(i) To CCC to satisfy the debtor's indebtedness including all costs associated with selling the collateral.

(ii) Payment to junior lien holders if approved by USDA's Office of the General Counsel and then to the borrower or other persons as determined appropriate by that office.

(4) For loans with nonmovable collateral, as determined by CCC, and no real estate lien, CCC may establish a claim according to 7 CFR part 1403.

(5) For loans secured with a real estate lien, CCC may obtain an appraisal of the property. Sales proceeds shall be distributed in the following order:

(i) To CCC to satisfy the debtor's indebtedness including all costs associated with selling the collateral and the appraisal.

(ii) To junior lien holders if approved by USDA's Office of the General Counsel; or

(iii) To the borrower or other persons as determined appropriate by that office.

(b) Assumption by another borrower of a farm storage facility loan is permitted subject to county committee approval and the subsequent borrower's ability to show a satisfactory credit history. An assumption of the loan may be approved when the collateral is sold by CCC to an otherwise eligible borrower, the current borrower will convey the collateral or property securing the loan to another eligible borrower, or the borrower is dead, incompetent, or missing and an eligible borrower wants to assume the loan.

(1) Requests for approval of assumptions shall be made to the county committee by the borrower, the borrower's successors, or representatives of the borrower. If approval is granted, the borrower's successors or representatives shall execute a new farm storage facility note and security agreement for the balance of the term of the loan.

(2) The principal amount of the loan shall include the unpaid amount of the loan, interest computed to the date of assumption, all past due installments, and any other charges that may be required.

(c) The borrower may voluntarily convey the collateral to CCC before repaying the loan. Before a borrower sells or conveys the facilities or other property securing a loan without repaying the loan in full, the borrower shall obtain approval for the sale or conveyance from the FSA county committee with the understanding that sale proceeds shall be paid to satisfy the borrowers indebtedness to CCC.

(d) Remedies provided for in this section shall, unless CCC determines otherwise, be subject to the administrative appeals provided for elsewhere in this part, including those that are found at § 1436.13.

§ 1436.17 Environmental compliance.

(a) Except as otherwise specified in this section, prior to approval of any farm storage facility loan, an environmental evaluation will be completed to determine if the proposed action will have any adverse impacts on the environment and cultural resources.

(b) If it is determined that a proposed action or group of proposed actions will not result in any adverse impact, the action will be considered as being categorically excluded for the purpose of compliance with the National Environmental Policy Act (NEPA), 40 CFR parts 1500–1508.

(c)(1) If adverse environmental impacts (either direct or indirect) are identified, an environmental assessment will be completed in accordance with the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA.

(2) The environmental assessment will be used to develop an action that results in no significant environmental impact on the human environment or cultural resources.

(3) No action will be approved that has been determined to have significant impacts on the human environment or cultural resources.

(d)(1) In order to minimize the exposure to environmental liabilities from the presence of contamination on real estate collateral, an evaluation will be made of the economic and environmental risks to the real estate collateral posed by the presence of hazardous substances and petroleum products.

(2) If the evaluation made under paragraph (d)(1) of this section reveals that the collateral is or may be contaminated, then the applicant will be notified and given an option of offering as collateral other real estate that is free from contamination or remediating the contamination on the original site offered as collateral.

§ 1436.18 Appeals.

The appeal, reconsideration, or review of all determinations made under this part, except for provisions for which there are no appeal rights because they are determined rules of general applicability, must be in accordance with parts 11 and 780 of this title.

Signed at Washington, DC, on January 10, 2001.

George Arredondo,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 01–1332 Filed 1–17–01; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF ENERGY

10 CFR Part 719

48 CFR Parts 931 and 970

RIN 1990–AA27

Contractor Legal Management Requirements; Department of Energy Acquisition Regulation

AGENCY: Department of Energy.

ACTION: Notice of final rulemaking.

SUMMARY: The Department of Energy (Department) is establishing new regulations covering contractor legal management requirements. Conforming amendments are also made to the Department of Energy Acquisition Regulation (DEAR). The new regulation covers legal costs to be reimbursed by the Department to its contractors at government owned or leased facilities with contracts exceeding $100,000,000. An Appendix to the regulation provides additional guidance to contractors.

EFFECTIVE DATE: This final rule is effective February 20, 2001.

FOR FURTHER INFORMATION CONTACT: Laura Fullerton at (202) 586–3420 (Laura.Fullerton@hq.doe.gov) or Anne Broker at (202) 586–5060 (Anne.Broker@hq.doe.gov).

