

(3) Be kept separate from other medical record documents, with access limited to the SOMD and the Designated Physician.

**PART 715—DEFINITION OF NON-RECOURSE PROJECT-FINANCED**

Sec.

715.1 Purpose and scope.

715.2 Definitions.

715.3 Definition of “Nonrecourse Project-Financed.”

AUTHORITY: 42 U.S.C. 7651o(a)(2)(B); 42 U.S.C. 7254.

SOURCE: 56 FR 55064, Oct. 24, 1991, unless otherwise noted.

**§ 715.1 Purpose and scope.**

This part sets forth the definition of “nonrecourse project-financed” as that term is used to define “new independent power production facility,” in section 416(a)(2)(B) of the Clean Air Act Amendments of 1990, 42 U.S.C. 7651o(a)(2)(B). This definition is for purposes of section 416(a)(2)(B) only. It is not intended to alter or impact the tax treatment of any facility or facility owner under the Internal Revenue Code and regulations.

**§ 715.2 Definitions.**

As used in this subpart—

*Act* means the Clean Air Act Amendments of 1990, 104 Stat. 2399.

*Facility* means a “new independent power production facility” as that term is used in the Act, 42 U.S.C. 7651o(a)(2).

**§ 715.3 Definition of “Nonrecourse Project-Financed”.**

*Nonrecourse project-financed* means when being financed by any debt, such debt is secured by the assets financed and the revenues received by the facility being financed including, but not limited to, part or all of the revenues received under one or more agreements for the sale of the electric output from the facility, and which neither an electric utility with a retail service territory, nor a public utility as defined by section 201(e) of the Federal Power Act, as amended, 16 U.S.C. 824(e), if any of its facilities are financed with general credit, is obligated to repay in whole or in part. A commitment to contribute

equity or the contribution of equity to a facility by an electric utility shall not be considered an obligation of such utility to repay the debt of a facility. The existence of limited guarantees, commitments to pay for cost overruns, indemnity provisions, or other similar undertakings or assurances by the facility’s owners or other project participants will not disqualify a facility from being “nonrecourse project-financed” as long as, at the time of the financing for the facility, the borrower is obligated to make repayment of the term debt from the revenues generated by the facility, rather than from other sources of funds. Projects that are 100 percent equity financed are also considered “nonrecourse project-financed” for purposes of section 416(a)(2)(B).

**PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS**

**Subpart A—General Provisions**

Sec.

719.1 What is the purpose of this part?

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

719.3 What contracts are covered by this part?

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

719.5 What contracts are not covered by this part?

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

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

**Subpart B—Legal Management Plan**

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

719.11 Who must submit a legal management plan?

719.12 When must the plan be submitted?

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

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

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

719.16 When must the staffing and resource plan be submitted?

719.17 Are there any budgetary requirements?

**Subpart C—Engagement Letter**

719.20 When must an engagement letter be used?

## §719.1

719.21 What are the required elements of an engagement letter?

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

- 719.30 Is there a standard for determining cost reasonableness?
- 719.31 How does the Department determine whether fees are reasonable?
- 719.32 For what costs is the contractor, or Department retained counsel, limited to reimbursement of actual costs only?
- 719.33 What categories of costs are unallowable?
- 719.34 What is the treatment for travel costs?
- 719.35 What categories of costs require advance approval?
- 719.36 Who at the Department must give advance approval?
- 719.37 Are there any special procedures or requirements regarding subcontractor legal costs?
- 719.38 Are costs covered by this part subject to audit?
- 719.39 What happens when more than one contractor is a party to the matter?

### Subpart E—Department Counsel Requirements

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

#### APPENDIX TO PART 719—GUIDANCE FOR LEGAL RESOURCE MANAGEMENT

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

SOURCE: 66 FR 4621, Jan. 18, 2001, unless otherwise noted.

### Subpart A—General Provisions

#### §719.1 What is the purpose of this part?

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

## 10 CFR Ch. III (1–1–13 Edition)

contracts is subject to compliance with this part.

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

For purposes of this part:

*Alternative dispute resolution* includes processes such as mediation, neutral evaluation, mini-trials and arbitration.

