DEPARTMENT OF ENERGY

48 CFR Parts 915 and 970

RIN 1991–AB32

Acquisition Regulation; Department of Energy Management and Operating Contracts and Other Designated Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department today amends the Department of Energy Acquisition Regulation (DEAR) to revise its fee policies and related procedures for management and operating contracts and other designated contracts. The final rule implements a fee policy that ensures that fees: are reasonable and commensurate with performance, business and cost risks; create and implement tailored incentives for performance-based management contracts; are structured to attract best business partners; and afford flexibility to provide incentives to contractors to perform better at less cost.

DATES: This final rule is effective for new awards and extensions after April 12, 1999.

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SUPPLEMENTARY INFORMATION:

I. Background
II. Disposition of Comments
III. Procedural Requirements
A. Review Under Executive Order 12866
B. Review Under Executive Order 12988
C. Review Under the Regulatory Flexibility Act
D. Review Under the Paperwork Reduction Act
E. Review Under Executive Order 12612
F. Review Under the National Environmental Policy Act
G. Review Under Small Business Regulatory Enforcement Fairness Act of 1996
H. Review Under the Unfunded Mandates Reform Act of 1995

I. Background

On April 10, 1998, the Department of Energy (DOE or Department) published in the **Federal Register** (63 FR 17800) a Notice of Proposed Rulemaking to amend the DEAR Subsection 970.15404–4 to revise fee policies and related procedures for management and operating contracts and other designated contracts. The Notice of Proposed Rulemaking continued the effort introduced in the Department's June 27, 1997 (62 FR 34842) rule to improve its management and operating contracts. Today's final rule amends DOE's fee policy to conform that policy to performance-based contracting concepts introduced in the earlier rule.

The Notice of Proposed Rulemaking solicited comments on all aspects of the proposed rulemaking, including the following five specific elements:

- The use of multiple contract types within the structure of a cost-plus-award-fee contract;
- The approach which places all fee at performance risk;
- The fee policy as it applies to contracts with nonprofit organizations including educational institutions, with an alternate proposal;
- The amount of fee necessary to attract the most capable contractors; and
- The application of the Conditional Payment of Fee, Profit or Incentives clause.

Because there were issues involved in the rulemaking that were significant and complex, a public workshop was conducted on May 19, 1998. This format allowed for the interactive exchange of ideas in an informal conference style setting. The workshop agenda included Department presentations on performance-based contract management, an executive summary of the proposed rule, and draft answers to questions that had been submitted by members of the public prior to the workshop. Four attendees made presentations. Written comments on the Notice of Proposed Rulemaking were due June 9, 1998. The Department received comments from 26 entities. The administrative record, including the transcript of the workshop is located in the Department's Freedom of Information Public Reading Room and on the Department's home page at http://www.pr.doe.gov.

Today's final rule adopts the Notice of Proposed Rulemaking with certain changes discussed in the Disposition of Comments section. The final rule reflects changes to existing regulations announced in the Notice of Proposed Rulemaking which include:

- Updated fee schedules based on the effects of inflation since 1991 (Subsections 915.404–4–71–5 and 970.15404–4–5);
- A new fee schedule for environmental management to support the environmental remediation work effort (Subsection 970.15404–4–5);
- Guidance on the availability of various contract types and a preference, when incentive contracting is utilized, for contract types under which all fee will be based on performance (Subsection 970.15404–4–3);
- A preference for those contract types that appropriately maximize the incentives for superior performance (Subsection 970.15404–4–3);
- Criteria for the use of multiple fee approaches (Subsection 970.15404–4–3);
- A correlation of incentive-fee type arrangements to Federal Acquisition Regulation (FAR) guidance (Subsection 970.15404–4–3);
- A requirement to make the maximum appropriate use of outcome oriented performance expectations consistent with performance-based management contract concepts (Subsection 970.15404–4–3);
- Restructuring of considerations and techniques for determining fixed fees and total available fee (Subsections 970.15404–4–4 and 970.15404–4–8);
- A redefinition of Facility/Task Categories consistent with changes in work at major facilities (Subsection 970.15404–4–8);
- An elimination of the references to fees for management and operating contracts for support services;
- A rewritten and retitled total available fee clause (Section 970.5204–54);
- A new clause that seeks to ensure, among other things, that performance affecting the critical areas of environment, safety and health, catastrophic events, specified level of performance, and cost performance is not compromised by any other performance objective (Subsection 970.5204–86);
- A new clause to address cost reduction proposal programs based on guidance in DEAR 970.15404–4–3(f) and 970.15404–4–11 (Subsection 970.5204–87); and,
- A new provision for identifying maximum available fee (Subsection 970.5204–88).

The final rule also reflects modifications to the Notice of Proposed Rulemaking in response to comments in the following areas:

- Added criteria for using negative fee incentives (Subsection 970.15404–4–1);
- A fee policy for laboratory management and operation, including Federally Funded Research and Development Centers (FFRDCs), (Subsection 970.15404–4–2);
- Limitation on using a fee schedule more than once in the determination of the fee amount for an annual period (Subsection 970.15404–4–6);
- The exclusion of at least 20% of the estimated cost or price of subcontracts

from the fee base (Subsection 970.15404–4–6);

- Description of fee schedule work efforts in the area of construction directly supporting effort in the various Facility/Task Categories (Subsection 970.1504–4–8);
- The right of the Contracting Officer and DOE Operation/Field Office Manager to make unilateral determinations (Subsections 970.5204–54, 970.5204–86, and 970.5204–87); and
- Revision of the proposed Conditional Payment of Fee, Profit, or Incentives clause which establishes the portion of total available fee, profit or incentives that is subject to recovery due to failure to meet minimum requirements for specified level of performance or cost performance while ensuring proper emphasis on environment, safety and health, and catastrophic events, including contracts with fixed fees (Subsection 970.5204–86).

II. Disposition of Comments

The Department has considered and evaluated the comments received during the public comment period. The following discussion provides a summary of the comments received, the Department's responses to the comments, and any resulting changes from the Notice of Proposed Rulemaking. This discussion is grouped by the major items covered. Text changes finalized by the rule are listed at the end of each major item discussed.

Item 1—Special Considerations: Nonprofit Organizations

Comment: The majority of the commenters opposed the Notice of Proposed Rulemaking at DEAR 970.15404–4–2, which would have placed limitations on the availability of fee for nonprofit organizations and educational institutions. Specifically, commenters expressed concerns that the proposed rulemaking did not reflect the diversity of interests of the contractors involved in managing laboratory operations. Commenters stated there were fundamental differences in structure and objectives between the diverse set of FFRDC contractors currently in operation in the DOE complex. The operators of FFRDCs represent a diverse set of organizations—educational institutions, educational consortiums, private institutions, technology companies, and combinations thereof.

Commenters suggested the total circumstances particular to the FFRDC and the selected operating organization should be considered when establishing compensation. Commenters stated that the Notice of Proposed Rulemaking was predicated on invalid assumptions regarding contractor performance incentives to satisfy the needs of the laboratories. Rather than extend the Department's commercial fee policy with its focus on incentives tied to financial and performance considerations, commenters suggested that some form of the alternate proposal be adopted, but with an emphasis on non-financial incentives. Commenters suggested that the Department adopt a policy more in line with the alternative policy proposed in the Notice of Proposed Rulemaking that focused on FFRDCs.

Further, many of the educational institutions that submitted comments sought to lessen the impact of Contract Reform liability provisions (62 FR 34842).

Expressing concern that the alternative policy might not be prepared on time for the publication of the final rule, several commenters suggested that the publication of DEAR 970.15404–4–2 be delayed.

While the majority of the commenters opposed the Notice of Proposed Rulemaking for the reasons described above, several commenters offered more general criticism that applied to both the proposed regulatory text and the alternate policy. Some commenters pointed out that the proposed regulatory text of DEAR 970.15404–4–2 did not provide adequate total available fee to attract the best business partners. Finally, a number of commenters questioned the Department's use of a definition of ''nonprofit'' that was inconsistent with the definition contained in the Internal Revenue Code.

Response: In preparing the Notice of Proposed Rulemaking, DOE recognized that there was no clear choice of a single policy which would allow the Department the flexibility to appropriately incentivize the performance of all of its laboratory contractors. Accordingly, while the Notice of Proposed Rulemaking proposed a fee policy at DEAR 970.15404–4–2 for contracts with nonprofit organizations including educational institutions, it also requested interested parties to comment on an alternative to the proposed rulemaking that would establish a fee policy for the operators of the Department's FFRDCs which would not distinguish between the types of business organizations operating them. The final rule at DEAR 970.15404–4–2 has retained those provisions of the Notice of Proposed Rulemaking at DEAR 970.15404–4–2 that have not generally been in dispute. The final rule retains the Contracting Officer's authority to consider whether fee is an appropriate incentive in each FFRDC circumstance at DEAR 970.15404–4–2(a). The Department recognizes that eliminating this commonly understood and accepted procedure would complicate rather than simplify the procurement process applied to FFRDCs. DOE agrees with the comments that the Notice of Proposed Rulemaking did not recognize the diversity of interests of the contractor operators of DOE laboratories.

Again, the alternative proposed a policy that more adequately considered the diversity of contractor interests. Accordingly, the Department has adopted in the final rule the guiding principles contained in the alternate policy—a policy which applies to the contractors operating the Department's laboratories without specifically distinguishing between types of business organizations. To that end, the final rule, among other things, does not specifically define ''nonprofit organizations.'' The final rule DEAR 970.15404–4–2 language provides a substantial degree of flexibility to Contracting Officers—including discretionary authority for the creation of performance incentives suited for local FFRDC operations. Nevertheless, because the purpose of the rulemaking is to implement the policy of linking the payment of fee to risk and performance, the final rule retains this requirement in DEAR 970.15404–4–2. As a result, the Contracting Officer under DEAR 970.15404–4–2 now has authority to consider whether fee is needed, and if so, how much is required, and the fee structure to incentivize optimal contractor performance.