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 the National Environmental Policy Act.
F. Review Under Executive Order 13132.
G. Review Under the Unfunded Mandates Reform Act of 1995.
H. Review Under the Treasury and General Government Appropriations Act of 1999.
I. Congressional Notification.

I. Background

This final rulemaking creates a new part 719, in Chapter 10 of the Code of Federal Regulations, establishing regulations to monitor and control legal costs and to provide guidance to aid contractors and Department personnel in making determinations regarding the

reasonableness of all outside legal costs, including the costs of litigation. This action finalizes the Notice of Proposed Rulemaking (NOPR) published October 25, 2000 (65 FR 63809). Today's rules cover all outside legal costs incurred by contractors with contracts exceeding $100,000,000 at facilities owned or leased by the Department. The policies also apply to legal counsel retained by the Department itself for litigation or other legal services where the legal costs over the life of the matter for which counsel has been retained are expected to exceed $100,000.

The regulation requires submission of a legal management plan by contractors where costs for legal services are to be reimbursed by the Department. Once approved by the Department, the legal management plan, as well as applicable regulations and contract provisions, forms the basis for approvals by the Department to reimburse litigation and other legal expenses. The cost principles and contract clauses in the Department's contracts generally make legal costs, including the cost of litigation, allowable if reasonable and incurred in accordance with the applicable cost principles and contract clauses.

The Department received some comments expressing concern about the potential waiver of attorney-client confidentiality privileges if contractors provide the type of information required under this rulemaking. The Department needs to receive information regarding contractor litigation in order to participate in strategy and to justify the reimbursement of the costs of litigation. Although it is true that attorney-client privilege can be waived by a disclosure of an otherwise confidential disclosure to a third party, there is an exception to this principle. The privilege is not waived when the nominal ''third party'' has a common interest with the client as to the subject matter of the communication. In the cases involving our contractors, the Department is contractually obligated, with few exceptions, to pay the contractors' litigation costs, as well as any judgment or settlements. In order to determine whether the costs are allowable and reasonable the Department needs to review the invoices, as well as budgets and staffing and resource plans. In addition, the Insurance—Litigation and claims clause provides that the Department can direct the defense of such litigation and provides for the collaboration between Department representatives and in-house or Department approved outside counsel. In order to provide guidance, the Department needs to be provided pleadings and other documents that deal with the strategy of the case.

In July 2000, the common interest privilege was upheld by the Supreme Court of Washington [1] in a case involving information provided to the Department by one of its contractors. The privilege was also recognized in a decision by the U.S. District Court for the District of New Mexico [2] which determined that a Litigation Plan is a privileged document and not subject to production.

An Appendix to the regulation provides additional ''safe harbor'' guidance for legal management practices. The guidance provided in the Appendix may be updated from time to time by the Department and those updates distributed to contractors, contracting officers and Department counsel.

Conforming technical amendments to the Department of Energy's Acquisition Regulation (DEAR), at 48 CFR Chapter 9, appear at the end of this notice of final rulemaking. Some changes have been made in the approach for these amendments.[3]

The proposal to add a clause to DEAR Part 952 and prescriptive language in Part 928 has been eliminated. Instead, prescriptive language has been added as Department coverage for the cost principle at 48 CFR 931.205–19, requiring the use of Insurance—Litigation and claims, 970.5228–1 (new citation) [970.5204–31 old citation], for contracts exceeding an amount of $100,000,000 involving work performed at a Department owned or leased site. Additionally, the language in the 48 CFR Part 970 clause, Insurance—Litigation and claims, 970.5228–1 (new citation) [970.5204–31 old citation], has been modified to permit use of that clause in non-M&O contracts now covered by 48 CFR 931.205–19. These changes involve only the elimination of references to DEAR Part 970 specific clauses and a substitution of generalized clause titles instead.

Department coverage for the Federal Acquisition Regulation (FAR) cost principle at FAR 31.205–33, Professional and consultant service costs, is added at DEAR 931.205–33(g) and DEAR 970.3102–05–33(g), to describe the applicability of 10 CFR Part 719 to M&O contracts, and to non-M&O contracts for an amount exceeding $100,000,000 involving work performed at facilities owned or leased by the Department, and for legal counsel retained directly by the Department for litigation or other legal matters.

Additionally, the language originally proposed to be inserted at subpart 970.71 has been revised and added to the contractor purchasing guidance contained at 970.5244–1 (new citation) [970.5204–22 old citation].

Contracting officers must apply these DEAR changes to solicitations issued on or after the effective date of this rule. Contracting officers may, at their discretion, include these DEAR changes in solicitations issued before the effective date of this rule, provided award of the resulting contract(s) occurs on or after the effective date.

