

or former GSA employee(s). In proceedings in which GSA, its current or former employees, or the United States are represented by DOJ, the determination shall be coordinated with DOJ which may respond to the issuer of the subpoenas or demand in lieu of the Appropriate Authority.

§ 105-60.606 Procedure where response to demand is required prior to receiving instructions.

(a) If a response to a demand is required before the Appropriate Authority's decision is issued, a GSA attorney designated by the Appropriate Authority for the purpose shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the judicial or other authority with a copy of the instructions contained in this subpart. The attorney shall inform the court or other authority that the demand has been or is being referred for the prompt consideration by the Appropriate Authority. The attorney shall respectfully request the judicial or administrative authority to stay the demand pending receipt of the requested instructions.

(b) The designated GSA attorney shall coordinate GSA's response with DOJ's Civil Division or the relevant Office of the United States Attorney and may request that a DOJ or Assistant United States Attorney appear with the employee in addition to or in lieu of a designated GSA attorney.

(c) If an immediate demand for production or disclosure is made in circumstances which preclude the appearance of a GSA or DOJ attorney on the behalf of the employee or the former employee, the employee or former employee shall respectfully make a request to the demanding authority for sufficient time to obtain advice of counsel.

§ 105-60.607 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 105-60.606 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions by the Appropriate Authority not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply, citing these instructions and the decision of the United States Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 105-60.608 Fees, expenses, and costs.

(a) In consultation with the Appropriate Authority, a current employee who appears as a witness pursuant to a demand shall ensure that he or she receives all fees and expenses, including travel expenses, to which witnesses are entitled pursuant to rules applicable to the judicial or administrative proceedings out of which the demand arose.

(b) Witness fees and reimbursement for expenses received by a GSA employee shall be disposed of in accordance with rules applicable to Federal employees in effect at the time.

(c) Reimbursement to the GSA for costs associated with producing material pursuant to a demand shall be determined in accordance with rules applicable to the proceedings out of which the demand arose.

Dated: October 13, 1998.

David J. Barram,

Administrator.

[FR Doc. 98-28180 Filed 10-22-98; 8:45 am]

BILLING CODE 6820-34-M

DEPARTMENT OF ENERGY

48 CFR Parts 903, 915, 916, 919, 935, and 970

RIN 1991-AB40

Acquisition Regulation; Technical and Administrative Amendments

AGENCY: Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is amending the Department of Energy Acquisition Regulation (DEAR) to make technical and administrative changes to the regulation. These changes include: adding definitions to identify those Department personnel subject to certain Procurement Integrity restrictions; renumbering and updating certain parts of the regulation to conform with recent Federal Acquisition Regulation (FAR) changes; correcting typographical errors; and, removing obsolete coverage. These changes are technical and administrative in nature and have no significant impact on non-agency persons such as contractors or offerors.

EFFECTIVE DATE: This final rule will be effective November 23, 1998.

FOR FURTHER INFORMATION CONTACT: Kevin M. Smith, Office of Procurement and Assistance Policy (HR-51), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, telephone 202-586-8189.

SUPPLEMENTARY INFORMATION:

- I. Explanation of Revisions
- II. Procedural Requirements
 - A. Review Under Executive Order 12612
 - B. Review Under Executive Order 12866
 - C. Review Under Executive Order 12988
 - D. Review Under the National Environmental Policy Act
 - E. Review Under the Paperwork Reduction Act
 - F. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996
 - G. Review Under the Unfunded Mandates Reform Act of 1995
 - H. Review Under the Office of Federal Procurement Policy Act

I. Explanation of Revisions

1. Definitions are added to subsection 903.104-3 to implement the Federal Acquisition Regulation (FAR) at section 3.104-1, which provides for the use of agency specific definitions to identify government individuals who occupy positions subject to the post-employment restrictions under the Procurement Integrity Act (41 U.S.C. 423). After the Procurement Integrity Act was revised in January 1997, the Department issued interim administrative guidance for identifying its personnel who were subject to the post-employment restrictions. Those definitions are now being incorporated into the acquisition regulation.

Definitions are added for Departmental personnel who are Program Managers and Deputy Program Managers for certain systems acquired through the acquisition process. The definition for Deputy Program Manager makes a distinction between individuals who normally act for the Program Manager and individuals who occasionally act for the Program Manager (e.g., a Deputy Program Manager is the person who makes program decisions for the Program Manager on a regular basis during the Program Manager's absence. A person who is acting for the Program Manager or the Deputy Program Manager on an intermittent basis, and does not make program decisions, is not a Program Manager or Deputy Program Manager.) Each program will have only one Program Manager and one Deputy Program Manager.

