirty calendar days prior to the end of the evaluation period.

(e) *Schedule for total available fee amount earned determinations.* The FDO shall issue the final total available fee amount earned determination in accordance with the schedule set forth in the PEMP or as otherwise set forth in this contract.

(1) The determination for the evaluation period must be made within the later of: sixty calendar days after the receipt by the Contracting Officer of the Contractor's self-assessment, if one is required or permitted; seventy calendar days after the end of the evaluation period; or a longer period if the Contractor and Contracting Officer agree.

(2) If the FDO elects to evaluate the Contractor's performance of any specific requirements upon their completion, the determination of any fee amount earned must be made: within seventy calendar

days of the requirements' completion; or a longer period if the Contractor and Contracting Officer agree.

(3) If the determination is not made within the periods stated above, the Contractor shall be entitled to interest on the total available fee amount earned at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 7109) that is in effect on the payment date. This rate is referred to as the ''Renegotiation Board Interest Rate,'' and is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest on any late total available fee amount earned determination will accrue daily and be compounded in 30-day increments inclusive from the first day after the schedule determination date through the actual date the determination is made. That is, interest accrued at the end of any 30-day period will be added to the total available fee amount earned and be subject to interest if not paid in the succeeding 30-day period.

(End of clause)

■ 295. Section 970.5215–3 is revised to read as follows:

970.5215–3 Conditional payment of fee, profit, and other incentives—facility management contracts

As prescribed in 970.1504–3(b), insert the following clause:

Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts [December 2024]

(a) *Definitions.* ''Amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for an evaluation period'' means the quantity the Contracting Officer or Fee Determining Official determines the Contractor is due for its performance in consideration of the Performance Evaluation and Measurement Plan, Award Fee Plan, or similar document prior to a separate determination that the Contractor did not comply with a term or condition of the contract or experienced a failure relating to: environment, safety, and health or security or safeguarding of Restricted Data and other classified information. If the contract includes incentives allocable to more than one evaluation period, the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for an evaluation period includes the allocable amount of payment for each such incentive for otherwise earned fee, fixed fee, profit, or other incentives. The allocable amount is the total amount divided by the number of evaluation periods the incentive covered. ''Amount actually payable to the Contractor for an evaluation period'' means: (the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for the evaluation period) less (the amount of any reduction under this clause and the amount of any reductions under other clauses to the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for the evaluation period).

(b) *General.* (Note: If this contract does not include the Security Requirements clause (48 CFR 952.204–2), the requirements of this clause related to security or safeguarding of Restricted Data and other classified information do not apply.)

(1) The amount of payment of otherwise earned fee, fixed fee, profit, or other incentives for any evaluation period under this contract is dependent upon the Contractor's and the Contractor's employees' compliance during the evaluation period with the performance requirements of this contract relating to:

(i) Environment, safety and health (ES&H), which includes worker safety and health (WS&H); and

(ii) Security or safeguarding of Restricted Data and other classified information.

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including the DOE-approved contractor Integrated Safety Management System (ISMS) or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) The security or safeguarding of Restricted Data and other classified information performance requirements of this contract are set forth in: the clause of this contract entitled, ''Security Requirements''; the clause of this contract entitled ''Laws, Regulations, and DOE Directives''; and other terms and conditions of this contract.

(4) If the Contractor does not meet the performance requirements of this contract relating to ES&H or security or safeguarding of Restricted Data and other classified information during any evaluation period established under the contract pursuant to the clause of this contract entitled ''Total Available Fee: Base Fee Amount and Performance Fee Amount,'' the amount of payment of otherwise earned fee, fixed fee, profit or other incentives for the evaluation period may be unilaterally reduced by the Contracting Officer.

(c) *Amount of Reduction.* (1) The Contracting Officer will unilaterally determine the amount of reduction to the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for an evaluation period based on the severity of the performance failure pursuant to the degrees of failure specified in paragraphs (e) and (f) of this clause. The percent reduction for each performance failure will be: not less than 26% nor more than 100% for a first degree failure; not less than 11% or more than 26% for a second degree failure; and no more than 11% for a third degree failure.

(2) For a reduction allocable to more than one evaluation period, the Government will effect the allocation at the end of the evaluation period in which it determines the total amount of the reduction. The allocable amount is the total reduction amount divided by the number of evaluation periods the reduction covered.

(3) The Government will reduce the payment of otherwise earned fee, fixed fee, profit, or other incentives as soon as practicable after the end of the evaluation period in which the performance failure occurs. If the Government is not aware of the failure, it will effect the reduction as soon as practicable after becoming aware.

(4) In determining the reduction and in applying the mitigating factors, the Contracting Officer must consider the Contractor's overall performance in meeting the ES&H, and security or safeguarding of Restricted Data and other classified information performance requirements of the contract. Such consideration must include performance against any site-specific performance criteria/requirements that provide additional definition or guidance for the amount of reduction or for the applicability of mitigating factors. In all cases, the Contracting Office must consider mitigating factors that may warrant a reduction below the reduction that would be appropriate absent mitigating factors. Mitigating factors include, but are not limited to, the following (paragraphs (c)(4)(v), (vi), (vii), and (viii) of this clause apply to ES&H only):

(i) Degree of control the Contractor had over the event or incident;

(ii) Efforts the Contractor made to anticipate and mitigate the possibility of the event in advance;

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence;

(iv) General status (trend and absolute performance) of: ES&H and compliance in related areas; or of safeguarding Restricted Data and other classified

information and compliance in related areas;

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial ES&H standards are routinely practiced;

(vi) Event caused by ''Good Samaritan'' act by the Contractor (*e.g.,* offsite emergency response);

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.,* policy, ES&H programs); and

(viii) Contractor demonstration that an operating experience and feedback program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons learned and best practices inter- and intra-DOE sites.

(d) *Reductions to the amount of payments the Contractor has received for earned fee, fixed fee, profit, or other incentives under this and other clauses.*

(1) The amount of the reduction under this clause for an evaluation period, in combination with the amount of any reduction under any other clause, shall not exceed the amount of payment for otherwise earned fee, fixed fee, profit, or other incentives for the evaluation period.

(2) If at any time during the contract any reductions under this clause or other clauses result in the sum of the amount of payments the Contractor has received for earned fee, fixed fee, profit, or other incentives to exceed the sum of the amounts of actually payable to the Contractor, the Contractor shall immediately return the excess to the Government.

(3) At the end of the contract—

(i) The Government will pay the Contractor the amount by which the sum of amounts actually payable to the Contractor exceeds the sum of the payments the Contractor has received; or

(ii) The Contractor shall return to the Government the amount by which the sum of the payments the Contractor has received exceeds the sum of the amounts actually payable to the Contractor.

(e) *Environment, Safety and Health (ES&H).* Performance failures occur if the Contractor does not comply with the contract's ES&H terms and conditions, including applicable ES&H laws, regulations, DOE directives, and the DOE approved Contractor ISMS. The degrees of performance failure under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are:

(1) *First Degree.* Performance failures most adverse to ES&H are first degree. They include:

(i) Failure to develop and obtain required DOE approval of an ISMS. (The Government will perform necessary reviews in a timely manner and not unreasonably withhold approval.)

(ii) Performance failures determined, per applicable ES&H laws, regulations, or DOE directives, to have resulted in, or that could reasonably be expected to result in, serious injury or death to a worker.

(iii) Occurrence of any accident or event that meets the criteria of Appendix A of DOE Order 225.1B (or successor Order) and results in a determination to conduct a Federal Accident Investigation Board.

(2) *Second Degree.* Performance failures significantly adverse to ES&H are second degree. They include:

(i) Failures to comply with an approved ISMS.

(ii) Failures that have been determined, per applicable ES&H laws, regulations, or DOE directives, to have resulted in, or could reasonably be expected to result in, an actual injury, exposure, or exceedance that occurred or nearly occurred but had minor practical long-term health consequences.

(iii) A breakdown of the Safety Management System.

(iv) The following performance failures or performance failures of similar import will be considered second degree:

(A) Non-compliance with applicable ES&H laws, regulations, or DOE directives actually resulting in an accident that meets the criteria of Appendix A of DOE Order 225.1B (or successor Order) but not resulting in a determination to conduct a Federal Accident Investigation Board.

(B) Non-compliance with applicable ES&H laws, regulations, or DOE directives that results in a near miss of an accident or event that could have resulted in an adverse effect and a determination to conduct a Federal Accident Investigation Board. (A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, that does not result in an adverse effect.)

(3) *Third Degree.* Performance failures determined per applicable ES&H laws, regulations, or DOE directives to reflect a lack of focus on improving ES&H are third degree. They include:

(i) Non-compliance with applicable ES&H laws, regulations, or DOE directives actually resulting in potential breakdown of the Safety Management System. The following performance failures or performance failures of similar import will be considered third degree:

(A) Failure to implement effective corrective actions to address deficiencies/non-compliances documented through: external (*e.g.,* Federal) oversight and/or reported per DOE Order 231.B (or successor Order) requirements; or internal oversight of 10 CFR parts 830, 835, 850, and 851, or DOE Orders 227.1A and 436.1 (or successor Order) requirements.

(B) Multiple similar non-compliances identified by external (*e.g.,* Federal) oversight that in aggregate indicate a significant programmatic breakdown.

(C) Non-compliances that have, or may have, significant negative impacts to the worker, the public, or the environment or that indicate a significant programmatic breakdown.

(D) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(f) *Security or Safeguarding Restricted Data and Other Classified Information.* Performance failures occur if the Contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failure under which reductions of fee, profit, or other incentives will be determined are as follows:

(1) *First Degree.* Performance failures determined, in accordance with applicable law, regulation, or DOE directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security are first degree. The following are examples:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in an SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in an SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree.* Performance failures determined, in accordance with applicable law, DOE regulation, or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security are second degree. The following are examples:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other classified information regardless of classification (except for information covered by paragraph (f)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other classified information classified as Secret.

(3) *Third Degree.* Performance failures determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security are third degree. This category also includes performance failures that result from a lack of Contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future more severe performance failures and/or conditions that if identified and corrected early would prevent serious incidents. The following are examples:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the Contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures that by themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the Contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of clause)

970.5215–4 [Removed]

■ 296. Section 970.5215–4 is removed.

■ 297. Section 970.5215–5 is revised to read as follows:

970.5215–5 Limitation on fee.

As prescribed in 970.1504–3(c), insert the following provision:

Limitation on Fee [December 2024]

(a) For the purpose of this solicitation, fee amounts shall not exceed the total available fee allowed by the fee policy at 48 CFR 970.1504–101, or as specifically stated elsewhere in the solicitation.

(b) The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit the total available fee to an amount allowed by the fee policy at 48 CFR 970.1504–101 unless specifically stated in this solicitation.

(End of provision)

■ 298. Section 970.5217–1 is revised to read as follows:

970.5217–1 Strategic partnership projects program.

As prescribed in 970.1707–4, insert the following clause:

Strategic Partnership Projects Program (Non-DOE Funded Work) [December 2024]

(a) *Authority to perform Strategic Partnership Projects.* Pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) the Contractor may perform work for non-DOE entities (sponsors) on a fully reimbursable basis in accordance with this clause. For instances in which the Atomic Energy Act of 1954 does not apply, and no other specific authority applies, DOE may use the Economy Act of 1932, as amended (31 U.S.C. 1535), as authority to accept and perform the work.

(b) *Contractor's implementation.* The Contractor must draft, implement, and maintain formal policies, practices, and procedures in accordance with this clause, which must be submitted to the Contracting Officer for review and approval.

(c) *Conditions of participation in Strategic Partnership Projects program.* The Contractor—

(1) Must not perform Strategic Partnership Projects (SPP) activities that would place it in direct competition with the domestic private sector;

(2) Must not respond to a request for proposals or any other solicitation from another Federal agency or non-Federal organization that involves direct comparative competition, either as an offeror, team member, or subcontractor to an offeror; however, the Contractor may, following notification to the Contracting Officer, respond to Broad Agency Announcements, Financial Assistance solicitations, and similar solicitations from another Federal Agency or non-Federal organizations when the selection is based on merit or peer review, the work involves basic or applied research to further advance scientific knowledge or understanding, and a response does not result in direct, comparative competition;

(3) Must not commence work on any SPP project until it has been approved by the DOE Contracting Officer or designated representative or, if it includes support for a Special Access Program (SAP), receives formal approval outlined in DOE Order 471.5 (or its successor), or the work falls under an approved Master Scope of Work (MSW);

(4) Must not incur project costs until receipt of DOE notification that a budgetary resource is available for the project, except as provided in 48 CFR 970.5232–6;

(5) Must ensure that all costs associated with the performance of the work under a SPP project are included in the project's cost estimate, as provided for in the current version of

DOE Order 522.1, Pricing of Departmental Materials and Services, including specifically all DOE direct costs and applicable surcharges;

(6) Must maintain records for the accumulation of costs and the billing of such work to ensure that DOE's appropriated funds are not used in support of SPP projects and to provide an accounting of the expenditures to DOE and the sponsor upon request;

(7) Must perform all SPP projects in accordance with the standards, policies, and procedures that apply to performance under this contract, including but not limited to environmental, safety and health, security, safeguards and classification procedures, and human and animal research regulations;

(8) May subcontract portion(s) of a SPP project; however, the Contractor must select the subcontractor and the work to be subcontracted. Any subcontracted work must be in direct support of the Contractor's performance as defined in the DOE approved SPP project;

(9) Must maintain a summary listing of project information for each active SPP project, consisting of—

(i) Sponsoring agency;

(ii) Total estimated costs;

(iii) Project title and description;

(iv) Project point of contact; and

(v) Estimated start and completion dates; and

(10) May use a Master Scope of Work (MSW) as defined in 48 CFR 970.5227–3 for a SPP project.

(d) *Negotiation and execution of Strategic Partnership Projects agreement.* (1) When delegated authority by the Contracting Officer, the Contractor may negotiate the terms and conditions that will govern the performance of a specific SPP project. Such terms and conditions must be consistent with the terms, conditions, and requirements of the Contractor's contract with DOE. The Contractor may use DOE-approved contract terms and conditions as delineated in the current version of DOE Order 481.1 or terms and conditions previously approved by the responsible Contracting Officer or authorized designee for agreements with non-Federal entities. The Contractor must not hold itself out as representing DOE when negotiating the proposed SPP agreement.

(2) With the exception of a SPP project using a Contracting Officer approved MSW, the Contractor must submit all SPP projects to the DOE Contracting Officer for DOE review and approval. The Contactor shall also include in any request for DOE SPP project approval a listing of any associated background intellectual property having a prior assignment, exclusive licensing or option for exclusive licensing. The Contractor may not start work under a SPP project until it has received notice of DOE approval except when the work falls under an approved MSW.

(3) The Contractor is authorized to reserve the intellectual property indemnity clause for Federally-funded sponsors, state and local governments and public universities. The Contractor is further authorized to include in subcontracts with other domestic sponsors (*i.e.,* private universities and small and large businesses) a warranty provision in lieu of a patent indemnification clause.

(e) *Preparation of Strategic Partnership Projects project proposals.* When the Contractor proposes to perform SPP projects pursuant to this clause, it may assist the project sponsor in the preparation of the proposed SPP project including the preparation of cost estimates.

(f) *Strategic Partnership Projects appraisals.* DOE may conduct periodic appraisals of the Contractor's compliance with its SPP policies, practices and procedures. The Contractor must provide facilities and other support in conjunction with such appraisals as directed by the Contracting Officer or authorized designee.

(g) *Annual Strategic Partnership Projects report.* The Contractor must provide assistance as required by the Contracting Officer or authorized designee in the preparation of a DOE Annual Summary Report of Strategic Partnership Projects Activities under the contract.

(End of clause)

■ 299. Section 970.5217–2 is added to read as follows:

970.5217–2 Agreements for commercializing technology.

As prescribed in 970.1708–3, insert the following clause:

Agreements for Commercializing Technology (Act) [December 2024]

(a) This clause authorizes the use of the mechanism, Agreements for Commercializing Technology (ACT). In accordance with the requirements specified in this clause, the M&O Contractor may conduct third party-sponsored research at the M&O Contractor's risk. While the Department believes ACT has the potential to greatly assist in the commercialization of technologies, it also specifically recognizes that ACT can be used for other engagements with outside entities that are not necessary aimed at commercialization (*e.g.,* technical assistance, training, studies), but that facilitate access to DOE facilities. In performing ACT work, the M&O Contractor may use staff and other resources associated with this M&O contract for the purposes of conducting technical services, training, studies, performing research and development, and/or furthering the technology transfer mission of the Department, only when such work does not interfere with DOE-funded activities conducted as authorized by other parts of this M&O contract. Any allocation of resources that adversely affects work for DOE due to performing ACT work is the responsibility of the M&O Contractor. The resources that may be used include Government-owned or leased facilities, equipment, or other property that is either in the M&O Contractor's custody or available to the M&O Contractor under this M&O contract (unless specifically excluded by the Contracting Officer). For M&O Contractor activities conducted under authority of this clause, the M&O Contractor shall provide full-cost recovery, assume indemnification and liability as provided in paragraph (b)(9) below, and may assume other risks normally borne by private parties sponsoring research at the DOE national laboratories and production plants. In exchange for accepting such risks, or for other private consideration provided by the M&O Contractor, the M&O Contractor is authorized to negotiate separate ACT agreements with the sponsoring third parties. Under ACT agreements, the M&O Contractor may charge those parties additional compensation beyond the full costs of the work at the facility.

(b) The following applies to all work conducted under the ACT mechanism, regardless of the source of funding:

(1) *Authority to Perform work under this clause.* Pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) and other applicable authorities, the M&O Contractor may perform work for non-Federal entities, in accordance with the requirements of this clause.

(2) *M&O Contractor's Implementation.* For ACT work conducted under the contract, the M&O Contractor must draft, implement, and maintain formal policies, practices, and procedures in accordance with this clause, which must be approved by the Contracting Officer, and such approval shall not be unreasonably withheld.

(3) *Conditions for Participation in ACT.* The M&O Contractor: (i) Must not perform ACT activities that would place

it in direct competition with the private sector;

(ii) May only conduct work under this clause if the work does not interfere with or adversely affect projects and programs the M&O Contractor conducts on behalf of the DOE under this contract, and complies with the terms and conditions of the prime contract If the Government determines that an activity conducted under this clause interferes with the Department's work under the M&O contract, or that termination/stay/suspension of work under an ACT agreement is in the best interest of the Government, the M&O Contractor must stop the interfering ACT work immediately to the extent necessary to resolve the interference. At any time, the Contracting Officer may require the use of specified Government-owned or leased property and facilities for the exclusive use of the DOE mission by providing a written notice excluding said property from the M&O Contractor's activities under this clause. Any cost incurred as a result of Contracting Officer decisions identified in this paragraph shall be borne by the M&O Contractor. The Contracting Officer shall provide to the M&O Contractor in writing its decision, identifying the issues and reasons for the decisions. The M&O Contractor shall be provided with a reasonable opportunity to address and resolve the issues identified by the Contracting Officer;

(iii) Except as otherwise excluded in this clause, must perform all ACT activities in accordance with the standards, policies, and procedures that apply to performance under this M&O contract, including but not limited to environmental, safety and health, security, safeguards, conflict of interest and classification procedures, and human and animal research regulations;

(iv) Must maintain and provide when requested by the DOE Contracting Officer, a summary of project information for each active ACT project, consisting of: sponsor name; total estimated costs; project title and description; project point of contact; and estimated start and completion dates;

(v) Is responsible for addressing the following items in ACT agreements as appropriate: disposition of property acquired under the agreement; export control; notice of intellectual property infringement; and a statement that the Government and/or the M&O Contractor shall have the right to perform similar services in the Statement of Work for other Parties as otherwise authorized by this M&O contract subject to applicable data restrictions;

(vi) Must include a standard legal disclaimer notice on all publications generated under ACT activities. Each DOE M&O Contractor has its own pre-approved publications statement, and this should be included; and

(vii) Must insert the following disclaimer in each agreement under ACT, which must be conspicuous (*e.g.,* bold type, all capital letters, or large font) in all Agreements under ACT so as to meet the standards of due notice.

DISCLAIMER

THIS AGREEMENT IS SOLELY BETWEEN [INSERT NAME OF THE M&O CONTRACTOR] AND [THE OTHER IDENTIFIED PARTY]. THE UNITED STATES GOVERNMENT IS *NOT* A PARTY TO THIS AGREEMENT, THIS AGREEMENT DOES NOT CREATE ANY OBLIGATIONS OR LIABILITY ON BEHALF OF THE GOVERNMENT AND THE GOVERNMENT MAKES NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT; THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. THE GOVERNMENT SHALL NOT BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS AGREEMENT. THIS DISCLAIMER DOES NOT AFFECT ANY RIGHTS THE GOVERNMENT MAY HAVE AGAINST THIRD PARTIES ARISING FROM WORK CONDUCTED IN CONNECTION WITH THIS AGREEMENT.

(4) *Contracting Authority.* (i) Subject to DOE approval as described in this paragraph, the M&O Contractor is hereby authorized to negotiate terms and conditions between the M&O Contractor and third parties when entering into ACT agreements. The M&O Contractor will have no authority to bind the Government in any way with such terms and conditions. The Government will have no obligation to the M&O Contractor due to such terms and conditions.