Contracting officers must apply these DEAR changes: to contracts extended in accordance with the Department's extend/compete policies and procedures (48 CFR 917.6, 48 CFR 970.1702–1(a), and internal guidance); and to options exercised under competitively awarded management and operating contracts (48 CFR 970.1702–1(b)).

For management and operating contracts or other contracts already containing subparagraph (d)(4) of the Allowable costs clause, 970.5204–13, or 970.5204–14, or other reference to the Department's litigation management procedures and cost guidelines, these changes and the new 10 CFR part 719 are automatically applicable. These provisions address the allowability of reasonable legal costs incurred by contractors and include references to the Department's ''approval of the contractors litigation management procedures (including cost guidelines)'' and also include the caveat that ''such procedures may be revised from time to time.''

II. Disposition of Comments

General Comments

Comment: One commenter stated that the proposed rule duplicates existing litigation management and legal cost reporting requirements established by the Final Policy Statement, which addressed contractor litigation cost policies, terms of law firm engagement, and allowability of costs (''Policy Statement''), 65 FR 14763, (April 3, 1996) and therefore is unnecessary.

Response: One of the purposes of this rulemaking is to codify the legal

[1] *Brundridge, et al.* v. *Fluor Daniel, Inc., Fluor Daniel Hanford, Inc., Daniel Northwest, Inc.,* No. 69732–9, Ruling Denying Review, (Sup. Ct. Wash., 7/27/00).

[2] *Morrison Knudsen Corp.* v. *Ground Improvement Techniques, Inc., and Fireman's Fund Insurance Co.,* Order Denying Motion to Compel Discovery From the Department of Energy, Misc. No. 96–37 MV/LFG (D.N.M., 10/8/96).

[3] **Note:** The Department republished 48 CFR (DEAR) subpart 970 in a final rulemaking in the **Federal Register** on December 22, 2000 (65 FR 80994). This rulemaking action streamlined and reorganized DEAR subpart 970 and both the new and old citations for DEAR subpart 970 are provided for the convenience of the reader.

management and cost policies described in the Policy Statement and related requirements from diverse sources and locations and to standardize those requirements. This regulation consolidates requirements from earlier contract reform initiatives and the Policy Statement and replaces those requirements. The commenter argues that the information collection in the proposed rule corresponds to the information collections in the Policy Statement and the Department agrees.

Comment: One commenter took issue with the Notice of Proposed Rulemaking's estimate of 15–30 hours to prepare a litigation management plan and stated that it expended estimated 150 hours reviewing, revising, and altering a litigation management plan and its office practices.

Response: The commenter did not explain how many of the 150 hours were used in the preparation of the legal management plan and how many were used reviewing its office practices. Also, the commenter did not state whether this time was expended for an initial legal management plan or for a plan and a series of revisions over a period of time. The NOPR's estimate of 15–30 hours for the initial preparation of a legal management plan was based on information provided by a contractor who had a litigation management plan in place. The Department expects that the time necessary to prepare and implement a legal management plan will vary from contractor to contractor, but does not expect that 150 hours for preparation of an initial plan will be the norm. Nevertheless, the Department notes that the time spent preparing the legal management plan is ordinarily an allowable cost that is paid for by the government.

Comment: The commenter noted that under its current practices with the Department that the retention agreement for, and then the billings and invoices for, any litigation must be submitted to the Department for prior approval. The commenter asked whether the $25,000 threshold pertaining to engagement letters would now replace their current practice.

Response: When the requirements contained in this regulation are incorporated into a contract, already existing guidance and requirements is canceled for that individual contract, unless specifically retained and made a part of the revised plan.

Comment: Two commenters stated that the goal of controlling legal costs should be addressed by agency guidance documents rather than in a mandatory regulation. The commenters argue that codifying the requirements in a regulation reduces the flexibility necessary for effective legal representation.

Response: The Department recognizes the concerns behind this view and has revised the regulation to provide more flexibility in the final rulemaking than provided in the NOPR. For example, in instances where the contractor does not know enough about the case at the time of filing an answer, the filing deadline for the staffing and resource plan is extended to 30 days after a determination that the costs of the matter are expected to exceed $100,000. Also, since there was concern that a contractor might be penalized for failing to determine whether a matter was significant for purposes of the staffing and resource plan, language has been added requiring the contractor to consult with Department counsel and an explanation that the primary purpose of the plan is informational. Finally, the requirement for advance approval of certain costs, in § 719.35, has been changed to permit submission of a justification after the incurrence of the cost.

Comment: Two commenters requested further explanation of the Department's reasons for including non-litigation matters in the rulemaking.