One of the primary rationales expressed in the alternate DEAR 970.15404–4–2 in the Notice of Proposed Rulemaking for the change in fee policy was to establish uniformity and consistency in the payment of fees to FFRDC operators. Prior to this rulemaking, the Department's practices differed significantly from other agencies' contracting with similar organizations. The adoption of DEAR 970.15404–4–2 as contained in this final rule will bring the Department closer into conformance with other similarly situated Government agencies. In writing the final rule to apply to the management of the Department's laboratories, the considerations and requirements were revised at DEAR 970.15404–4–2 to reflect FAR Part 35 policy regarding FFRDCs and be more in line with other agency policies as requested by several commenters.

The Contract Reform rule (62 FR 34842) imposed increased liability on contractors in several areas including statutorily based unallowable costs and costs due to failure to exercise prudent business judgment on the part of the contractor's managerial personnel. In this final rule, DOE is conforming its fee policy to the principles established by Contract Reform. The Department's decision is based on consideration of a number of internal and external factors, including parity with liabilities imposed on ''commercial'' contractors, accountability for taxpayer dollars, congressional interest and oversight, and the broad objectives of Contract Reform. Nevertheless, the Department recognized that the Notice of Proposed Rulemaking, in both the policy and the alternate, may not provide sufficient fee to compensate for the operator's assumption of both liability and performance risks that Contract Reform had shifted to the FFRDC operators. As a result, the final rule adds DEAR 970.15404–4–2(c)(4) to allow for the establishment of fee for the life of the contract for operation of laboratories. To provide educational or nonprofit organizations adequate compensation for the liability they assume under their contracts and the risk posed by having all or the majority of fee tied to performance, the final rule also: allows the provision of fee to educational institutions; allows for a performance fee which is higher than the fixed fee amount; and minimizes risk by making fee subject to downward adjustment only if performance is less than the target performance level stated in the contract. Further, the policy allows the establishment of a fixed fee or base fee in an amount reflective of the cost associated with the risk of the liabilities assumed.

To the extent that a delay in implementation was requested, it is not believed that any such delay would result in any further improvements to DEAR 970.15404–4–2.

In summary, the final rule at DEAR 970.15404–4–2 addresses special considerations for laboratory management and operation without distinguishing between the types of organizations operating the facilities; provides a substantial degree of flexibility to Contracting Officers; brings the Department closer into conformance with other similarly situated Government agencies; and allows for the establishment of fee for the life of the contract for the operation of laboratories.

Item 2—Calculating Fixed Fee

A. Comment: Three commenters recommended that the Department conduct its negotiations and structure types of contracts more in accordance with FAR. These comments included a proposal to negotiate fees, to use FAR type cost-plus-incentive-fee or cost-plus-award-fee contracts, and to use a weighted guideline approach. One commenter recommended that fee not be artificially limited by fee schedules and that fee schedules be utilized only as a guide for estimating fee targets for negotiation. Six commenters recommended various alternative indexes which would factor in more labor costs or a broader index for inflation to represent the actual types of costs incurred by the Department's contractors. The commenters also asserted that the modifications to the fee schedules in the Notice of Proposed Rulemaking were inadequate to account for inflation, the additional risks from the added liabilities from Contract Reform, and the performance risk environment.

Response: The nature of the management and operating contract does not lend itself to the application of the weighted guidelines approach. Therefore, the Department continues to use fee schedules associated with various categories of work as the foundation for determining fees. The schedules are regressive in nature, reflecting the general principle applied to government contracting which provides lower fee ranges for categories of cost which indicate less risk, complexity and technical value; and higher fee ranges for categories of cost which indicate greater risk, complexity and technical value (e.g., low fee range for manufacturing labor, high fee range for engineering labor). To better reflect the changing focus of the work being performed by the Department, an additional schedule was added in the Notice of Proposed Rulemaking to address environmental management work.

As proposed in the Notice of Proposed Rulemaking and adopted in the final rule, the revised fee policy provides for the use of alternatives to the traditional management and operating cost and fee arrangements. However, the use of such alternatives is conditioned at DEAR 970.15404–4–3 on obtaining and negotiating the costs for the alternative used and complying with the conditions of DEAR Part 915 and FAR Parts 15 and 16. In establishing fees under these alternative arrangements, a structured approach as set forth in FAR Part 15 and DEAR Part 915 will be used.

As proposed, all of the fee schedules were adjusted based on inflation which occurred from 1991 through 1997. This resulted in an adjustment of 9.4% for the schedules in the Notice of Proposed Rulemaking. Some commenters criticized this adjustment as not truly representative of the actual inflation of costs incurred at the Department's sites. In response to these comments, DOE conducted a review of various indexes. After consideration of that review, the complexities of index selection, and the applicability of the indexes to the Department's specialized work, DOE determined to make no further adjustments to the schedules proposed in the Notice of Proposed Rulemaking. Nevertheless, in developing periodic inflation adjustments in the future, DOE will consider other indexes as alternatives for use if deemed better indicators of the DOE inflation experience.

B. Comment: Four commenters requested a definition for each of the fee schedule work efforts at DEAR 970.15404–4–5 in order to reduce the subjectivity of categorizing work scope as production, research and development, or environmental management. They requested clarification of classifying primary mission work versus performing contract efforts (particularly environmental management) for the various fee schedules. Commenters also requested a clarification of the application of multiple fee schedules for multi-program facilities.

Response: The Notice of Proposed Rulemaking and final rule at DEAR 970.15404–4–5 allow for the work at a site to be broken into various categories and the cost of such work allocated to an appropriate fee schedule for the purposes of determining fee. There is latitude provided to Contracting Officers in determining the appropriate schedule against which to allocate the cost of various work categories. For example, the Environmental Management schedule is designed to include the grouping of various types of work related to environmental management, including waste management, environmental remediation, incidental construction, and incidental technology development/demonstration. However, the Environmental Management schedule does not contemplate inclusion of significant work which would more properly be allocated to another schedule. For example, major construction performed by the prime contractor (e.g., construction of a vitrification facility) related to

environmental management should be grouped with other construction projects using the construction schedule, while minor construction (e.g., construction of temporary facility in which to collect low level waste) incidental to environmental management should remain grouped with other environmental management projects using the Environmental Management schedule. No definitions of fee schedules were added to DEAR 970.15404–4–5.

The Notice of Proposed Rulemaking stated at DEAR 970.15404–4–6(c): ''the fee base is to be allocated to the category reflecting the work to be performed,'' but did not state that each schedule should be used no more than once to calculate fee for an annual period. Dividing work and applying a fee schedule multiple times in a year would artificially raise the fee for the total work. This is because the fee rate declines as the total fee base increases. Each fee schedule is intended to apply annually to the total work of a particular type. DEAR 970.15404–4–6(e) was added to the final rule to clearly state this.

Nevertheless, in unusual circumstances, e.g., where fee is to be determined for work which (1) is distinct, but related and of such magnitude that combining it for application against one schedule will result in an unreasonably low fee, or (2) covers more than an annual period such that combining the total work for application against one schedule will result in an unreasonably low fee, a schedule may be used more than once during a fee cycle with the approval of the Procurement Executive, or designee.

Item 3—Authority

Comment: Four commenters recommended decreasing the approval level of decision authority from the Procurement Executive, or designee, to the Contracting Officer in areas of: base fee, total available fees exceeding fee schedules, and establishing fees for longer than the funding cycle. One commenter recommended increasing the level of decision authority from the Field Office Manager to DOE Headquarters for withholding earned fee under the ''Conditional Payment of Fee, Profit, or Incentives'' clause because of its subjective and unilateral basis, while another commenter recommended that determinations to withhold fee be made by the Contracting Officer with concurrence of the Procurement Executive and the Department's General Counsel.

Response: The levels of decision authority specified in the fee policy reflect a balance between DOE Operations/Field Office Mangers and the Procurement Executive, or designee, for flexibility and authority to support mission objectives and establish consistency in the Department's application of fee. At this time, generally, authority regarding operational decisions is with DOE Operations/Field Office Managers, and Department-wide application of fee consistency decisions, including annual total available fee amounts not established in accordance with DEAR 970.15404–4 is with the Procurement Executive, or designee. As such, it has been determined that the Department will retain in the final rule Procurement Executive, or designee, approvals listed in the Notice of Proposed Rulemaking to reflect these considerations.

Item 4—Special Considerations: Cost-Plus-Award-Fee

Comment: Six commenters recommended changes to the Facility/Task Categories and associated Classification Factors at DEAR 970.15404–4–8 in several areas. The first area was that the fee policy give special consideration for facilities on Environmental Protection Agency's National Priority List (NPL) since higher risks are involved. Commenters recommended that those NPL-designated facilities continue, as stated in the current DEAR, to be classified at the site and/or contract level in recognition of the contractor's overall integration responsibilities and asked DOE to consider work at NPL sites to be among the ''riskiest'' work for DOE. The second comment area was that research and development (R&D) conducted at a laboratory was assigned too low a classification factor (lower than current DEAR) which three commenters believed downgraded the importance of R&D when laboratory R&D contractors are subject to the same risks as non-laboratory contractors. Two additional commenters recommended broadening the considerations to also consider financial risk, degree of managerial skill, and value of the task to DOE. They stated the considerations fall short in that they focus exclusively on the technical scope of work, and strongly urged DOE to consider other non-technical contractor challenges in its selection of Facility/Task Categories. Also, clarification was requested regarding the assignment of Facility/Task Categories and Classification Factors to the construction effort associated with the Facility/Task Categories.

Response: The effort performed at NPL sites is included in the Facility/Task Categories based on the primary focus of the effort to be performed. NPL sites are all different. NPL work is at different stages of the environmental cleanup process, which impacts the amount of technical uncertainty and information available to determine risk to the Government. The work at the various sites has different waste types, components, special handling requirements, and regulatory requirements and should be classified accordingly. The Facility/Task Categories and associated Classification Factors accommodate the variety of categories of work and associated risks. Each category is assigned a factor by which the calculated fixed fee associated with that work should be increased if fee is no longer to be fixed, but tied entirely to performance. This factor reflects the potential risk of not earning the fee. It is not the Department's intent to create an equal progression between the factors associated with the different categories. With the creation of a Facility/Task Category for the performance of R&D work in a laboratory, performance risk is less on a relative scale, and, therefore, the factor of 1.25 remains unchanged from the Notice of Proposed Rulemaking at DEAR 970.15404–4–8(d).