(ii) The M&O Contractor shall submit an ACT proposal package (Package) to the Contracting Officer for approval prior to beginning work under an ACT agreement.

(A) A complete Package will include at a minimum: the identity of the parties to the ACT agreement; the principal place of performance; any foreign ownership or control of the ACT agreement parties; a Statement of Work; an estimate of costs incurred under the M&O contract; an anticipated schedule; identification of key Government equipment and facilities that will be used under the ACT agreement; a list of expected deliverables; identification of the Intellectual Property (IP) lead and proposed selection of IP rights, as defined in DOE Class Waiver W(C)–2011–013; a signed certification by the private party(ies) that the M&O Contractor offered the option to use Cooperative Research and Development Agreement (CRADA) and Strategic Partnership Project (SPP) alternatives (see paragraph (b)(7)(i) of this clause) sufficiently such that the private parties are aware of the relative costs and other differences between the ACT agreement and the CRADA and SPP alternatives; source of funds, including a statement that no Federal funds, including pass-through funds received as a subcontractor or partner, are being utilized; applicable ES&H and NEPA documentation; a statement of consideration, summarizing the risk and/or consideration offered the ACT participants in exchange for charging beyond full cost recovery or for other compensation provided by the participants; and when multiple third parties are parties to the ACT agreement, or as otherwise requested by the Contracting Officer, an IP Management Plan that sets forth the proposed disposition of IP rights, and income and royalty sharing, among the parties to an ACT agreement.

(B) If the M&O Contractor, the M&O Contractor's parent, member, subsidiary, or other entity in which the M&O Contractor, the M&O Contractor's parent, member or subsidiary has an equity interest, is a party to the ACT agreement, the M&O Contractor shall include as necessary a project-specific addendum to the Master OCI Plan in the Package to address special circumstances not fully anticipated in the prior approved Master OCI Plan (see paragraph (b)(7) of this clause).

(C) If the ACT agreement includes a foreign entity as a party or the statement of work includes the use of human

subjects, animal subjects, classified or sensitive subject matter or describes a work scope involving high risks or hazards including environmental issues, the M&O Contractor shall include additional information as necessary or as requested by the Contracting Officer.

(iii) The Contracting Officer shall use reasonable best efforts to review each complete Package submitted by the M&O Contractor under paragraph (b)(4)(ii)(B) of this clause within 10 business days of receiving the Package and provide the M&O Contractor with approval or non-approval of the Package. The review of the complete Package by the Contracting Officer shall include a determination that the proposed work: is consistent with or complementary to DOE missions and the contract statement of work; will not adversely impact programs under the contract scope of work; will not place the contractor in direct competition with the domestic private sector; and will not create a detrimental future burden on DOE resources.

(iv) Except as conditionally allowed under paragraph (b)(4)(iv)(A) of this clause, the Contracting Officer must approve the Package before the M&O Contractor may begin work under the proposed ACT agreement. If the Contracting Officer rejects the Package, then the Contracting Officer must provide said rejection to the M&O Contractor in writing including the reasons for the rejection. Upon receipt of the Contracting Officer's written rejection, the M&O Contractor agrees to not further pursue the work described in the package or incur additional costs under the M&O contract for the work described in the Package.

(A) The M&O Contractor may request a preliminary determination that the proposed scope of work is consistent with the contract statement of work and the Contracting Officer will use his/her best efforts to provide such a determination within three business days. Upon such a determination from the Contracting Officer, the M&O Contractor may begin work under the ACT agreement at the M&O Contractor's risk pending final approval of the complete Package. The M&O Contractor must submit a complete Package, as identified in paragraph (b)(4)(ii) of this clause, within 10 business days of the preliminary determination. All costs associated with the performance of work under a preliminary determination are the responsibility of the M&O Contractor, as no Federal funds will be used to fund any work conducted under this clause.

(B) If any source affiliated with the M&O Contractor (any division, subsidiary, or affiliate of the M&O Contractor or its parent company) is a party sponsoring work in connection with the ACT agreement, work may not commence until approval of the complete Package by the Contracting Officer.

(5) *Advance Payment for ACT Projects.* The M&O Contractor shall be responsible for providing adequate advance payment for ACT work conducted under this clause consistent with procedures defined in the Department's Financial Management Handbook. The M&O Contractor shall be solely responsible for collecting payments from third parties for any work conducted under this clause and such collections shall be independent of providing advance payment. For such payments and for any costs, obligations, or liabilities arising due to the M&O Contractor's work under this clause, the M&O Contractor is entirely at risk and the Government shall have no risk.

(6) *Costs and Fee.* (i) All direct costs associated with the M&O Contractor's work conducted under this clause shall be directly charged to separate and identifiable accounts in accordance with the requirements of the Department's Financial Management Handbook. An allocable portion of indirect costs normally applied to equivalent work under this M&O contract shall also be applied to work conducted under this clause in accordance with the requirements of the Financial Management Handbook. As required by the Financial Management Handbook, changes to the Handbook will be incorporated into this clause by a unilateral administrative modification to the contract. In addition, all work must be performed at full costs that would include Federal Administrative Charge (FAC).

(ii) Work conducted under this clause shall be excluded from the M&O contract award fee calculations and such fee shall not be allocable to work conducted under this clause.

(7) *Organizational Conflict of Interest.* The M&O Contractor shall conduct work under this clause in a manner that minimizes the appearance of conflicts of interest and avoids or mitigates actual conflicts of interest with the M&O Contractor's functions under this M&O contract. Accordingly, the M&O Contractor shall develop an Organizational Conflict of Interest Mitigation Plan (OCI Plan). The OCI Plan should address OCI issues that arise as a result of the M&O Contractor taking a financial interest in ACT projects, especially in those cases where the M&O Contractor retains rights in ACT IP. Said OCI Plan shall be provided to the Contracting Officer for review and approval as soon as practicable after execution of the M&O contract modification incorporating this clause into the M&O contract. Unless provided otherwise by the Contracting Officer, no work on ACT agreements may commence before Contracting Officer approval of the OCI Plan. In addition to those elements expressly stated in the OCI Plan, the Department may condition any ACT transaction on such other mitigating conditions it determines are appropriate. The OCI Plan shall, at a minimum, include elements that address the following:

(i) *Full Disclosure.* Before work can begin under an ACT transaction, all parties to ACT agreements must sign a DOE-approved certification that they have been fully informed about the availability of SPP agreements and CRADAs in addition to ACT. The certification at a minimum shall briefly describe SPP agreements, CRADAs and ACT, and will include the relative disposition of IP rights and the costs (including identification of any additional costs *e.g.,* insurance, and other compensation to the M&O Contractor under ACT) for each type of agreement for the scope of work being proposed.

(ii) *Priority of Work.* The M&O Contractor shall not give work under ACT any special attention or priority over other work under the DOE M&O contract. Work under ACT shall be approved by the Contracting Officer and assigned the same priority relative to other work under the DOE M&O contract that it would normally have if performed under a non-Federal SPP agreement. The Contracting Officer has discretion to determine the agency's priority of work, considering the M&O Contractor's input.

(iii) *Participation by Contractor-affiliated sources:* If any source affiliated with the M&O Contractor (any division, subsidiary, or affiliate of the M&O Contractor or its parent company) is a party to the ACT agreement, the M&O Contractor shall include as necessary an addendum to the OCI Plan to address special circumstances not fully anticipated in the OCI Plan.

(iv) *Right of Inquiry for ACT IP Designation.* The Contracting Officer, upon request of DOE Patent Counsel may inquire into the M&O Contractor's designation of any invention or data as arising under an ACT transaction. The M&O Contractor is responsible for curing any defect identified in such inquiry, and if the M&O Contractor cannot adequately justify the designation or cure the defect, then the parties to the ACT agreement may

receive modified rights in the IP to the degree necessary to resolve the issues identified by the inquiry.

(8) *Intellectual Property.* Disposition of intellectual property (IP) arising from work conducted under this clause shall be governed by Class Waiver W(C)–2011–013 (ACT Class Waiver), which is incorporated herein by reference.

(i) All Contractor ACT inventions shall be reported to DOE pursuant to the requirements of the [*cite Patent Rights—M&O contract, Nonprofit Organization or Small Business Firm Contractor*] clause of this M&O contract.

(ii) In reporting ACT inventions, the M&O Contractor shall identify the ACT agreement under which the invention was made and specify the rights reserved by the Government pursuant to the ACT Class Waiver.

(iii) All technical data identified by the ACT client as Protected ACT Information shall also be marked to identify the ACT agreement under which the data was generated.

(iv) The M&O Contractor shall ensure that all rights and obligations concerning ACT IP, including the appropriate IP provisions authorized in the ACT Class Waiver, are clearly provided in ACT agreements, and that all parties granted any rights in ACT IP are informed of the terms of the waived rights, including the rights reserved by the Government.

(v) Where the M&O Contractor receives ownership or license rights to ACT IP, the M&O Contractor may elect to commercialize the ACT IP consistent with the Technology Transfer Mission clause of this M&O contract.

(vi) As an alternative to paragraph (b)(8)(v) of this clause, if the M&O Contractor has an authorized Private Funded Technology Transfer (PFTT) program, the M&O Contractor may elect to retain private ownership of the ACT IP and commercialize the IP under its applicable PFTT clause, using its private funds, where no costs for developing, patenting, and marketing will be allowable under this M&O contract. The M&O Contractor will share royalties collected on ACT IP with inventors in accordance with paragraph (h) of the Technology Transfer Mission clause of this M&O contract.

(vii) For ACT projects in which the terms of the Agreement provide that the Government reserves the right to use generated data after the particular project expires, the M&O Contractor must provide, to the DOE Office of Technical Information (OSTI), computer software produced under the Agreement in both source and executable object code format.

(viii) Where terms and conditions governing Data and Subject Inventions under this Contract are inconsistent with the terms of the ACT Class Waiver, the ACT Class Waiver will control.

(9) *Contractor Liability and Indemnification.*

(i) *General Indemnity.* (A) The M&O Contractor agrees to indemnify and hold harmless the Government, the Department, and persons acting on their behalf from all liability, including costs and expenses incurred, to any person, including the ACT participants, for injury to or death of persons or other living things or injury to or destruction of property arising out of the performance of an ACT transaction by the Government, the Department, the M&O Contractor, or persons acting on their behalf, or arising out of the use of the services performed, materials supplied, or information given hereunder by any person including the M&O Contractor, and not directly resulting from the fault or negligence of the Government, the Department, or persons (other than the M&O Contractor) acting on their behalf.

(B) Subject to Contracting Officer approval, the General Indemnity set forth in this paragraph (b)(9)(i) may be modified or waived where:

(*1*) ACT participants are not providing material or equipment to the M&O Contractor to be used in the performance of the Statement of Work under the ACT transaction; and (*2*) ACT participants are not sending their employees to the M&O facilities as part of the Statement of Work; and (*3*) the specific activities performed under the ACT transaction are normally performed by the DOE M&O Contractor under the DOE contract.

(C) Notwithstanding the provisions in paragraphs (b)(9)(i)(A) and (B) of this clause, the M&O Contractor shall indemnify and hold harmless the Government, the Department, and persons acting on their behalf for loss, damage, or destruction of Government property resulting from the fault or negligence of the M&O Contractor. Such indemnification shall be subject to a liability limit of $2,000,000 (two million dollars) per year, or such greater liability limit approved by the cognizant DOE Contracting Officer under the DOE contract. Above the applicable liability limit, the M&O Contractor's responsibility to the Government for such loss, damage or destruction, shall be as set forth in the ''Property'' clause of this contract.

(ii) *Intellectual Property Indemnity.* The M&O Contractor shall indemnify the Government, its agents, and employees against liability, including costs, for infringement of any United States patent, copyright, or other intellectual property arising out of any acts required or directed to be performed under the Statement of Work under an ACT transaction to the extent such acts are not already performed at the M&O contract facilities. Such indemnity shall not apply to a claimed infringement that is settled without the consent of the M&O Contractor unless required by a court of competent jurisdiction.

(iii) *Product Liability Indemnity.* (A) Except for any liability resulting from any negligent acts or omissions of the Government, the M&O Contractor agrees to indemnify the Government for all damages, costs, and expenses, including attorney's 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 ACT participants or the M&O Contractor, their assignees, or licensees, which was derived from the work performed under ACT transactions. With respect to this clause, neither the Government nor the M&O Contractor shall be considered assignees or licensees as a result of reserved Government rights in ACT IP. The indemnity set forth in this paragraph shall apply only if the M&O Contractor shall have been informed as soon and as completely as practical by the Government of the action alleging such claim and shall have been given an opportunity, to the maximum extent afforded by applicable laws, rules, or regulations, to participate in and control its defense, and the Government shall have provided all reasonably available information and reasonable assistance requested by the M&O Contractor. No settlement for which the M&O Contractor would be responsible shall be made without the M&O Contractor's consent, unless required by final decree of a court of competent jurisdiction.

(B) Where the M&O Contractor assigns the responsibility for indemnifying the Government under paragraph (b)(9)(iii)(A) of this clause to other ACT participants, the M&O Contractor agrees to seek such indemnification from the other ACT participants.

(iv) *Claims and Liabilities.* Claims and liabilities resulting from the M&O Contractor's performance of work under an ACT transaction authorized pursuant to this clause shall not be subject to the M&O contract clause entitled ''Insurance—Litigation and Claims.'' In no event shall the M&O Contractor be reimbursed under the M&O contract for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, and judgment and

settlements) incurred as a result of third party claims related to the M&O Contractor's performance under this clause.

(v) *Government Obligations.* The M&O Contractor shall not include any guarantee or requirement that will obligate the Government to pay or incur any costs or create any liability on behalf of the Government in any ACT agreement or commitment the M&O Contractor executes under authority of this clause. The M&O Contractor agrees if the Contractor does include such a guarantee or requirement, it will have no effect on the Government, such that, the M&O Contractor will be responsible for any costs or liability due to such a guarantee or requirement.

(vi) *Insurance.* Any cost of insurance to cover risks of the M&O Contractor associated with ACT agreements is unallowable under this contract.

(10) *ACT Records.* All records associated with the M&O Contractor's activities conducted under the authority of this clause, with the exception of information required under paragraphs (b)(3)(v), (b)(4)(ii)(A), and (b)(13) of this clause shall be treated as M&O Contractor-owned records under the provisions of the Access to and Ownership of Records clause of this M&O contract. The Government or its designees shall use such records in accordance with applicable Federal laws (including the Privacy Act), as appropriate.

(11) *Termination.* The Government or the M&O Contractor may terminate ACT authority under this contract by providing written notification of termination to the other party (Contracting Officer or the M&O Contractor) as appropriate, no less than 60 days prior to the requested termination date. In such cases, the M&O Contractor shall provide DOE a comprehensive list of active ACT projects. DOE anticipates work commitments under these agreements will be completed regardless of termination. All costs associated with early termination of any ACT agreements prior to the completion shall be the responsibility of the M&O Contractor.

(12) *Successor M&O Contractor.* To minimize the potential for negative Government programmatic impact and to facilitate seamless transition of work to a successor M&O Contractor, ACT agreement(s) executed under this clause and any contractual instruments associated therewith may be novated to the successor M&O Contractor with the mutual consent of the M&O Contractor, the successor M&O Contractor, and the parties to the affected ACT agreement(s). If the ACT agreement(s) cannot be novated, then the M&O Contractor as a private sponsor shall be permitted to enter into a Non-Federal SPP agreement with the successor M&O Contractor that will enable completion of the statement of work. Such agreements shall be entered into pursuant to DOE SPP policies. DOE shall make good faith efforts to incorporate the terms of the applicable ACT agreement.

(13) *Minimum Reporting requirements.* The M&O Contractor shall maintain records of its activities related to ACT in a manner and to the extent satisfactory to DOE and specifically including, but not limited to the number of ACT agreements, the amount of funds reimbursed to DOE for work under ACT and aggregate funding received beyond costs in the performance of ACT, the number of third party entities engaged through ACT that had not previously sponsored projects under the M&O contract and the number that had not previously sponsored projects under any DOE M&O contract, the amount of funds reimbursed to DOE by newly engaged entities, the number of parties and types of entities engaged in each individual ACT agreement, and the number of invention disclosures, licenses and start-ups arising from ACT. The M&O Contractor shall establish performance metric(s) to measure the time required to negotiate ACT agreements in a manner consistent with the time required to negotiate CRADAs and SPPs. The M&O Contractor shall obtain from each entity engaged in ACT the entity's reason(s) for selecting ACT for performance of work under the M&O contract. Also, the M&O Contractor shall report the above identified data annually to the DOE Contracting Officer and in such a format that will serve to adequately inform DOE of the Contractor's activities under ACT while protecting any data not subject to disclosure under this M&O contract. Such records shall be made available in accordance with the clauses of this M&O contract pertaining to inspection, audit and examination of records.

(End of clause)

■ 300. Section 970.5219 is added to read as follows:

970.5219 Small business subcontracting plan.

As prescribed in 970.1907–8(b), supplement the clause at FAR 52.219–9 with the following:

Small Business Subcontracting Plan [December 2024]

(b) *Definitions.* ''First-tier subcontract'' means a subcontract awarded directly by the Contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that would benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs.

''*Management and Operating Contractor Subcontract Reporting Capability (MOSRC)*'' means a DOE system and associated processes to collect key information about Management and Operating Contractor first-tier subcontracts for reporting to the Small Business Administration.

''*Transaction*'' means any contract, order, other agreement or modification thereof (other than one involving an employer-employee relationship) entered into by the Contractor acquiring supplies or services (including construction) required solely for performance of the prime contract.

(l)(3) *MOSRC.* The Contractor shall collect and report data via MOSRC necessary for DOE to meet its agency reporting requirements, as determined by the Small Business Administration. The Contractor shall report first-tier subcontract data in MOSRC. Classified subcontracts shall not be reported. Subcontracts with Controlled Unclassified Information marking shall not be reported if restricted by its category. The Contractor should contact its Contracting Officer if uncertain of reporting requirements. The MOSRC requirement does not replace any other reporting requirements under this clause.

(End of clause)

■ 301. Section 970.5222–1 is amended by revising the introductory text to read as follows:

970.5222–1 Collective Bargaining Agreements Management and Operating Contracts

As prescribed in 970.2201–130, insert the following clause:

* * * * *

■ 302. Section 970.5222–2 is amended by revising the introductory text to read as follows:

970.5222–2 Overtime Management

As prescribed in 970.2201–220, insert the following clause:

* * * * *

■ 303. Section 970.5222–4 is added to read as follows:

970.5222–4 Unemployment compensation.

As prescribed in 970.2270–2, insert the following clause.

Unemployment Compensation [December 2024]

(a) When under state law the contractor is permitted the option to pay unemployment claims either through the state unemployment insurance tax (pay in) or by reimbursing the state for actual claims paid out to former employees (opt out), the contractor shall provide the following:

(1) *Statement of Coverage.* The statement of coverage shall identify whether the contractor will opt into the state unemployment fund through payment of the unemployment insurance tax or opt out by reimbursing the state(s) for actual claims paid. A statement of coverage shall be provided within (fill in) ____ calendar days of contract award, contract extension, or exercise of an option.

(2) *Change in Election Status.* The contractor shall notify the contracting officer no less than (fill in) ____ calendar days before state approval is sought to change its pay in or opt out election.

(b) The Government reserves the right to request additional information to assess budgetary and programmatic risks and impact when the contractor chooses to opt out.

(End of clause)

■ 304. Redesignate sections 970.5223–3 and 970.5223–4 as sections 970.5226–4 and 970.5226–5, respectively.

970.5223–6 and 970.5223–7 [Removed]

■ 305. Sections 970.5223–6 and 970.5223–7 are removed.

■ 306. Section 970.5226–1 is revised to read as follows:

970.5226–1 Diversity plan.

As prescribed in 970.2671–2, insert the following clause:

Diversity Plan [December 2024]

The Contractor shall submit a Diversity, Equity, Inclusion, and Accessibility (DEIA) Plan to the Contracting Officer for approval within 90 days after the effective date of this contract (or contract modification, if appropriate). The Contractor shall submit an update to its Plan annually or with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided in the Appendix ____. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan shall address, at a minimum, the Contractor's approach for promoting diversity through:

(1) the Contractor's work force;

(2) educational outreach;

(3) community involvement and outreach;

(4) subcontracting;

(5) economic development (including technology transfer); and

(6) the prevention of profiling, harassment, discrimination, and/or retaliation based on protected EEO categories.

(End of clause)

970.5226–4 [Amended]

■ 307. Amend newly redesignated section 970.5226–4, in the introductory text, by removing ''970.2305–4(a)'' and adding ''970.2605–4(a)'' in its place.

970.5226–5 [Amended]

■ 308. Amend newly redesignated section 970.5226–5, in the introductory text, by removing ''970.2305–4(b)'' and adding ''970.2605–4(b)'' in its place.

■ 309. Amend section 970.5227–1 by:

■ a. Revising the clause date and paragraphs (a), (b)(1) introductory text, and (b)(1)(ii);

■ b. Adding paragraphs (b)(4) and (c)(3);

■ c. Revising paragraph (d)(1);

■ d. Removing ''(End of clause)'' after Alternate I and adding in its place ''(End of Alternate)''; and

■ e. Adding Alternate II after Alternate I.