Response: It came to the Department's attention that there were instances where contractors incurred significant legal fees for matters not involving litigation. Given the Department's interest in assuring that appropriate cost controls are in place for all major legal representation and the interest Congress has in the expenditure of appropriated funds for legal fees, we decided it was prudent to include legal services for all matters expected to exceed $100,000.

Section 719.2 Definitions

Comment: One commenter suggested that the phrase ''administrative expenses associated with the provision of legal services by retained counsel'' could be ambiguous and proposed a revised definition for the term ''legal costs'' that excludes that phrase.

Response: The definition of ''costs'' contained at 48 CFR (FAR) 31.205–47, Costs related to legal and other proceedings, includes ''administrative and clerical expenses'' and the Department sees no reason to deviate from the FAR standard.

Section 719.3 What Contracts Are Covered by This Part?

Comment: One commenter observed that the Final Policy Statement applied to only management and operating contracts and requested an explanation for the Department's extension of the application of the regulation beyond the scope of the existing Policy Statement.

Response: The Final Policy Statement applied only to legal costs incurred by management and operating (M&O) contractors. Today's rule applies to all cost-reimbursement contracts in excess of $100,000,000 involving work performed at DOE facilities, including contracts that are not M&O contracts. The Department has experienced resistance against application of the Policy Statement in a number of non-M&O contracts that involve facility and site management responsibilities where the litigation management and cost policies need to be applied. The legal management plan has been expanded beyond DEAR part 970, which contains the M&O contract provisions, to make it clear that this requirement applies to some non-M&O type contracts.

Section 719.6(a) Are There Any Types of Legal Matters Not Included in the Coverage of This Part?

Comment: Seven commenters recommended against extending the coverage of the legal management requirements to matters handled by insurance carriers providing third party administrator (TPA) services or retrospective policies, as provided in § 719.6(a) of the NOPR. Some of the commenters noted that the purpose of using TPA services is to purchase the expertise and administrative capabilities of insurance companies and that part of the expertise package provided by the insurance carrier is the retention, oversight and direction of an outside law firm with specialized experience and contacts. They also noted that one of the benefits is reduced legal fees because of business volume and the ongoing relationship between the insurance carrier and law firm.

Response: The comments provided insight and experience and are persuasive. Proposed § 719.6 has been revised by deleting the references to matters handled by insurance carriers providing third party administrator and retrospective policy services and by inserting a new subparagraph (c) that excludes routine workers compensation matters.

Section 719.10 What Information Must Be Included in the Legal Management Plan?

Comment: One commenter stated an opinion that the information requirements in this section are too intrusive in the contractor's counsel selection process by dictating that the contractors abide by these criteria as a prerequisite for allowability of its legal counsel costs.

Response: The provisions of this section do not make any costs unallowable. The purpose of this section is to require the contractor to submit a legal management plan with its own individualized list of criteria. The regulation provides a list of criteria or factors that the contractor must consider prior to making its selection of retained legal counsel and that the Department must consider in determining if the costs are reasonable and allowable. No costs are made unallowable merely for failure to address all of the recommended criteria.

Section 719.14 Will the Department Notify the Contractor Concerning the Adequacy or Inadequacy of the Submitted Plan?

Comment: One commenter stated that it was unclear whether the term ''deficiencies'' as used in § 719.14(a) referred to failure to comply with a requirement in § 719.10 or an objection from the Department concerning the substance of the plan. The commenter noted also that the proposed regulation fails to specify a route for appeal or a remedy for a dispute concerning a deficiency.

Response: The term ''deficiencies'' in this section refers to the failure of the legal management plan to meet the mandatory requirements of § 719.10 and this clarification has been added to § 719.14(a). Section 719.14(b) has been revised to provide for a letter of appeal to the General Counsel disputing a deficiency determination.

Section 719.17 Are There Any Budgetary Requirements?

Comment: Four commenters expressed concern that prospective budgets would be entirely speculative and that requiring contractors to speculate on budget needs would set them up for criticism in the event the budgeted amount is exceeded. One of these commenters recommended clarifying that only ''known or existing matters'' are intended to be included in the prospective budget.

Response: The prospective budget requirement is intended to serve only as an information device for the Department and the contractor, so that both have a better understanding of the contractor's awareness of its legal staffing needs and the contractor's ability to estimate based on its experience. Clarifying language has been added in paragraph § 719.17(a) that the annual budget requirement covers only pending matters, and in § 719.17(c) to state that the purpose of the budget requirement is primarily informational and that the Department recognizes that there will be departures from the budget beyond the control of the contractor.