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

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

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

*Department counsel* means the individual in the field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or Department retained legal counsel, for purposes of this part only, for submission and approval of the legal management plan, advance approval of certain costs, and submission of a staffing and resource plan, as addressed in this part.

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

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

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

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

## Department of Energy

## § 719.10

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

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

(a) This part covers cost reimbursement contracts:

(1) For an amount exceeding \$100,000,000, and

(2) Involving work performed at the facilities owned or leased by the Department.

(b) This part covers contracts otherwise not covered by paragraph 3(a) of this section containing a specialized clause requiring compliance with this part.

(c) This part also covers Department contracts with retained legal counsel where the legal costs are expected to exceed \$100,000.

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

Retained legal counsel under fixed rate or other type of contract with the Department itself to provide legal services must comply with the following where the legal costs over the life of the matter for which counsel has been retained are expected to exceed \$100,000:

(a) Requirements related to staffing and resource plans in subpart B of this part,

(b) Engagement letter requirements if legal work is contracted out, and

(c) Cost guidelines in subpart D of this part.

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

This part does not cover:

(a) Fixed price contracts;

(b) Cost reimbursement contracts for an amount less than \$100,000,000; or

(c) Contracts for an amount exceeding \$100,000,000 involving work not performed at a government owned or leased site.

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

Matters not covered by this part include:

(a) Matters handled by counsel retained by an insurance carrier;

(b) Routine intellectual property law support services;

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

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

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

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

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

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

## Subpart B—Legal Management Plan

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

The legal management plan must include the following items:

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

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

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

## §719.11

- (1) Competition;
  - (2) Past performance and proficiency shown by previously retained counsel;
  - (3) Particular expertise in a specific area of the law;
  - (4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;
  - (5) Location of retained legal counsel relative to:
    - (i) The site involved in the matter,
    - (ii) Any forum in which the matter will be processed, and
    - (iii) Where a significant portion of the work will be performed;
  - (6) Experience as an advocate in alternative dispute resolution procedures such as mediation;
  - (7) Actual or potential conflicts of interest; and
  - (8) The means and rate of compensation (*e.g.*, hourly billing, fixed fee, blended fees, etc.).
- (d) A description of:
- (1) The system that the contractor will use to review each case to determine whether and when alternative dispute resolution is appropriate;
  - (2) The role of in house counsel in cost management;
  - (3) The contractor's process for review and approval of invoices from outside law firms or consultants;
  - (4) The contractor's strategy for interaction with, and supervision of, retained legal counsel;
  - (5) How appropriate interaction with the contracting officer and Department counsel will be ensured; and,
  - (6) The contractor's corporate approach to legal decision making.

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

Contractors identified under paragraphs (a) and (b) in §719.3 must submit a legal management plan.

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

Contractors identified under paragraphs (a) and (b) in §719.3 must submit a legal management plan within 60 days following the execution of a contract with the Department.

## 10 CFR Ch. III (1-1-13 Edition)

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

The contractors identified under paragraphs (a) and (b) in §719.3 must file a legal management plan with Department counsel.

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

(a) The Department will notify the contractor within 30 days of the contractor's submission of the plan of any deficiencies relating to requirements in §719.10.

(b) The contractor must either correct identified deficiencies within 30 days of notice of the deficiency or file a letter with the General Counsel disputing the determination of a deficiency.

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

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

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

- (1) Major phases likely to be involved in the handling of the matter;
- (2) Timing and sequence of such phases;
- (3) Projected cost for each phase of the representation; and
- (4) Numbers and mix of resources, when applicable, that the retained legal counsel intends to devote to the representation.

(c) For significant matters in litigation, in addition to the generalized annual budget required by §719.17 a staffing and resource plan must include a budget, broken down by phases, including at a minimum:

- (1) Matter assessment, development and administration;
- (2) Pretrial pleadings and motions;
- (3) Discovery;
- (4) Trial preparation and trial; and

## Department of Energy

## § 719.21

(5) Appeal.

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

(a) For significant matters in litigation, the contractor or Department retained counsel must submit the staffing and resource within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, or 30 days after a determination that the cost is expected to exceed \$100,000.

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

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

(d) When it is unclear whether a matter is significant, the contractor must consult with Department counsel on the question.