The revisions and additions read as follows:

970.5227–1 Rights in data-facilities.

* * * * *

Rights In Data—Facilities [December 2024]

(a) *Definitions—Assistant General Counsel for Technology Transfer and Intellectual Property* is the senior intellectual property counsel for the Department of Energy, as distinguished from the NNSA Patent Counsel, and, where used in this clause, indicates that the authority for the activity(ies) being described belongs to DOE.

Computer data bases, as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software, as used in this clause, means:

(1) Computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(2) Data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

Data, as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

Department of Energy (DOE), as used in this clause, includes the National Nuclear Security Administration (NNSA), unless otherwise identified or indicated.

Limited rights data, as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of paragraph (e) of this clause.

Patent Counsel means the DOE or NNSA Patent Counsel assisting the contracting activity.

Restricted computer software, as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of paragraph (f) of this clause.

Technical data, as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

Unlimited rights, as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) * * *

(1) Except as may be otherwise expressly provided or directed in

writing by the Patent Counsel, the Government shall have:

* * * * *

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, or except for other data specifically protected by statute for a period of time or, where, approved by Patent Counsel;

* * * * *

(4) In the performance of DOE contracted obligations, each contractor is required to manage scientific and technical information (STI) produced under the contract as a direct and integral part of the work and ensure its broad availability to all customer segments by making STI available to DOE's central STI coordinating office, the Office of Scientific and Technical Information (OSTI). Requirements for all such reportable information to OSTI are in DOE Order 241.1, or successor version, whether it is publicly releasable, controlled unclassified information, or classified.

(c) * * *

(3) If the Contractor has not been granted permission to copyright technical data or computer software first produced under the contract, and if the Government desires to obtain copyright in such data and computer software, the Patent Counsel may direct the Contractor to establish claim to copyright in such data or computer software and to assign such copyright to the Government or its designated assignee.

(d) * * *

(1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 48 CFR 927.409 including alternates as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternate II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with 48 CFR 927.409(d). In subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE, the Contractor shall use the ''rights in Data-Facilities'' clause at 48 CFR 970.5227–1.

* * * * *

Alternate II (DATE XXXX). As prescribed in 970.2704–3(a), where Government facilities are being constructed, modified, or in decontamination and decommissioning, and it is anticipated that further solicitation may be required to complete the project, insert paragraph (f) in the Limited Rights Notice required by paragraph (e) of the basic clause:

(f) This ''limited rights data'' may be disclosed in future solicitations for the continuation or completion of the work contemplated under this contract under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed.

(End of alternate)

■ 310. Section 970.5227–2 is revised to read as follows:

970.5227–2 Rights in data-technology transfer.

As prescribed in 970.2704–3(b), insert the following clause:

Rights In Data—Technology Transfer [December 2024]

(a) *Definitions—Assistant General Counsel for Technology Transfer and Intellectual Property* is the senior intellectual property counsel for the Department of Energy, as distinguished from the NNSA Patent Counsel, and, where used in this clause, indicates that the authority for the activity(ies) being described belongs to DOE.

Computer data bases, as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software, as used in this clause, means:

(1) Computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(2) Data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

Data, as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

Department of Energy (DOE), as used in this clause, includes the National Nuclear Security Administration (NNSA), unless otherwise identified or indicated.

Limited rights data, as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of paragraph (g) of this clause.

Open source software, as used in this clause, means computer software with its source code that is distributed under a license in which the user is granted the right to use, copy, modify, and prepare derivative works thereof, without having to make royalty payments.

Patent Counsel means the DOE or NNSA Patent Counsel assisting the contracting activity.

Restricted computer software, as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of paragraph (h) of this clause.

Technical data, as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

Unlimited rights, as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) Except as may be otherwise expressly provided or

directed in writing by the Patent Counsel, the Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, and except for data subject to the withholding provisions for protected Cooperative Research and Development Agreement (CRADA) information in accordance with Technology Transfer actions under this Contract, or other data specifically protected by statute for a period of time or, where, approved by Patent Counsel, appropriate instances of the DOE Strategic Partnership Projects Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. When delivering all Contractor-produced computer software to the DOE Office of Scientific and Technical Information (OSTI), the Contractor shall submit a complete package as prescribed in paragraph (e)(3) of this clause. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (h) of this clause (''Rights in Limited Rights Data'') or paragraph (i) of this clause (''Rights in Restricted Computer Software''); and

(v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in provisions of this clause;

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data; and

(iii) The right to assert copyright subsisting in scientific and technical works, and works produced by Contractor under 48 CFR 952.204–75 as provided in paragraph (d) of this clause and the right to request permission to assert copyright subsisting in works other than scientific and technical articles as provided in paragraph (e) of this clause.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical business or financial data in the form of recorded information which it receives from, or is given access to by DOE or a third party, including a DOE contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(4) In the performance of DOE contracted obligations, each Contractor is required to manage scientific and technical information (STI) produced under the contract as a direct and integral part of the work and ensure its broad availability to all customer segments by making STI available to DOE's central STI coordinating office, OSTI. Requirements for all such reportable information to OSTI are in DOE Order 241.1B, or successor version, whether it is publicly releasable, controlled unclassified information, or classified.

(c) *Copyright (General).* (1) The Contractor agrees not to mark, register, or otherwise assert copyright in any data in a published or unpublished work, other than as set forth in paragraph (d), (e), or (f) of this clause.

(2) Except for material to which the Contractor has obtained the right to assert copyright in accordance with paragraph (d), (e), or (f) of this clause, the Contractor agrees not to include in the data delivered under this Contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (d) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the data to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the data prior to its delivery.

(3) If the Contractor has not been granted permission to copyright data or computer software first produced under the contract where such permission is necessary, *i.e.,* for works other than scientific and technical journal articles and data produced under a CRADA, and if the Government desires to obtain copyright in such data or computer software, the Patent Counsel may direct the Contractor to establish claim to copyright in such data or computer software and to assign such copyright to the Government or its designated assignee.

(d) *Copyrighted works (scientific and technical works).* (1) The Contractor shall have the right to assert, without prior approval of the contracting officer, copyright subsisting in scientific and technical works composed under this contract or based on or containing data first produced by the Contractor in the performance of this Contract, and published in academic, technical or professional journals, symposia, proceedings, contributions to chapters of book compilations or similar means of dissemination to make broadly available to the public or scientific community for the purpose of scientific, research, knowledge and education. Such scientific and technical works may be recorded or fixed in any medium including but not limited to print, online, web, audio, video or other medium, and released or disseminated through any communication or distribution channel including but not limited to articles, reports, books, non-architectural drawings, repositories, videos, websites, workshops, or social media. When assertion of copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) on the data when such data are delivered to the Government as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The

Contractor grants to the Government, and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) For each scientific or technical work first produced or composed under this contract and submitted for publication or similar means of dissemination, the contractor shall provide notice to the publisher of the Government's license in the copyright that is substantially similar to or otherwise references one of the following notices below:

A suitable notice (long version) reflecting the Government's non-exclusive, paid-up, irrevocable, world-wide license in the copyright.

Notice: This work was produced by [insert the name of the Contractor] under contract No. [insert the contract number] with the U.S. Department of Energy. The United States Government retains and the publisher, by accepting the work for publication, acknowledges that the United States Government retains a non-exclusive, paid-up, irrevocable, world-wide license to publish or reproduce the published form of this work, or allow others to do so, for United States Government purposes. The Department of Energy will provide public access to these results of federally sponsored research in accordance with the DOE Public Access Plan *[insert current link].*

(End of notice)

A suitable notice (short version) reflecting the Government's non-exclusive, paid-up, irrevocable, world-wide license in the copyright follows:

Notice: This work was produced by [insert the name of the Contractor] under Contract No. [insert the contract number] with the U.S. Department of Energy. Publisher acknowledges the U.S. Government license to provide public access under the DOE Public Access Plan *[insert current link].*

(End of notice)

(3) The title to the copyright of the original of unclassified graduate theses and the original of related unclassified scientific papers shall vest in the author thereof, subject to the right of DOE to retain duplicates of such documents and to use such documents for any purpose whatsoever without any claim on the part of the author or the contractor for additional compensation.

(e) *Copyrighted works (other than scientific and technical works and data produced under a CRADA).* The Contractor may obtain permission to assert copyright subsisting in technical data and computer software first produced by the Contractor in performance of this Contract, when the Contractor needs to control distribution to advance the goals of the technology transfer mission and where the Contractor can show that commercialization would be enhanced by such copyright protection, subject to the following:

(1) *Contractor Request to Assert Copyright.* (i) For data other than scientific and technical works under paragraph (d) of this clause and data produced under a CRADA, the Contractor shall submit in writing to Patent Counsel its request to assert copyright in data first produced in the performance of this Contract pursuant to this clause. The right of the Contractor to copyright data first produced under a CRADA is as described in the individual CRADA. Each request by the Contractor must include:

(A) The identity of the data (including any computer program) for which the Contractor requests permission to assert copyright, as well as an abstract which is descriptive of the data and is suitable for dissemination purposes;

(B) The program under which it was funded;

(C) Whether, to the best knowledge of the Contractor, the data is subject to an international treaty or agreement;

(D) Whether the data is subject to export control; and if so, which jurisdiction;

(E) A statement that the Contractor plans to commercialize the data in compliance with the clause of this contract entitled, ''Technology Transfer Mission,'' within five (5) years after obtaining permission to assert copyright or, on a case-by-case basis, a specified longer period where the Contractor can demonstrate that the ability to commercialize effectively is dependent upon such longer period; and

(F) For data other than computer software, a statement explaining why the assertion of copyright is necessary to enhance commercialization and is consistent with DOE's dissemination responsibilities.

(ii) For data that is developed using other funding sources in addition to DOE funding, the permission to assert copyright in accordance with this clause must also be obtained by the Contractor from all other funding sources prior to the Contractor's request to Patent Counsel. The request shall include the Contractor's certification or other documentation acceptable to Patent Counsel demonstrating such permission has been obtained.

(iii) Permission for the Contractor to assert copyright in excepted categories of data as determined exclusively by DOE will be expressly withheld. Such excepted categories include data whose release:

(A) Would be detrimental to national security, *i.e.,* involve classified information or data or sensitive information under section 148 of the Atomic Energy Act of 1954, as amended, or are subject to export control for nonproliferation and other nuclear-related national security purposes;

(B) Would not enhance the appropriate transfer or dissemination and commercialization of such data;

(C) Would have a negative impact on U.S. industrial competitiveness;

(D) Would prevent DOE from meeting its obligations under treaties and international agreements; or

(E) Would be detrimental to one or more of DOE's programs.

(iv) The Contractor will obtain the advanced written approval of the Patent Counsel to assert copyright where data are determined to be in the following excepted categories:

(A) Under export control restrictions;

(B) Developed with Naval Reactors' funding;

(C) Subject to disposition of data rights under treaties and international agreements. Additional excepted categories may be added by the Assistant General Counsel for Technology Transfer and Intellectual Property. Where data are determined to be under export control restriction, the Contractor may obtain permission to assert copyright subject to the provisions of this clause for purposes of limited commercialization in a manner that complies with export control statutes and applicable regulations. In addition, notwithstanding any other provision of this contract, all data developed with Naval Reactors' funding and those data that are classified fall within excepted categories. The rights of the Contractor in data are subject to the disposition of data rights in the treaties and international agreements identified at DOE's Office of International Affairs (International Commitments—IEC).

(2) *Patent Counsel Review and Response to Contractor's Request.* The Patent Counsel shall use its best efforts to respond in writing within 60 days of receipt of a complete request by the Contractor to assert copyright in technical data and computer software pursuant to this clause. Such response shall either give or withhold DOE's permission for the Contractor to assert copyright or advise the Contractor that

DOE needs additional time to respond, and the reasons therefor. If Patent Counsel grants permission for the Contractor to assert copyright in computer software, the permission automatically extends to subsequent minor versions (*e.g.,* minor revisions, patches and bug fixes) having the same funding source, same name and substantially same functionality as the original computer software, and may be extended to subsequent major versions representing significant modifications of the program with the approval of Patent Counsel.

(3) *Permission for Contractor to Assert Copyright.* (i) For computer software, the Contractor shall furnish, or make available to the DOE Office of Scientific and Technical Information (OSTI) in accordance with OSTI guidelines at the time permission to assert copyright is given under paragraph (e)(2) of this clause:

(A) Announcement information/metadata contained in the Software Announcement Notice 241.4;

(B) the source code and/or executable file for each software program; and

(C) Documentation, if any, which may consist of a user manual, sample test cases, or similar information, needed by a technically competent user to understand and use the software (whether included on the software media itself or provided in a separate file or in paper format).

(ii) The Contractor acknowledges that the DOE designated software distribution and control point may provide a technical description of the software in an announcement identifying its availability from the copyright holder.

(iii) Unless otherwise directed by the Patent Counsel, for data other than computer software to which the Contractor has received permission to assert copyright under paragraph (e)(2) of this clause, the Contractor shall within sixty (60) days of obtaining such permission furnish, or make available to OSTI in accordance with OSTI guidelines, a copy of such data as well as an abstract of the data suitable for dissemination purposes. The Contractor acknowledges that OSTI may provide an abstract of the data in an announcement to DOE, its contractors and to the public identifying its availability from the copyright holder.

(iv) Once the Contractor is given permission to assert copyright in data, the Contractor may begin to commercialize the copyrighted data by making copyrighted data available for licensing to third parties and by offering other types of distribution to third parties. During the period in which commercialization activities pertaining to the copyrighted data are continuing, or for a specified period of time prescribed by Patent Counsel in paragraph (e)(2) of this clause, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works and perform publicly and display publicly, by or on behalf of the Government. For all previously approved and current copyrighted data that the Contractor is actively commercializing, the Contractor may continue to commercialize in accordance with this paragraph.

(v) When the Contractor abandons commercialization activities pertaining to the data to which the Contractor has been given permission to assert copyright or at the end of the specified period as prescribed by Patent Counsel, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, distribute copies to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so.

(vi) At any time the Contractor abandons commercialization activities for copyrighted data, the Contractor shall advise OSTI and Patent Counsel and, upon request, assign the copyright to the Government so that the Government can distribute the copyrighted data to the public. When the Contractor abandons commercialization activities, the Contractor will provide to OSTI the latest version of the copyrighted data (for example, source code, object code, minimal support documentation, drawings or updated manuals.) In addition, the Contractor will provide annually to Patent Counsel, if requested, a list of all copyrighted data that the Contractor has abandoned commercial licensing activity during that year.

(vii) Whenever the Contractor asserts copyright in data pursuant to this paragraph (e), the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 on the copyrighted data and also an acknowledgment of the Government sponsorship and license rights of paragraphs (e)(3)(iv) and (v) of this clause. Such action shall be taken when the data are delivered to the Government, licensed or deposited for registration as a published work in the U.S. Copyright Office, or when submitted for publication. The acknowledgment of Government sponsorship and license rights shall be substantially similar to the following:

Notice: These data were produced by (insert name of Contractor) under Contract No. _____ with the Department of Energy. During the period of commercialization or such other time period specified by the Department of Energy, the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government. Subsequent to that period the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, and to permit others to do so. The specific term of the license can be identified by inquiry made to Contractor or DOE. Neither the United States nor the United States Department of Energy, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any data, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights.

(End of notice)

(viii) With respect to any data to which the Contractor has received permission to assert copyright, the DOE has the right, during the period that Contractor is commercializing the data as provided for in paragraph (e)(3)(iv) of this clause, to request the Contractor to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant(s) upon terms that are reasonable under the circumstances, and if the Contractor refuses such request, to grant such license itself, if the DOE determines that the Contractor has not made a satisfactory demonstration that either it or its licensee(s) is actively pursuing commercialization of the data as set forth in paragraph (e)(1)(i) of this clause. Before licensing under this paragraph, DOE shall furnish the Contractor a written request for the Contractor to grant the stated license, and the Contractor shall be allowed thirty (30) days (or such longer period as may be authorized by the contracting officer for good cause shown in writing by the Contractor) after such notice to show cause why the license should not be granted. The Contractor shall have the right to appeal the decision of the DOE

to grant the stated license to the Invention Licensing Appeal Board as set forth in 10 CFR 781.65—''Appeals.''

(ix) No costs shall be allowable for maintenance of copyrighted data, primarily for the benefit of the Contractor and/or a licensee which exceeds DOE Program needs, except as expressly provided in writing by the contracting officer. The Contractor may use its net royalty income to effect such maintenance costs.

(4) The following notice may be included in computer software prior to any publication or release and prior to the Contractor's obtaining permission from the Department of Energy to assert copyright in the computer software pursuant to paragraph (c)(3) of this clause.

Notice: This computer software was prepared by [insert the Contractor's name and the individual author], hereinafter the Contractor, under Contract [insert the Contract Number] with the Department of Energy (DOE). All rights in the computer software are reserved by DOE on behalf of the United States Government and the Contractor as provided in the Contract. You are authorized to use this computer software for Governmental purposes but it is not to be released or distributed to the public. NEITHER THE GOVERNMENT NOR THE CONTRACTOR MAKES ANY WARRANTY, EXPRESS OR IMPLIED, OR ASSUMES ANY LIABILITY FOR THE USE OF THIS SOFTWARE. This notice including this sentence must appear on any copies of this computer software.

(End of notice)

(5) A similar notice can be used for data, other than computer software, prior to any publication or release and prior to Contractor's obtaining permission of DOE Patent Counsel to assert copyright.

(f) *Open software source.* The Contractor may release computer software first produced by the Contractor in the performance of this contract under an open source software license. Such software shall hereinafter be referred to as open source software or OSS, subject to the following:

(1) *DOE Program notice for copyright assertion for OSS.* (i) The Contractor shall provide written notice (including relevant data such as, for example, the software disclosure form) to each DOE Program or Programs that have provided a substantial portion of the funding (funding source(s)) to develop the software that the Contractor intends to release as OSS unless the funding Program(s) has previously provided blanket approval for all software developed with funding from that Program or a specific DOE project stipulates the software to be released as OSS. If Program has neither consented nor objected to the assertion of copyright within two weeks of such written notification, the Contractor may assert copyright in the software. If notification of a funding DOE Program(s) is not practicable or DOE Program(s) has objected, the Contractor shall consult with Patent Counsel, which may provide approval. For software developed under a CRADA, Strategic Partnership Projects (SPP), User Facility Agreement, or Agreement for Commercializing Technology (ACT), authorization from the partner of such agreement shall be additionally obtained for OSS release unless such agreement has a provision providing for such copyright assertion.

(ii) If the software is developed with funding from a federal government agency or agencies (funding source(s)) other than DOE, then authorization from all the funding agency(ies) shall be obtained for OSS release, if practicable. Such federal government agency(ies) may provide blanket approval for all software developed with funding from that agency(ies). However, OSS release of any one of such software shall be subject to approval by all other funding sources for the software, if any. If approval from such federal government agency(ies) is not practicable, the Patent Counsel may provide approval instead.

(2) *Assert copyright in the OSS.* Once the Contractor has met the program approval requirements set forth in paragraph (f)(1) of this clause, copyright in the software to be distributed as OSS may be asserted by the Contractor, or, for OSS developed under a CRADA, User Facility Agreement, or SPP Agreement, either by the Contractor, CRADA Participant, User Facility User, or SPP Sponsor, as applicable, which precludes marking such OSS as protectable from public distribution.

(3) *Submit Software Announcement Notice 241.4 to OSTI.* The Contractor must submit Software Announcement Notice (AN) 241.4 (or the current notice as may be required by DOE) to OSTI. In the AN 241.4, the Contractor shall provide the unique URL (*i.e.,* a persistent identifier) from which the software can be obtained so that OSTI can announce the availability of the OSS and the public has access via the URL.

(4) *Maintain OSS record.* The Contractor must maintain a record of all software distributed as OSS. Upon request of the Patent Counsel, the Contractor shall provide the necessary information regarding any or all OSS.

(5) *Provide public access to the OSS.* The Contractor shall ensure that the OSS is publicly accessible as open source via the Contractor's website, Open Source Bulletin Boards operated by third parties, DOE, or other standard industry methods.

(6) *Select an OSS license.* Each OSS will be distributed pursuant to an OSS license. The Contractor may choose among industry standard OSS licenses or create its own set of Contractor standard licenses. To assist the Contractor, the Assistant General Counsel for Technology Transfer and Intellectual Property, may periodically issue guidance on OSS licenses. Each Contractor-created OSS license, must contain, at a minimum, the following provisions—

(i) A disclaimer or equivalent that disclaims the Government's and Contractor's liability for licensees' and third parties' use of the software; and

(ii) A grant of permission for licensee to distribute OSS containing the licensee's derivative works. This provision may allow the licensee and third parties to commercialize their derivative works or might request that the licensee's derivative works be forwarded to the Contractor for incorporation into future OSS versions.