The Department is developing internal guidance to assist its personnel in determining whether they are covered by the definitions. That guidance will provide for specific identification for individuals who are affected, and for their notification. However, individuals who perform the functions described in this regulation are subject to the post-employment restrictions even if they do not receive

the specific notification. The notification supplements the constructive notice given by this regulation. In addition, the head of an organization may be deemed to be a Program Manager for programs under his or her purview in the event of failure to name an employee to fill a position which meets the definition of Program Manager.

2. Part 915 and associated sections in Subpart 970.15 are revised to conform with the recent FAR Part 15 rewrite which addressed contracting by negotiation. The FAR rewrite simplified the acquisition process, made changes in pricing and unsolicited proposal policy, facilitated the acquisition of best value products and services, and revised the sequence in which the information was presented to facilitate use of the regulation. The following crosswalk reflects the DEAR numbering changes made within Part 915 and Subpart 970.15 to conform with the FAR revisions:

Former DEAR cite	New DEAR cite
915.4	915.2.
915.401	915.200.
915.405-1	915.201.
915.413	deleted.
915.413-2	deleted.
915.5	915.6.
915.502	915.602.
915.503	915.603.
915.505	915.605.
915.506	915.606.
915.507	915.607.
915.509	deleted.
915.8	915.4.
915.804-1	deleted.
915.804-6	deleted.
915.805-5	915.404-2.
915.805-70	915.404-2-70.
915.806-2	deleted.
915.9	915.404-4.
915.903	915.404-4(c).
915.905	915.404-4(d).
915.970	915.404-4-70.
915.970-1	915.404-4-70-1.
915.970-2	915.404-4-70-2.
915.970-3	915.404-4-70-3.
915.970-4	915.404-4-70-4.
915.970-5	915.404-4-70-5.
915.970-6	915.404-4-70-6.
915.970-7	915.404-4-70-7.
915.970-8	915.404-4-70-8.
915.971	915.404-4-71.
915.971-1	915.404-4-71-1.
915.971-2	915.404-4-71-2.
915.971-3	915.404-4-71-3.
915.971-4	915.404-4-71-4.
915.971-5	915.404-4-71-5.
915.971-6	915.404-4-71-6.
915.972	915.404-4-72.
970.1507	970.15407-2.
970.1507-1	970.15407-2-1.
970.1507-2	970.15407-2-2.
970.1507-3	970.15407-2-3.
970.1508	970.15405.

Former DEAR cite	New DEAR cite
970.1508-1	970.15406-2.
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.

3. The heading, Indefinite-Delivery Contracts, which was previously omitted, is added to Subpart 916.5.

4. Part 919 is amended to conform to a previous change made to the regulation that eliminated DEAR subpart 915.6, and to correct a typographical error in a Code of Federal Regulation citation.

5. Section 935.016, Research opportunity announcements, is removed. This policy, which supplemented FAR coverage for broad agency announcements, is no longer used by the Department. The broad agency announcement policies and procedures of the FAR are being used by DOE.

6. Other sections of Part 970 also are revised to conform to recent FAR numbering changes. In addition, section 970.5202, Deviations, is revised to conform to a previous change made to the regulation that eliminated DEAR Subpart 901.4.

7. Subsection 970.5204-22 has been updated to conform bonding requirements to those at FAR 28.102-1.

II. Procedural Requirements

A. 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. DOE has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

B. 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).

C. 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), 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 regulations meet the relevant standards of Executive Order 12988.

D. 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), DOE has determined that this rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

E. Review Under the Paperwork Reduction Act

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

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

As required by 5 U.S.C. 801, DOE 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).

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

H. Review Under the Office of Federal Procurement Policy Act

The Office of Federal Procurement Policy Act authorizes publication of a final rule without prior opportunity for public comment if there are no significant impacts on non-agency persons such as contractors or offerors (41 U.S.C. 418b). This rule will not have significant impacts on non-agency persons, and accordingly DOE decided not to issue it as a proposal for public comment.

List of Subjects in 48 CFR Parts 903, 915, 916, 919, 935 and 970

Government procurement.

Issued in Washington, D.C., on October 14, 1998.

Richard H. Hopf,

Deputy Assistant Secretary for 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.

1. The authority citation for Parts 903, 916, 919, and 935 continues to read as follows:

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

PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST [AMENDED]

2. Subsection 903.104-3 is added as follows:

903.104-3 Definitions.

As used in this section and for the purposes of the post-employment restrictions at 48 CFR (FAR) 3.104-4(d)—

Deputy program manager means the individual within DOE who normally acts as the program manager in the absence of the program manager, and does not mean an individual who occasionally acts for the program manager or the deputy program manager.