The Notice of Proposed Rulemaking at DEAR 970.15404–4–8(c) moves away from past approaches where a factor was applied on a site wide basis to one where the factor is applied at the work element level, which supports performance-based contracting concepts. Assignment of Facility/Task Categories and associated Classification Factors should be based on the technology used or the inherent risk of the work.

DEAR 970.15404–4–4(b) in the Notice of Proposed Rulemaking allows judgmental evaluation of eight significant factors and the assignment of appropriate fee values according to financial and management risk. The value of tasks to DOE is reflected in the requirements subject to incentives, the amount of fee, and the allocation of fee.

The final rule was revised at DEAR 970.15404–4–8(e) to clarify that construction directly supporting work in the various Facility/Task Categories is to be included in each Facility/Task Category.

Item 5—Fee Amount

A. Comment: Four commenters stated that the Notice of Proposed Rulemaking appears to reduce available fees by eliminating base fee, requiring fee discounts in competitive solicitations, and expanding the scope of DEAR 970.5204–86, ''Conditional Payment of

Fee, Profit, or Incentives'' clause. These commenters recommended that no maximum available fee be set in competitive solicitations, that the policy should be a guideline not a means of ''fee fixing'' beyond statutory limits (FAR 15.404–4(c)(4)(i)), and that greater reliance be placed on competition and negotiation.

Response: As part of the process of developing a final rule fee policy, DOE performed analysis using historical cost and fee data from actual contracts and applied different approaches to fee calculation as well as different variations of the fee policy. Additionally, DOE analyzed all data for FY 98 comparing total available fees as calculated by the current DEAR, the Notice of Proposed Rulemaking, and actual total available fee awarded. The FY 98 data reinforced previous analyses. After adjusting for the effects of inflation in the proposed fee schedules, total available fees calculated as set forth in the Notice of Proposed Rulemaking tended to be somewhat higher than those calculated under the current DEAR. This reflects, among other things, the greater risk associated with earning those fees. It was the Department's specific intent to provide a greater risk-reward ratio. The notable exception to somewhat higher fees was the total available fees tied to performance calculated for nonprofit organizations operating the Department's laboratories. In those cases where fee was paid to nonprofits in the past, the fees calculated under the final rule were lower than those previously awarded, due to the introduction of the new Facility/Task Category ''D'' and ''1.25'' factor for the performance of R&D in a laboratory in proposed DEAR 970.15404–4–8(d). However, under the final rule, not only nonprofit organizations but also educational institutions may be paid fee.

Another facet of the fee policy which was observed by commenters to potentially reduce fee is its application to competitive solicitations. In most cases where the actual total available fee amount had been established as part of a competitive award process, the fees tended to be higher than the total available fees calculated using either the current DEAR or the Notice of Proposed Rulemaking. The Department has observed that competition forces on fee were not adequate given the weight generally attached to fee in the source selection process. Accordingly, DEAR 970.15404–4–1(f) is intended to establish the maximum available fee and fee amount targeted for negotiation for competitive solicitations or the initiation of negotiations for an extension of an existing contract. In view of this, the final fee rule remains unchanged for contracts at DEAR 970.15404–4–1(f), which was renumbered from DEAR 970.15404–4–1(d) and DEAR 970.5204–88 Limitation on Fee clause, stating the requirement that fixed fee and total available fee proposed not exceed the limits set forth in the policy. Fees that are proposed below the limits set in the Notice of Proposed Rulemaking and set by the final rule may be considered and evaluated as part of the award process.

B. Comment: Use of Fixed Price contracts.

One commenter recommended that three basic principles should underlie the Department's fee policy. It agreed that the more risk a contractor is willing to take, the more fee should be available. As envisioned by the commenter, however, this would include not only putting fee at risk, as proposed in the Notice of Proposed Rulemaking, but also putting the reimbursement of otherwise allowable, allocable, and reasonable costs at risk. The commenter also recommended that when work elements cannot be fixed price, award fees tied to objective measures should be used to the maximum extent practicable. The commenter further recommended that when work elements cannot be fixed price and award fees are tied to either objective or subjective measures, each measure should be directly tied to a sum certain portion of the fee pool.

In addition, the commenter recommended that DOE include negative fee incentives in contracts when appropriate.

Response: DOE added DEAR 970.15404–4–1(b) to the final rule to list the basic principles underlying the Department's fee policy. These principles are: the amount of fee should reflect the financial risk assumed by the contractor; when work elements cannot be fixed price, incentive fees (including award fees) should be tied to objective measures to the maximum extent appropriate; and when work elements cannot be fixed price and award fees are employed, they should be tied to either objective or subjective measures with each measure to the maximum extent appropriate tied to a specific portion of the fee pool. These three basic principles were discussed at DEAR 970.15404–4–3 in the Notice of Proposed Rulemaking and expanded in the final rule. DEAR 970.15404–4–3 (c)(4) of the final rule clearly states that objective performance measures provide greater incentives for superior performance than do subjective performance measures and should be used to the maximum extent appropriate.

The Department did not accept the recommendation to go beyond putting fee at risk by putting the reimbursement of otherwise allowable, allocable, and reasonable costs at risk. DOE did, however, add criteria for using negative fee incentives at DEAR 970.15404–4–1(e). When performance is considered to be less than the level of performance set forth in the contract, the Department may adjust the fee determination to reflect such performance. DEAR 970.15404–4–3(c)(3) remains unchanged from the Notice of Proposed Rulemaking placing only fee at risk.

After consideration of the types of management and operating contracts utilized at the Department, the Department intends to structure contracts in such a manner that the risk is manageable, and therefore, assumable by the contractor. To the extent the requirements of DEAR Part 915 and FAR Parts 15 and 16 can be met, the most appropriate contract type and fee arrangement listed at DEAR 970.15404–4–3(a) should be used. If it is appropriate to use fixed price arrangements, the policy as proposed supports their use.

DEAR 970.15404–4–3(b) remains unchanged from the Notice of Proposed Rulemaking continuing to require Procurement Executive, or designee, approval for use of a cost-plus-fixed-fee contract.

C. Comment: Nine commenters recommended that DEAR 970.15404–4–6(b) either include all subcontracts and major contractor procurements, or not arbitrarily limit the amount of subcontract costs used to calculate the fee base. Their concerns focused on creating a bias for doing work in-house when subcontracting allows a contractor flexibility to adjust workforce, meet Contract Reform subcontracting initiatives, and comply with make or buy plans.

Response: The exclusion of at least 20% of subcontractor costs from the fee base at DEAR 970.15404–4–6(b)(2) of the final rule reflects the general principle that the contributions of the prime contractor to the accomplishment of the work may be less as the amount of subcontracting increases. We note however, that in some cases, there are types of subcontracts that are as managerially demanding and complex to administer as the supervision of the workforce directly performing work for the prime contractor.

The final rule is our attempt to balance these disparate aspects of subcontracting fee policy. It is not intended that the application of the

policy should discourage subcontracting, especially since the trend is toward outsourcing and privatization, but it is anticipated that in most cases, a portion of the subcontracting effort will require less oversight and involvement by the prime contractor. In that regard the rule allows the inclusion of up to 80% of subcontracting costs in the calculation of the fee base. It is noted that FAR Part 15 permits 100% of subcontract costs to be used in the base to calculate fee. However the FAR also provides that the amount of fee associated with subcontractor costs may be less than fee amounts associated with fee categories directly contributed to by the prime. As written, the final rule has been brought closer into conformance with the Federal contracting practices broadly applied under the FAR.

With respect to the concern that this adjustment may also negatively impact the Department's ability to incentivize prime contractors to contract work out as in the case of the management and integrating contracts, there are many factors which will influence proper implementation of ''make or buy'' decisions, with fee only one of them. However, if, in the opinion of the Contracting Officer, it is evident that the exclusion of the 20% of subcontract costs is adversely impacting the implementation of the Department's goals, the Contracting Officer shall seek a waiver from the Procurement Executive, or designee, to include additional subcontractor costs above the 80%.

In the final rule, DEAR 970.15404–4–6(b)(2) was clarified to state that the prime contractor's fee base shall exclude (1) at least 20% of the estimated cost or price of subcontracts and other major contractor procurements; and (2) up to 100% of such costs if they are of a magnitude or nature as to distort the technical and management effort actually required of the contractor.

D. Comment: One commenter stated the fee policy did not go far enough in providing an acceptable mix of incentives necessary to encourage accelerated closure of the Department's facilities. They stated that projects must have flexibility to link greater fee opportunity to real value to the Government from significant acceleration of schedule. They believed there is a negative incentive for contractors to significantly expedite schedule/reduce cost because such action frequently will result in reduction of earned fee during the life of the contract.

Response: It is beyond the scope of the fee policy to address the numerous ways incentives may be used, including their use in encouraging accelerated closure. However, with respect to accelerated closure, the Department is piloting the use of fees calculated using uncosted balances which result from achieved cost efficiency. The use of uncosted balances is being considered as a viable approach even though the Notice of Proposed Rulemaking precluded the use of any portion of an uncosted balance which has been previously included in a fee base used to calculate fee without the DEAR 970.15404–4–6(b)(9) waiver approval of the Procurement Executive, or designee. The concern the Department has in using an uncosted balance in calculating additional fee pertains to the accuracy of the estimates of the work which can be done within a given budget or the cost of the work scheduled to be performed. The approaches presently being explored attempt to ensure adequate fee is available to incentivize the acceleration of the work, while ensuring that the funds for its acceleration are available due to achieved efficiencies rather than to poor estimating. As an alternative approach, where cost, performance and schedule are negotiated and improved performance can be incentivized the requirements of DEAR Part 915 and FAR Parts 15 and 16 would apply rather than the DEAR Part 970 provisions.

DEAR 970.15404–4–6(b) remains unchanged from the Notice of Proposed Rulemaking in this area.

Item 6—Clauses

A. Comment: Several comments were received questioning the need for the Contracting Officer to retain the unilateral right to determine or modify requirements, specific incentives, and the amount and allocation of fee under DEAR 970.5204–54 Total Available Fee: Base Fee Amount and Performance Fee Amount. Also, commenters suggested that all unilateral decisions should be subject to appeal under the Disputes clause. A number of commenters suggested that the Performance Evaluation and Measurement Plan (PEMP) should be bilaterally established.