(7) *Relationship to other required clauses in the contract.* OSS distributed in accordance with this section shall not be subject to the requirements relating to indemnification of the Contractor or Federal Government, U.S. Competitiveness and U.S. Preference, as set forth in paragraphs (f) and (g) of the clause within this contract entitled Technology Transfer Mission (48 CFR 970.5227–3). The requirement for the Contractor to request permission to assert copyright for the purpose of engaging in licensing software for royalties, as set forth elsewhere in this clause, is not modified by this section.

(8) *Government license.* For all OSS, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in data copyrighted in accordance with paragraph (f)(2) of this clause to reproduce, distribute copies to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so.

(9) *Contractor abandons OSS.* If the Contractor ceases to make OSS publicly available, then the Contractor shall submit to OSTI the object code and source code of the latest version of the OSS developed by the Contractor in addition to a revised Announcement

Notice 241.4 (which includes an abstract) and the Contractor shall direct any inquiries from third parties seeking to obtain the original OSS to OSTI.

(g) *Subcontracting.* (1) Unless otherwise directed by the Patent Counsel, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the DOE policy and procedures, the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 48 CFR 927.409 including alternates as appropriate with the prior approval of DOE Patent Counsel. The Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternate II or III, respectively, without the prior approval of the Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with 48 CFR 927.409(d). In subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE, the Contractor shall use the ''Rights in Data-Facilities'' clause at 48 CFR 970.5227–1.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data and restricted computer software for their private use.

(h) *Rights in Limited Rights Data.* Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Limited Rights Notice'' set forth below. All such limited rights data shall be marked with the following ''Limited Rights Notice:''

Limited Rights Notice

These data contain ''limited rights data,'' furnished under Contract No. _____ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the ''limited rights data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This ''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;

(c) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) 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;

(d) This ''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; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

This Notice shall be marked on any reproduction of this data in whole or in part.

(End of notice)

(i) *Rights in restricted computer software.* (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract; provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Restricted Rights Notice'' set forth below. All such restricted computer software shall be marked with the following ''Restricted Rights Notice:''

Restricted Rights Notice—Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. ____. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in 48 CFR 37.101) in accordance with paragraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. ____ with (name of Contractor).

(End of notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr) in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice ''Unpublished-rights reserved under the Copyright Laws of the United States.''

(j) *Relationship to patents.* Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of clause)

Alternate I (DEC 2000). As prescribed in 970.2704–3(b), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase ''and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology'' after ''laser isotope separation'' and before the comma in paragraph (b)(2)(ii) of the clause at 970.5227–2, Rights in Data—Technology Transfer, as appropriate.

(End of clause)

Alternate II (DATE XXXX). As prescribed in 970.2704–3(b), where government facilities are being constructed, modified, or in decontamination and decommissioning, and it is anticipated that further solicitation may be required to complete the project, insert paragraph (f) in the Limited Rights Notice of the basic clause:

(f) This ''limited rights data'' may be disclosed in future solicitations for the continuation or completion of the work contemplated under this contract under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed.

(End of clause)

■ 311. Section 970.5227–3 is revised to read as follows:

970.5227–3 Technology transfer mission.

As prescribed in 970.2770–4(a), insert the following clause:

Technology Transfer Mission [December 2024]

This clause has as its purpose implementation of the National Competitiveness Technology Transfer Act of 1989 (sections 3131, 3132, 3133, and 3157 of Pub. L. 101–189 and as amended by Pub. L. 103–160, sections 3134 and 3160). The Contractor shall conduct technology transfer activities with a purpose of providing benefit from Federal research to U.S. industrial competitiveness.

(a) *Authority.* (1) In order to ensure the full use of the results of research and development efforts of, and the capabilities of, the Laboratory, technology transfer, including Cooperative Research and Development Agreements (CRADAs), is established as a mission of the Laboratory consistent with the policy, principles and purposes of sections 11(a)(1) and 12(g) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a); section 3132(b) of Public Law 101–189, sections 3134 and 3160 of Public Law 103–160, and of chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*); section 152 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2182); section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); section 102 of the Laboratory Modernization and Technology Transfer Act (Pub. L. 115–246) and Executive Order 12591 of April 10, 1987.

(2) In pursuing the technology transfer mission, the Contractor is authorized to conduct activities including but not limited to: identifying and protecting Intellectual Property made, created or acquired at or by the Laboratory; negotiating licensing agreements and assignments for Intellectual Property made, created or acquired at or by the Laboratory that the Contractor controls or owns; bailments; negotiating all aspects of and entering into CRADAs; providing technical consulting and personnel exchanges; conducting science education activities and reimbursable Strategic Partnership Projects (SPP); providing information exchanges; and making available laboratory or weapon production user facilities. It is fully expected that the Contractor shall use all of the mechanisms available to it to accomplish this technology transfer mission, including, but not limited to, CRADAs, user facilities, SPP, science education activities, consulting, personnel exchanges, assignments, and licensing in accordance with this clause.

(3) *Trademarks and service marks.* The Contractor, with notification to DOE Patent Counsel, is authorized to protect goods/services resulting from work at the Laboratory through Trademark and Service Mark protection. The Laboratory name and associated logos are owned by the Department of Energy unless an exception is allowed by the DOE Patent Counsel, and shall be protected by DOE Patent Counsel. In furtherance of the technology transfer mission, should the Contractor want to assert trademark or service mark protection for any word, phrase, symbol, design, or combination thereof that includes or is associated with the Laboratory name, the Contractor must first notify and obtain permission from the Department of Energy Patent Counsel. All marks, whether or not registered with the United States Patent and Trademark Office, are to be included in the ''Intellectual property rights'' paragraph (i) of this clause, regarding transfer to successor contractor, DOE reserves the right to require the Contractor to cancel registration of the mark or cease use of the mark.

(b) *Definitions—Agreements for Commercializing Technology (ACT)* means any agreement pursuant to the ACT clause, if included in this M&O contract, entered into between the Contractor as operator of the Laboratory and a third party to conduct sponsored research at the M&O Contractor's risk, only when such work does not interfere with DOE-funded activities conducted as authorized by other parts of this M&O contract and on a fully reimbursable basis.

Assignment means any agreement by which the Contractor transfers ownership of Laboratory Intellectual Property, subject to the Government's retained rights.

Bailment means any agreement in which the Contractor permits the commercial or non-commercial transfer of custody, access or use of Laboratory Biological Materials or Laboratory Tangible Research Product for a specified purpose of technology transfer or research and development, including without limitation evaluation, and without transferring ownership to the bailee.

Contractor's Laboratory Director means the individual who has supervision over all or substantially all of the Contractor's operations at the Laboratory.

Cooperative Research and Development Agreement (CRADA) means any agreement entered into between the Contractor as operator of the Laboratory, and one or more parties under which the Government, through its laboratory, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the other parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the Laboratory; except that such term does not include a procurement contract, grant, or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of title 31 of the United States Code.

Department of Energy (DOE), as used in this clause, includes the National Nuclear Security Administration (NNSA), unless otherwise identified or indicated.

Intellectual property means data, inventions, patents, patent applications, trademarks, service marks, copyrights, mask works, protected CRADA information, and other forms of comparable property rights protected by Federal Law and other foreign counterparts.

Joint Work Statement (JWS) means a proposal for a CRADA prepared by the Contractor, signed by the Contractor's Laboratory Director or designee which describes the project.

Laboratory Biological Materials means biological materials capable of replication or reproduction, such as plasmids, deoxyribonucleic acid molecules, ribonucleic acid molecules, living organisms of any sort and their progeny, including viruses, prokaryote and eukaryote cell lines, transgenic plants and animals, and any derivatives or modifications thereof or products produced through their use or associated biological products, made under this contract by Laboratory employees or through the use of Laboratory research facilities.

Laboratory Tangible Research Product means tangible material results of research which

(1) Are provided to permit replication, reproduction, evaluation or confirmation of the research effort, or to evaluate its potential commercial utility;

(2) Are not materials generally commercially available; and

(3) Were made under this contract by Laboratory employees or through the use of Laboratory research facilities.

Master Scope of Work (MSW) means a detailed description of a routine scope of work 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;

(2) Allow DOE to make all reviews, approvals, determinations, and certifications required pursuant to relevant DOE Orders and policy; and

(3) Enable the CO and the Contractor to agree that the work is suitable for special processing as the subject of Strategic Partnership Project (SPP) agreements or Cooperative Research and Development Agreements (CRADAs) for non-Federal sponsors.

Patent Counsel means the DOE or NNSA Patent Counsel assisting the contracting activity. The Patent Counsel is the first and primary point of contact for activities described in this clause.

Strategic Partnership Projects (SPP) means any agreement pursuant to the SPP clause, if included in this M&O contract, entered into between the Contractor as operator of the Laboratory and a non-Federal party under which the Government, through its laboratory, provides personnel, services, facilities, equipment, intellectual property, only when such work does not interfere with DOE-funded activities conducted as authorized by other parts of this M&O contract and on a fully reimbursable basis.

(c) *Allowable costs.* (1) The Contractor shall establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications (ORTA) pursuant to paragraphs (b) and (c) of section 11 of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710). The costs associated with the conduct of technology transfer through the ORTA including activities associated with obtaining, maintaining, licensing, and assigning Intellectual Property rights, increasing the potential for the transfer of technology, widespread notice of technology transfer opportunities, and early stage and precommercial technology demonstration to remove barriers that limit private sector interest and demonstrate potential commercial applications of any research and technologies arising from Laboratory activities, shall be deemed allowable provided that such costs meet the other requirements of the allowable cost provisions of this Contract.

(2) The Contractor's participation in litigation to enforce or defend Intellectual Property claims incurred in its technology transfer efforts shall be as provided in the clause entitled ''Insurance—Litigation and Claims'' of this contract.

(d) *Conflicts of Interest—Technology Transfer.* The Contractor shall have 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. These procedures shall apply to all persons participating in Laboratory research or related technology transfer activities. Such implementing procedures shall be provided to the contracting officer for review and approval within sixty (60) days after execution of this contract. The contracting officer shall have thirty (30) days thereafter to approve or require specific changes to such procedures. Such implementing procedures shall include procedures to:

(1) Inform employees of and require conformance with standards of conduct and integrity in connection with research involving non-federal sponsors in accordance with the provisions of paragraph (n)(5) of this clause;

(2) Review and approve employee activities so as to avoid conflicts of interest arising from commercial utilization activities relating to Contractor-developed Intellectual Property;

(3) Conduct work performed using royalties so as to avoid interference with or adverse effects on ongoing DOE projects and programs;

(4) Conduct activities relating to commercial utilization of Contractor-developed Intellectual Property so as to avoid interference with or adverse effects on user facility or SPP activities of the Contractor;

(5) Conduct DOE-funded projects and programs so as to avoid the appearance of conflicts of interest or actual conflicts

of interest with non-Government funded work;

(6) Notify the contracting officer with respect to any new work to be performed or proposed to be performed under the Contract for DOE or other Federal agencies where the new work or proposal involves Intellectual Property in which the Contractor has obtained or intends to request or elect title;

(7) Except as provided elsewhere in this Contract, obtain the approval of the contracting officer for any licensing of or assignment of title to Intellectual Property rights by the Contractor to any business or corporate affiliate of the Contractor;

(8) Obtain the approval of the contracting officer prior to any assignment, exclusive licensing, or option for exclusive licensing, of Intellectual Property to any individual who is a current or has been a Laboratory employee within the previous two years or to the company in which the individual is a principal and the Contractor's request should include notice of any SPP, CRADA and/or ACT associated with the Intellectual Property;

(9) Notify non-Federal sponsors of SPP activities of any relevant Intellectual Property interest of the Contractor prior to execution of SPP; and

(10) Notify the Contracting Officer and DOE funding program prior to evaluating a proposal from a third party for DOE, when:

(i) The evaluator is an inventor of a Contractor invention that is the subject matter of the proposal; or

(ii) The evaluator is a principal or has financial interest in the third party; or

(iii) The third party is a licensee of the Contractor.

(e) *Fairness of Opportunity.* In conducting its technology transfer activities, the Contractor shall 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 arrangements. The requirement to widely disseminate the availability of technology transfer opportunities does not apply to a specific application originated outside of the Laboratory and by entities other than the Contractor.

(f) *U.S. Industrial Competitiveness for licensing and assignments of rights in subject inventions.* In the interest of enhancing U.S. industrial competitiveness, and generating economic and technological benefits to the U.S. economy, the Contractor shall comply with the following in its licensing and assignment involving Contractor's rights in subject inventions, where the Contractor obtains rights in subject inventions during the course of the Contractor's operation of the facility under this contract:

(1) The Contractor agrees to be bound by:

(i) The provisions of 35 U.S.C. 204 (Preference for United States industry);

(ii) All requirements in applicable Determinations of Exceptional Circumstances; and

(iii) Paragraph (t) U.S. Competitiveness in its Patent Rights provision (*e.g., 48 CFR 970.5227–10 or 48 CFR 970.5227–12 as may be modified*) as applicable.

(2) When the provisions in paragraph (f)(1) of this section do not apply, the Contractor shall ensure in its license or assignment to comply the provisions of 35 U.S.C. 204 and consider in its decisions, at any tier, the following:

(i) Whether resulting products, and/or embodying parts, including components thereof, will be substantially manufactured in the United States; or

(ii) (A) Whether the proposed licensee or assignee has a business unit located in the United States and whether significant economic and technical benefits will flow to the United States as a result of the license or assignment agreement; and

(B) If the proposed licensee or assignee is subject to the control of a foreign company or government, whether such foreign government permits United States agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements and has policies to protect United States Intellectual Property rights by relying upon U.S. Trade Representative reports on Foreign Trade Barriers, U.S. Trade Representative Special 301 Report (see U.S. Trade Representative website at: *https://www.ustr.gov*) and other available resources, as necessary, to allow for a complete and informed decision.

(iii) If the Contractor determines that the licensee or assignee does not meet either of the requirements in paragraphs (f)(2)(i) or (ii) of this clause, the Contractor, prior to entering into such an agreement, must obtain the approval of the Contracting Officer after consulting with DOE Patent Counsel. The Contracting Officer shall act on any such requests for approval within thirty (30) days.

(g) *Indemnity—Product Liability.* In entering into written technology transfer agreements, including but not limited to, research and development agreements, licenses, assignments and CRADAs, the Contractor agrees to include in such agreements a requirement that the U.S. Government and the Contractor, except for any negligent acts or omissions of 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. Except for CRADA and SPP where the guidance is already provided elsewhere, the Contractor shall identify and obtain the approval of the contracting officer for any proposed exceptions to this requirement such as where State or local law expressly prohibit the Participant from providing indemnification or where the research results will be placed in the public domain.

(h) *Disposition of Income.* (1) Royalties or other income earned or retained by the Contractor as a result of performance of authorized technology transfer activities herein shall be used by the Contractor 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 through the effective date of this contract award or modification. If the net amounts of such royalties and income received from patent licensing after payment of patenting costs, licensing costs, payments to inventors and other expenses incidental to the administration of Subject Inventions during any fiscal year exceed 5 percent of the Laboratory's budget for that fiscal year, 15 percent of such excess amounts shall be paid to the Treasury of the United States, and the remaining amount of such excess shall be used by the Contractor for the purposes as described in this paragraph. Any inventions arising out of such scientific research and development activities shall be deemed to be Subject Inventions under the Contract.

(2) The Contractor shall include as a 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 herein will be applied at the Laboratory, and at the end of the year, provide a separate accounting for how the funds were actually used. Under no

circumstances shall these royalties and income be used for any purpose inconsistent with DOE mission direction.

(3) The Contractor shall establish subject to the approval of the contracting officer a policy for making awards or sharing of royalties with Contractor employees, other coinventors and coauthors, including Federal employee coinventors when deemed appropriate by the contracting officer. The Contractor shall notify the contracting officer of any changes to that policy, and such changes, shall be subject to the approval of the contracting officer.

(i) *Transfer to successor contractor.* In the event of termination or upon the expiration of this Contract, any unexpended balance of income received for use at the Laboratory shall be transferred, 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. The Contractor shall transfer title, as one or several packages if necessary, 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 as directed by the contracting officer.

(j) *Technology transfer affecting the national security.* (1) The Contractor shall notify and obtain the approval of the contracting officer, prior to 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), as amended. Such notification shall include sufficient information to enable DOE to determine the extent that commercialization of such technology would enhance or diminish security interests of the United States, or diminish communications within DOE's nuclear weapon production complex. DOE shall use its best efforts to complete its determination within sixty (60) days of the Contractor's notification, and provision of any supporting information, and DOE shall promptly notify the Contractor as to whether the technology is transferable.

(2) The Contractor shall include in all of its technology transfer agreements with third parties, including, but not limited to, CRADAs, licensing agreements and assignments, notice to such third parties 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.

(3) For other than fundamental research as defined in National Security Decision Directive 189, the Contractor is responsible to conduct internal export control reviews and assure that technology is transferred in accordance with applicable law.

(k) *Records.* The Contractor shall maintain records of its technology transfer activities in a manner and to the extent satisfactory to the DOE and specifically including, but not limited to, the licensing agreements, assignments and the records required to implement the requirements of paragraphs (e), (f), and (h) of this clause and shall provide 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 (15 U.S.C. 3710a(c)(6)). Such reports shall be made annually in a format to be agreed upon between the Contractor and DOE and in such a format which will serve to adequately inform DOE of the Contractor's technology transfer activities while protecting any data not subject to disclosure under the Rights in Technical Data clause and paragraph (n) of this clause. Such records shall be made available in accordance with the clauses of this Contract pertaining to inspection, audit and examination of records.

(l) *Reports to Congress.* To facilitate DOE's reporting to Congress, the Contractor is required to submit annually to DOE a technology transfer plan for conducting its technology transfer function for the upcoming year, including plans for securing Intellectual Property rights in Laboratory innovations with commercial promise and plans for managing such innovations so as to benefit the competitiveness of United States industry. This plan, which may be included in the Annual Laboratory Plan, shall be provided to the contracting officer on or before October 1st of each year.

(m) *Oversight and appraisal.* The Contractor is responsible for developing and implementing effective internal controls for all technology transfer activities consistent with the audit and record requirements of this Contract. Laboratory Contractor performance in implementing the technology transfer mission and the effectiveness of the Contractor's procedures will be evaluated by the contracting officer as part of the annual appraisal process, with input from the cognizant Secretarial Officer or program office.

(n) *Technology transfer through cooperative research and development agreements.* Upon approval of the contracting officer and as provided in DOE approved guidance, the Laboratory Director, or designee, may enter into CRADAs on behalf of the DOE subject to the requirements set forth in this paragraph.

(1) *Review and approval of CRADAs.* (i) Except as otherwise directed in writing by the contracting officer, each JWS or MSW shall be submitted to the contracting officer for approval. The Contractor's Laboratory Director or designee shall provide a program mission impact statement and shall include an impact statement regarding related Intellectual Property rights known by the Contractor to be owned by the Government to assist the contracting officer in the approval determination.

(ii) The Contractor shall also include (specific to the proposed CRADA) a statement of compliance with the Fairness of Opportunity requirements of paragraph (e) of this clause.

(iii) Within thirty (30) days after submission of a JWS, MSW or proposed CRADA, the contracting officer shall approve, disapprove or request modification to the JWS, MSW or CRADA. The contracting officer shall provide a written explanation to the Contractor's Laboratory Director or designee of any disapproval or requirement for modification of a JWS or proposed CRADA.

(iv) Except as otherwise directed in writing by the contracting officer, the Contractor shall not enter into, or begin work under, a CRADA until approval of the CRADA or relevant MSW has been granted by the contracting officer. The Contractor may submit its proposed CRADA to the contracting officer at the time of submitting its proposed JWS, relevant MSW or any time thereafter.

(2) *Selection of participants.* The Contractor's Laboratory Director or designee in deciding what CRADA to enter into shall:

(i) Give special consideration to small business firms, and consortia involving small business firms;

(ii) Give preference to business units located in the United States which agree that products or processes embodying Intellectual Property will be substantially manufactured or practiced in the United States and, in the case of any industrial organization or other person subject to the control of a foreign company or government, take into consideration whether or not such foreign government permits United

States agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements. The Contractor, in considering these factors, may rely upon the information and same sources as referenced in paragraphs (f)(1)(ii)(C) and (D) of this clause;

(iii) Provide Fairness of Opportunity in accordance with the requirements of paragraph (e) of this clause; and

(iv) Give consideration to the Conflicts of Interest requirements of paragraph (d) of this clause.

(3) *Withholding of data.* (i) Data that is first produced as a result of research and development activities conducted under a CRADA and that would be a trade secret or commercial or financial data that would be privileged or confidential, if such data had been obtained from a non-Federal third party, may be protected from disclosure under the Freedom of Information Act as provided in the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(7)) for a period as agreed in the CRADA of up to five (5) years from the time the data is first produced or otherwise as delineated in Stevenson-Wydler, as amended. The DOE shall cooperate with the Contractor in protecting such data.

(ii) Unless otherwise expressly approved by the contracting officer in advance for a specific CRADA, the Contractor agrees, at the request of the contracting officer, to transmit such data to other DOE facilities for use by DOE or its Contractors by or on behalf of the Government. When data protected pursuant to paragraph (n)(3)(i) of this clause is so transferred, the Contractor shall clearly mark the data with a legend setting out the restrictions against private use and further dissemination, along with the expiration date of such restrictions.