Program manager means the individual within DOE who:

(1) Exercises authority on a day-to-day basis to manage an acquisition program—

(i) For a system attained through the acquisition process; and

(ii) With one or more contracts, at least one of which has a value exceeding \$10,000,000; and

(2) Is generally the person at the lowest organizational level who has authority to make technical and budgetary decisions on behalf of DOE.

System means a combination of elements that function together to produce the capabilities required to fulfill a mission need, including, but not limited to hardware, equipment, software, or any combination thereof.

PART 915—CONTRACTING BY NEGOTIATION [REVISED]

3. Part 915 is revised to read as follows:

PART 915—CONTRACTING BY NEGOTIATION

Subpart 915.2—Solicitation and Receipt of Proposals and Information

- 915.200 Scope of subpart.
915.201 Exchanges with industry before receipt of proposals.
915.207-70 Handling of proposals during evaluation.

Subpart 915.3—Source Selection

- 915.305 Proposal evaluation.

Subpart 915.4—Contract Pricing

- 915.404-2 Information to support proposal analysis.
915.404-2-70 Audit as an aid in proposal analysis.
915.404-4 Profit.
915.404-4-70 DOE structured profit and fee system.
915.404-4-70-1 General.
915.404-70-2 Weighted guidelines system.
915.404-4-70-3 Documentation.

- 915.404-4-70-4 Exceptions.
915.404-4-70-5 Special considerations—contracts with nonprofit organizations (other than educational institutions).
915.404-4-70-6 Contracts with educational institutions.
915.404-4-70-7 Alternative techniques.
915.404-4-70-8 Weighted guidelines application considerations.
915.404-4-71 Profit and fee-system for construction and construction management contracts.
915.404-4-71-1 General.
915.404-4-71-2 Limitations.
915.404-4-71-3 Factors for determining fees.
915.404-4-71-4 Considerations affecting fee amounts.
915.404-4-71-5 Fee schedules.
915.404-4-71-6 Fee base.
915.404-4-72 Special considerations for cost-plus-award-fee contracts.

Subpart 915.6—Unsolicited Proposals

- 915.602 Policy.
915.603 General.
915.605 Content of unsolicited proposals.
915.606 Agency procedures.
915.607 Criteria for acceptance of an unsolicited proposal.

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

Subpart 915.2—Solicitation and Receipt of Proposals and Information

915.200 Scope of subpart.

FAR 15.2 is not applicable to Program Opportunity Notices (See 48 CFR 917.72) or Program Research and Development Announcements (See 48 CFR 917.73).

915.201 Exchanges with industry before receipt of proposals. (DOE coverage-paragraph (e)).

(e) Approval for the use of solicitations for information or planning purposes shall be obtained from the Head of the Contracting Activity.

915.207-70 Handling of proposals during evaluation

(a) Proposals furnished to the Government are to be used for evaluation purposes only. Disclosure outside the Government for evaluation is permitted only to the extent authorized by, and in accordance with, the procedures in this subsection.

(b) While the Government's limited use of proposals does not require that the proposal bear a restrictive notice, proposers should, if they desire to maximize protection of their trade secrets or confidential or privileged commercial and financial information contained in them, apply the restrictive notice prescribed in paragraph (e) of the provision at 48 CFR 52.215-1 to such information. In any event, information contained in proposals will be protected to the extent permitted by law, but the Government assumes no liability for the use or disclosure of information (data)

not made subject to such notice in accordance with paragraph (e) of the provision at 48 CFR 52.215-1.

(c) If proposals are received with more restrictive conditions than those in paragraph (e) of the provision at 48 CFR 52.215-1, the contracting officer or coordinating officer shall inquire whether the submitter is willing to accept the conditions of paragraph (e). If the submitter does not, the contracting officer or coordinating officer shall, after consultation with counsel, either return the proposal or accept it as marked. Contracting officers shall not exclude from consideration any proposals merely because they contain an authorized or agreed to notice, nor shall they be prejudiced by such notice.

(d) Release of proposal information (data) before decision as to the award of a contract, or the transfer of valuable and sensitive information between competing offerors during the competitive phase of the acquisition process, would seriously disrupt the Government's decision-making process and undermine the integrity of the competitive acquisition process, thus adversely affecting the Government's ability to solicit competitive proposals and award a contract which would best meet the Government's needs and serve the public interest. Therefore, to the extent permitted by law, none of the information (data) contained in proposals, except as authorized in this subsection, is to be disclosed outside the Government before the Government's decision as to the award of a contract. In the event an outside evaluation is to be obtained, it shall be only to the extent authorized by, and in accordance with the procedures of, this subsection.