Response: DEAR 970.5204–54 Total Available Fee: Base Fee Amount and Performance Fee Amount clause continues to provide for the Contracting Officer to make unilateral determinations when the parties fail to reach agreement on work scope, cost, incentives, fee amounts and allocation, and fee determination. This right is retained due to the unique structure of the Department's major site management contracts. These contracts are awarded for a period of five years and usually contain an option for an additional five years; however, the scope of work is only defined for annual periods. The unilateral provision of the clause ensures that the Department can continue to require performance within defined bounds in the event of a disagreement with the contractor. The clause, DEAR 970.5204–54, has been changed from the Notice of Proposed Rulemaking to delete all reference to the Disputes clause of the contract. This change was made to reflect the fact that the policy will remain silent regarding the applicability of the Disputes clause to Contracting Officer decisions. It is the Department's position that applicability of the Contracts Dispute Act is provided by statute and needs no further amplification in the DOE acquisition policy.

The PEMP is intended as a management tool for the government's use. This administrative plan has never been intended to be a comprehensive, legally binding contractual document. To have an administrative plan, which is subject to many changes, bilaterally agreed to would place an undue administrative burden on the parties involved; therefore, DEAR 970.5204–54(d) was not changed in this area.

B. Comment: Several comments questioned the equity of DEAR 970.5204–86 Conditional Payment of Fee, Profit or Incentives clause which allows the government to unilaterally and subjectively reduce any otherwise earned fee, profit, or share of cost savings based on the occurrence of any one of several events. Several commenters sought clarification of the circumstances which would trigger the first two conditions identified in paragraphs (a) and (b) of the clause. A number of commenters requested that if the clause is to be used that it be restricted regarding the amount of fee, profit or contractor's share of cost savings which is subject to adjustment.

Response: The Department is moving toward better defined performance-based contracts for the majority of its management and operating and similar contracts. However, these contracts retain broad requirements, characteristics and concerns which cannot be ignored when determining fee. The Department, in its implementation of performance-based contracting, is attempting to narrow the focus to critical performance while maintaining acceptable performance overall. However, because of the breadth of the Department's requirements at its various sites, there is the potential that while focus is given to the performance of critical requirements, the

performance of other requirements, either due to their number or the cross cutting impact of many of them, if performed poorly, could seriously jeopardize overall contract performance. The use of this clause affords the Department flexibility to emphasize critical requirements (through the direct association to fee) while not ignoring the significant number of other requirements which still must be performed. This also allows the contractor to reasonably allocate its resources. The clause is intended to be more specific than similar clauses in the previous management and operating award fee contracts, but not so specific as to unduly limit the Department's recourse in the event of poor performance.

Regarding paragraph (a) of the clause, the failure to have developed and obtained an approved Safety Management System by an agreed-to date would be a trigger. Failure to meet agreed upon performance commitments would also be a trigger, but any action taken is at the discretion of the DOE Operations/Field Office Manager. Regarding paragraph (b) of the clause, any of the examples in the clause, or incidences of a similar magnitude, would act as a trigger, but again any action taken is at the discretion of the DOE Operations/Field Office Manager. In both instances, the triggering events should be well defined (e.g., the system and performance commitments) and agreed to between the DOE and the contractor. With regard to catastrophic events, DOE believes the language and examples provide sufficient clarity and definition.

The DOE Operations/Field Office Manager also has been given broad latitude to exercise judgement in the application of any adjustment to fee in recognition of possible mitigating circumstances associated with any occurrence.

The comments regarding restrictions on the amount of fee, profit or contractor's share of cost savings which is subject to adjustment were considered; and DOE revised the clause limiting the adjustment which could be made due to poor technical and cost performance.

C. Comment: Five commenters stated that DEAR 970.5204–87 Cost Reduction clause was too limiting, overly prescriptive, and administratively burdensome. They stated that the complex administrative requirements in the clause may turn out to be a disincentive. One commenter asserted that the clause should only be used where there are adequate baseline definitions and the likelihood of savings sufficient to warrant the administrative and infrastructure expense.

Response: This clause provides the opportunity for the Department to benefit from valid cost reductions, while providing contractors additional fee or a share of cost savings. Because the cost of most management and operating and similar contracts is not negotiated, the clause is more limiting and prescriptive than the standard value engineering clause found in the FAR. Accordingly, no changes were made in this area at DEAR 970.5204–87. The alternative, which is allowed by the fee policy, is to negotiate the cost of the work, rather than basing the cost of the work on budgets, and incorporate the FAR clauses. The clause defines a design, process, or method change as one which has established cost, technical and schedule baselines.

D. Comment: Two commenters stated that DEAR 970.5204–88 Limitation on Fee creates artificial maximum fees beyond statutory limitation and will not attract quality contractors.

Response: The fee amounts established by the revision to the fee policy are believed reasonable given the fact that fee is not heavily weighted in the Department's source selection evaluation criteria and that the competitive market place has not kept proposed fees within the policy limitations. For further discussion see Item 5A comment and response regarding fee discounts in competitive solicitations. DEAR 970.5204–88 remains unchanged in this area.

Item 7—Clarifications

Comment: Several commenters included minor clarifications, editorial comments or consistent terminology recommendations in the areas of ''annual'' funding cycle, fee amounts, and performance incentives; references to sections and subsections within the final rule; logical order; use of subjective measures; and determinations by the Government, Fee Determination Official, and Manager.

Response: In almost every case, the nonsubstantive revisions for clarity were made and are contained in the final rule. The clarification of ''annual'' funding cycles, ''annual'' fee amounts, and ''annual'' performance incentives was added to distinguish between fees now allowed to be negotiated for the life of the contract for laboratory operation; however, fee schedules both currently and historically are based on annual fee bases. For clarification, state taxes were added to DEAR 970.15404–4–6(b) as a specific exclusion to fee base. They previously were intended to fall within the exclusion category of costs which are of such magnitude or nature as to distort the technical and management effort actually required of the contractor. For consistency, references to Government determinations were changed to DOE Operations/Field Office Manager determinations. Subsections were renumbered to conform with the October 23, 1998 (63 FR 56849) DEAR numbering changes to conform with September 30, 1997 (62 FR 51224) FAR Part 15 rewrite.

The following crosswalk reflects the DEAR numbering changes from the Notice of Proposed Rulemaking to the final rule:

Notice of proposed rulemaking	Final rule
915.971–5	915.404–4–71–5
915.972	915.404–4–72
970.1509	970.15404–4
970.1509–1	970.15404–4–1
970.1509–2	970.15404–4–2
970.1509–3	970.15404–4–3
970.1509–4	970.15404–4–4
970.1509–5	970.15404–4–5
970.1509–6	970.15404–4–6
970.1509–7	970.15404–4–7
970.1509–8	970.15404–4–8
970.1509–9	970.15404–4–9
970.1509–10	970.15404–4–10
970.1509–11	970.15404–4–11
970.5204–54	970.5204–54
970.5204–XX	970.5204–86
970.5204–YY	970.5204–87
970.5204–ZZ	970.5204–88

III. Procedural Requirements

A. Review Under Executive Order 12866

This regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review, under that Executive Order, by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. 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 Executive 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. With regard to the review required by section 3(a) and 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, the proposed regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96–354, which requires preparation of a regulatory flexibility analysis for any rule that is likely to have a significant economic impact on a substantial number of small entities. Currently all 42 of the Department's management and operating and other site management operators are large businesses. Based on the history of the Department and the requirements contained in its management and operating contracts, the rule will not affect small entities as small businesses generally do not have the resources required to manage and operate the complex activities at the Department's largest sites. The rule establishes the policy for the payment of fee to prime contractors. There are no mandatory flowdown requirements to subcontractors and no significant economic impact on subcontractors. One commenter suggested that the fee base adjustment for subcontract costs may have an impact on small entities by altering the prime contractor's ''Make or Buy'' decisions. The fee base adjustment is a clarification of rather than a major change to the current DEAR which excludes subcontract costs if they distort the prime's contribution. The extent a prime subcontracts work is in accordance with its ''Make or Buy Plan,'' and while fee may be a factor, the decision to not subcontract is not driven by fee considerations. Based on the foregoing reasons, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

No new information collection or record keeping requirements are imposed by this rule. Accordingly, no Office of Management and Budget clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

E. Review Under Executive Order 12612

Executive Order 12612, entitled ''Federalism'' (52 FR 41685, October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. The Department has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500–1508), the Department has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR 1021, National Environmental Policy Act Implementing Procedures (Categorical Exclusion A6), the Department has determined that this rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

G. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, the Department of Energy will report to Congress promulgation of the rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(3).

H. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of $100 million or more. This rulemaking only affects private sector entities, and the impact is less than $100 million.

List of Subjects in 48 CFR Parts 915 and 970

Government procurement.

Issued in Washington, DC, on March 2, 1999.

Richard H. Hopf,

Director, Office of Procurement and Assistance Management.

For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is amended as set forth below.

PART 915—CONTRACTING BY NEGOTIATION

1. The authority citation for Part 915 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

2. Subsection 915.404–4–71–5 is amended by revising paragraphs (d), (f), and (h) to read as follows:

§ 915.404–4–71–5 Fee schedules.