Comment: One commenter stated that the budget requirements of § 719.17(b) duplicate the staffing and resource plan requirements of § 719.16.

Response: No budgetary information is required in § 719.16. As defined in § 719.2, staffing and resource plan means a statement prepared by retained legal counsel describing plans for managing a significant matter. The budget described in § 719.17 is prepared by the contractor.

Section 719.20 When Must an Engagement Letter Be Used?

Comment: One commenter sought clarification whether the term ''matters'' meant particular, individual matters or all matters handled by an individual law firm.

Response: Section 719.20 has been modified by adding the phrase ''for a particular matter'' to make clear that as used in this section, the term ''matter'' refers to particular, individual matters handled by a law firm and not to a cumulative amount of matters handled by a particular firm.

Section 719.21 What Are the Required Elements of an Engagement Letter?

Comment: One commenter recommended a modification to allow both retained legal counsel and contractor counsel the flexibility to communicate material concerning the case in a manner that serves the Department's needs without creating risk of waiving any attorney-client confidentiality privilege.

Response: Section 719.21(b)(2) has been modified by adding language that an exemption for specific records may be obtained where contractors can demonstrate that a particular situation may provide grounds for a waiver. This change is intended to make clear that in instances when the contractor has demonstrated that production of specific documents may provide grounds for waiver of the attorney-client privilege, that material may be withheld.

Section 719.31 How Does the Department Determine Whether Fees Are Reasonable?

Comment: One commenter inquired whether the phrase ''lowest reasonably achievable fees or rates'' as used in 719.31(a) is intended to include consideration of the terms of engagement, § 719.21, and reimbursement guidance, subpart D, in the proposed rule.

Response: The phrase ''lowest reasonably achievable fees or rates'' is to be applied with due consideration for the individual circumstances of each situation, including the overall terms of engagement between the contractor and retained legal counsel, and the guidance found throughout part 719.

Comment: Another commenter asked how the Department will treat legal services obtained by a contractor which do not meet all the criteria in § 719.31 and whether the Department will pay at the rate it deems reasonable and allow the contractor to pay the difference if the contractor elects to use an attorney whose rates are determined to not be the lowest price available.

Response: The Department anticipates that there will be circumstances which do not meet all the criteria in this section. The Department will reimburse the amount that it determines to be allowable and reasonable. It is not the intent of this regulation to select legal representation for contractors, to limit the choice of legal representation available to the contractor, or prevent the contractor from engaging any particular attorney or firm. The purpose of this regulation is to outline the Department's approach to evaluating the reasonableness of costs associated with legal representation for purposes of determining legal cost reimbursement. Contractors may elect to deviate from the regulation but they run the substantial risk that the Department will determine costs that do not conform to the regulation to be unreasonable. Contractors are responsible alone for costs that are deemed unreasonable under part 719. This approach allows the contractor, for example, to pay the difference if the contractor wishes to retain the services of an attorney whose fees are higher than that deemed reasonable under part 719.

Section 719.35 What Categories of Costs Require Advance Approval?

Comment: Five commenters objected to requiring advance approval from Department counsel for attendance by more than one person at a deposition, court hearing, interview or meeting. One of these commenters also enquired whether this requirement is meant to include impromptu meetings or routine meetings between partners and associates. Two of these commenters also noted that quick turn around times often occur with litigation and recommended more flexibility in the system, such as a presumption of approval after a certain waiting time, exception process or pre-approval mechanism.

Response: These concerns have been addressed by adding language to § 719.35 to permit the contractor to

submit a justification following the incurrence of the cost. The Department has not changed the language in § 719.35(d) covering attendance by more than one person at a deposition, court hearing, interview or meeting. If the contractor decides to have more than one person attend a meeting, justification for attendance of more than one person may be provided following the incurrence of that cost. This is the procedure the contractor should follow for impromptu and routine meetings.

Comment: Two commenters stated that the proposed requirement for advance approval for costs for items listed in this section creates cost allowability rules which are not consistent with current FAR cost allowability rules since the Federal Acquisition Regulation (FAR) does not contain specific advance approval requirements.

Response: This section of the final rule effectively puts contractors on advance notice that the contractors must demonstrate the reasonableness of certain listed costs. Contracting officers can require the contractor to demonstrate the reasonableness of a cost by questioning the cost. The Federal Acquisition Regulation already states, at 48 CFR (FAR) 31.201–3, that no presumption of reasonableness is attached to the incurrence of costs by a contractor. In accordance with 48 CFR (FAR) 31.201–3, the contracting officer shifts the burden of proof to the contractor when the reasonableness of the cost is questioned. Section 719.35 automatically invokes this process for the listed costs.