(iii) A final technical report, upon completion of a CRADA, shall be provided to DOE's Office of Scientific and Technical Information; reports marked as Protected CRADA Information will not be released to the public for a period in accordance with the terms of the CRADA.

(iv) In addition to its authority to license Intellectual Property, the Contractor may enter into licensing agreements with third parties for data developed by the Contractor under a CRADA subject to other provisions of this Contract. However, the Contractor shall neither use the protection against dissemination nor the licensing of data as an alternative to the submittal of invention disclosures which include data protected pursuant to paragraph (n)(3)(i) of this clause.

(4) *SPP, ACT and user facility programs.* (i) SPP, ACT and User Facility Agreements (UFAs) may be available for use by the Contractor in addition to CRADAs. The Contractor 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.,* SPP, ACT and UFA, and of the Class Patent Waiver provisions associated therewith.

(ii) Where the Contractor believes that the transfer of technology to the U.S. domestic economy will benefit from, or other equity considerations dictate, an arrangement other than the Class Waiver of patent rights to the sponsor in SPP, ACT and UFAs, a request may be made to the contracting officer for an exception to the Class Waivers.

(iii) Rights to inventions made under agreements other than funding agreements with third parties shall be governed by the appropriate provisions incorporated, with DOE approval, in such agreements, and the provisions in such agreements take precedence over any disposition of rights contained in this Contract. Disposition of rights under any such agreement shall be in accordance with any DOE class waiver (including SPP, ACT and User Class Waivers) or individually negotiated waiver which applies to the agreement.

(5) *Conflicts of interest.* (i) Except as provided in paragraph (n)(5)(iii) of this clause, the Contractor shall assure that no employee of the Contractor shall have a substantial role (including an advisory role) in the negotiation, approval or performance of a CRADA, if, to such employee's knowledge:

(A) Such employee, or the spouse, child, parent, sibling, or partner of such employee, or an organization (other than the Contractor) in which such employee serves as an officer, director, trustee, partner, or employee—

(*1*) Holds financial interest in any entity, other than the Contractor, that has a substantial interest in the entity of the CRADA; or

(*2*) Receives a gift or gratuity from any entity, other than the Contractor, that has a substantial interest in the entity of the CRADA; or

(B) A financial interest in any entity, other than the Contractor, that has a substantial interest in the entity of the CRADA, is held by any person or organization with whom such employee is negotiating or has any arrangement concerning prospective employment.

(ii) The Contractor shall require that each employee of the Contractor who has a substantial role (including an advisory role) in the negotiation, approval or performance of the CRADA certify through the Contractor to the contracting officer that the circumstances described in paragraph (n)(5)(i) of this clause do not apply to that employee.

(iii) The requirements of paragraphs (n)(5)(i) and (ii) of this clause shall not apply in a case where the contracting officer is advised by the Contractor in advance of the participation of an employee described in those paragraphs of the nature of and extent of any financial interest described in paragraph (n)(5)(i) of this clause, and the contracting officer determines that such financial interest is not so substantial as to be considered likely to affect the integrity of the Contractor employee's participation in the process of negotiation, approval or performance of the CRADA.

(o) *Technology transfer in other cost-sharing agreements.* In conducting research and development activities in cost-shared agreements not covered by paragraph (n) of this clause, the Contractor, with prior written permission of the contracting officer, may provide for the withholding of data produced thereunder in accordance with the applicable provisions of paragraph (n)(3) of this clause.

(p) *Technology partnership ombudsman.* (1) The Contractor agrees to establish a position to be known as ''Technology Partnership Ombudsman,'' to help resolve complaints from outside organizations regarding the policies and actions of the contractor with respect to technology partnerships (including CRADAs), patents owned by the contractor for inventions made at the laboratory, and technology licensing.

(2) The Ombudsman shall be a senior official of the Contactor's laboratory staff, who is not involved in day-to-day technology partnerships, patents or technology licensing, or, if appointed from outside the laboratory or facility, shall function as such senior official.

(3) The duties of the Technology Partnership Ombudsman shall include:

(i) Serving as the focal point for assisting the public and industry in resolving complaints and disputes with the laboratory or facility regarding technology partnerships, patents, and technology licensing;

(ii) Promoting the use of collaborative alternative dispute resolution techniques such as mediation to facilitate the speedy and low cost resolution of complaints and disputes, when appropriate; and

(iii) Submitting a quarterly report, in a format provided by DOE, to the

Director of the DOE Office of Dispute Resolution, and the Contracting Officer concerning the number and nature of complaints and disputes raised, along with the Ombudsman's assessment of their resolution, consistent with the protection of confidential and sensitive information.

(End of clause)

Alternate I [December 2024]. As prescribed in 970.2770–4(b), add the following definition and new paragraph (q):

Privately funded technology transfer means the prosecuting, maintaining, licensing, and marketing of inventions which are not owned by the Government (and not related to CRADAs) when such activities are conducted entirely without the use of Government funds.

(q) Nothing in paragraphs (c), (e), (f), (g), (h), and (i) of this clause are intended to apply to the contractor's privately funded technology transfer activities if such privately funded activities are addressed elsewhere in the contract.

(End of alternate)

Alternate II (DEC 2000). As prescribed in 970.2770–4(c), the contracting officer shall substitute the phrase ''weapon production facility'' wherever the word ''laboratory'' appears in the clause.

■ 312. Amend section 970.5227–4 by revising the introductory text, clause date, and paragraph (c) to read as follows:

970.5227–4 Authorization and consent.

Insert the following clause in solicitations and contracts in accordance with 970.2702–70:

Authorization and Consent [December 2024]

* * * * *

(c)(1) The Contractor agrees to include, and require inclusion of, the Authorization and Consent clause at 48 CFR 52.227–1, without Alternate 1, but suitably modified to identify the parties, in all subcontracts expected to exceed the simplified acquisition threshold at any tier for supplies or services, including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services.

(2) The Contractor agrees to include, and require inclusion of, paragraph (a) of this Authorization and Consent clause, suitably modified to identify the parties, in all subcontracts at any tier for research and development activities expected to exceed the simplified acquisition threshold.

(3) Omission of an authorization and consent clause from any subcontract, including those valued less than the simplified acquisition threshold does not affect this authorization and consent.

(End of clause)

■ 313. Amend section 970.5227–5 by:

■ a. Revising the introductory text and clause date; and

■ b. In paragraph (c), removing ''$100,000'' and adding in its place ''the simplified acquisition threshold''.

The revisions read as follows:

970.5227–5 Notice and assistance regarding patent and copyright infringement.

Insert the following clause in solicitations and contracts in accordance with 970.2702–70:

Notice and Assistance Regarding Patent and Copyright Infringement [December 2024]

* * * * *

970.5227–6 [Amended]

■ 314. Amend section 970.5227–6 in the introductory text by removing ''970.2702–3'' and adding in its place ''970.2702–70''.

970.5227–7 [Amended]

■ 315. Amend section 970.5227–7 in the introductory text by removing ''970.2702–4'' and adding in its place ''970.2702–70''.

970.5227–8 [Amended]

■ 316. Amend section 970.5227–8 in the introductory text by removing ''970.2702–4'' and adding in its place ''970.2702–70''.

970.5227–9 [Amended]

■ 317. Amend section 970.5227–9 in the introductory text by removing ''970.2704–6'' and adding in its place ''970.2702–70''.

■ 318. Section 970.5227–10 is revised to read as follows:

970.5227–10 Patent rights—management and operating contracts, nonprofit organization or small business firm contractor.

As prescribed in 970.2703–2(a), insert the following clause:

Patent Rights—Management and Operating Contracts, Nonprofit Organization or Small Business Firm Contractor [December 2024]

(a) *Definitions—DOE licensing regulations* means the Department of Energy patent licensing regulations at 10 CFR part 781.

Exceptional circumstance subject invention means any subject invention in a technical field or related to a task determined by the Department of Energy to be subject to an exceptional circumstance under 35 U.S.C. 202(a)(ii) and in accordance with 37 CFR 401.3(e).

Initial Patent Application means, as to a given Subject Invention, the first provisional or non-provisional U.S. national application for patent as defined in 37 CFR 1.9(a)(2) and (3), respectively, the first international application filed under the Patent Cooperation Treaty as defined in 37 CFR 1.9(b) which designates the United States, or the first application for a Plant Variety Protection certificate, as applicable.

Invention means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*).

Made when used in relation to any invention means the conception or first actual reduction to practice of such invention.

Nonprofit organization means a university or other institution of higher education, or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

Patent Counsel means the Department of Energy (DOE) Patent Counsel assisting the DOE contracting activity. The Patent Counsel is the first and primary point of contact for activities described in this clause.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Small business firm means a small business concern as defined at section 2 of Public Law 85–536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and

subcontracting at 13 CFR 121.3–8 and 121.3–12, respectively, are used.

Statutory Period means the one-year period before the effective filing date of a claimed invention during which exceptions to prior art exist per 35 U.S.C. 102(b) as amended by the Leahy-Smith America Invents Act, Public Law 112–29.

Subject Invention means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of Principal Rights.* (1) *Retention of title by the Contractor.* Except for exceptional circumstance subject inventions outlined in paragraph (b)(3)(i) of this clause, the contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(2) *Treaties and international agreements.* Any rights acquired by the Contractor in subject inventions are subject to any disposition of right, title, or interest in or to subject inventions provided for in treaties or international agreements identified at DOE's Office of International Affairs (International Commitments—IEC) (*https://energy.gov/ia/iec-documents*), or other rights which are necessary for the Government to meet its obligations to foreign governments, their nationals and international organizations under such treaties or international agreements with respect to subject inventions.

(3) *Exceptional circumstance subject inventions.* Except to the extent that rights are retained by the Contractor in a determination of exceptional circumstances or granted to a contractor through a determination of greater rights in accordance with paragraph (b)(4) of this clause, the Contractor does not have a right to retain title to any exceptional circumstance subject inventions and agrees to assign to the Government the entire right, title, and interest, throughout the world, in and to any exceptional circumstance subject inventions.

(i) Inventions within or relating to the following fields of technology are exceptional circumstance subject inventions in which the Contractor cannot retain title without specific grant of a waiver from DOE:

(A) Uranium enrichment technology;

(B) Storage and disposal of civilian high-level nuclear waste and spent fuel technology; and

(C) National security technologies classified or sensitive under section 148 of the Atomic Energy Act (42 U.S.C. 2168); and

(D) DOE Steel Initiative and Metals Initiative.

(ii) As determined by the DOE, inventions made under any agreement, contract or subcontract related to the exceptional circumstance subject inventions subject to specific terms outlined in those declarations of exceptional circumstance, the Contractor may take title to these inventions consistent with the terms of the contract. A complete list of declarations of exceptional circumstance, which is maintained by the Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, include but is not limited to the following—

(A) U.S. Advanced Battery Consortium;

(B) Any funding agreement which is funded in part by the Electric Power Research Institute (EPRI) or the Gas Research Institute (GRI);

(C) Any funding agreement related to Energy Efficiency, Storage, Integration and Related Technologies, Renewable Energy, and Advanced Energy Technologies which is funded by the Office of Energy Efficiency and Renewable Energy (EERE) or the Advanced Research Projects Agency—Energy (ARPA–E);

(D) Solid State Energy Conversion Alliance (SECA), if the Contractor is a participant in the ''Core Technology Program'';

(E) Solid State Lighting (SSL) Program, if the Contractor is a participant in the ''Core Technology Program.''

(F) Cybersecurity, Energy Security, and Emergency Response;

(G) Quantum Information Science Technologies; and

(H) Domestic Manufacture of DOE Science and Energy Technologies (S&E DEC).

(iii) Inventions subject to ''Department of Energy Determination of Exceptional Circumstances under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies'' (S&E DEC) issued June 7, 2021, must comply with the requirements of paragraph (t) of this section to the maximum extent authorized by the S&E DEC unless otherwise directed by DOE Patent Counsel in writing.

(iv) DOE reserves the right to unilaterally amend this contract to modify, by deletion or insertion, technical fields, tasks, or other classifications for the purpose of determining DOE exceptional circumstance subject inventions.

(4) *Contractor request for greater rights in exceptional circumstance subject inventions.* The Contractor may request rights greater than allowed by the exceptional circumstance determination in an exceptional circumstance subject invention by submitting such a request in writing to Patent Counsel at the time the exceptional circumstance subject invention is disclosed to DOE or within eight (8) months after conception or first actual reduction to practice of the exceptional circumstance subject invention, whichever occurs first, unless a longer period is authorized in writing by the Patent Counsel for good cause shown in writing by the Contractor. DOE may, in its discretion, grant or refuse to grant such a request by the Contractor.

(5) *Contractor employee-inventor rights.* If the Contractor does not elect to retain title to a subject invention or does not request greater rights in an exceptional circumstance subject invention, a Contractor employee-inventor, after consultation with the Contractor and with written authorization from the Contractor in accordance with 10 CFR 784.9(b)(4), may request greater rights, including title, in the subject invention or the exceptional circumstance invention from DOE, and DOE may, in its discretion, grant or refuse to grant such a request by the Contractor employee-inventor.

(6) *Government assignment of rights in Government employees' subject inventions.* If a Government employee is a joint inventor of a subject invention or of an exceptional circumstance subject invention to which the Contractor has rights, the Government may assign or refuse to assign to the Contractor any rights in the subject invention or exceptional circumstance subject invention acquired by the Government from the Government employee, in accordance with 48 CFR 27.304–1(d). The rights assigned to the Contractor are subject to any provision of this clause that is applicable to subject inventions in which the Contractor retains title, including reservation by the Government of a nonexclusive,

nontransferable, irrevocable, paid-up license, except that the Contractor shall file its initial patent application claiming the subject invention or exceptional circumstance invention within one (1) year after the assignment of such rights. The Contractor shall share royalties collected for the manufacture, use or sale of the subject invention with the Government employee.

(c) *Subject invention disclosure, election of title and filing of patent application by contractor*—(1) *Subject invention disclosure.* The contractor will disclose each subject invention to the Patent Counsel within two months after the inventor discloses it in writing to contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written or electronic report and shall identify the contract or any other agreement under which the invention was made and the inventor(s) and all sources of funding by Budget and Resources (B&R) code for the invention. The funding program may require other invention identifiers such as related award numbers or funding opportunity announcement numbers. It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted or made available for publication at the time of disclosure. The disclosure shall identify if the invention falls within an exceptional circumstance field. DOE will make a determination and advise the Contractor within 30 days of receipt of an invention disclosure as to whether the invention is an exceptional circumstance subject invention. In addition, after disclosure to the Patent Counsel, the Contractor will notify the agency of any accepted manuscript describing the invention for publication or of any on sale or public use planned by the contractor that is 60 days prior to the end of the Statutory Period. The Contractor shall notify Patent Counsel prior to any release or publication of information concerning any nonelectable subject invention such as an exceptional circumstance subject invention or any subject invention related to a treaty or international agreement.

(2) *Election by the Contractor.* Except as provided in paragraph (b)(2) of this clause, the Contractor will elect in writing whether or not to retain title to any such invention by notifying the Federal agency within two years of disclosure to the Federal agency. However, in any case where publication, on sale or public use has initiated the statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) *Filing of patent applications by the Contractor.* The Contractor will file its initial patent application on a subject invention to which it elects to retain title within one year after election of title or, if earlier, or prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries or international patent offices within either ten months of the corresponding first filed patent application or six months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) *Contractor's request for an extension of time.* Requests for an extension of the time for disclosure, election, and filing under paragraphs (c)(1), (2), and (3) of this clause may, at the discretion of Patent Counsel, be granted.

(5) *Publication review.* During the course of the work under this contract, the Contractor may desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. Contractor's Invention Identification Procedures under paragraph (f)(5) of this clause should address timely disclosure of inventions, consider whether review is required, and if so, facilitate such review by Contractor personnel responsible for patent matters prior to disclosure of publications in order that public disclosure of such information will not adversely affect the patent interest of DOE or the Contractor.

(6) *Reporting to DOE and Approvals.* Whenever possible in this paragraph (c), the Government electronic reporting system (*e.g.,* iEdison or similar system) shall be used for reporting and approvals.

(d) *Conditions when the Government may obtain title.* The Contractor will convey to the DOE, upon written request, title to any subject invention—

(1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title.

(2) In those countries in which the Contractor fails to file a patent application within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c), but prior to its receipt of the written request of the DOE, the Contractor shall continue to retain title in that country.

(3) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in a reexamination or opposition proceeding on, a patent on a subject invention.

(4) If the Contractor requests that DOE acquire title or rights from the Contractor in a subject invention to which the Contractor had initially retained title or rights, or in an exceptional circumstance subject invention to which the Contractor was granted greater rights, DOE may acquire such title or rights from the Contractor, or DOE may decide against acquiring such title or rights from the Contractor, at DOE's sole discretion.

(5) Upon a breach of paragraph (t) of this clause.

(e) *Minimum rights of the Contractor and protection of the Contractor's right to file*—(1) *Request for a Contractor license.* The Contractor may request the right to reserve a revocable, nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. DOE may grant or refuse to grant such a request by the Contractor. When DOE approves such reservation, the Contractor's license will normally extend to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE, except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(2) *Revocation or modification of a Contractor license.* The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical

application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and DOE licensing regulations at 10 CFR part 781. This license will not be revoked in the field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the subject invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application of the subject invention in that foreign country.

(3) *Notice of revocation of modification of a Contractor license.* Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and DOE licensing regulations at 10 CFR part 781 concerning the licensing of Government owned inventions, any decision concerning the revocation or modification of the license.

(f) *Contractor action to protect the Government's interest*—(1) *Execution of delivery of title or license instruments.* The Contractor agrees to execute or to have executed, and promptly deliver to the Patent Counsel all instruments necessary to accomplish the following actions:

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title; and

(ii) Convey title to DOE when requested under paragraph (b) or (d) of this clause and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) *Notification of discontinuation of patent protection.* The contractor will notify the Patent Counsel of any decision not to file a patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 60 days before the expiration of the response period required by the relevant patent office.

(4) *Notification of Government rights.* The contractor agrees to include, within the specification of any United States patent applications and any patent issuing thereon covering a subject invention, the following statement, ''This invention was made with government support under (identify the contract) awarded by (identify the Federal agency). The government has certain rights in the invention.''

(5) *Invention identification procedures.* The Contractor shall establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed and shall submit a written description of such procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

(6) *Patent filing documentation.* If the Contractor files a domestic or foreign patent application claiming a subject invention, the Contractor shall promptly submit to Patent Counsel, upon request, the following information and documents:

(i) The filing date, serial number, title, and a copy of the patent application (including an English-language version if filed in a language other than English);

(ii) An executed and approved instrument fully confirmatory of all Government rights in the subject invention; and

(iii) The patent number, issue date, and a copy of any issued patent claiming the subject invention.

(7) *Duplication and disclosure of documents.* The Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause; provided, however, that any such duplication or disclosure by the Government is subject to the confidentiality provision at 35 U.S.C. 205 and 37 CFR part 401.

(g) *Subcontracts*—(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—non-profit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 37 CFR 401.14 with Alternate I of 48 CFR 952.227–11, Patent Rights—Retention by the Contractor, suitably modified to identify the parties, in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202 and paragraph (b)(3) of this clause. The subcontractor retains all rights provided for the contractor in the patent rights clause at 37 CFR 401.3(a) and 401.14. If the S&E DEC, or any other related DEC, is applicable (see paragraph (b)(3)(iii) of this clause), the Contractor shall use Alternate II of DEAR 952.227–11, Patent Rights—Retention by the Contractor.

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations and small business firms.* Except for the subcontracts described in paragraph (g)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties, in any contract for experimental, developmental, demonstration or research work. For subcontracts subject to a patent waiver granted by DOE Patent Counsel, the contractor must consult with DOE patent counsel with respect to the appropriate patent clause. For subcontracts subject to exceptional circumstances, the contractor must consult with DOE patent counsel with respect to the appropriate patent clause which may require the use of Alternate II of 48 CFR 952.227–13 Patent Rights—Acquisition by the Government.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor, and the

Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(5) *Subcontractor refusal to accept terms of patent clause.* If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such a refusal, including any relevant information for expediting disposition of the matter, and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention.

(h) *Reporting on utilization of subject inventions.* The Contractor agrees to submit to DOE on request, periodic reports, no more frequently than annually, on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. In addition, the Contractor shall provide data to DOE for the annual data call for the Department of Commerce report that includes the number of patent applications filed, the number of patents issued, licensing activity, gross royalties received by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Contractor.

(i) *Preference for United States Industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *March-in Rights.* The Contractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right under 35 U.S.C. 203 and in accordance with the procedures in 37 CFR 401.6 and any DOE supplemental regulations to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Contractor, assignee or exclusive licensee refuses such a request, DOE has the right to grant such a license itself under applicable law stated above.

(k) *Special provisions for contracts with nonprofit organizations.* If the Contractor is a nonprofit organization, it agrees that—

(1) *DOE approval of assignment of rights.* Rights to a subject invention in the United States may not be assigned by the Contractor without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions of this clause as the Contractor.

(2) *Small business firm licensees.* It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business firm applicants, and the Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this paragraph (k)(2).