(e)(1) In order to maintain the integrity of the procurement process and to assure that the propriety of proposals will be respected, contracting officers shall assure that the following notice is affixed to each solicited proposal prior to distribution for evaluation:

Government Notice for Handling Proposals

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, the procedures in DEAR subsection 915.207-70.

(End of Notice)

(2) The notice at FAR 15.609(d) for unsolicited proposals shall be affixed to a cover sheet attached to each such

proposal upon receipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

(f)(1) Normally, evaluations of proposals shall be performed only by employees of the Department of Energy. As used in this section, "proposals" includes the offers in response to requests for proposals, sealed bids, program opportunity announcements, program research and development announcements, or any other method of solicitation where the review of proposals or bids is to be performed by other than peer review. In certain cases, in order to gain necessary expertise, employees of other agencies may be used in instances in which they will be available and committed during the period of evaluation. Evaluators or advisors who are not Federal employees, including employees of DOE management and operating contractors, may be used where necessary. Where such non-Federal employees are used as evaluators, they may only participate as members of technical evaluation committees. They may not serve as members of the Source Evaluation Board or equivalent board or committee.

(2)(i) Pursuant to section 6002 of Pub. L. 103-355, a determination is required for every competitive procurement as to whether sufficient DOE personnel with the necessary training and capabilities are available to evaluate the proposals that will be received. This determination, discussed at FAR 37.204, shall be made in the memorandum appointing the technical evaluation committee by the Source Selection Official, in the case of Source Evaluation Board procurements, or by the Contracting Officer in all other procurements.

(ii) Where it is determined such qualified personnel are not available within DOE but are available from other Federal agencies, a determination to that effect shall be made by the same officials in the same memorandum. Should such qualified personnel not be available, a determination to use non-Federal evaluators or advisors must be made in accordance with paragraph (f)(3) of this subsection.

(3) The decision to employ non-Federal evaluators or advisors, including employees of DOE management and operating contractors, in Source Evaluation Board procurements must be made by the Source Selection Official with the concurrence of the Head of the Contracting Activity. In all other procurements, the decision shall be made by the senior program official or

designee with the concurrence of the Head of the Contracting Activity. In a case where multiple solicitations are part of a single program and would call for the same resources for evaluation, a class determination to use non-Federal evaluators may be made by the DOE Procurement Executive.

(4) Where such non-Federal evaluators or advisors are to be used, the solicitation shall contain a provision informing prospective offerors that non-Federal personnel may be used in the evaluation of proposals.

(5) The nondisclosure agreement as it appears in paragraph (f)(6) of this subsection shall be signed before DOE furnishes a copy of the proposal to non-Federal evaluators or advisors, and care should be taken that the required handling notice described in paragraph (e) of this subsection is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator or advisor. In all instances, such persons will be required to comply with nondisclosure of information requirements and requirements involving Procurement Integrity, see FAR 3.104; with requirements to prevent the potential for personal conflicts of interest; or, where a non-Federal evaluator or advisor is acquired under a contract with an entity other than the individual, with requirements to prevent the potential for organizational conflicts of interest.

(6) Non-Federal evaluators or advisors shall be required to sign the following agreement prior to having access to any proposal:

Nondisclosure Agreement

Whenever DOE furnishes a proposal for evaluation, I, the recipient, agree to use the information contained in the proposal only for DOE evaluation purposes and to treat the information obtained in confidence. This requirement for confidential treatment does not apply to information obtained from any source, including the proposer, without restriction. Any notice or restriction placed on the proposal by either DOE or the originator of the proposal shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of the evaluation, it is agreed all copies of the proposal and abstracts, if any, shall be returned to the DOE office which initially furnished the proposal for evaluation. Unless authorized by the Contracting Officer, I agree that I shall not contact the originator of the proposal concerning any aspect of its elements.

Recipient: _____

Date: _____

(End of Agreement)

(g) The submitter of any proposal shall be provided notice adequate to afford an opportunity to take

appropriate action before release of any information (data) contained therein pursuant to a request under the Freedom of Information Act (5 U.S.C. 552); and, time permitting, the submitter should be consulted to obtain assistance in determining the eligibility of the information (data) in question as an exemption under the Act. (See also 48 CFR 24.2, Freedom of Information Act.)