Section 719.37 Are There Any Special Procedures or Requirements Regarding Subcontractor Legal Costs?

Comment: One commenter viewed § 719.37(b) as subjecting subcontractors to the same set of requirements imposed on prime contractors while two commenters stated that this proposal is unworkable and unmanageable.

Response: The Department agrees that, as proposed, this section could be read in a manner that would make it somewhat unworkable and this section has been revised to require the contractor submit to Department counsel information copies of subcontractor invoices for legal services.

Section 719.39 What Happens When More Than One Contractor Is a Party to a Matter?

Comment: Two commenters stated that it is unreasonable to expect contractors and their retained legal counsel to waive ethical conflict issues which are created by the lead lawyer requirement.

Response: The Department has already provided for exceptions for situations where an ethical conflict arises, including an exception for situations where there are conflicts with the standards of professional conduct (§ 719.39(a)), and an opportunity for the contractor to demonstrate the reasonableness of its decision (§ 719.39(b)).

Comment: Another commenter recommended the section be modified to give Department counsel the authority to approve joint or lead counsel recommended by the parties and to designate directly only in those situations where recommended counsel is unacceptable or the contractors cannot agree on a choice.

Response: It is not the intent of the regulation to circumscribe the contractors' choice of counsel but to eliminate duplicative billings for identical legal services, particularly where the issues involved are similar for the contractors involved. The language in this section has been modified to permit contractors to propose their preference for the attorney or law firm to serve as lead counsel.

Comment: Two of the commenters interpreted this provision as making expressly unallowable legal costs incurred by a contractor who hires different counsel than the designated lead counsel.

Response: As stated earlier in this rulemaking, every situation will be reviewed on an individual basis. Reasonable costs will be reimbursed where the contractor can demonstrate the reasonableness of its decision to engage additional counsel based on contractor interests that diverge from those represented by lead counsel.

III. Procedural Requirements

A. Review Under Executive Order 12866

Today's 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 final rule 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; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by section 3(a), 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. The Department has completed the required review and determined that, to the extent permitted by law, the regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, requires that a federal agency prepare a regulatory flexibility analysis for any rule for which the agency is required to publish a general notice of proposed rulemaking. Such an analysis is not required, however, if the agency certifies that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

The Department certifies that today's final rule creating a new part 10 CFR part 719 does not have a significant economic impact on a substantial number of small entities. This rule only restates and clarifies the Department's restrictions on the reimbursement of contractor legal costs. The rule affects only potential claims for reimbursement of costs. The rule does not directly regulate small entities.

D. Review Under the Paperwork Reduction Act

The final rule requires each covered contractor to submit a legal management

plan that describes the contractor's practices for managing legal costs and matters for which it procures the services of retained legal counsel. This collection of information is required for the Department to determine whether to approve reimbursement of contractors' litigation and other legal expenses.

The Department submitted to the Office of Management and Budget (OMB) this collection of information for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Office of Management and Budget has not yet approved the collection of information in this rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by OMB.

E. Review Under the National Environmental Policy Act

The Department has concluded that promulgation of this final rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by Department of Energy regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this final rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this final rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999) requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have ''federalism implications.'' As defined in the Executive Order, policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Department has examined this final rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. 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 affects private sector entities, and the impact is less than $100 million.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub.L 105–277) requires federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's rule does not impact on the autonomy or integrity of the family institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Statement.

I. Congressional Notification

As required by 5 U.S.C. 801, the Department will report to Congress promulgation of this final 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(2).

List of Subjects

10 CFR Part 719

Government contracts, Legal services, Reportintg and recordkeeping requirements.

48 CFR Parts 931 and 970

Government procurement.

Issued in Washington, DC on January 3, 2001.

T.J. Glauthier,

Deputy Secretary, Department of Energy.

For the reasons set out in the preamble, Chapter III of title10 and Chapter 9 of title 48 of the Code of Federal Regulations is amended as set forth below:

1. 10 CFR Part 719 is added to read as follows:

PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS

Subpart A—General Provisions

719.1 What is the purpose of this part?
719.2 What are the definitions of terms used in this part?
719.3 What contracts are covered by this part?
719.4 Are law firms that are retained by the Department covered by this part?
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Appendix to Part 719—Guidance for Legal Resource Management

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

Subpart A—General Provisions

§ 719.1 What is the purpose of this part?

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

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

For purposes of this part:

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

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

Covered contracts means those contracts described in § 719.3.

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

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

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

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

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

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

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

§ 719.3 What contracts are covered by this part?