(3) *Contractor licensing of subject inventions.* To the extent that it provides the most effective technology transfer, licensing of subject inventions shall be administered by Contractor employees on location at the facility.

(l) *Communications.* The Contractor shall direct any notification, disclosure or request provided for in this clause to the Patent Counsel assisting the DOE contracting activity.

(m) *Reports*—(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a specified period, or a statement that no subject inventions were made during the specified period; and a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement that no such subcontracts were awarded during the specified period.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period under which a subject invention was reported, or a statement that no such subject inventions under subcontracts were reported during the contract performance period.

(n) *Examination of Records Relating to Subject Inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including

laboratory notebooks), records, documents, and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, including exceptional circumstance subject inventions, or to determine Contractor compliance with any requirement of this clause.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, including exceptional circumstance subject inventions, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(4) *Power of inspection.* With respect to a subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall furnish the Government, upon request by DOE, an irrevocable power to inspect and make copies of a prosecution file for any patent application claiming the subject invention.

(o) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or product manufactured at the facility.

(1) To practice or have practiced by or for the Government at the facility; and

(2) To transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(p) *Atomic Energy*—(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of paragraph (p)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(q) *Classified inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(r) *Patent functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(s) *Educational awards subject to 35 U.S.C. 212.* The Contractor shall notify the Contracting Officer prior to the placement of any person subject to 35 U.S.C. 212 in an area of technology or task (1) related to exceptional circumstance technology or (2) which is subject to treaties or international agreements as set forth in paragraph (b)(3) of this clause or agreements other than funding agreements. The Contracting Officer may disapprove of any such placement.

(t) *U.S. Competitiveness.* (1) Consistent with 48 CFR 970.5227–3(f) U.S. Industrial Competitiveness, for all subject inventions under the S&E DEC, the Contractor agrees that any products embodying any subject invention or produced through the use of any subject invention will be manufactured substantially in the United States unless the Contractor can show to the satisfaction of DOE that it is not commercially feasible. In the event DOE agrees to foreign manufacture, there will be a requirement that the Government's support of the technology be recognized in some appropriate manner, *e.g.,* alternative binding commitments to provide an overall net benefit to the U.S. economy. The Contractor agrees that it will not license, assign or otherwise transfer any subject invention to any entity, at any tier, unless that entity agrees to these same requirements. In the event that the Contractor or other such entity receiving rights in the Subject Invention undergoes a change in ownership amounting to a controlling interest, the Contractor or other such entity receiving rights shall ensure continual compliance with the requirements of this paragraph (t)(1) and shall inform DOE, in writing, of the change in ownership within six months of the change. The Contractor and any successor assignee will convey to DOE, upon written request from DOE, title to any subject invention, upon a breach of this paragraph (t)(1). The Contractor will include this paragraph (t) in all subawards/contracts, regardless of tier, for experimental, developmental or research work.

(2) The requirements, rights and administration of paragraph (t)(1) of this clause are further clarified as follows:

(i) *Waivers.* The Contractor (or any entity subject to this paragraph) may request a waiver or modification of paragraph (t)(1) of this clause. Such waivers or modifications may be granted when DOE determines that:

(A) The Contractor (or any entity subject to paragraph (t)(1) of this clause) has demonstrated, with quantifiable data, that manufacturing in the United States is not commercially feasible; and

(B) A waiver or modification would best serve the interests of the United States and the general public.

(ii) *Final determination of breach of paragraph (t)(1) of this clause.* If DOE determines the Contractor is in breach of paragraph (t)(1) of this clause, the Department may issue a final written determination of such breach. If such determination includes a demand for title to the subject inventions under the award, the demand for title will cause an immediate conveyance and

assignment of all rights to all subject inventions subject to the breach to the United States Government, including all pending U.S. and foreign patent applications and all U.S. and foreign patents that cover any subject invention, without compensation. Any such final determination shall be signed by the cognizant DOE Contracting Officer with the concurrence of the Assistant General Counsel for Technology Transfer & Intellectual Property. Advanced notice will be provided for comment to the Contractor before any final written determination by DOE is issued.

(iii) Pursuant to Contractor's agreement in paragraph (t)(1) of this clause to not license, assign or otherwise transfer rights to subject inventions at any tier unless the entity agrees to paragraph (t)(1) of this clause: any such license, assignment, or other transfer of right to any subject invention developed under the award shall contain paragraph (t)(1) of this clause suitably modified to properly identify the parties. If a licensee, assignee, or other transferee of rights to any subject invention is finally determined by DOE in writing to be in breach of paragraph (t)(1) of this clause, the applicable license, assignment or other transfer shall be deemed null and void. Advanced notice will be provided for comment to the non-complying party before any final written determination by DOE is made.

(iv) For clarity, if the forfeiture of title to any subject invention is due to a breach of paragraph (t)(1) of this clause, the Contractor shall not be entitled to any compensation, or to a license to the subject invention including the reserved license in paragraph (e)(1) of this clause, unless DOE grants a license through a separately agreed upon licensing agreement.

(u) *Annual appraisal by Patent Counsel.* Patent Counsel may conduct an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(v) *Unauthorized Access.* The contractor will protect all invention reports, unpublished patent applications and other invention related information from unauthorized access and disclosure using at least commonly available techniques and practices. In the event that the Contractor becomes aware of unauthorized access to invention reports, unpublished patent applications and other invention related information, the Contractor shall notify Patent Counsel within 7 days.

(End of clause)

Alternate 1 Weapons Related Subject Inventions. As prescribed at 970.2703–2(g), insert the following definition in paragraph (a) and add paragraph (b)(7), respectively:

(a) *Definitions—Weapons related subject invention* means any subject invention conceived or first actually reduced to practice in the course of or under work funded by or through defense programs, including Department of Defense and intelligence reimbursable work, or the Naval Nuclear Propulsion Program of the Department of Energy or the National Nuclear Security Administration.

(b) *Allocation of Principal Rights*—(7) *Weapons related subject inventions.* Except to the extent that DOE is solely satisfied that the Contractor meets certain procedural requirements and DOE grants rights to the Contractor in weapons related subject inventions, the Contractor does not have the right to retain title to any weapons related subject inventions.

(End of alternate)

■ 319. Amend section 970.5227–11 by:
■ a. Revising the introductory text, clause heading and date, and paragraphs (a), (c)(2) introductory text, (c)(2)(vii), (c)(5), (f)(2), and (f)(3); and
■ b. Adding paragraph (o).

The revisions and addition read as follows:

970.5227–11 Patent rights—management and operating contracts, for-profit contractor, no patent waiver.

As prescribed in 970.2702–2(b), insert the following clause:

Patent Rights—Management and Operating Contracts, for-Profit Contractor, No Patent Waiver [December 2024]

(a) *Definitions—Department of Energy (DOE),* as used in this clause, includes the National Nuclear Security Administration (NNSA), and unless otherwise identified or indicated, includes the coordinated efforts of the DOE and NNSA.

DOE licensing regulations means the Department of Energy patent licensing regulations at 10 CFR part 781.

DOE patent waiver regulations means the Department of Energy patent waiver regulations at 10 CFR part 784.

Invention means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Made when used in relation to any invention means the conception or first actual reduction to practice of such invention.

Patent counsel means DOE Patent Counsel assisting the contracting activity. The Patent Counsel is the first and primary point of contact for activities described in this clause.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor conceived or first actually reduced to practice in the course of or under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

* * * * *

(c) * * *

(2) *Subject invention disclosure.* The Contractor shall disclose each subject invention to Patent Counsel with a copy to the Contracting Officer within two (2) months after the subject invention is reported to Contractor personnel responsible for patent matters, in accordance with paragraph (c)(1) of this clause, or, if earlier, within six (6) months after the Contractor has knowledge of the subject invention, but in any event no less than 60 days before any on sale, public use, or publication of the subject invention. The disclosure to DOE shall be in the form of a written report and shall include:

* * * * *

(vii) All sources of funding by Budget and Resources (B&R) code. The funding program may require other invention identifiers such as related award numbers or funding opportunity announcement numbers; and

* * * * *

(5) *Contractor procedures for reporting subject inventions to DOE.* The Contractor agrees to establish and maintain effective procedures for ensuring the prompt identification and timely disclosure of subject inventions to DOE. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation of the effectiveness of such procedures by the Contracting

Officer. Whenever possible in this paragraph (c), the Government electronic reporting system (*e.g.,* iEdison or similar system) may be used for reporting and approvals.

* * * * *

(f) * * *

(2) *Inclusion of patent rights clause—non-profit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 37 CFR 401.14 with Alternate I of 48 CFR 952.227–11 Patent Rights—Retention by the Contractor, suitably modified to identify the parties, in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202. If the Department of Energy Determination of Exceptional Circumstances under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies'' (S&E DEC) issued 6/7/2021, or any related DEC, is applicable, the Contractor shall use Alternate II of 48 CFR 952.227–11 Patent Rights—Retention by the Contractor.

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations and small business firms.* Except for the subcontracts described in paragraph (f)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties and any applicable patent waiver granted by DOE Patent Counsel, in any contract for experimental, developmental, demonstration or research work. If the S&E DEC, or any related DEC, is applicable, the Contractor shall use Alternate II of 48 CFR 952.227–13 Patent Rights—Acquisition by the Government.

* * * * *

(o) *Unauthorized Access.* The contractor will protect all invention reports, unpublished patent applications and other invention related information from unauthorized access and disclosure using at least commonly available techniques and practices. In the event that the Contractor becomes aware of unauthorized access to invention reports, unpublished patent applications and other invention related information, the Contractor shall notify Patent Counsel within 7 days.

(End of clause)

■ 320. Section 970.5227–12 is revised to read as follows:

970.5227–12 Patent rights—management and operating contracts, for-profit contractor, patent waiver.

As prescribed in 970.2703–2(c), insert the following clause:

Patent Rights—Management and Operating Contracts, For-Profit Contractor, Patent Waiver [December 2024]

(a) *Definitions—Department of Energy (DOE),* as used in this clause, includes the National Nuclear Security Administration (NNSA), and unless otherwise identified or indicated, includes the coordinated efforts of the DOE and NNSA.

DOE licensing regulations means the Department of Energy patent licensing regulations at 10 CFR part 781.

DOE patent waiver regulations means the Department of Energy patent waiver regulations at 10 CFR part 784.

Exceptional Circumstance Subject Invention means any subject invention in a technical field or related to a task determined by the Department of Energy to be subject to an exceptional circumstance under 35 U.S.C. 202(a)(ii), and in accordance with 37 CFR 401.3(e).

Initial Patent Application means, as to a given Subject Invention, the first provisional or non-provisional U.S. national application for patent as defined in 37 CFR 1.9(a)(2) and (3), respectively, the first international application filed under the Patent Cooperation Treaty as defined in 37 CFR 1.9(b) which designates the United States, or the first application for a Plant Variety Protection certificate, as applicable.

Invention means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Made when used in relation to any invention means the conception or first actual reduction to practice of such invention.

Patent counsel means DOE Patent Counsel assisting the contracting activity. The Patent Counsel is the first and primary point of contact for activities described in this clause.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Statutory period means the one-year period before the effective filing date of a claimed invention during which exceptions to prior art exist per 35 U.S.C. 102(b) as amended by the Leahy-Smith America Invents Act, Public Law 112–29.

Subject invention means any invention of the contractor conceived or first actually reduced to practice in the course of or under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of principal rights*—(1) *Assignment to the Government.* Except to the extent that rights are retained by the Contractor by the granting of an advance class waiver pursuant to paragraph (b)(2) of this clause or a determination of greater rights pursuant to paragraph (b)(7) of this clause, the Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention.

(2) *Advance class waiver of Government rights to the contractor.* DOE may grant to the Contractor an advance class waiver of Government rights in any or all subject inventions, at the time of execution of the contract, such that the Contractor may elect to retain the entire right, title and interest throughout the world to such waived subject inventions, in accordance with the terms and conditions of the advance class waiver. Unless otherwise provided by the terms of the advance class waiver, any rights in a subject invention retained by the Contractor under an advance class waiver are subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in paragraph (b)(3) of this clause, paragraph (t) of this clause, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(3) *Government license.* With respect to any subject invention to which the Contractor retains title, either under an advance class waiver pursuant to paragraph (b)(2) or a determination of greater rights pursuant to paragraph (b)(7) of this clause, the Government has a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(4) *Foreign patent rights.* If the Government has title to a subject invention and the Government decides against securing patent rights in a foreign country for the subject invention, the Contractor may request such foreign patent rights from DOE, and DOE may grant the Contractor's request, subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in paragraph (b)(3) of this clause, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(5) *Treaties and international agreements.* Any rights acquired by the Contractor in subject inventions are subject to any disposition of right, title, or interest in or to subject inventions provided for in treaties or international agreements identified at DOE's Office of International Affairs (international Commitments—IEC) (*https://energy.gov/ia/.iec-documents*), or other rights which are necessary for the Government to meet its obligations to foreign governments, their nationals and international organizations under such treaties or international agreements with respect to subject inventions.

(6) *Exceptional circumstance subject inventions.* Except to the extent that rights are retained by the Contractor by a determination of greater rights in accordance with paragraph (b)(7) of this clause, the Contractor does not have the right to retain title to any exceptional circumstance subject inventions and agrees to assign to the Government the entire right, title, and interest, throughout the world, in and to any exceptional circumstance subject inventions.

(i) Inventions within or relating to the following fields of technology are exceptional circumstance subject inventions in which the Contractor cannot retain title without specific grant of a waiver from DOE:

(A) Uranium enrichment technology;

(B) Storage and disposal of civilian high-level nuclear waste and spent fuel technology; and

(C) National security technologies classified or sensitive under section 148 of the Atomic Energy Act (42 U.S.C. 2168); and

(D) DOE Steel Initiative and Metals Initiative.

(ii) As determined by the DOE, inventions made under any agreement, contract or subcontract related to the exceptional circumstance subject inventions subject to specific terms outlined in those declarations of exceptional circumstance, the Contractor may take title to these inventions consistent with the terms of this contract. A complete list of declarations of exceptional circumstance, which is maintained by the Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, include but is not limited to the following—

(A) U.S. Advanced Battery Consortium;

(B) Any funding agreement which is funded in part by the Electric Power Research Institute (EPRI) or the Gas Research Institute (GRI);

(C) Any funding agreement related to Energy Efficiency, Storage, Integration and Related Technologies, Renewable Energy, and Advanced Energy Technologies which is funded by the Office of Energy Efficiency and Renewable Energy (EERE) or the Advanced Research Projects Agency—Energy (ARPA–E);

(D) Solid State Energy Conversion Alliance (SECA), if the Contractor is a participant in the ''Core Technology Program'';

(E) Solid State Lighting (SSL) Program, if the Contractor is a participant in the ''Core Technology Program.''

(F) Cybersecurity, Energy Security, and Emergency Response;

(G) Quantum Information Science Technologies; and

(H) Domestic Manufacture of DOE Science and Energy Technologies (S&E DEC).

(iii) Inventions subject to ''Department of Energy Determination of Exceptional Circumstances under the Bayh-Dole Act to Further Promote Domestic Manufacture of DOE Science and Energy Technologies'' (S&E DEC) issued 6/7/2021, including as applied through DOE policy, must comply with the requirements of paragraph (t) of this clause to the maximum extent authorized by the S&E DEC unless otherwise directed by DOE Patent Counsel or the funding source (*e.g.* Work Authorization or Annual Operating Plan). Notwithstanding paragraph (b)(7) of this clause, inventions subject to the S&E DEC may continue to be retained by the Contractor (subject to the requirements of paragraph (t) of this clause) without a request for greater rights, unless subject to another Determination of Exceptional Circumstances.

(iv) Exceptional circumstances subject inventions are as set forth in the applicable patent waiver. In addition, DOE reserves the right to unilaterally amend this contract to modify, by deletion or insertion, technical fields, programs, initiatives, and/or other classifications for the purpose of defining DOE exceptional circumstance subject inventions.

(7) *Contractor request for greater rights.* The Contractor may request greater rights in an identified subject invention, including an exceptional circumstance subject invention, to which the Contractor does not have the right to elect to retain title, in accordance with the DOE patent waiver regulations, by submitting such a request in writing to Patent Counsel with a copy to the Contracting Officer at the time the subject invention is first disclosed to DOE pursuant to paragraph (c)(1) of this clause, or not later than eight (8) months after such disclosure, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. DOE may grant or refuse to grant such a request by the Contractor. Unless otherwise provided in the greater rights determination, any rights in a subject invention obtained by the Contractor under a determination of greater rights is subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in paragraph (b)(3) of this clause, and to any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(8) *Contractor employee-inventor rights.* If the Contractor does not elect to retain title to a subject invention or does not request greater rights in a subject invention, including an exceptional circumstance subject invention, to which the Contractor does not have the right to elect to retain title, a Contractor employee-inventor, after consultation with the Contractor and with written authorization from the Contractor in accordance with 10 CFR 784.9(b)(4), may request greater rights, including title, in the subject invention or the exceptional circumstance invention from DOE, and DOE may grant or refuse to grant such a request by the Contractor employee-inventor.

(9) *Government assignment of rights in Government employees' subject inventions.* If a DOE employee is a joint inventor of a subject invention to which the Contractor has rights, DOE may assign or refuse to assign any rights in the subject invention acquired by the Government from the DOE employee to the Contractor, consistent with 48 CFR 27.304–1(d). Unless otherwise provided in the assignment, the rights assigned to the Contractor are subject to the Government license provided for in paragraph (b)(3) of this clause, and to any provision of this clause applicable to subject inventions in which rights are retained by the Contractor, and to any reservations and conditions deemed

appropriate by the Secretary of Energy or designee. The Contractor shall share royalties collected for the manufacture, use or sale of the subject invention with the DOE employee.

(c) *Subject invention disclosure, election of title, and filing of patent application by Contractor*—(1) *Subject invention disclosure.* The Contractor shall disclose each subject invention to Patent Counsel with a copy to the Contracting Officer within two (2) months after an inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within six (6) months after the Contractor has knowledge of the subject invention, but in any event no less than 60 days before any on sale, public use, or publication of the subject invention. The disclosure to DOE shall be in the form of a written or electronic report and shall include:

(i) The contract number under which the subject invention was made;

(ii) The inventor(s) of the subject invention;

(iii) A description of the subject invention in sufficient technical detail to convey a clear understanding of the nature, purpose and operation of the subject invention, and of the physical, chemical, biological or electrical characteristics of the subject invention, to the extent known by the Contractor at the time of the disclosure;

(iv) The date and identification of any publication, on sale or public use of the invention;

(v) The date and identification of any submissions for publication of any manuscripts describing the invention, and a statement of whether the manuscript is accepted for publication, to the extent known by the Contractor at the time of the disclosure;

(vi) A statement indicating whether the subject invention is an exceptional circumstance subject invention, related to national security, or subject to a treaty or an international agreement, to the extent known or believed by Contractor at the time of the disclosure;

(vii) All sources of funding by Budget and Resources (B&R) code. The funding program may require other invention identifiers such as related award numbers or funding opportunity announcement numbers; and

(viii) The identification of any agreement relating to the subject invention, including Cooperative Research and Development Agreements and Strategic Partnership Projects agreements.

Unless the Contractor contends otherwise in writing at the time the invention is disclosed, inventions disclosed to DOE under this paragraph are deemed made in the manner specified in sections (a)(1) and (2) of 42 U.S.C. 5908.

(2) *Publication after disclosure.* After disclosure of the subject invention to the DOE, the Contractor shall promptly notify Patent Counsel of the acceptance for publication of any manuscript describing the subject invention or of any expected or on sale or public use of the subject invention, known by the Contractor. The Contractor shall obtain approval from Patent Counsel prior to any release or publication of information concerning an exceptional circumstance subject invention or any subject invention related to a treaty or international agreement. Notwithstanding the above, inventions subject to the S&E DEC do not require approval from Patent Counsel prior to any release or publication of information.

(3) *Election by the Contractor under an advance class waiver.* If the Contractor has the right to elect to retain title to subject inventions under an advance class waiver granted in accordance with paragraph (b)(2) of this clause, and unless otherwise provided for by the terms of the advance class waiver, the Contractor shall elect in writing whether or not to retain title to any subject invention by notifying DOE within two (2) years of the date of the disclosure of the subject invention to DOE, in accordance with paragraph (c)(1) of this clause. The notification shall identify the advance class waiver, state the countries, including the United States, in which rights are retained, and certify that the subject invention is not an exceptional circumstance subject invention or subject to a treaty or international agreement. If a publication, on sale or public use of the subject invention has initiated the statutory period under 35 U.S.C. 102(b), the period for election may be shortened by DOE to a date that is no more than sixty (60) days prior to the end of the statutory period.

(4) *Filing of patent applications by the Contractor under an advance class waiver.* If the Contractor has the right to retain title to a subject invention in accordance with an advance class waiver pursuant to paragraph (b)(2) of this clause or a determination of greater rights pursuant to paragraph (b)(7) of this clause, and unless otherwise provided for by the terms of the advance class waiver or greater rights determination, the Contractor shall file an initial patent application claiming the subject invention to which it retains title either within one (1) year after the Contractor's election to retain or grant of title to the subject invention or prior to the end of any statutory period, whichever occurs first. Any patent applications filed by the Contractor in foreign countries or international patent offices shall be filed within either ten (10) months of the corresponding initial patent application or, if such filing has been prohibited by a Secrecy Order, within six (6) months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications.