* * * * *

(d) The following schedule sets forth the base for construction contracts:

CONSTRUCTION CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million			5.47
1,000,000	54,700	5.47	3.88
3,000,000	132,374	4.41	3.28

CONSTRUCTION CONTRACTS SCHEDULE—Continued

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
5,000,000	198,014	3.96	2.87
10,000,000	341,328	3.41	2.60
15,000,000	471,514	3.14	2.20
25,000,000	691,408	2.77	1.95
40,000,000	984,600	2.46	1.73
60,000,000	1,330,304	2.22	1.56
80,000,000	1,643,188	2.05	1.41
100,000,000	1,924,346	1.92	1.26
150,000,000	2,552,302	1.70	1.09
200,000,000	3,094,926	1.55	0.80
300,000,000	3,897,922	1.30	0.68
400,000,000	4,581,672	1.15	0.57
500,000,000	5,148,364	1.03	
Over $500 Million	5,148,364	.....	0.57

* * * * *

(f) The following schedule sets forth the base for construction management contracts:

CONSTRUCTION MANAGEMENT CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million	.....	.....	5.47
1,000,000	54,700	5.47	3.88
3,000,000	132,374	4.41	3.28
5,000,000	198,014	3.96	2.87
10,000,000	341,328	3.41	2.60
15,000,000	471,514	3.14	2.20
25,000,000	691,408	2.77	1.95
40,000,000	984,600	2.46	1.73
60,000,000	1,330,304	2.22	1.56
80,000,000	1,643,188	2.05	1.41
100,000,000	1,924,346	1.92	1.26
150,000,000	2,552,302	1.70	1.09
200,000,000	3,094,926	1.55	0.80
300,000,000	3,897,922	1.30	0.68
400,000,000	4,581,672	1.15	0.57
500,000,000	5,148,364	1.03	
Over $500 Million	5,148,364	.....	0.57

* * * * *

(h) The schedule of fees for consideration of special equipment purchases and for consideration of the subcontract program under a construction management contract is as follows:

SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million	.....	.....	1.64
1,000,000	16,410	1.64	1.09
2,000,000	27,350	1.37	0.93
4,000,000	45,948	1.15	0.77
6,000,000	61,264	1.02	0.71
8,000,000	75,486	0.94	0.66
10,000,000	88,614	0.89	0.61
15,000,000	119,246	0.79	0.53
25,000,000	171,758	0.69	0.47
40,000,000	242,868	0.61	0.43
60,000,000	329,294	0.55	0.39
80,000,000	406,968	0.51	0.37
100,000,000	480,266	0.48	0.28

SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE—Continued

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
150,000,000	619,204	0.41	0.23
200,000,000	732,980	0.37	0.13
300,000,000	867,542	0.29	.....
Over $300 Million	867,542	.....	013

3. Subsection 915.404–4–72 is amended by revising the introductory text of paragraph (a) to read as follows:

915.404–4–72 Special considerations for cost-plus-award-fee contracts.

(a) When a contract is to be awarded on a cost-plus-award-fee basis several special considerations are appropriate. Fee objectives for management and operating contracts or other contracts as determined by the Procurement Executive, including those using the Construction, Construction Management, or Special Equipment Purchases/Subcontract Work schedules from 48 CFR 915.404–4–71–5, shall be developed pursuant to the procedures set forth in 48 CFR 970.15404–4–8. Fee objectives for other cost-plus-award-fee contracts shall be in accordance with 48 CFR 916.404–2 and be developed as follows:

* * * * *

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

4. The authority citation for Part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Public Law 95–91 (42 U.S.C. 7254).

5. Subsection 970.15404–4, including subsections 970.15404–4–1 through 970.15404–4–11, is revised to read as follows:

970.15404–4 Fees for management and operating contracts.

This subsection sets forth the Department's policies on fees for management and operating contracts and may be applied to other contracts as determined by the Procurement Executive, or designee.

970.15404–4–1 Fee policy.

(a) DOE management and operating contractors may be paid a fee in accordance with the requirements of this subsection.

(b) There are three basic principles underlying the Department's fee policy:

(1) The amount of available fee should reflect the financial risk assumed by the contractor.

(2) It is the policy of the Department, when work elements cannot be fixed price, incentive fees (including award fees) tied to objective measures should be used to the maximum extent appropriate.

(3) When work elements cannot be fixed price and award fees are employed, they should be tied to either objective or subjective measures. Each measure should, to the maximum extent appropriate, be directly tied to a specific portion of the fee pool.

(c) Fee objectives and amounts are to be determined for each contract. Standard fees or across-the-board fee agreements will not be used or made. Due to the nature of funding management and operating contracts, it is anticipated that fee shall be established in accordance with the annual funding cycle; however, with the prior approval of the Procurement Executive, or designee, a longer period may be used where necessary to incentivize performance objectives that span funding cycles or to optimize cost reduction efforts.

(d) Annual fee amounts shall be established in accordance with this subsection. Annual amounts shall not exceed maximum amounts derived from the appropriate fee schedule (and Classification Factor, if applicable) unless approved in advance by the Procurement Executive, or designee. In no event shall any fee exceed statutory limits imposed by 41 U.S.C. 254(b).

(e)(1) Contracting Officers shall include negative fee incentives in contracts when appropriate. A negative fee incentive is one in which the contractor will not be paid the full target fee amount when the actual performance level falls below the target level established in the contract.

(2) Negative fee incentives may only be used when:

(i) A target level of performance can be established, which the contractor can reasonably be expected to reach;

(ii) The value of the negative incentive is commensurate with the lower level of performance and any additional administrative costs;

(iii) Factors likely to prevent attainment of the target level of performance are clearly within the control of the contractor; and

(iv) The contract indicates clearly a level below which performance is not acceptable.

(f) Prior to the issuance of a competitive solicitation or the initiation of negotiations for an extension of an existing contract, the HCA shall coordinate the maximum available fee, as allowed by 48 CFR 970.15404–4, and the fee amount targeted for negotiation, if less, with the Procurement Executive, or designee. Solicitations shall identify maximum available fee under the contract and may invite offerors to propose fee less than the maximum available.

(g) When a contract subject to this subsection requires a contractor to use its own facilities or equipment, or other resources to make its own cost investment for contract performance, (e.g., when there is no letter-of-credit financing) consideration may be given, subject to approval by the Procurement Executive, or designee, to increasing the total available fee amount above that otherwise provided by this subsection.

(h) Multiple fee arrangements should be used in accordance with 48 CFR 970.15404–4–3.

970.15404–4–2 Special considerations: laboratory management and operation.

(a) For the management and operation of a laboratory, the contracting officer shall consider whether any fee is appropriate. Considerations should include:

(1) The nature and extent of financial or other liability or risk assumed or to be assumed under the contract;

(2) The proportion of retained earnings (as established under generally accepted accounting methods) that are utilized to fund the performance of work related to the DOE contracted effort;

(3) Facilities capital or capital equipment acquisition plans;

(4) Other funding needs, to include contingency funding, working capital funding, and provision for funding unreimbursed costs deemed ordinary and necessary;

(5) The utility of fee as a performance incentive; and

(6) The need for fee to attract qualified contractors, organizations, and institutions.

(b) In the event fee is considered appropriate, the contracting officer shall determine the amount of fee in accordance with this subsection.

(1) Costs incurred in the operation of a laboratory that are allowable and allocable under the cost principles (i.e., commercial using FAR 31.2, nonprofit using OMB Circular A–122, or university-affiliated using OMB Circular A–21), regulations, or statutes applicable to the operating contractor should be classified as direct or indirect (overhead or G&A) charges to the contract and not included as proposed fee. Exceptions must be approved by the Procurement Executive, or designee.

(2) Except as specified in 48 CFR 970.15404–4–2(c)(3), the maximum total amount of fee shall be calculated in accordance with 48 CFR 970.15404–4–4 or 48 CFR 970.15404–4–8, as appropriate. The total amount of fee under any laboratory management and operating contract or other designated contract shall not exceed, and may be significantly less than, the result of that calculation. In determining the total amount of fee, the contracting officer shall consider the evaluation of the factors in paragraph (a) of this subsection as well as any benefits the laboratory operator will receive due to its tax status.

(c) In the event fee is considered appropriate, the contracting officer shall establish the type of fee arrangement in accordance with this subsection.

(1) The amount of fee may be established as total available fee with a base fee portion and a performance fee portion. Base fee, if any, shall be an amount in recognition of the risk of financial liability assumed by the contractor and shall not exceed the cost risk associated with those liabilities or the amount calculated in accordance with 48 CFR 970.15404–4–4, whichever is less. The total available fee, excepting any base fee, shall normally be associated with performance at or above the target level of performance as defined by the contract. If performance in either of the two general work categories appropriate for laboratories (science/technology and support) is rated at less than the target level of performance, the total amount of the available fee shall be subject to downward adjustment. Such downward adjustment shall be subject to the terms of 48 CFR 970.5204–86, ''Conditional Payment of Fee, Profit, or Incentives,'' clause, if contained in the contract.

(2) The amount of fee may be established as a fixed fee in recognition of the risk of financial liability to be assumed by the contractor, with such fixed fee amount not exceeding the cost risk associated with the liabilities assumed or the amount of fee calculated in accordance with 48 CFR 970.15404–4–4, whichever is less.

(3) If the fixed fee or total available fee exceeds 75% of the fee that would be calculated per 48 CFR 970.15404–4–4 or 48 CFR 970.15404–4–8; or if a fee arrangement other than one of those set forth in paragraphs (c) (1) or (2) of this subsection is considered appropriate, the approval of the Procurement Executive, or designee, shall be obtained prior to its use.

(4) Fee, if any, as well as the type of fee arrangement, will normally be established for the life of the contract. It will be established at time of award, as part of the extend/compete decision, at the time of option exercise, or at such other time as the parties can mutually reach agreement, e.g., negotiations. Such agreement shall require the approval of the Procurement Executive, or designee.

(5) Fee established for longer than one year shall be subject to adjustment in the event of a significant change (greater than +/-10% or a lessor amount if appropriate) to the budget or work scope.

(6) Retained earnings (reserves) shall be identified and a plan for their use and disposition developed.

(7) The use of retained earnings as a result of performance of laboratory management and operation may be restricted if the operator is an educational institution.

970.15404–4–3 Types of contracts and fee arrangements.

(a) Contract types and fee arrangements suitable for management and operating contracts may include cost, cost-plus-fixed-fee, cost-plus-award-fee, cost-plus-incentive-fee, fixed-price incentive, firm-fixed-price or any combination thereof. See FAR 16.1. In accordance with 48 CFR 970.15404–4–1(b)(1), the fee arrangement chosen for each work element should reflect the financial risk for project failure that contractors are willing to accept. Contracting officials shall structure each contract and the elements of the work in such a manner that the risk is manageable and, therefore, assumable by the contractor.

(b) Consistent with the concept of a performance-based management contract, those contract types which incentivize performance and cost control are preferred over a cost-plus-fixed-fee arrangement. Accordingly, a cost-plus-fixed-fee contract in instances other than those set forth in 48 CFR 970.15404–4–2(c)(2) may only be used when approved in advance by the Procurement Executive, or designee.

