(1) An expressly unallowable cost is a particular item or type of cost which, under the express provisions of an applicable law, regulation, or this contract, is specifically named and stated to be unallowable.

(2) A cost determined unallowable is one which, for that Contractor—
   (i) Was subject to a Contracting Officer’s final decision and not appealed;
   (ii) The Civilian Board of Contract Appeals or a court has previously ruled as unallowable; or
   (iii) Was mutually agreed to be unallowable.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its submission for settlement of cost incurred is—
   (1) Expressly unallowable, then the Contracting Officer shall assess a penalty in an amount equal to the disallowed cost allocated to this contract plus interest on the paid portion of the disallowed cost. Interest shall be computed from the date of overpayment to the date of repayment using the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92–41 (85 Stat. 97); or
   (2) Determined unallowable, then the Contracting Officer shall assess a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(e) The Contracting Officer may waive the penalty provisions when—
   (1) The Contractor withdraws the submission before the formal initiation of an audit of the submission and submits a revised submission;
   (2) The amount of the unallowable costs allocated to covered contracts is $10,000 or less; or
   (3) The Contractor demonstrates to the Contracting Officer’s satisfaction that—
      (i) It has established appropriate policies, personnel training, and an internal control and review system that provides assurances that unallowable costs subject to penalties are precluded from the Contractor’s submission for settlement of costs; and
      (ii) The unallowable costs subject to the penalty were inadvertently incorporated into the submission.

(End of clause)

[74 FR 36376, July 22, 2009]

970.5243–1 Changes.

As prescribed in 970.4302–1, the contracting officer shall insert the following clause in all management and operating contracts:

(End of clause)
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 purchasing function, including the Contractor’s compliance with approved system and methods. Such appraisals will be performed through the conduct of Contractor Purchasing System Reviews in accordance with 48 CFR subpart 44.3, or, when approved by the Contracting Officer, through the Contractor’s participation in the conduct of the Balanced Scorecard performance measurement and performance management system. The Contractor’s approved purchasing system and methods shall include the requirements set forth in paragraphs (b) through (y) of this clause.

(b) Acquisition of utility services. Utility services shall be acquired in accordance with the requirements of 48 CFR subpart 970.41.

(c) Acquisition of real property. Real property shall be acquired in accordance with 48 CFR subpart 917.74.

(d) Advance notice of proposed subcontract awards. Advance notice shall be provided in accordance with 48 CFR 970.4401-3.

(e) Audit of subcontractors. The Contractor shall provide for—

(1) Periodic post-award audit of cost-reimbursement subcontractors at all tiers; and

(2) 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 involvement of the Contractor and the DOE Contracting Officer in resolution of subcontract cost allowability.

(3) Where audits of subcontractors at any tier are required, arrangements may be made to have the cognizant Federal agency perform the audit of the subcontract. These arrangements shall be made administratively between DOE and the other agency involved and shall provide for the cognizant agency to audit in an appropriate manner in light of the magnitude and nature of the subcontract. In no case, however, shall these 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 subcontractors are to be determined in accordance with the cost principles of 48 CFR Part 93, 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 48 CFR 31.205-26(e).

(f) Bonds and insurance. The Contractor shall require performance bonds in penal amounts as set forth in 48 CFR 28.102-2(a) for all fixed-priced and unit-priced construction subcontracts in excess of $100,000. 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 $100,000, a payment bond shall be obtained on Standard Form 2A modified to name the Contractor as well as the United States of America as obligees. The penal 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 $25,000, but not greater than $100,000, 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 penal 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.

(5) Buy American. The Contractor shall comply with the provisions of the Buy American Act as reflected in 48 CFR 52.225-1 and 48 CFR 52.225-9. The Contractor shall forward determinations of non-availability of individual items to the DOE Contracting Officer for approval. Items in excess of $100,000 require the prior concurrence of the Head of Contracting Activity. If, however, the Contractor has an approved purchasing system, the Head of the Contracting Activity may authorize the Contractor to make determinations of non-availability for individual items valued at $100,000 or less.

(h) Construction and architect-engineer subcontracts. (1) Independent Estimates. A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted.

(2) Specifications. Specifications for construction shall be prepared in accordance with the DOE publication entitled “General Design Criteria Manual.”

(3) Prevention of conflict of interest. The Contractor shall not award a subcontract for construction to the architect-engineer firm or an affiliate that prepared the design. This prohibition does not preclude the award of a
tractor-affiliated source shall be purchased. The obligations of the contractor to the same firm where those subcontracts will be performed at the same site.