(5) *Submission of patent information and documents.* If the Contractor files a domestic or foreign patent application claiming a subject invention, the Contractor shall promptly submit to Patent Counsel, upon request, the following information and documents:

(i) The filing date, serial number, title, and a copy of the patent application (including an English-language version if filed in a language other than English);

(ii) An executed and approved instrument fully confirmatory of all Government rights in the subject invention; and

(iii) The patent number, issue date, and a copy of any issued patent claiming the subject invention.

(6) *Contractor's request for an extension of time.* Requests for an extension of the time to disclose a subject invention, to elect to retain title to a subject invention, or to file a patent application under paragraphs (c)(1), (3), and (4) of this clause may be granted at the discretion of Patent Counsel or DOE.

(7) *Duplication and disclosure of documents.* The Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause; provided, however, that any such duplication or disclosure by the Government is subject to 35 U.S.C. 205 and 37 CFR part 40.

(8) *Reporting to DOE and Approvals.* Whenever possible in this paragraph (c), the Government electronic reporting system (*e.g.,* iEdison or similar system) may be used for reporting and approvals.

(d) *Conditions when the Government may obtain title notwithstanding an advance class waiver*—(1) *Return of title to a subject invention.* If the Contractor requests that DOE acquire title or rights from the Contractor in a subject invention, including an exceptional circumstance subject invention, to which the Contractor retained title or rights under paragraph (b)(2) or (7) of this clause, DOE may acquire such title or rights from the Contractor, or DOE may decide against acquiring such title

or rights from the Contractor, at DOE's sole discretion.

(2) *Failure to disclose or elect to retain title.* Title vests in DOE and DOE may request, in writing, a formal assignment of title to a subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE, if the Contractor elects not to retain title to the subject invention under an advance class waiver, or the Contractor fails to disclose or fails to elect to retain title to the subject invention within the times specified in paragraphs (c)(1) and (3) of this clause.

(3) *Failure to file domestic or foreign patent applications.* In those countries in which the Contractor fails to file a patent application within the times specified in paragraph (c)(4) of this clause, DOE may request, in writing, title to the subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE; provided, however, that if the Contractor has filed a patent application in any country after the times specified in paragraph (c)(4) of this clause, but prior to its receipt of DOE's written request for title, the Contractor continues to retain title in that country.

(4) *Discontinuation of patent protection by the Contractor.* If the Contractor decides to not file a non-provisional application, or to discontinue the prosecution of a patent application, the payment of maintenance fees, or the defense of a subject invention in a reexamination or opposition proceeding, in any country, DOE may request, in writing, title to the subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE.

(5) *Termination of advance class waiver.* DOE may request, in writing, title to any subject inventions from the Contractor, and the Contractor shall convey title to the subject inventions to DOE, if the advance class waiver granted under paragraph (b)(2) of this clause is terminated under paragraph (v) of this clause.

(6) Upon a breach of paragraph (t) of this clause.

(e) *Minimum rights of the Contractor*—(1) *Request for a Contractor license.* Except for subject inventions that the Contractor fails to disclose within the time periods specified at paragraph (c)(1) of this clause, the Contractor may request a revocable, nonexclusive, royalty-free license in each patent application filed in any country claiming a subject invention and any resulting patent in which the Government obtains title, and DOE may grant or refuse to grant such a request by the Contractor. If DOE grants the Contractor's request for a license, the Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded.

(2) *Transfer of a Contractor license.* Contractor must obtain DOE approval of any transfer of the Contractor's license in a subject invention, and DOE may determine that the Contractor's license is non-transferrable, on a case-by-case basis.

(3) *Revocation or modification of a Contractor license.* DOE may revoke or modify the Contractor's domestic license to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR part 404 and DOE licensing regulations. DOE may not revoke the Contractor's domestic license in that field of use or the geographical areas in which the Contractor, its licensees or its domestic subsidiaries or affiliates have achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. DOE may revoke or modify the Contractor's license in any foreign country to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(4) *Notice of revocation or modification of a Contractor license.* Before revocation or modification of the license, DOE shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed thirty (30) days from the date of the notice (or such other time as may be authorized by DOE for good cause shown by the Contractor) to show cause why the license should not be revoked or modified. The Contractor has the right to appeal any decision concerning the revocation or modification of its license, in accordance with applicable regulations in 37 CFR part 404 and DOE licensing regulations.

(f) *Contractor action to protect the Government's interest*—(1) *Execution and delivery of title or license instruments.* The Contractor agrees to execute or have executed, and to deliver promptly to DOE all instruments necessary to accomplish the following actions:

(i) Establish or confirm the Government's rights throughout the world in subject inventions to which the Contractor elects to retain title;

(ii) Convey title in a subject invention to DOE pursuant to paragraph (b)(5) and paragraph (d) of this clause; or

(iii) Enable the Government to obtain patent protection throughout the world in a subject invention to which the Government has title.

(2) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract, and to execute all papers necessary to file patent applications claiming subject inventions or to establish the Government's rights in the subject inventions. This disclosure format shall at a minimum include the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) *Contractor procedures for reporting subject inventions to DOE.* The Contractor agrees to establish and maintain effective procedures for ensuring the prompt identification and timely disclosure of subject inventions to DOE. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation and approval of the effectiveness of such procedures by the Contracting Officer.

(4) *Notification of discontinuation of patent protection.* With respect to any subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall notify Patent Counsel of any decision to discontinue the prosecution of a patent application, payment of maintenance fees, or defense of a subject invention in a reexamination or opposition proceeding, in any country, not less than 60 days before the expiration of the response period for any action required by the corresponding patent office.

(5) *Notification of Government rights.* With respect to any subject invention to which the Contractor has title, the Contractor agrees to include, within the specification of any United States patent application and within any patent issuing thereon claiming a subject invention, the following statement, ''This invention was made with

Government support under (identify the contract) awarded by the United States Department of Energy. The Government has certain rights in the invention.''

(6) *Avoidance of royalty charges.* If the Contractor licenses a subject invention, the Contractor agrees to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the subject invention to any party.

(7) *DOE approval of assignment of rights.* Rights in a subject invention in the United States may not be assigned by the Contractor without the approval of DOE.

(8) *Small business firm licensees.* The Contractor shall make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and may give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision as to whether to give a preference in any specific case is at the discretion of the Contractor.

(9) *Contractor licensing of subject inventions.* To the extent that it provides the most effective technology transfer, licensing of subject inventions shall be administered by Contractor employees on location at the facility.

(g) *Subcontracts*—(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—non-profit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 37 CFR 401.14, with Alternate I of 48 CFR 952.227–11 Patent Rights—Retention by the Contractor, suitably modified to identify the parties, in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202 and paragraph (b)(6) of this clause. If the S&E DEC, or any related DEC, is applicable (see paragraph (b)(6)(iii) of this clause), the Contractor shall use Alternate II of 48 CFR 952.227–11 Patent Rights—Retention by the Contractor.

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations or small business firms.* Except for the subcontracts described in paragraph (g)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties and any applicable patent waiver granted by DOE Patent Counsel, in any contract for experimental, developmental, demonstration or research work. If the S&E DEC, or any related DEC, is applicable (see paragraph (b)(6)(iii) of this clause), the Contractor shall use Alternate II of 48 CFR 952.227–13 Patent Rights—Acquisition by the Government.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to those matters covered by this clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(5) Subcontractor refusal to accept terms of patent rights clause. If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such refusal and including relevant information for expediting disposition of the matter; and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention, with a copy of the notification and identification to the Contracting Officer.

(h) *Reporting on utilization of subject inventions.* Upon request by DOE, the Contractor agrees to submit periodic reports, no more frequently than annually, describing the utilization of a subject invention or efforts made by the Contractor or its licensees or assignees to obtain utilization of the subject invention. In addition, the Contractor shall provide data to DOE for the annual data call for the Department of Commerce report that included the number of patent applications filed, the number of patents issued, licensing activity, gross royalties received by the Contractor, and other data and information reasonably specified by DOE. Upon request by DOE, the Contractor also agrees to provide reports in connection with any march-in proceedings undertaken by DOE, in accordance with paragraph (j) of this clause. If any data or information reported by the Contractor in accordance with this provision is considered privileged and confidential by the Contractor, its licensee, or assignee and the Contractor properly marks the data or information privileged or confidential, DOE agrees not to disclose such information to persons outside the Government, to the extent permitted by law.

(i) *Preference for United States industry.* Notwithstanding any other provision of this clause the Contractor agrees that with respect to any subject invention in which it retains title, neither it nor any assignee may grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, DOE may waive the requirement for such an agreement upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *March-In rights.* With respect to any subject invention to which the Contractor has elected to retain or is granted title, DOE may, in accordance with the procedures in the DOE patent waiver regulations, require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances. If the Contractor, assignee or exclusive licensee refuses such a request, DOE has the right to grant such a license itself under the patent waiver.

(k) *Communications.* The Contractor shall direct any notification, disclosure, or request provided for in this clause to the Patent Counsel identified in the contract.

(l) *Reports*—(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a specified period, or a statement that no subject inventions were made during the specified period; and/or a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement that no such subcontracts were awarded during the specified period. The interim report shall state whether the Contractor's invention disclosures were submitted to DOE in accordance with the requirements of paragraphs (f)(3) and (4) of this clause.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract or within three (3) months of the date of completion of the contracted work, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and/or a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period, or a statement that no such subcontracts were awarded during the contract performance period.

(m) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility:

(1) To practice or have practiced by or for the Government at the facility; and

(2) To transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(n) *Atomic energy*—(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of paragraph (o)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(o) *Classified inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(p) *Records relating to inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including laboratory notebooks), records, and documents and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, including exceptional circumstance subject inventions, or to determine Contractor (and inventor) compliance with the requirements of this clause, including proper identification and disclosure of subject inventions, and establishment and maintenance of invention disclosure procedures.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(4) *Power of inspection.* With respect to a subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall furnish the Government, upon request by DOE, an irrevocable power to inspect and make copies of a prosecution file for any patent application claiming the subject invention.

(q) *Patent functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(r) *Educational awards subject to 35 U.S.C. 212.* The Contractor shall notify the Contracting Officer prior to the placement of any person subject to 35 U.S.C. 212 in an area of technology or task:

(1) Related to exceptional circumstance technology; or

(2) Any person who is subject to treaties or international agreements as set forth in paragraph (b)(6) of this clause or to agreements other than funding agreements. The Contracting Officer may disapprove of any such placement.

(s) *Annual appraisal by Patent Counsel.* Patent Counsel may conduct

an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(t) *U.S. Competitiveness.* (1) Consistent with 48 CFR 970.5227–3(f) U.S. Industrial Competitiveness, for all subject inventions under the S&E DEC, the Contractor agrees that any products embodying any subject invention or produced through the use of any subject invention will be manufactured substantially in the United States unless the Contractor can show to the satisfaction of DOE that it is not commercially feasible. In the event DOE agrees to foreign manufacture, there will be a requirement that the Government's support of the technology be recognized in some appropriate manner, *e.g.,* alternative binding commitments to provide an overall net benefit to the U.S. economy. The Contractor agrees that it will not license, assign or otherwise transfer any subject invention to any entity, at any tier, unless that entity agrees to these same requirements. In the event that the Contactor or other such entity receiving rights in the Subject Invention undergoes a change in ownership amounting to a controlling interest, the Contractor or other such entity receiving rights shall ensure continual compliance with the requirements of this paragraph (t)(1) and shall inform DOE, in writing, of the change in ownership within six months of the change. The Contractor and any successor assignee will convey to DOE, upon written request from DOE, title to any subject invention, upon a breach of this paragraph (t)(1). The Contractor will include this paragraph (t) in all subawards/contracts, regardless of tier, for experimental, developmental or research work.

(2) The requirements, rights and administration of paragraph (t)(1) of this clause are further clarified as follows:

(i) *Waivers.* The Contractor (or any entity subject to this paragraph) may request a waiver or modification of paragraph (t)(1) of this clause. Such waivers or modifications may be granted when DOE determines that (A) the Contractor (or any entity subject to paragraph (t)(1) of this clause) has demonstrated, with quantifiable data, that manufacturing in the United States is not commercially feasible and (B) a waiver or modification would best serve the interests of the United States and the general public.

(ii) *Final determination of breach of paragraph (t)(1) of this clause.* If DOE determines the Contractor is in breach of paragraph (t)(1) of this clause, the Department may issue a final written determination of such breach. If such determination includes a demand for title to the subject inventions under the award, the demand for title will cause an immediate conveyance and assignment of all rights to all subject inventions subject to the breach to the United States Government, including all pending U.S. and foreign patent applications and all U.S. and foreign patents that cover any subject invention, without compensation. Any such final determination shall be signed by the cognizant DOE Contracting Officer with the concurrence of the Assistant General Counsel for Technology Transfer & Intellectual Property. Advanced notice will be provided for comment to the Contractor before any final written determination by DOE is issued.

(iii) *License, Assignment, or Transfer.* Pursuant to Contractor's agreement in paragraph (t)(1) of this clause to not license, assign or otherwise transfer rights to subject inventions at any tier unless the entity agrees to paragraph (t)(1) of this clause: any such license, assignment, or other transfer of right to any subject invention developed under the award shall contain paragraph (t)(1) of this clause suitably modified to properly identify the parties. If a licensee, assignee, or other transferee of rights to any subject invention is finally determined by DOE in writing to be in breach of paragraph (t)(1) of this clause, the applicable license, assignment or other transfer shall be deemed null and void. Advanced notice will be provided for comment to the non-complying party before any final written determination by DOE is made.

(iv) *Compensation.* For clarity, if the forfeiture of title to any subject invention is due to a breach of paragraph (t)(1) of this clause, the Contractor shall not be entitled to any compensation, or to a license to the subject invention including the reserved license in paragraph (e)(1) of this clause, unless DOE grants a license through a separately agreed upon licensing agreement.

(u) *Publication.* The Contractor shall receive approval from Patent Counsel prior to releasing or publishing information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract, to ensure such release or publication does not adversely affect the patent rights of DOE or the Contractor. At the discretion of the Patent Counsel, authority to review publications prior to release may be delegated to the Contractor.

(v) *Termination of contractor's advance class waiver.* If a request by the Contractor for an advance class waiver pursuant to paragraph (b)(2) of this clause or a determination of greater rights pursuant to paragraph (c) of this clause contains false material statements or fails to disclose material facts, and DOE relies on the false statements or omissions in granting the Contractor's request, the waiver or grant of any Government rights (in whole or in part) to the subject invention(s) may be terminated at the discretion of the Secretary of Energy or designee. Prior to termination, DOE shall provide the Contractor with written notification of the termination, including a statement of facts in support of the termination, and the Contractor shall be allowed thirty (30) days, or a longer period authorized by the Secretary of Energy or designee for good cause shown in writing by the Contractor, to show cause for not terminating the waiver or grant. Any termination of an advance class waiver or a determination of greater rights is subject to the Contractor's license as provided for in paragraph (f) of this clause.

(w) *Unauthorized Access.* The contractor will protect all invention reports, unpublished patent applications and other invention related information from unauthorized access and disclosure using at least commonly available techniques and practices. In the event that the Contractor becomes aware of unauthorized access to invention reports, unpublished patent applications and other invention related information, the Contractor shall notify Patent Counsel within 7 days.

(End of clause)

Alternate 1 Weapons Related Subject Inventions. As prescribed at 970.2703–2(g), insert the following definition in paragraph (a) and add paragraph (b)(10) respectively:

(a) *Definitions—Weapons Related Subject Invention* means any subject invention conceived or first actually reduced to practice in the course of or under work funded by or through defense programs, including Department of Defense and intelligence reimbursable work, or the Naval Nuclear Propulsion Program of the Department of Energy or the National Nuclear Security Administration.

(b) *Allocation of Principal Rights.* (10) *Weapons related subject inventions.* Except to the extent that DOE is solely satisfied that the Contractor meets certain procedural requirements and DOE grants rights to the Contractor in weapons related subject inventions, the Contractor does not have a right to retain title to any weapons related subject inventions.

(End of alternate)

■ 321. Section 970.5232–1 is amended by revising the introductory text to read as follows:

970.5232–1 Reduction or suspension of advance, partial, or progress payments upon finding of substantial evidence of fraud.

As prescribed in 970.3200–11, insert the following clause:

* * * * *

■ 322. Section 970.5232–2 is revised to read as follows:

970.5232–2 Payments and advances.

As prescribed in 970.3270(a)(1), insert the following clause:

Payments and Advances [December 2024]

(a) *Installments of fixed-fee.* The fixed-fee payable, if applicable, under this contract shall become due and payable in periodic installments in accordance with a schedule determined by the Contracting Officer. Fixed-fee payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the Contracting Officer. The Contracting Officer may offset against any such fee payment the amounts owed to the Government by the Contractor, including any amounts owed for disallowed costs under this contract. No fixed-fee payment may be withdrawn against the payments cleared financing arrangement without prior written approval of the Contracting Officer.

(b) *Payments on Account of Allowable Costs.* The Contracting Officer and the Contractor shall agree as to the extent to which payment for allowable costs or payments for other items specifically approved in writing by the Contracting Officer (for example, negotiated fixed amounts) shall be made from advances of Government funds.

(c) *Timing of payments.* Funds for payments of allowable costs, including payments for pension plan contributions, shall be drawn from the special financial institution account when those payments are made, not when the costs are accrued.

(d) *Special financial institution account—use.* All advances of Government funds shall be withdrawn pursuant to a payments cleared financing arrangement prescribed by DOE in favor of the financial institution or, at the option of the Government, shall be made by direct payment or other payment mechanism to the Contractor, and shall be deposited only in the special financial institution account referred to in the Special Financial Institution Account Agreement, which is incorporated into this contract as Appendix—''_____''. The contractor will follow current procedures and requirements for establishing and managing the special financial institution account that are stated in the Department's Financial Management Handbook and relevant Department of Treasury rules.

(e) *Use of the special financial institution account for unallowable costs.* Government funds in the special financial institution account shall be used only for costs allowable and, if applicable, fees earned under this contract, negotiated fixed amounts, or payments for other items specifically approved in writing by the Contracting Officer.

(f) *Title to funds advanced.* Title to the unexpended balance of any funds advanced and of any special financial institution account established pursuant to this clause shall remain in the Government and be superior to any claim or lien of the financial institution of deposit or others. It is understood that an advance to the Contractor hereunder is not a loan to the Contractor and will not require the payment of interest by the Contractor, and that the Contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.

(g) *Financial settlement.* The Government shall promptly pay to the Contractor the unpaid balance of allowable costs (or other items specifically approved in writing by the Contracting Officer) and fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after—

(1) Compliance by the Contractor with DOE's patent clearance requirements; and

(2) The furnishing by the Contractor of—

(i) An assignment of the Contractor's rights to any refunds, rebates, allowances, accounts receivable, collections accruing to the Contractor in connection with the work under this contract, or other credits applicable to allowable costs under the contract;

(ii) A closing financial statement;

(iii) The accounting for Government-owned property required by the clause entitled ''Property''; and

(iv) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract subject only to the following exceptions—

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible to exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided that such claims are not known to the Contractor on the date of the execution of the release; and provided further that the Contractor gives notice of such claims in writing to the Contracting Officer promptly, but not more than one (1) year after the Contractor's right of action first accrues. In addition, the Contractor shall provide prompt notice to the Contracting Officer of all potential claims under this clause, whether in litigation or not (see Contract Clause, 48 CFR 970.5228–1, Insurance—Litigation and Claims);

(C) Claims for reimbursement of costs (other than expenses of the Contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents; and

(D) Claims recognizable under the clause entitled, Nuclear Hazards Indemnity Agreement.

(3) In arriving at the amount due the Contractor under this clause, there shall be deducted—

(i) Any claim which the Government may have against the Contractor in connection with this contract; and

(ii) Deductions due under the terms of this contract and not otherwise recovered by or credited to the Government. The unliquidated balance of the special financial institution account may be applied to the amount due, and any balance shall be returned to the Government forthwith.

(h) *Claims.* Claims for credit against funds advanced for payment shall be accompanied by such supporting documents and justification as the Contracting Officer shall prescribe.

(i) *Discounts.* The Contractor shall take and afford the Government the advantage of all known and available cash and trade discounts, rebates, allowances, credits, salvage, and commissions unless the Contracting Officer finds that action is not in the best interest of the Government.

(j) *Collections.* All collections accruing to the Contractor in connection with the work under this contract, except for the Contractor's fee and royalties or other income accruing to the Contractor from technology transfer activities in accordance with this contract, shall be Government property and shall be processed and accounted

for in accordance with applicable requirements imposed by the Contracting Officer pursuant to the Laws, regulations, and DOE directives clause of this contract and, to the extent consistent with those requirements, shall be deposited in the special financial institution account or otherwise made available for payment of allowable costs under this contract, unless otherwise directed by the Contracting Officer.

(k) *Direct payment of charges.* The Government reserves the right, upon ten days written notice from the Contracting Officer to the Contractor, to pay directly to the persons concerned, all amounts due which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the Contractor.