(c) A cost-plus-award-fee contract is generally the appropriate contract type for a management and operating contract.

(1) Where work cannot be adequately defined to the point that a fixed price contract is acceptable, the attainment of acquisition objectives generally will be enhanced by using a cost-plus-award-fee contract or other incentive fee arrangement to effectively motivate the contractor to superior performance and to provide the Department with flexibility to evaluate actual performance and the conditions under which it was achieved.

(2) The construct of fee for a cost-plus-award-fee management and operating contract is that total available fee will equal a base fee amount and a performance fee amount.

The total available fee amount including the performance fee amount the contractor may earn, in whole or in part during performance, shall be established annually (or as otherwise agreed to by the parties and approved by the Procurement Executive, or designee), in an amount sufficient to motivate performance excellence.

(3) However, consistent with concepts of performance-based contracting, it is Departmental policy to place fee at risk based on performance. Accordingly, a base fee amount will be available only when approved in advance by the Procurement Executive, or designee, except as permitted in 48 CFR 970.15404–4–2(c)(1). Any base fee amount shall be fixed, expressed as a percent of the total available fee at inception of the contract, and shall not exceed that percent during the life of the contract.

(4) The performance fee amount may consist of an objective fee component and a subjective fee component. Objective performance measures, when appropriately applied, provide greater incentives for superior performance than do subjective performance measures and should be used to the maximum extent appropriate. Subjective measures should be used when it is not feasible to devise effective predetermined objective measures applicable to cost, technical performance, or schedule for particular work elements.

(d) Consistent with performance-based contracting concepts,

performance objectives and measures related to performance fee should be as clearly defined as possible and, where feasible, expressed in terms of desired performance results or outcomes. Specific measures for determining performance achievement should be used. The contract should identify the amount and allocation of fee to each performance result or outcome.

(e) Because the nature and complexity of the work performed under a management and operating contract may be varied, opportunities may exist to utilize multiple contract types and fee arrangements. Consistent with paragraph (a) of this subsection and FAR 16.1, the contracting officer should apply that contract type or fee arrangement most appropriate to the work component. However, multiple contract types or fee arrangements:

(1) Must conform to the requirements of DEAR Part 915 and FAR Parts 15 and 16, and

(2) Where appropriate to the type, must be supported by

(i) Negotiated costs subject to the requirements of the Truth in Negotiations Act,

(ii) A pre-negotiation memorandum, and

(iii) A plan describing how each contract type or fee arrangement will be administered.

(f) Cost reduction incentives are addressed in 48 CFR 970.5204–87, ''Cost Reduction.'' This clause provides for incentives for quantifiable cost reductions associated with contractor proposed changes to a design, process, or method that has an established cost, technical, and schedule baseline, is defined, and is subject to a formal control procedure. The clause is to be included in management and operating contracts as appropriate. Proposed changes must be: initiated by the contractor, innovative, applied to a specific project or program, and not otherwise included in an incentive under the contract. Such cost reduction incentives do not constitute fee and are not subject to statutory or regulatory fee limitations; however, they are subject to all appropriate requirements set forth in this regulation.

(g) Operations and field offices shall take the lead in developing and implementing the most appropriate pricing arrangement or cost reduction incentive for the requirements. Pricing arrangements which provide incentives for performance and cost control are preferred over those that do not. The operations and field offices are to ensure that the necessary resources and infrastructure exist within both the contractor's and government's organizations to prepare, evaluate, and administer the pricing arrangement or cost reduction incentive prior to its implementation.

970.15404–4–4 General considerations and techniques for determining fixed fees.

(a) The Department's fee policy recognizes that fee is remuneration to contractors for the entrepreneurial function of organizing and managing resources, the use of their resources (including capital resources), and, as appropriate, their assumption of the risk that some incurred costs (operating and capital) may not be reimbursed.

(b) Use of a purely cost-based structured approach for determining fee objectives and amounts for DOE management and operating contracts is inappropriate considering the limited level of contractor cost, capital goods, and operating capital outlays for performance of such contracts. Instead of being solely cost-based, the desirable approach calls for a structure that allows evaluation of the following eight significant factors, as outlined in order of importance, and the assignment of appropriate fee values (subject to the limitations on fixed fee in 48 CFR 970.15404–4–5):

(1) The presence or absence of financial risk, including the type and terms of the contract;

(2) 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;

(3) Management risk relating to performance, including:

(i) Composite risk and complexity of principal work tasks required to do the job;

(ii) Labor intensity of the job;

(iii) Special control problems; and

(iv) Advance planning, forecasting and other such requirements;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, as compared to the nature and degree of subcontracting and the relative complexity of subcontracted efforts, subcontractor management and integration;

(5) Size and operation (number of locations, plants, differing operations, etc.);

(6) Influence of alternative investment opportunities available to the contractor (i.e., the extent to which undertaking a task for the Government displaces a contractor's opportunity to make a profit with the same staff and equipment in some other field of activity);

(7) Benefits which may accrue to the contractor from gaining experience and knowledge of how to do something, from establishing or enhancing a reputation, or from having the opportunity to hold or expand a staff whose loyalties are primarily to the contractor; and

(8) Other special considerations, including support of Government programs such as those relating to small and minority business subcontracting, energy conservation, etc.

(c) The total fee objective for a particular annual fixed fee negotiation is established by evaluating the above factors, assigning fee values to them, and totaling the resulting amounts (subject to limitations on total fixed fee in 48 CFR 970.15404–4–5).

970.15404–4–5 Calculating fixed fee.

(a) In recognition of the complexities of the fee determination process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, the following fee schedules set forth the maximum amounts of fee that contracting activities are allowed to award for a particular fixed fee transaction calculated annually.

(b) Fee schedules representing the maximum allowable annual fixed fee available under management and operating contracts have been established for the following management and operating contract efforts:

(1) Production;

(2) Research and Development; and

(3) Environmental Management.

(c) The schedules are:

PRODUCTION EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million	.....	.....	7.66
1,000,000	76,580	7.66	6.78

PRODUCTION EFFORTS—Continued

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
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 Million	6,097,956	.....	0.45

RESEARCH AND DEVELOPMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
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 Million	7,172,264	.....	0.50

ENVIRONMENTAL MANAGEMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
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	5,219,924	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 1.0 Billion	10,786,788	.....	0.55

970.15404–4–6 Fee base.

(a) The fee base is an estimate of necessary allowable costs, with some exclusions. It is used in the fee schedules to determine the maximum annual fee for a fixed fee contract. That portion of the fee base that represents the cost of the Production, Research and Development, or Environmental Management work to be performed, shall be exclusive of the cost of source and special nuclear materials; estimated costs of land, buildings and facilities whether to be leased, purchased or constructed; depreciation of Government facilities; and any estimate of effort for which a separate fee is to be negotiated.

(b) Such portion of the fee base, in addition to the adjustments in paragraph (a) of this subsection, shall exclude:

(1) Any part of the estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract or other similar costs which is of such magnitude or nature as to distort the technical and management effort actually required of the contractor;

(2) At least 20% of the estimated cost or price of subcontracts and other major contractor procurements;

(3) Up to 100% of the estimated cost or price of subcontracts and other major contractor procurements if they are of a magnitude or nature as to distort the technical and management effort actually required of the contractor;

(4) Special equipment as defined in 48 CFR 970.15404–4–7;

(5) Estimated cost of Government-furnished property, services and equipment;

(6) All estimates of costs not directly incurred by or reimbursed to the operating contractor;

(7) Estimates of home office or corporate general and administrative expenses that shall be reimbursed through the contract;

(8) Estimates of any independent research and development cost or bid and proposal expenses that may be approved under the contract;

(9) Any cost of work funded with uncosted balances previously included in a fee base of this or any other contract performed by the contractor;

(10) Cost of rework attributable to the contractor; and

(11) State taxes.

(c) In calculating the annual fee amounts associated with the Production, Research and Development, or Environmental Management work to be performed, the fee base is to be allocated to the category reflecting the work to be performed and the appropriate fee schedule utilized.

(d) The portion of the fee base associated with the Production, Research and Development, or Environmental Management work to be performed and the associated schedules in this part are not intended to reflect the portion of the fee base or related compensation for unusual architect-engineer, construction services, or special equipment provided by the management and operating contractor. Architect-engineer and construction services are normally covered by special agreements based on the policies applying to architect-engineer or construction contracts. Fees paid for such services shall be calculated using the provisions of 48 CFR 915.404–4 relating to architect-engineer or construction fees and shall be in addition to the operating fees calculated for the Production, Research and Development, or Environmental Management work to be performed. Special equipment purchases shall be addressed in accordance with the provisions of 48 CFR 970.15404–4–7 relating to special equipment.

(e) No schedule set forth in 48 CFR 915.404–4–71–5 or 48 CFR 970.15404–4–5 shall be used more than once in the determination of the fee amount for an annual period, unless prior approval of the Procurement Executive, or designee, is obtained.

970.15404–4–7 Special equipment purchases.

(a) Special equipment is sometimes procured in conjunction with management and operating contracts. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment which shall not exceed the maximum fee allowable as established using the schedule in 48 CFR 915.404–4–71–5(h).

(b) In determining appropriate fees, factors such as complexity of equipment, ratio of procurement transactions to volume of equipment to be purchased and completeness of services should be considered. Where possible, the reasonableness of the fees should be checked by their relationship to actual costs of comparable procurement services.

(c) For purposes of this subsection, special equipment is equipment for which the purchase price is of such a magnitude compared to the cost of installation as to distort the amount of technical direction and management effort required of the contractor. Special equipment is of a nature that requires less management attention. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment using the schedule in 48 CFR 915.404–4–71–5(h). The determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved in each project. This category of equipment would generally include:

(1) Major items of prefabricated process or research equipment; and

(2) Major items of preassembled equipment such as packaged boilers, generators, machine tools, and large electrical equipment. In some cases, it would also include special apparatus or devices such as reactor vessels and reactor charging machines.

970.15404–4–8 Special considerations: cost-plus-award-fee.

(a) When a management and operating contract is to be awarded on a cost-plus-award-fee basis, several special considerations are appropriate.

(b) All annual performance incentives identified under these contracts are funded from the annual total available fee, which consists of a base fee amount (which may be zero) and a performance fee amount (which typically will consist of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both).