Subpart 915.3—Source Selection

915.305 Proposal evaluation. (DOE coverage—paragraph (d))

(d) Personnel from DOE, other Government agencies, consultants, and contractors, including those who manage or operate Government-owned facilities, may be used in the evaluation process as evaluators or advisors when their services are necessary and available. When personnel outside the Government, including those of contractors who operate or manage Government-owned facilities, are to be used as evaluators or advisors, approval and nondisclosure procedures as required by 48 CFR (DEAR) 915.207-70 shall be followed and a notice of the use of non-Federal evaluators shall be included in the solicitation. In all instances, such personnel will be required to comply with DOE conflict of interest and nondisclosure requirements.

Subpart 915.4—Contract Pricing

915.404-2 Information to support proposal analysis. (DOE coverage—paragraphs (a), (c) and (e))

(a)(1) Field pricing assistance as discussed in FAR 15.404-2(a) is not required for the negotiation of DOE contract prices or modifications thereof. The term "field pricing assistance" refers to the Department of Defense (DOD) system for obtaining a price and/or cost analysis report from a cognizant DOD field level contract management office wherein requests for the review of a proposal submitted by an offeror are initiated and the recommendations made by the various specialists of the management office are consolidated into a single report that is forwarded to the office making the contract award for use in conducting negotiations. In the DOE, such review activities, except for reviews performed by professional auditors, are expected to be accomplished by pricing support personnel located in DOE Contracting Activities. The DOE contracting officer shall formally request the assistance of appropriate pricing support personnel, other than auditors, for the review of any proposal that exceeds \$500,000, unless the contracting officer has

sufficient data to determine the reasonableness of the proposed cost or price. Such pricing support may be requested for proposals below \$500,000, if considered necessary for the establishment of a reasonable pricing arrangement. Contracting officers, however, are not precluded by this section from requesting pricing assistance from a cognizant DOD contract management office, provided an appropriate cross-servicing arrangement for pricing support services exists between the DOE and the servicing agency.

(c)(1) When an audit is required pursuant to 48 CFR 915.404-2-70, "Audit as an aid in proposal analysis," the request for audit shall be sent directly to the Federal audit office assigned cognizance of the offeror or prospective contractor. When the cognizant agency is other than the Defense Contract Audit Agency or the Department of Health and Human Services, and an appropriate interagency agreement has not been established, the need for audit assistance shall be coordinated with the Office of Policy, within the Headquarters procurement organization.

(2) The request for audit shall establish the due date for receipt of the auditor's report and in so doing shall allow as much time as possible for the auditor's review.

(e)(6) Copies of technical analysis reports prepared by DOE technical or other pricing support personnel shall not normally be provided to the auditor. The contracting officer or the supporting price, cost, or financial analyst at the contracting activity shall determine the monetary impact of the technical findings.

915.404-2-70 Audit as an aid in proposal analysis.

(a) When a contract price will be based on cost or pricing data submitted by the offerors, the DOE contracting officer or authorized representative shall request a review by the cognizant Federal audit activity prior to the negotiation of any contract or modification including modifications under advertised contracts in excess of:

- (1) \$500,000 for a firm fixed-price contract or a fixed-price contract with economic price adjustment provisions; or adjustment provisions; or
- (2) \$1,000,000 for all other contract types, including initial prices, estimated costs of cost-reimbursement contracts, interim and final price redeterminations, and target and settlement of incentive contracts.

(b) The requirement for auditor reviews of proposals which exceed the

thresholds specified in paragraph (a) of this section may be waived at a level above the contracting officer when the reasonableness of the negotiated contract price can be determined from information already available. The contract file shall be documented to reflect the reason for any such waiver, provided, however, that independent Government estimates of cost or price shall not be used as the sole justification for any such waiver.

§ 915.404-4 Profit. (DOE coverage—paragraphs (c) and (d))

(c)(4)(i) *Contracting officer responsibilities.* The statutory limitations on profit and fees as set forth in FAR 15.404-4(c)(4)(i) shall be followed, except as exempted for DOE architect-engineer contracts covering Atomic Energy Commission (AEC) and Bonneville Power Administration (BPA) functions. Pursuant to section 602(d)(13) and (20) of the Federal Property and Administration Services Act of 1949, as amended, those former AEC functions, as well as those of the BPA, now being performed by DOE are exempt from the 6 percent of cost restriction on contracts for architect-engineer services. The estimated costs on which the maximum fee is computed shall include facilities capital cost of money when this cost is included in cost estimates.

(c)(6) In cases where a change or modification calls for substantially different work than the basic contract, the contractor's effort may be radically changed and a detailed analysis of the profit factors would be a necessity. Also, if the dollar amount of the change or contract modification is very significant in comparison to the contract dollar amount, a detailed analysis should be made.