(a) This part covers cost reimbursement contracts:

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

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

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

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

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

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

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

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

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

§ 719.5 What contracts are not covered by this part?

This part does not cover:

(a) Fixed price contracts;

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

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

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

Matters not covered by this part include:

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

(b) Routine intellectual property law support services;

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

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

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

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

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

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

Subpart B—Legal Management Plan

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

The legal management plan must include the following items:

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

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

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

(1) Competition;

(2) Past performance and proficiency shown by previously retained counsel;

(3) Particular expertise in a specific area of the law;

(4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;

(5) Location of retained legal counsel relative to:

(i) The site involved in the matter,

(ii) Any forum in which the matter will be processed, and

(iii) Where a significant portion of the work will be performed;

(6) Experience as an advocate in alternative dispute resolution procedures such as mediation;

(7) Actual or potential conflicts of interest; and

(8) The means and rate of compensation (*e.g.,* hourly billing, fixed fee, blended fees, etc.).

(d) A description of:

(1) The system that the contractor will use to review each case to determine whether and when alternative dispute resolution is appropriate;

(2) The role of in house counsel in cost management;

(3) The contractor's process for review and approval of invoices from outside law firms or consultants;

(4) The contractor's strategy for interaction with, and supervision of, retained legal counsel;

(5) How appropriate interaction with the contracting officer and Department counsel will be ensured; and,

(6) The contractor's corporate approach to legal decision making.

§ 719.11 Who must submit a legal management plan?

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

§ 719.12 When must the plan be submitted?

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

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

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

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

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

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

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

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

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

(1) Major phases likely to be involved in the handling of the matter;

(2) Timing and sequence of such phases;

(3) Projected cost for each phase of the representation; and

(4) Numbers and mix of resources, when applicable, that the retained legal counsel intends to devote to the representation.

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

(1) Matter assessment, development and administration;

(2) Pretrial pleadings and motions;

(3) Discovery;

(4) Trial preparation and trial; and

(5) Appeal.

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

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

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

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

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

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

§ 719.17 Are there any budgetary requirements?

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

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

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

Subpart C—Engagement Letters

§ 719.20 When must an engagement letter be used?

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

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

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

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

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

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

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

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

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

(1) Identification of all attorneys and staff who are assigned to the matter and

the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.

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

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

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

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

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

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

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

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

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

Subpart D—Reimbursement of Costs Subject to This Part

§ 719.30 Is there a standard for determining cost reasonableness?

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

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

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

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

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

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

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

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

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

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

§ 719.33 What categories of costs are unallowable?

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

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

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

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

§ 719.34 What is the treatment for travel costs?

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

§ 719.35 What categories of costs require advance approval?

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

(a) Computers or general application software, or non-routine computerized databases specifically created for a particular matter;

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

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

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

(e) Expert witnesses and consultants;

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

(g) Professional or educational seminars and conferences;

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

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

(j) Pro hac vice admissions.

§ 719.36 Who at the Department must give advance approval?

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

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

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

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

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

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

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

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

(b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal

counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor persuasively shows that it was reasonable for the contractor to incur such expenses.

Subpart E—Department Counsel Requirements

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

(a) The individual selected as Department counsel for a contract subject to the requirements of this part must be approved by the contracting officer and the appropriate Chief Counsel, or General Counsel if at Headquarters. The Department counsel must receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters. The contractor must receive a copy of this delegation of authority.

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

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

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

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

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

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

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

Appendix to Part 719—Guidance for Legal Resource Management

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

Management and Administration of Outside Legal Services

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

1.0 Initiation of Litigation

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

(1) Identification of the proposed parties;

(2) The nature of the proposed action;

(3) Relief sought;

(4) Venue;

(5) Proposed representation and reason for selection;

(6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;

(7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;

(8) Whether, for any reason, the contractor will assume any part of the costs of the action;

(9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and

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

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

2.0 Defense of Litigation

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

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

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

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

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

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

2.1 Disapproval of Defensive Litigation

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

3.0 Notice to the Department of Significant Matters and Litigation

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

4.0 Alternative Dispute Resolution

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, *e.g.*, before a case is filed, pre-discovery, after initial discovery and pre-trial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or the Department counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department counsel are also encouraged to consult with the Department's Director of the

Office of Dispute Resolution. The Department anticipates that mediation will be the principal and most common method of alternative dispute resolution. In exceptional circumstances, arbitration may be appropriate. However, agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, *et seq.*) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

5.0 Cost Allowability Issues

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

5.1 Underlying Cause for Incurrence of Costs

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

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

5.2 Fees and Other Charges

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

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

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

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

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

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

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

7.0 Future Amendments to Guidance

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

Attachment—Contractor Litigation and Legal Costs, Model Bill Certification and Format

1. Certification

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

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

2. Model Bill Format

I.—FOR FEES

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

II.—FOR DISBURSEMENTS

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

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

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

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

2. The authority citation for Part 931 continues to read as follows:

Authority: 42 U.S.C. 7101, *et seq.*; 40 U.S.C. 486(c); 50 U.S.C. 2401, *et seq.*; 42 U.S.C. 2201.