(i) Contractor-affiliated sources. Equipment, materials, supplies, or services from a contractor-affiliated source shall be purchased or transferred in accordance with 48 CFR 970.4402–3.

(j) Contractor-subcontractor relationship. The obligations of the contractor under paragraph (a) of this clause, including the development of the purchasing system and methods, and purchases made pursuant thereto, shall not relieve the contractor of any obligation under this contract (including, among other things, the obligation to properly supervise, administer, and coordinate the work of subcontractors). Subcontracts shall be in the name of the contractor, and shall not bind or purport to bind the Government.

(k) Government property. Identification, inspection, maintenance, protection, and disposition of government property shall conform with the policies and principles of 48 CFR part 45, 48 CFR part 945, the Federal Property Management Regulations, 41 CFR chapter 101, the DOE Property Management Regulations, 41 CFR chapter 109, and their contracts.

(l) Indemnification. Except for Price-Anderson Nuclear Hazards Indemnity, no subcontractor may be indemnified except with the prior approval of the Senior Procurement Executive.

(m) Leasing of motor vehicles. Contractors shall comply with 48 CFR subpart 8.11 and 48 CFR part 908.11.

(n) [Reserved]

(o) Management, acquisition and use of information resources. Requirements for automatic data processing resources and telecommunications facilities, services, and equipment, shall be reviewed and approved in accordance with applicable DOE Orders and regulations regarding information resources.

(p) Priorities, allocations and allotments. Priorities, allocations and allotments shall be extended to appropriate subcontracts in accordance with the clauses or clauses of this contract dealing with priorities and allocations.

(q) Purchase of special items. Purchase of the following items shall be in accordance with the following provisions of 48 CFR subpart 8.5, 48 CFR subpart 908.71, Federal Management Regulation 41 CFR part 102, and the Federal Property Management Regulation 41 CFR chapter 101:

(i) Motor vehicles—48 CFR 908.7101

(ii) Aircraft—48 CFR 908.7102

(iii) Security Cabinets—48 CFR 908.7106

(iv) Alcohol—48 CFR 908.7107

(v) Precious Metals—48 CFR 908.7121(b)

(vi) Lithium—48 CFR 908.7121(c)

(vii) Products and services of the blind and severely handicapped—41 CFR 101–26.701

(r) Strategic and critical materials. The contractor may use strategic and critical materials in the National Defense Stockpile.

(s) Termination. When subcontracts are terminated as a result of the termination of all or a portion of this contract, the contractor shall settle with subcontractors in general conformity with the policies and principles relating to settlement of prime contracts in 48 CFR subparts 49.1, 49.2 and 49.3. When subcontracts are terminated for reasons other than termination of this contract, the contractor shall settle such subcontracts in accordance with 48 CFR part 49.3.

(t) Unclassified controlled nuclear information. Subcontracts involving unclassified uncontrolled nuclear information shall be treated in accordance with 10 CFR part 1037.
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(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) Davis-Bacon clauses prescribed in 48 CFR 22.207.
(2) Foreign Travel clause prescribed in 48 CFR 552.247–70.
(3) Counterintelligence clause prescribed in 48 CFR 970.4904–4(a).
(5) State and local taxes clause prescribed in 48 CFR 970.2904–1.
(6) Cost or pricing data clauses prescribed in 48 CFR 970.1504–3(b).
(7) Legal services. Contractor purchases of litigation and other legal services are subject to the requirements in 10 CFR part 719 and the requirements of this clause.

(End of Clause)

[74 FR 36375, July 22, 2009]

970.5245–1 Property.

As prescribed in 970.4501–1(a), insert the following clause:

PROPERTY (DEC 2000)

(a) Furnishing of Government property. The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(b) Title to property. Except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The Contractor shall make such disposition of rejected items as the Contracting Officer shall direct. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to and vest in the Government upon (1) issuance for use of such property in the performance of this contract, or (2) commencement of processing or use of such property in the performance of this contract, or (3) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the Contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any reality.

(c) Identification. To the extent directed by the Contracting Officer, the Contractor shall identify Government property coming into the Contractor’s possession or custody, by marking and segregating in such a way, satisfactory to the Contracting Officer, as shall indicate its ownership by the Government.

(d) Disposition. The Contractor shall make such disposition of Government property which has come into the possession or custody of the Contractor 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.

(e) 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 199), 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, as defined in 10 CFR part 719. Such property includes, but is not limited to, classified materials and property, high-risk classified materials and property, critical high-risk property, and high-risk classified information.