(d) *Profit-analysis factors.* A profit/fee analysis technique designed for a systematic application of the profit factors in FAR 15.404-4(d) provides contracting officers with an approach that will ensure consistent consideration of the relative value of the various factors in the establishment of a profit objective and the conduct of negotiations for a contract award. It also provides a basis for documentation of this objective, including an explanation of any significant departure from it in reaching a final agreement. The contracting officer's analysis of these prescribed factors is based on information available prior to negotiations. Such information is furnished in proposals, audit data, performance reports, preaward surveys and the like.

915.404-4-70 DOE structured profit and fee system.

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

915.404-4-70-1 General.

(a) *Objective.* It is the intent of DOE to remunerate contractors for financial and other risks which they may assume, resources they use, and organization, performance and management capabilities they employ. Profit or fee shall be negotiated for this purpose; however, when profit or fee is determined as a separate element of the contract price, the aim of negotiation should be to fit it to the acquisition, giving due weight to effort, risk, facilities investment, and special factors as set forth in this subpart.

(b) *Commercial (profit) organization.* Profit or fee prenegotiation objectives for contracts with commercial (profit) organizations shall be determined as provided in this subpart.

(c) *Nonprofit organizations.* It is DOE's general policy to pay fees in contracts with nonprofit organizations other than educational institutions and governmental bodies; however, it is a matter of negotiation whether a fee will be paid in a given case. In making this

decision, the DOE negotiating official should consider whether the contractor is ordinarily paid fees for the type of work involved. The profit objective should be reasonable in relation to the task to be performed and the requirements placed on the contractor.

(d) *Educational institutions.* It is DOE policy not to pay fees under contracts with educational institutions.

(e) *State, local and Indian tribal governments.* Profit or fee shall not be paid under contracts with State, local, and Indian tribal Governments.

915.404-70-2 Weighted guidelines system.

(a) To properly reflect differences among contracts and the circumstances relating thereto and to select an appropriate relative profit/fee in consideration of these differences and circumstances, weightings have been developed for application by the contracting officer to standard measurement bases representative of the prescribed profit factors cited in FAR 15.404-4(d) and paragraph (d) of this section. This is a structured system, referred to as weighted guidelines. Each profit factor or subfactor, or component thereof, has been assigned weights

relative to their value to the contract's overall effort. The range of weights to be applied to each profit factor is also set forth in paragraph (d) of this section. Guidance on how to apply the weighted guidelines is set forth in 48 CFR 915.404-4-70-8.

(b) Except as set forth in 48 CFR 915.404-4-70-4, the weighted guidelines shall be used in establishing the profit objective for negotiation of contracts where cost analysis is performed.

(c) The negotiation process does not contemplate or require agreement on either estimated cost elements or profit elements. Accordingly, although the details of analysis and evaluation may be discussed in the fact-finding phase of the negotiation process in order to develop a mutual understanding of the logic of the respective positions, specific agreement on the exact weights of values of the individual profit factors is not required and need not be attempted.

(d) The factors set forth in the following table are to be used in determining DOE profit objectives. The factors and weight ranges for each factor shall be used in all instances where the weighted guidelines are applied.

Profit factors	Weight ranges (percent)
I. Contractor Effort (Weights applied to cost):	
A. Material acquisitions:	
1. Purchased parts	1 to 3.
2. Subcontracted items	1 to 4.
3. Other materials	1 to 3.
B. Labor skills:	
1. Technical and managerial:	
a. Scientific	10 to 20.
b. Project management/administration	8 to 20.
c. Engineering	8 to 14.
2. Manufacturing	4 to 8.
3. Support services	4 to 14.
C. Overhead:	
1. Technical and managerial	5 to 8.
2. Manufacturing	3 to 6.
3. Support services	3 to 7.
D. Other direct costs	3 to 8.
E. G&A (General Management) expenses	5 to 7.
II. Contract Risk (type of contract-weights applied to total cost of items IA thru E)	0 to 8.
III. Capital Investment (Weights applied to the net book value of allocable facilities)	5 to 20.
IV. Independent Research and Development:	
A. Investment in IR&D program (Weights applied to allocable IR&D costs)	5 to 7.
B. Developed items employed (Weights applied to total of profit \$ for items IA thru E)	0 to 20.
V. Special Program Participation (Weights applied to total of Profit \$ for items IA thru E)	-5 to +5.
VI. Other Considerations (Weights applied to total of Profits \$ for items 1A thru E)	-5 to +5.
VII. Productivity/Performance (special computation)	(N/A).

915.404-4-70-3 Documentation.