PART 931—COST PRINCIPLES

3. Section 931.205–19 is added to read as follows:

931.205–19 Insurance and Indemnification. (Department coverage-paragraph (h)).

(h) Cost reimbursement contracts involving work performed at facilities owned or leased by the Department for an amount exceeding $100,000,000 must insert the clause at 48 CFR 970.5228–1, Insurance-Litigation and claims.

4. Section 931.205–33 is added to read as follows:

931.205–33 Professional and consultant service costs. (Department coverage-paragraph (g)).

(g)(1) Reasonable litigation and other legal expenses are allowable when incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements, if not otherwise made unallowable by law or provisions of the contract.

(2)(A) Cost reimbursement contracts involving work performed at facilities owned or leased by the Department for an amount exceeding $100,000,000 are covered by this cost principle and 10 CFR part 719.

(B) This cost principle and 10 CFR part 719 are applicable to legal counsel retained by the Department itself for litigation and other legal services where the legal costs over the life of the matter for which counsel has been retained are expected to exceed $100,000.

(3) Contractors described in paragraph (g)(2)(A) of this section are required to submit a Legal Management Plan within 60 days of execution of a contract.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

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

Authority: Atomic Energy Act of 1954 (42 U.S.C. 2201); Department of Energy Organization Act (42 U.S.C. 7101, *et seq.*); and National Nuclear Security Administration Act (50 U.S.C. 2401, *et seq.*)

6. Section 970.3102–05–33 is added to read as follows:

970.3102–05–33 Professional and consultant service costs. (Department coverage-paragraph (g)).

(g) Section 931.205–33 is applicable to management and operating contracts under this part.

7. Section 970.5228–1 is amended by:

a. revising clause paragraph (e)(2),

b. revising the introcutory text of clause paragraph (h),

c. revising clause paragraph (j)(4), and

d. removing clause paragraph (m).

The revisions read as follows:

970.5228–1 Insurance—litigation and claims.

* * * * *

(e) * * *

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or limitation of funds clause of this contract.

* * * * *

(h) In addition to the cost reimbursement limitations contained in the cost principles at FAR part 31, as supplemented in the DEAR, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons, including employees but excluding costs incidental to workers' compensation actions (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements), shall not be reimbursed if such liabilities were caused by contractor managerial personnel's * * *.

* * * * *

(j) * * *

(4) The term ''contractor's managerial personnel'' is defined in the Property clause in this contract.

* * * * *

8. Section 970.5244–1 is amended by revising the reference to ''paragraphs (b) through (x)'' in the last sentence of clause paragraph (a) to read ''paragraphs (b) through (y)'' and by adding clause paragraph (y) to read as follows:

970.5244–1 Contractor purchasing system.

* * * * *

(y) Legal Services. Contractor purchases of litigation and other legal services are subject to the requirements in 10 CFR part 719 and the requirements of this clause.

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DEPARTMENT OF ENERGY

10 CFR Parts 1040 and 1042

RIN: 1901–AA87

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: This final rule adds a new part to the Code of Federal Regulations to replace existing Department of Energy (DOE) regulations for the enforcement of Title IX of the Education Amendments of 1972, as amended (''Title IX''). Title IX prohibits recipients of Federal financial assistance from discriminating on the basis of sex in education programs or activities. The provisions of this final rule are the same as a common rule published by the Department of Justice on August 30, 2000, for Federal agencies that did not already have Title IX implementing regulations. DOE adopts the provisions of the common rule in order to promote consistent and adequate enforcement of Title IX.

EFFECTIVE DATE: February 20, 2001.

FOR FURTHER INFORMATION CONTACT: Sharon Wyatt, Paralegal Specialist, Office of Civil Rights and Diversity, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20285. Telephone: (202) 586–2256.

SUPPLEMENTARY INFORMATION:

I. Background

On June 13, 1980, DOE published a final rule (10 CFR part 1040) to implement various nondiscrimination statutes, including Title IX of the Education Amendments of 1972. 45 FR 40514. DOE's Title IX regulations, which prohibit discrimination on the basis of sex in educational programs or activities operated by recipients of