(e) The purpose of the staffing and resource plan is primarily informational, but Department counsel may state objections within 30 days of the submission of a staffing and resource plan. When an objection is stated, the contractor has 30 days to satisfy the objection or dispute the objection in a letter to the General Counsel.

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

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

(b) The annual legal budget must include cost projections for known or existing matters for which reimbursable legal costs are expected to exceed \$100,000, at a level of detail reflective of the types of billable activities and the stage of each such matter.

(c) For informational purposes for both the contractor and Department counsel, the contractor must report on its success on staying within budget at the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there will be departures from the annual

budget beyond the control of the contractor.

## **Subpart C—Engagement Letters**

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

Contractors must submit an engagement letter to retained legal counsel expected to provide \$25,000 or more in legal services for a particular matter and submit a copy of correspondence relating to § 719.21, including correspondence from retained legal counsel addressing any of the issues under § 719.21, to Department counsel.

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

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

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

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

(2) A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. (An exemption for specific records may be obtained where contractors can demonstrate that a particular situation may provide grounds for a waiver.)

(3) A requirement that the contractor, the Department, and the General Accounting Office, have the right upon request, at reasonable times and locations, to inspect, copy, and audit all records documenting billable fees and costs.

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

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

(1) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary

## § 719.30

adjustments in staffing levels or identified attorneys.

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

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

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

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

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

(3) That retained counsel must comply with the cost guidelines in subpart D of this part.

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

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

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

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

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

The standard for cost reasonableness determinations, one of the criteria for an allowability determination, is contained in the Federal Acquisition Regulation (FAR), at 48 CFR 31.201-3.

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

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

(a) Whether the lowest reasonably achievable fees or rates (including any

## 10 CFR Ch. III (1-1-13 Edition)

currently available or negotiable discounts) were obtained from retained legal counsel;

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

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

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

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

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

All costs determined to be allowable are reimbursable for actual costs only, with no overhead or surcharge adjustments.

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

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and 48 CFR (DEAR) part 931 and 970.31. See also 41 U.S.C. 256(e).

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

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

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

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

Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR (FAR) 31.205-46, or 48 CFR (DEAR) 970.3102-05-46, as appropriate, to be reimbursable.

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

Costs for the following require specific justification or advance written approval from Department counsel to be considered for reimbursement:

(a) Computers or general application software, or non-routine computerized

## Department of Energy

## § 719.40

databases specifically created for a particular matter;

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

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

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

(e) Expert witnesses and consultants;

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

(g) Professional or educational seminars and conferences;

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

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

(j) Pro hac vice admissions.

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

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

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

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

(b) Contractors must submit information copies of subcontractor invoices for legal services to Department counsel.

### § 719.38 Are costs covered by this part subject to audit?

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

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

(a) If more than one contractor is a party in a particular matter and the issues involved are similar for all the contractors, a single legal counsel designated by the General Counsel must either represent all of the contractors or serve as lead counsel, when the rights of the contractors and the government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

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

## Subpart E—Department Counsel Requirements

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

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

## § 719.41

Department counsel must receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters. The contractor must receive a copy of this delegation of authority.

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

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

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

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

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

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

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

## 10 CFR Ch. III (1–1–13 Edition)

### APPENDIX TO PART 719—GUIDANCE FOR LEGAL RESOURCE MANAGEMENT

- Management and Administration of Outside Legal Services
- 1.0 Initiation of Litigation
- 2.0 Defense of Litigation
- 2.1 Disapproval of Defensive Litigation
- 3.0 Notice to the Department of Significant Matters and Litigation
- 4.0 Alternative Dispute Resolution
- 5.0 Cost Allowability Issues
- 5.1 Underlying Cause for Incurrence of Costs
- 5.2 Fees and Other Charges
- 6.0 Role of Department Counsel as the Contracting Officer's Representative
- 7.0 Future Amendments to Guidance Attachment—Contractor Litigation and Legal Costs, Model Bill Certification and Format

#### *Management and Administration of Outside Legal Services*

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

#### *1.0 Initiation of Litigation*

(A) The Insurance—Litigation and Claims clause (48 CFR (DEAR) 970.5228-1) in the Department's facility management contracts provides that the contractor may not initiate litigation, including appeals from adverse decisions, without the prior authorization or approval of Department counsel acting in his/her capacity as the Department's contracting officer representative. The following are the minimum informational requirements for requests for authorization or approval under that clause:

- (1) Identification of the proposed parties;
- (2) The nature of the proposed action;
- (3) Relief sought;
- (4) Venue;
- (5) Proposed representation and reason for selection;
- (6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;
- (7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;
- (8) Whether, for any reason, the contractor will assume any part of the costs of the action;
- (9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and

## Department of Energy

Pt. 719, App.