Determination of the profit or fee objective, in accordance with this subpart shall be fully documented. Since the profit objective is the contracting officer's pre-negotiation

evaluation of a total profit allowance for the proposed contract, the amounts developed for each category of cost will probably change in the course of negotiation. Furthermore, the negotiated amounts will probably vary from the

objective and from the pre-negotiation detailed application of the weighted guidelines technique to each element of the contractor's input to total performance. Since the profit objective is viewed as a whole rather than as its

component parts, insignificant variations from the pre-negotiation profit objective, as a result of changes to the contractor's input to total performance, need not be documented in detail. Conversely, significant deviations from the profit objective necessary to reach a final agreement on profit or fee shall be explained in the price negotiation memorandum prepared in accordance with FAR 15.406-3.

915.404-4-70-4 Exceptions.

(a) For contracts not expected to exceed \$500,000, the weighted guidelines need not be used; however, the contracting officer may use the weighted guidelines for contracts below this amount if he or she elects to do so.

(b) For the following classes of contracts, the weighted guidelines shall not be used:

- (1) Commercialization and demonstration type contracts;
- (2) Management and operating contracts;
- (3) Construction contracts;
- (4) Construction management contracts;
- (5) Contracts primarily requiring delivery of material supplied by subcontractors;
- (6) Termination settlements; and
- (7) Contracts with educational institutions.

(c) In addition to paragraphs (a) and (b) of this section, the contracting officer need not use the weighted guidelines in unusual pricing situations where the weighted guidelines method has been determined by the DOE negotiating official to be unsuitable. Such exceptions shall be justified in writing and shall be authorized by the Head of the Contracting Activity. The contract file shall include this documentation and any other information that may support the exception.

(d) If the contracting officer makes a written determination that the pricing situation meets any of the circumstances set forth in this section, other methods for establishing the profit objective may be used. For contracts other than those subject to 48 CFR 917.6, the selected method shall be supported in a manner similar to that used in the weighted guidelines (profit factor breakdown and documentation of profit objectives); however, investment or other factors that would not be applicable to the contract shall be excluded from the profit objective determination. It is intended that the methods will result in profit objectives for noncapital intensive contracts that are below those generally developed for capital intensive contracts.

915.404-4-70-5 Special considerations—contracts with nonprofit organizations (other than educational institutions).

(a) For purposes of identification, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from Federal income taxation under section 501 of the Internal Revenue Code.

(b) In computing the amount of profit or fee to be paid, the DOE negotiating official shall take into account the tax benefits received by a nonprofit organization. While it is difficult to establish the degree to which a remuneration under any given contract contributes to an organization's overall net profit, the DOE negotiating official should assume that there is an element of profit in any amount to be paid.

(c) In order to assure consideration of the tax posture of nonprofit organizations during a profit or fee negotiation, the DOE negotiating official shall calculate the fee as for a contract with a commercial concern and then reduce it at least 25 percent. However, depending on the circumstances, the contracting officer may pay profit or fees somewhere between this amount and the appropriate profit or fee as if it were a commercial concern. When this is the case, the contract file shall be documented to specifically state the reason or reasons.

(d) Where a contract with a nonprofit organization is for the operation of Government-owned facilities, the fee should be calculated using the procedures and schedules applicable to operating contracts as set forth in 48 CFR part 970.

915.404-4-70-6 Contracts with educational institutions.

In certain situations the DOE may contract with a university to manage or operate Government-owned laboratories. These efforts are generally apart from, and not in conjunction with, their other activities, and the complexity and magnitude of the work are not normally found in standard university research or study contracts. Such operating contracts are subject to the applicable provisions set forth in 48 CFR part 970.

915.404-4-70-7 Alternative techniques.

(a) Profit or fees to be paid on construction contracts and construction management contracts shall be determined in accordance with the applicable profit/fee technique for such contracts set forth in 48 CFR 915.404-4-71.

(b) Profit and fee to be paid on contracts under \$500,000, not using the weighted guidelines, shall be judgmentally developed by the contracting officer by assigning individual dollar amounts to the factors appropriate to DOE profit considerations discussed in 48 CFR 915.404-4-70-2(d).

(c) Contracts which require only delivery or furnishing of goods or services supplied by subcontractors shall include a fee or profit which, in the best judgment of the contracting officer, is appropriate. It would be expected that there would be a declining relationship of profit/fee dollars in relation to total costs. The higher the cost of subcontracts, for example, the lower the profit/fee ratio to these costs.

(d) Profit/Fee considerations in termination settlements are often a question of equity. They are a matter of negotiation. They should not, however, exceed what would have otherwise been payable under weighted guidelines had the termination not occurred.

915.404-4-70-8 Weighted guidelines application considerations.