(l) *Determining allowable costs.* Regardless of contractor type, the Contracting Officer shall determine allowable costs in accordance with the Federal Acquisition Regulation subpart 31.2 and the Department of Energy Acquisition Regulation subpart 48 CFR 970.31 in effect on the date of this contract and other provisions of this contract.

(End of clause)

Alternate I (DEC 2000). As prescribed in 970.3270(a)(1)(i), if a separate fixed-fee is provided for a separate item of work, paragraph (a) of the basic clause should be modified to permit payment of the entire fixed-fee upon completion of that item.

Alternate II [December 2024]. As prescribed in 970.3270(a)(1)(ii), when total available fee provisions are used, replace paragraph (a) of the basic clause with the following paragraph (a):

(a) *Payment of Total available fee: Base Fee and Performance Fee.* (1) The base fee amount, if any, is payable in equal monthly installments. Total available fee amount earned is payable following the Government's Determination of Total Available Fee Amount Earned in accordance with the clause of this contract entitled ''Total Available Fee: Base Fee Amount and Performance Fee Amount.'' Base fee amount and total available fee amount earned payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the Contracting Officer. The Contracting Officer may offset against any such fee payment the amounts owed to the Government by the Contractor, including any amounts owed for disallowed costs under this contract. No base fee amount or total available fee amount earned payment may be withdrawn against the payments cleared financing arrangement without the prior written approval of the contracting officer.

(2) *Provisional fee.* Additionally, if the Contracting Officer authorizes provisional payment of fee and for only as long as the Contracting Officer authorizes it, the Contractor may withdraw from funds advanced on the last working day of each month a provisional fee equal to 6 percent of the annual total available fee amount. The Contracting Officer may for any reason withdraw his/her authorization allowing the Contractor's withdrawal of provisional fee if at any time in his/her judgement the Contractor will not earn the provisional fee. The Contracting Officer's decision to authorize the Contractor's withdrawal of provisional fee or to withdraw such authorization is solely within the Contracting Officer's discretion. Following the Government's determination of total available fee amount earned, the Contractor may withdraw from funds advanced the amount by which earned fee exceeds provisional fee; and must immediately return to funds advanced the amount by which provisional fee exceeds earned fee.

(End of alternate)

Alternate III [December 2024]. As prescribed in 970.3270(a)(1)(iii), the following paragraph (k) shall be included in management and operating contracts with integrated accounting systems:

(k) *Review and approval of costs incurred.* The Contractor shall prepare and submit annually as of September 30, a ''Statement of Costs Incurred and Claimed'' (Cost Statement) for the total of net expenditures accrued (*i.e.,* net costs incurred) for the period covered by the Cost Statement. The Contractor shall certify the Cost Statement subject to the penalty provisions for unallowable costs as stated in sections 306(b) and (i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 308), as amended, and the False Claims Act (31 U.S.C. 3279, *et seq.*). DOE, after audit and appropriate adjustment, will approve such Cost Statement. This approval by DOE will constitute an acknowledgment by DOE that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the Contractor in accordance with DOE accounting policies, but will not relieve the Contractor of responsibility for DOE's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to DOE.

(End of alternate)

Alternate IV [December 2024]. As prescribed in 970.3270(a)(1)(iv), the following paragraph (k) shall be included in management and operating contracts without integrated accounting systems:

(k) *Certification and penalties.* The Contractor shall prepare and submit a ''Statement of Costs Incurred and Claimed'' (Cost Statement) for the total of net expenditures incurred for the period covered by the Cost Statement. It is anticipated that this will be an annual submission unless otherwise agreed to by the Contracting Officer. The Contractor shall certify the Cost Statement subject to the penalty provisions for unallowable costs as stated in sections 306(b) and (i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 308), as amended.

(End of alternate)

■ 323. Amend section 970.5232–3 by revising the clause date and paragraphs (a), (c), and (h)(1) to read as follows:

970.5232–3 Accounts, records, and inspection.

* * * * *

Accounts, Records, and Inspection [December 2024]

(a) *Accounts.* The Contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting: all allowable costs; collections accruing to the Contractor in connection with the work under this contract, other applicable credits, negotiated fixed amounts, and fee accruals under this contract; and the receipt, use, and disposition of all Government property coming into the possession of the Contractor under this contract. The system of accounts employed by the Contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

* * * * *

(c) *Audit of subcontractors' incurred costs.* If the subcontractor's incurred costs are a factor in determining the amount the Contractor pays the subcontractor and submits to the Government for reimbursement, the Contractor shall: perform a sufficient amount of audit work (that the Contractor's auditor or the Contracting Officer agrees is sufficient) of its subcontractor's incurred costs to provide reasonable assurance the costs are allowable; or arrange for an audit by the cognizant government audit agency

through the Contracting Officer of its subcontractor's incurred costs.

* * * * *

(h) * * *

(1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the contractor's or subcontractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder and to interview any employee regarding such transactions.

* * * * *

■ 324. Section 970.5232–5 is amended by revising the introductory text to read as follows:

970.5232–5 Liability with respect to cost accounting standards.

As prescribed in 970.3270(a)(4), insert the following clause:

* * * * *

■ 325. Section 970.5232–6 is amended by revising the introductory text to read as follows:

970.5232–6 Strategic partnership project funding authorization.

As prescribed in 970.3270(a)(5), insert the following clause:

* * * * *

■ 326. Section 970.5232–7 is revised to read as follows:

970.5232–7 Financial management system.

As prescribed in 970.3270(b)(1), insert the following clause:

Financial Management System [December 2024]

(a) The Contractor shall maintain and administer a financial management system that is suitable to provide proper accounting in accordance with DOE requirements. In addition, the Contractor shall maintain and administer a financial management system that is in accordance with Generally Accepted Accounting Principles (GAAP) for Federal entities, as defined by the Federal Accounting Standards Advisory Board and implemented by the DOE Financial Management Handbook and other implementing policies. The financial system will also permit the proper allocation of costs to separately funded activities consistent with Cost Accounting Standards (CAS), as defined by 48 CFR part 9900 and any implementing DOE policies and ensures that accountability for the assets can be maintained.

(b) The Contractor shall submit to the Contracting Officer for written approval an annual plan for new financial management systems and/or subsystems and major enhancements and/or upgrades to the currently existing financial systems and/or subsystems. The Contractor shall notify DOE thirty (30) days in advance of any planned implementation of any substantial changes to the plan and, as requested by the Contracting Officer, shall submit any such changes to the Contracting Officer for written approval before implementation.

(End of clause)

■ 327. Amend section 970.5235–1 by revising the clause date and paragraphs (c) and (d) to read as follows:

970.5235–1 Federally funded research and development center sponsoring agreement.

* * * * *

Federally Funded Research and Development Center Sponsoring Agreement [December 2024]

* * * * *

(c) Unless otherwise provided by the contract, the Contractor may accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements and limitations of 48 CFR 970.3501, and the clause at 48 CFR 970.5217–1, Strategic Partnership Projects Program. Only the Contracting Officer can place work on the contract; and obligate the Government to reimburse the contractor for the work.

(d) As an FFRDC, the Contractor shall not use its privileged information or access to government facilities to compete with the private sector. Specific guidance on restricted activities is contained in DOE Order 481.1, Strategic Partnership Projects (Non-Department of Energy Funded Work)), or its successor version.

* * * * *

■ 328. Amend section 970.5242–1 by revising the introductory text to read as follows:

970.5242–1 Penalties for unallowable costs.

As prescribed in 970.4207–370, insert the following clause:

* * * * *

■ 329. Amend section 970.5244–1 by revising the clause date and paragraphs (a), (c), (e), (f), (h)(1), (l), (w), and (x) to read as follows:

970.5244–1 Contractor purchasing system.

* * * * *

Contractor Purchasing System [December 2024]

(a) *General.* The Contractor shall develop, implement, and maintain formal policies, practices, and procedures to be used in the award of subcontracts consistent with this clause and 48 CFR subpart 970.44, as well as 48 CFR subpart 44.3. The Contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to the Department of Energy (DOE) in accordance with 48 CFR 970.4401–1. The Contractor shall maintain file documentation which is appropriate to the value of the purchase and is adequate to establish the propriety of the transaction and the price paid. The Contractor's obligations include, among other things, retaining documentation to justify the cost on any flexibly priced subcontract or any subcontract with a flexibly priced element. DOE reserves the right at any time to require that the Contractor submit for approval any or all subcontracts or purchases under this contract. The Contractor shall not purchase any item or service, the purchase of which is expressly prohibited by the written direction of DOE and shall use such special and directed sources as may be expressly required by the DOE Contracting Officer. DOE will conduct periodic appraisals of the Contractor's management of all facets of the Contractor's purchasing function, including the Contractor's compliance with its approved system and methods. Such appraisals shall be performed against the criteria and measures set forth in 48 CFR part 44, subpart 44.3. The Contractor's approved purchasing system and methods shall include the requirements set forth in paragraphs (b) through (y) of this clause.

* * * * *

(c) *Acquisition of real property.* Real estate or real property interests shall be acquired in accordance with 48 CFR part 917, subpart 917.74.

* * * * *

(e) *Audit of subcontractors.* (1) The Contractor shall provide for—

(i) Periodic post-award audit—or a sufficient amount of audit work (that the Contractor's auditor or the Contracting Officer agrees is sufficient)—to provide reasonable assurance that all claimed subcontract costs are allowable for: flexibly priced subcontracts at all tiers; and the flexibly priced elements in any subcontracts at all tiers (''flexibly priced'' subcontracts and elements include Cost-Reimbursement subcontracts, Time-and-Materials subcontracts, cost-reimbursement elements in Fixed-Priced contracts, etc.); and

(ii) Audits, where necessary, to provide a valid basis for pre-award or cost or price analysis.

(2) Responsibility for determining the costs allowable under each cost-reimbursement subcontract remains with the contractor or next higher-tier subcontractor. The Contractor shall provide, in appropriate cases, for the timely joint involvement of the Contractor and the DOE Contracting Officer in resolution of subcontract cost allowability. In no case, however, shall the Contractor's subcontract audit arrangements preclude the Contracting Officer's determination of the allowability or unallowability of the subcontract costs the Contractor claims for reimbursement.

(3) Where audits of subcontractors at any tier are required, the Contractor shall consult with the DOE Contracting Officer on the best approach for obtaining an audit; this may involve employing external auditors. The Contractor shall interact with the cognizant Federal agency in a manner appropriate to the magnitude and nature of the subcontracted work. In no case, however, shall subcontractor auditing arrangements preclude determination by the DOE Contracting Officer of the allowability or unallowability of subcontractor costs claimed for reimbursement by the Contractor.

(4) Allowable costs for cost reimbursable subcontracts are to be determined in accordance with the cost principles of 48 CFR part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by 48 CFR part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 48 CFR 970.4402–3 and 31.205–26(e).

(f) *Bonds and insurance.* (1) The Contractor shall require performance bonds in amounts as set forth in 48 CFR 28.102–2(b) for all fixed-priced and unit-priced construction subcontracts in excess of $150,000. The Contractor shall consider the use of performance bonds in fixed-price non-construction subcontracts, where appropriate.

(2) For fixed-price, unit-priced and cost reimbursement construction subcontracts in excess of $150,000, a payment bond shall be obtained on Standard Form 25A modified to name the Contractor as well as the United States of America as obligees. The amounts shall be determined in accordance with 48 CFR 28.102–2(b).

(3) For fixed-price, unit-priced and cost-reimbursement construction subcontracts greater than $35,000, but not greater than $150,000, the Contractor shall select two or more of the payment protections at 48 CFR 28.102–1(b), giving particular consideration to the inclusion of an irrevocable letter of credit as one of the selected alternatives.

(4) A subcontractor may have more than one acceptable surety in both construction and other subcontracts, provided that in no case will the liability of any one surety exceed the maximum sum for which it is qualified for any one obligation. For subcontracts other than construction, a co-surety (two or more sureties together) may reinsure amounts in excess of their individual capacity, with each surety having the required underwriting capacity that appears on the list of acceptable corporate sureties.

* * * * *

(h) * * *

(1) *Independent Estimates.* A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted that is expected to exceed the simplified acquisition threshold.

* * * * *

(l) *Indemnification.* Except for Price-Anderson Nuclear Hazards Indemnity, no subcontractor may be indemnified except with the prior approval of the Head of the Contracting Activity, in consultation with local legal counsel.

* * * * *

(w) *Unclassified controlled nuclear information.* Subcontracts involving unclassified controlled nuclear information shall be treated in accordance with 10 CFR part 1017.

(x) *Subcontract flowdown requirements.* In addition to terms and conditions that are included in the prime contract which direct application of such terms and conditions in appropriate subcontracts, the Contractor shall include the following clauses in subcontracts, as applicable:

(1) Construction Wage Rate requirements, formerly known as Davis-Bacon, clauses prescribed in 48 CFR 22.407.

(2) Foreign Travel clause prescribed in 48 CFR 952.247–70.

(3) Counterintelligence clause prescribed in 48 CFR 904.404(d)(7).

(4) Service Contract Labor Standards, formerly known as Service Contract Act, clauses prescribed in 48 CFR 22.1006.

(5) State and local taxes clause prescribed in 48 CFR 970.2904–1.

(6) Cost or pricing data clauses prescribed in 48 CFR 970.1504–201.

(7) Workforce Restructuring and Displaced Employee Hiring Preference clause prescribed in 48 CFR 970.2672–3.

(8) Service Contract Reporting clause prescribed in 48 CFR 4.1705.

(9) Contract Work Hours and Safety Standards—Overtime Compensation as prescribed in 48 CFR 22.305.

(10) Paid Sick leave under Executive Order 13706 as prescribed in 48 CFR 22.2110.

(11) Collective Bargaining Agreements Management and Operating Contracts as prescribed in 48 CFR 970.2201–130.

(12) Workplace Substance Abuse Programs at DOE Sites as prescribed in 48 CFR 970.2605–4.

(13) Contracts for Materials, Supplies, Articles, and Equipment clause prescribed in 48 CFR 22.610.

* * * * *

■ 330. Section 970.5245–1 is revised to read as follows:

970.5245–1 Property.

As prescribed in 970.4501–2, insert the following clause:

Property [December 2024]

(a) *Application of regulations.* The Contractor shall comply with the applicable requirements in 41 CFR chapters 101, 102 and 109 in addition to this clause.

(b) *Furnishing of Government property.* The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(c) *Title to property.* Except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The Contractor shall make such disposition of rejected items as the Contracting Officer shall direct. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to and vest in the Government upon:

(1) Issuance for use of such property in the performance of this contract; or

(2) Commencement of processing or use of such property in the performance of this contract; or

(3) Reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the Contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or

become a fixture or lose its identity as personal property by reason of affixation to any realty.

(d) *Identification.* To the extent directed by the Contracting Officer, the Contractor shall identify Government property coming into the Contractor's possession or custody, by marking and segregating in such a way, satisfactory to the Contracting Officer, as shall indicate its ownership by the Government.

(e) *Disposition.* The Contractor shall make such disposition of Government property which has come into the possession or custody of the Contractor under this contract as the Contracting Officer may direct during the progress of the work or upon completion or termination of this contract. The Contractor may, upon such terms and conditions as the Contracting Officer may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the Contracting Officer and the Contractor as the fair value thereof. The amount received by the Contractor as the result of any disposition, or the agreed fair value of any such property acquired by the Contractor, shall be applied in reduction of costs allowable under this contract or shall be otherwise credited to account to the Government, as the Contracting Officer may direct. Upon completion of the work or the termination of this contract, the Contractor shall render an accounting, as prescribed by the Contracting Officer, of all government property which had come into the possession or custody of the Contractor under this contract.

(f) *Protection of government property—management of high-risk property and classified materials.* (1) The Contractor shall take all reasonable precautions, and such other actions as may be directed by the Contracting Officer, or in the absence of such direction, in accordance with sound business practice, to safeguard and protect government property in the Contractor's possession or custody.

(2) In addition, the Contractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of high-risk property and classified materials throughout the life cycle of the property and materials consistent with the policies, practices and procedures for property management contained in the Federal Property Management Regulations (41 CFR chapter 101), the Department of Energy (DOE) Property Management Regulations (41 CFR chapter 109), and other applicable Regulations.

(3) High-risk property is property, the loss, destruction, damage to, or the unintended or premature transfer of which could pose risks to the public, the environment, or the national security interests of the United States. High-risk property includes proliferation sensitive, nuclear related dual use, export controlled, chemically or radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list.

(g) *Risk of loss of Government property.* (1)(i) The Contractor shall not be liable for the loss or destruction of, or damage to, Government property unless such loss, destruction, or damage was caused by any of the following—

(A) Willful misconduct or lack of good faith on the part of the Contractor's managerial personnel;

(B) Failure of the Contractor's managerial personnel to take all reasonable steps to comply with any appropriate written direction of the Contracting Officer to safeguard such property and classified materials; or

(C) Failure of contractor managerial personnel to establish, administer, or properly maintain an approved property management system in accordance with 41 CFR chapter 109.

(ii) If, after an initial review of the facts, the Contracting Officer informs the Contractor that there is reason to believe that the loss, destruction of, or damage to the government property results from conduct falling within one of the categories set forth above, the burden of proof shall be upon the Contractor to show that the Contractor should not be required to compensate the government for the loss, destruction, or damage.

(2) In the event that the Contractor is determined liable for the loss, destruction or damage to Government property in accordance with this clause, the Contractor's compensation to the Government shall be determined as follows:

(i) For damaged property, the compensation shall be the cost of repairing such damaged property, plus any costs incurred for temporary replacement of the damaged property. However, the value of repair costs shall not exceed the fair market value of the damaged property. If a fair market value of the property does not exist, the Contracting Officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(ii) For destroyed or lost property, the compensation shall be the fair market value of such property at the time of such loss or destruction, plus any costs incurred for temporary replacement and costs associated with the disposition of destroyed property. If a fair market value of the property does not exist, the Contracting Officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(3) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of risks of loss referred to in this clause is not allowable.

(h) *Steps to be taken in event of loss.* In the event of any damage, destruction, or loss to Government property in the possession or custody of the Contractor with a value above the threshold set out in the Contractor's approved property management system, the Contractor—

(1) Shall immediately inform the Contracting Officer of the occasion and extent thereof;

(2) Shall take all reasonable steps to protect the property remaining; and

(3) Shall repair or replace the damaged, destroyed, or lost property in accordance with the written direction of the Contracting Officer. The Contractor shall take no action prejudicial to the right of the Government to recover therefore, and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

(i) *Government property for Government use only.* Government property shall be used only for the performance of this contract.

(j) *Property Management*—(1) *Property Management System.* (i) The Contractor shall establish, administer, and properly maintain an approved property management system of accounting for and control, utilization, maintenance, repair, protection, preservation, and disposition of Government property in its possession under the contract. The Contractor's property management system shall be submitted to the Contracting Officer for approval and shall be maintained and administered in accordance with sound business practice, applicable Federal Property Management Regulations and Department of Energy Property Management Regulations, and such directives or instructions which the Contracting Officer may from time to time prescribe.

(ii) In order for a property management system to be approved, it must provide for—

(A) Comprehensive coverage of property from the requirement identification, through its life cycle, to final disposition;

(B) [Reserved]

(C) Full integration with the Contractor's other administrative and financial systems; and

(D) A method for continuously improving property management

practices through the identification of best practices established by ''best in class'' performers.

(iii) Approval of the Contractor's property management system shall be contingent upon the completion of the baseline inventory as provided in paragraph (i)(2) of this clause.

(2) *Property Inventory.* (i) Unless otherwise directed by the Contracting Officer, the Contractor shall within six months after execution of the contract provide a baseline inventory covering all items of Government property.

(ii) If the Contractor is succeeding another contractor in the performance of this contract, the Contractor shall conduct a joint reconciliation of the property inventory with the predecessor contractor. The Contractor agrees to participate in a joint reconciliation of the property inventory at the completion of this contract. This information will be used to provide a baseline for the succeeding contract as well as information for closeout of the predecessor contract.

(k) The term ''contractor's managerial personnel'' as used in this clause means the Contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business; or

(2) All or substantially all of the Contractor's operations at any one facility or separate location to which this contract is being performed; or

(3) A separate and complete major industrial operation in connection with the performance of this contract; or

(4) A separate and complete major construction, alteration, or repair operation in connection with performance of this contract; or

(5) A separate and discrete major task or operation in connection with the performance of this contract.

(l) The Contractor shall include this clause in all cost reimbursable subcontracts.

(End of clause)

Alternate I [December 2024]. As prescribed in 970.4501–2, when the award is to a nonprofit contractor, replace paragraph (k) of the basic clause with the following paragraph (k):

(k) The term ''contractor's managerial personnel'' as used in this clause means the Contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of—

(1) The Contractor's business; or

(2) The Contractor's operations at any one facility or separate location at which this contract is being performed; or

(3) The Contractor's Government property system and/or a Major System Project as defined in DOE Order 413.3B, or successor version (Version in effect on effective date of contract).

[FR Doc. 2024–23817 Filed 11–12–24; 8:45 am]

BILLING CODE 6450–01–P