(c) The annual total available fee for the contract shall equal the product of the fee(s) that would have been calculated for an annual fixed fee contract and the classification factor(s) most appropriate for the facility/task. If more than one fee schedule is applicable to the contract, the annual total available fee shall be the sum of the available fees derived proportionately from each fee schedule; consideration of significant factors applicable to each fee schedule; and application of a Classification Factor(s) most appropriate for the work.

(d) Classification Factors applied to each Facility/Task Category are:

Facility/task category	Classification factor
A	3.0
B	2.5
C	2.0
D	1.25

(e) 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) Research and development directly supporting paragraphs (e)(1)(i), (ii), or (iii) of this subsection and not conducted in a laboratory, or

(v) As designated by the Procurement Executive, 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 which 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) Research and development directly supporting paragraphs (e)(2)(i), (ii), (iii), (iv) or (v) of this subsection and not conducted in a laboratory; or

(vii) As designated by the Procurement Executive, 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) Research and development directly supporting paragraphs (e)(3)(i), (ii), (iii) or (iv) of this subsection and not conducted in a laboratory; or

(vi) As designated by the Procurement Executive, or designee. (Classification factor 2.0)

(4) Facility/Task Category D. The main focus of the effort performed is research and development conducted at a laboratory. (Classification factor 1.25)

(f) Where the Procurement Executive, or designee, has approved a base fee, the Classification Factors shall be reduced, as approved by the Procurement Executive, or designee.

(g) Any risks which are indemnified by the Government (for example, by the Price-Anderson Act) will not be considered as risk to the contractor.

(h) All management and operating contracts awarded on a cost-plus-award-fee basis shall set forth in the contract, or the Performance Evaluation and Measurement Plan(s) required by the contract clause at 48 CFR 970.5204–54, a site specific method of rating the contractor's performance of the contract requirements and a method of fee determination tied to the method of rating.

(i) Prior approval of the Procurement Executive, or designee, is required for an annual total available fee amount exceeding the guidelines in paragraph (c) of this subsection.

(j) DOE Operations/Field Office Managers must ensure that all important areas of contract performance are specified in the contract or Performance Evaluation and Measurement Plan(s), even if such areas are not assigned specific weights or percentages of available fee.

970.15404–4–9 Special considerations: fee limitations.

In situations where the objective performance incentives are of unusual difficulty or where the successful completion of the performance incentives would provide extraordinary value to the Government, fees in excess of those allowed under 48 CFR 970.15404–4–4 and 48 CFR 970.15404–4–8 may be allowed with the approval of the Procurement Executive, or designee. Requests to allow fees in excess of those provided under other provisions of this fee policy must be accompanied by a written justification with detailed supporting rationale as to how the specific circumstances satisfy the two criteria listed in this Subsection.

970.15404–4–10 Documentation.

The contracting officer shall tailor the documentation of the determination of fee prenegotiation objective based on FAR 15.406–1, Prenegotiation objectives, and the determination of the negotiated fee in accordance with FAR 15.406–3, Documenting the negotiation. The contracting officer shall include as part of the documentation: the rationale for the allocation of cost and the assignment of Facility/Task Categories; a discussion of the calculations described in 48 CFR 970.15404–4–4; and discussion of any other relevant provision of this Subsection.

970.15404–4–11 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5204–54, ''Total Available Fee: Base Fee Amount and Performance Fee Amount,'' in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, that include cost-plus-award-fee arrangements.

(b) The contracting officer shall insert the clause at 48 CFR 970.5204–86, ''Conditional Payment of Fee, Profit, or Incentives,'' in management and operating contracts, and other contracts determined by the Procurement Executive, or designee. Further, due to the various types of fee and incentive arrangements which may be included in a contract and the need to ensure the overall balanced performance of the contract, Alternate I shall be included in such contracts awarded on a cost-plus-award-fee, multiple fee, or incentive fee basis.

(c) The contracting officer shall insert the clause at 48 CFR 970.5204–87, ''Cost Reduction,'' in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, if cost savings programs are contemplated.

(d) The Contracting Officer shall insert the provision at 48 CFR 970.5204–88, ''Limitation on Fee,'' in solicitations for management and operating contracts, and other contracts determined by the Procurement Executive, or designee.

6. Section 970.5204–54 is revised to read as follows:

970.5204–54 Total available fee: base fee amount and performance fee amount.

As prescribed in 48 CFR 970.15404–4–11(a), insert the following clause. The clause should be tailored to reflect the contract's actual inclusion of base fee amount and performance fee amount.

Total Available Fee: Base Fee Amount and Performance Fee Amount (April 1999)

(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.* Prior to the beginning of each fiscal year under this contract, or other appropriate period as mutually agreed upon and, if exceeding one year, approved by the Procurement Executive, or designee, the Contracting Officer and Contractor shall enter into negotiation of the requirements for the year or appropriate period, including the evaluation areas and individual requirements subject to incentives, the total available fee, and the allocation of fee. The Contracting Officer shall modify this contract at the conclusion of each negotiation to reflect the negotiated requirements, evaluation areas and individual requirements subject to incentives, the total available fee, and the allocation of fee. In the event the parties fail to agree on the requirements, the evaluation areas and individual requirements subject to incentives, the total available fee, or the allocation of fee, a unilateral determination will be made by the Contracting Officer. The total available fee amount shall be allocated to a twelve month cycle composed of one or more evaluation periods, or such longer period as may be mutually agreed to between the parties and approved by the Procurement Executive, or designee.

(c) *Determination of Total Available Fee Amount Earned.*

(1) The Government shall, at the conclusion of each specified evaluation period, evaluate the contractor's performance of all requirements, including performance based incentives completed during the period, and determine the total available fee amount earned. At the Contracting Officer's discretion, evaluation of incentivized performance may occur at the scheduled completion of specific incentivized requirements.

(2) The DOE Operations/Field Office Manager, or designee, will be (insert title of DOE Operations/Field Office Manager, or designee). The contractor agrees that the determination as to the total available fee earned is a unilateral determination made by the DOE Operations/Field Office Manager, or designee .

(3) The evaluation of contractor performance shall be in accordance with the Performance Evaluation and Measurement Plan(s) described in subparagraph (d) of this clause unless otherwise set forth in the contract. The Contractor shall be promptly advised in writing of the fee determination, and the basis of the fee determination. In the event that the contractor's performance is considered to be less than the level of performance set forth in the Statement of Work, as amended to include the current Work Authorization Directive or similar document, for any contract requirement, it will be considered by the DOE Operations/Field Office Manager, or designee, who may at his/her discretion adjust the fee determination to reflect such performance. Any such adjustment shall be in accordance with the clause entitled ''Conditional Payment of Fee, Profit, or Incentives'' if contained in the contract.

(d) *Performance Evaluation and Measurement Plan(s).* To the extent not set forth elsewhere in the contract:

(1) The Government shall establish a Performance Evaluation and Measurement Plan(s) upon which the determination of the total available fee amount earned shall be based. The Performance Evaluation and Measurement Plan(s) will address all of the requirements of contract performance specified in the contract directly or by reference. A copy of the Performance Evaluation and Measurement Plan(s) shall be provided to the Contractor:

(i) Prior to the start of an evaluation period if the requirements, evaluation areas, specific incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been mutually agreed to by the parties; or

(ii) Not later than thirty days prior to the scheduled start date of the evaluation period, if the requirements, evaluation areas, specific incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been unilaterally established by the Contracting Officer.

(2) The Performance Evaluation and Measurement Plan(s) 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. Such criteria should be objective, but may also include subjective criteria. The Plan(s) shall also set forth the method by which the total available fee amount will be allocated and the amount earned determined.

(3) The Performance Evaluation and Measurement Plan(s) may, consistent with the contract statement of work, be revised during the period of performance. The Contracting Officer shall notify the contractor:

(i) Of such unilateral changes at least ninety calendar days prior to the end of the affected evaluation period and at least thirty calendar days prior to the effective date of the change;

(ii) Of such bilateral changes at least sixty calendar days prior to the end of the affected evaluation period; or

(iii) If such change, whether unilateral or bilateral, is urgent and high priority, at least thirty calendar days prior to the end of the evaluation period.

(e) *Schedule for total available fee amount earned determinations.* The DOE Operations/Field Office Manager, or designee, shall issue the final total available fee amount earned determination in accordance with the schedule set forth in the Performance Evaluation and Measurement Plan(s). However, a determination must be made within sixty calendar days after the receipt by the Contracting Officer of the Contractor's self-assessment, if one is required or permitted by paragraph (f) of this clause, or seventy calendar days after the end of the evaluation period, whichever is later. If the Contracting Officer evaluates the Contractor's performance of specific requirements on their completion, the payment of any earned fee amount must be made within seventy calendar days (or such other time period as mutually agreed to between the Contracting Officer and the Contractor) after such completion. If the determination is delayed beyond that date, the Contractor shall be entitled to interest on the determined 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. 611) 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 issued. That is, interest accrued at the end of any 30-day period will be added to the determined amount of fee earned and be subject to interest if not paid in the succeeding 30-day period.

Alternate I: When the award fee cycle consists of two or more evaluation periods, add the following as paragraph (c)(4): At the sole discretion of the Government, unearned total available 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.

Alternate II: When the award fee cycle consists of one evaluation period, add the following as paragraph (c)(4): Award fee not earned during the evaluation period shall not be allocated to future evaluation periods.

Alternate III: When the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment, add the following text as paragraph

(f): Contractor self-assessment. Following each evaluation period, the Contractor 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 such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the contractor's management during the period.

A self-assessment, in and of itself may not be the only basis for the award fee determination.

Alternate IV: When the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option, add the following text as paragraph (f): *Contractor self-assessment.* Following each evaluation period, the Contractor may submit a self-assessment, provided such assessment is submitted 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 such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the Contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

7. Subsection 970.5204–86, Conditional Payment of Fee, Profit, or Incentives; 970.5204-87, Cost Reduction; and 970.5204–88, Limitation on Fee, are added to read as follows:

970.5204–86 Conditional payment of fee, profit, or incentives.