(10) A discussion of why initiating litigation would prove beneficial to the contractor and to the Government.

(B) Department counsel should advise the contracting officer concerning each request and must provide assistance to the contracting officer in communicating the Department's decision to the contractor.

### 2.0 Defense of Litigation

(A) In accordance with the Insurance-Litigation and Claims clause, the contractor must immediately notify Department counsel, acting in his/her capacity as contracting officer representative, of the initiation of litigation against the contractor. Department counsel will advise the contractor as to:

(1) Whether the defense of the litigation will be either approved or disapproved or approval deferred and any conditions to which approval is subject;

(2) Whether the contractor must authorize the Government to defend the action;

(3) Whether the Government will take charge of the action; or

(4) Whether the Government must receive an assignment of the contractor's rights.

(B) When defensive litigation is approved at a later stage or at the conclusion of the matter, reimbursement can be made for only those expenses which would have been reimbursable as allowable costs if the Department had originally approved the defense of the litigation.

### 2.1 Disapproval of Defensive Litigation

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

### 3.0 Notice to the Department of Significant Matters and Litigation

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

### 4.0 Alternative Dispute Resolution

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

### 5.0 Cost Allowability Issues

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

### 5.1 Underlying Cause for Incurrence of Costs

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

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

#### 5.2 Fees and Other Charges

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

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

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

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

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

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

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

#### 7.0 Future Amendments to Guidance

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

#### ATTACHMENT—CONTRACTOR LITIGATION AND LEGAL COSTS, MODEL BILL CERTIFICATION AND FORMAT

##### 1. Certification

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

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

##### 2. Model Bill Format

I—FOR FEES

Date of service	Description of service	Name or initials of attorney	Approved rate	Time charged	Amount (rate × time)
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(See Note 1 to this table).

II—FOR DISBURSEMENTS

Date	Description of disbursement	Amount
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(See Note 2 to this table).

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

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

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

725.15 Requirements for approval of applications.

PERMITS

- 725.21 Issuance.
- 725.22 Scope of permit.
- 725.23 Terms and conditions of access.
- 725.24 Administration.
- 725.25 Term and renewal.
- 725.26 Assignment.
- 725.27 Amendment.
- 725.28 Action on application to renew or amend.
- 725.29 Suspension, revocation and termination of permits.
- 725.30 Exceptions and additional requirements.
- 725.31 Violations.

APPENDIX A TO PART 725—CATEGORIES OF RESTRICTED DATA AVAILABLE

AUTHORITY: Sec. 161 of the Atomic Energy Act of 1954, as amended, 68 Stat. 943, 42 U.S.C. 2201.

SOURCE: 41 FR 56778, Dec. 30, 1976, unless otherwise noted.

GENERAL PROVISIONS

§ 725.1 Purpose.

This part establishes procedures and standards for the issuance of an Access Permit to any person subject to this part who requires access to Restricted Data applicable to civil uses of atomic energy for use in his business, trade or profession; provides for the amendment, renewal, suspension, termination and revocation of an Access Permit; and specifies the terms and conditions under which the Chief Health, Safety and Security Officer will issue the Permit.

[41 FR 56778, Dec. 30, 1976, as amended at 71 FR 68732, Nov. 28, 2006]

**PART 725—PERMITS FOR ACCESS TO RESTRICTED DATA**

GENERAL PROVISIONS

- Sec.
- 725.1 Purpose.
- 725.2 Applicability.
- 725.3 Definitions.
- 725.4 Interpretations.
- 725.5 Communications.
- 725.6 Categories of available information.
- 725.7 Specific waivers.

APPLICATIONS

- 725.11 Applications.
- 725.12 Noneligibility.
- 725.13 Additional information.
- 725.14 Public inspection of applications.