As prescribed in 48 CFR 970.15404–4–11(b), insert the following clause:

Conditional Payment of Fee, Profit, Or Incentives (April 1999)

In order for the Contractor to receive all otherwise earned fee, fixed fee, profit, or share of cost savings under the contract in an evaluation period, the Contractor must meet the minimum requirements in paragraphs (a) and (b) of this clause and if Alternate I is applicable (a) through (d) of this clause. If the Contractor does not meet the minimum requirements, the DOE Operations/Field Office Manager or designee may make a unilateral determination to reduce the evaluation period's otherwise earned fee, fixed fee, profit or share of cost savings as described in the following paragraphs of this clause.

(a) *Minimum requirements for Environment, Safety & Health (ES&H) Program.* The Contractor shall develop, obtain DOE approval of, and implement a Safety Management System in accordance with the provisions of the clause entitled, ''Integration of Environment, Safety and Health into Work Planning and Execution,'' if included in the contract, or as otherwise agreed to with the Contracting Officer. The minimal performance requirements of the system will be set forth in the approved Safety Management System, or similar document. If the Contractor fails to obtain approval of the Safety Management System or fails to achieve the minimum performance requirements of the system during the evaluation period, the DOE Operations/Field Office Manager or designee, at his/her sole discretion, may reduce any otherwise earned fees, fixed fee, profit or share of cost savings for the evaluation period by an amount up to the amount earned.

(b) *Minimum requirements for catastrophic event.* If, in the performance of this contract, there is a catastrophic event (such as a fatality, or a serious workplace-related injury or illness to one or more Federal, contractor, or subcontractor employees or the general public, loss of control over classified or special nuclear material, or significant damage to the environment), the DOE Operations/Field Office Manager or designee may reduce any otherwise earned fee for the evaluation period by an amount up to the amount earned. In determining any diminution of fee, fixed fee, profit, or share of cost savings resulting from a catastrophic event, the DOE Operations/Field Office Manager or designee will consider whether willful misconduct and/or negligence contributed to the occurrence and will take into consideration any mitigating circumstances presented by the contractor or other sources.

Alternate I: Add the following paragraphs (c) and (d) in contracts awarded on a cost-plus-award-fee, incentive fee or multiple fee basis:

(c) *Minimum requirements for specified level of performance.*

(1) At a minimum the Contractor must perform the following:

(i) The requirements with specific incentives at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document unless an otherwise minimal level of performance has been established in the specific incentive;

(ii) All of the performance requirements directly related to requirements specifically incentivized at a level of performance such that the overall performance of these related requirements is at an acceptable level; and

(iii) All other requirements at a level of performance such that the total performance of the contract is not jeopardized.

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the Contracting Officer. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the evaluation period, the DOE Operations/Field Office Manager, or designee, may reduce any otherwise earned fee, fixed fee, profit, or shared net savings for the evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit, or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

(d) *Minimum requirements for cost performance.*

(1) Requirements incentivized by other than cost incentives must be performed within their specified cost constraint and must not adversely impact the costs of performing unrelated activities.

(2) The performance of requirements with a specific cost incentive must not adversely impact the costs of performing unrelated requirements.

(3) The Contractor's performance within the stipulated cost performance levels for the evaluation period shall be determined by the Contracting Officer. To the extent the Contractor fails to achieve the stipulated cost performance levels, the DOE Operations/Field Office Manager, or designee, at his/her sole discretion, may reduce in whole or in part any otherwise earned fee, fixed fee, profit, or shared net savings for the evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

970.5204–87 Cost reduction.

As prescribed in 48 CFR 970.15404–4–11(c), insert the following clause:

Cost Reduction (April 1999)

(a) *General.* It is the Department of Energy's (DOE's) intent to have its facilities and laboratories operated in an efficient and effective manner. To this end, the Contractor shall assess its operations and identify areas where cost reductions would bring cost efficiency to operations without adversely affecting the level of performance required by the contract. The Contractor, to the maximum extent practical, shall identify areas where cost reductions may be effected, and develop and submit Cost Reduction Proposals (CRPs) to the Contracting Officer. If accepted, the Contractor may share in any shared net savings from accepted CRPs in accordance with paragraph (g) of this clause.

(b) *Definitions.*

Administrative cost is the contractor cost of developing and administering the CRP.

Design, process, or method change is a change to a design, process, or method which has established cost, technical and schedule baseline, is defined, and is subject to a formal control procedure. Such a change must be innovative, initiated by the contractor, and applied to a specific project or program.

Development cost is the Contractor cost of up-front planning, engineering, prototyping, and testing of a design, process, or method.

DOE cost is the Government cost incurred implementing and validating the CRP.

Implementation cost is the Contractor cost of tooling, facilities, documentation, etc., required to effect a design, process, or method change once it has been tested and approved.

Net Savings means a reduction in the total amount (to include all related costs and fee) of performing the effort where the savings revert to DOE control and may be available for deobligation. Such savings may result from a specific cost reduction effort which is negotiated on a cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price basis, or may result directly from a design, process, or method change. They may also be savings resulting from formal or informal direction given by DOE or from changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget.

Shared Net Savings are those net savings which result from:

(1) A specific cost reduction effort which is negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, and is the difference between the negotiated target cost of performing an effort as negotiated and the actual allowable cost of performing that effort or

(2) A design, process, or method change, which occurs in the fiscal year in which the change is accepted and the subsequent fiscal year, and is the difference between the estimated cost of performing an effort as originally planned and the actual allowable cost of performing that same effort utilizing a revised plan intended to reduce costs along with any Contractor development costs, implementation costs, administrative costs, and DOE costs associated with the revised plan. Administrative costs and DOE costs are only included at the discretion of the Contracting Officer. Savings resulting from formal or informal direction given by the DOE or changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget are not to be considered as shared net savings for purposes of this clause and do not qualify for incentive sharing.

(c) *Procedure for submission of CRPs.*

(1) CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts or for design, process, or methods changes submitted by the Contractor shall contain, at a minimum, the following:

(i) Current Method (Baseline)—A verifiable description of the current scope of work, cost, and schedule to be impacted by the initiative; and supporting documentation.

(ii) New Method (New Proposed Baseline)—A verifiable description of the new scope of work, cost, and schedule, how the initiative will be accomplished; and supporting documentation.

(iii) Feasibility Assessment—A description and evaluation of the proposed initiative and benefits, risks, and impacts of implementation. This evaluation shall include an assessment of the difference between the current method (baseline) and proposed new method including all related costs.

(2) In addition, CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts shall contain, at a minimum, the following:

(i) The proposed contractual arrangement and the justification for its use; and

(ii) A detailed cost/price estimate and supporting rationale. If the approach is proposed on an incentive basis, minimum and maximum cost estimates should be included along with any proposed sharing arrangements.

(d) *Evaluation and Decision.* All CRPs must be submitted to and approved by the Contracting Officer. Included in the information provided by the CRP must be a discussion of the extent the proposed cost reduction effort may:

(1) Pose a risk to the health and safety of workers, the community, or to the environment;

(2) Result in a waiver or deviation from DOE requirements, such as DOE Orders and Joint oversight agreements;

(3) Require a change in other contractual agreements;

(4) Result in significant organizational and personnel impacts;

(5) Create a negative impact on the cost, schedule, or scope of work in another area;

(6) Pose a potential negative impact on the credibility of the Contractor or the DOE; and

(7) Impact successful and timely completion of any of the work in the cost, technical, and schedule baseline.

(e) *Acceptance or Rejection of CRPs.* Acceptance or rejection of a CRP is a unilateral determination made by the Contracting Officer. The Contracting Officer will notify the Contractor that a CRP has been accepted, rejected, or deferred within (Insert Number) days of receipt. The only CRPs that will be considered for acceptance are those which the Contractor can demonstrate, at a minimum, will:

(1) Result in net savings (in the sharing period if a design, process, or method change);

(2) Not reappear as costs in subsequent periods; and

(3) Not result in any impairment of essential functions.

(f) The failure of the Contracting Officer to notify the Contractor of the acceptance, rejection, or deferral of a CRP within the specified time shall not be construed as approval.

(g) *Adjustment to Original Estimated Cost and Fee.* If a CRP is established on a cost-plus-incentive-fee, fixed-price incentive or firm-fixed-price basis, the originally estimated cost and fee for the total effort shall be adjusted to remove the estimated cost and fee amount associated with the CRP effort.

(h) *Sharing Arrangement.* If a CRP is accepted, the Contractor may share in the shared net savings. For a CRP negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, with the specific incentive arrangement (negotiated target costs, target fees, share lines, ceilings, profit, etc.) set forth in the contractual document authorizing the effort, the Contractor's share shall be the actual fee or profit resulting from such an arrangement. For a CRP negotiated as a cost savings incentive resulting from a design, process, or method change, the Contractor's share shall be a percentage, not to exceed 25% of the shared net savings. The specific percentage and sharing period shall be set forth in the contractual document.

(i) *Validation of Shared Net Savings.* The Contracting Officer shall validate actual shared net savings. If actual shared net savings cannot be validated, the contractor will not be entitled to a share of the net shared savings.

(j) *Relationship to Other Incentives.* Only those benefits of an accepted CRP not rewardable under other clauses of this contract shall be rewarded under this clause.

(k) *Subcontracts.* The Contractor may include a clause similar to this clause in any subcontract. In calculating any estimated shared net savings in a CRP under this contract, the Contractor's administration, development, and implementation costs shall include any subcontractor's allowable costs, and any CRP incentive payments to a subcontractor resulting from the acceptance of such CRP. The Contractor may choose any arrangement for subcontractor CRP incentive payments, provided that the payments not reduce the DOE's share of shared net savings.

970.5204–88 Limitation on Fee.

As prescribed in 48 CFR 970.15404–4–11(d), insert the following provision:

Limitation on Fee (April 1999)

For the purpose of this solicitation, fee amounts shall not exceed the total available fee allowed by the fee policy at 48 CFR 970.15404–4 or as specifically stated elsewhere in the solicitation. The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit: fixed fee to not exceed an amount established pursuant to 48 CFR 970.15404–4–4; and total available fee to not exceed an amount established pursuant to 48 CFR 970.15404–4–8; or fixed fee or total available fee to an amount as specifically stated elsewhere in the solicitation.

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