The Department has developed internal procedures to aid the contracting officer in the application of weighted guidelines and to assure a reasonable degree of uniformity across the Department.

915.404-4-71 Profit and fee-system for construction and construction management contracts.

915.404-4-71-1 General.

(a) Business concerns awarded a DOE construction or construction management contract shall be paid a profit or fee if requested or solicited. The profit or fee objective for a construction or construction management contract shall be an amount appropriate for the type of effort contained therein. It is the intent of DOE to

- (1) Reward contractors based on the complexity of work,
- (2) Reward contractors who demonstrate and establish excellent records of performance and
- (3) Reward contractors who contribute their own resources, including facilities and investment of capital.

(b) Standard fees or across-the-board agreements will not be used or made. Profit or fee objectives are to be determined for each contract according to the effort or task contracted for thereunder.

(c) Profit or fee payable on fixed-price and cost-reimbursable construction or construction management contracts shall be established in accordance with the appropriate procedures and schedules set forth in this subpart.

915.404-4-71-2 Limitations.

Amounts payable under construction and construction management contracts shall not exceed amounts derived from the schedules established for this purpose. Requests to pay fees in excess of these levels shall be forwarded to the Procurement Executive for review and approval.

915.404-4-71-3 Factors for determining fees.

(a) The profit policy stated in 48 CFR 915.404-4-71-1(a) reflects, in a broad sense, recognition that profit is compensation to contractors for the entrepreneurial function of organizing and managing resources (including capital resources), and the assumption of risk that all costs of performance (operating and capital) may not be reimbursable.

(b) The best approach calls for a structure that allows judgmental evaluation and determination of fee dollars for prescribed factors which impact the need for, and the rewards associated with, fee or profit, as follows.

(1) Management risk relating to performance, including the

- (i) Quality and diversity 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;

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

(3) The relative difficulty of work, including consideration of technical and administrative knowledge, skill, experience and clarity of technical specifications;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, including the extent to which the contractor contributes plant, equipment, computers, or working capital (labor, etc.);

(5) Duration of project;

(6) Size of operation;

(7) Benefits which may accrue to the contractor from gaining experience and know-how, from establishing or enhancing a reputation, or from being enabled 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, small disadvantaged, and women-owned small business in subcontracting, energy conservation, etc.

(c) The total fee objective and amount for a particular negotiation is established by judgmental considerations of the factors in paragraph (b) of this section, assigning fee values as deemed appropriate for each factor and totaling the resulting amounts.

(d) In recognition of the complexities of this process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, fee schedules have been developed which set forth maximum fee amounts that contracting activities are allowed to negotiate for a particular transaction without obtaining prior approval of the Procurement Executive. In addition, the fee negotiation objective established in accordance with 48 CFR 915.404-4-71-3(a), (b), and (c) shall not exceed the applicable fee schedule amounts without prior approval of the Procurement Executive. To facilitate application to a contract, the fee amounts are related to the total cost base which is defined as total operating and capital costs.

915.404-4-71-4 Considerations affecting fee amounts.

(a) In selecting final fee amounts for the various factors in 48 CFR 915.404-4-71-3 of this section, the DOE negotiating official will have to make

several judgments as discussed in this subsection.

(b) Complexity of a construction project shall be considered by analysis of its major parts. For a project which includes items of work of different degrees of complexity, a single average classification should be considered, or the work should be divided into separate classifications. The following class identifications are appropriate for proper fee determinations.

(1) *Class A*—Manufacturing plants involving operations requiring a high degree of design layout or process control; nuclear reactors; atomic particle accelerators; complex laboratories or industrial units especially designed for handling radioactive materials.

(2) *Class B*—Normal manufacturing processes and assembly operations such as ore dressing, metal working plant and simple processing plants; power plants and accessory switching and transformer stations; water treatment plants; sewage disposal plants; hospitals; and ordinary laboratories.

(3) *Class C*—Permanent administrative and general service buildings, permanent housing, roads, railroads, grading, sewers, storm drains, and water and power distribution systems.

(4) *Class D*—Construction camps and facilities and other construction of a temporary nature.

(c) Normal management elements of principal tasks relating to a construction contract cover several categories of tasks with differing rates of application throughout the construction period. The principal elements of management effort are outlined in this paragraph. Although each project has a total management value equal to 100% for all elements, the distribution of effort among the various elements will be different for each project due to differences in project character or size. The basic management elements and the normal range of efforts expected to apply for a normal sized project are as follows. When the normally expected effort will not be performed by a contractor, this fact should be considered in arriving at appropriate fee amounts.

Management elements	Effort range	
	Minimum	Maximum
I. <i>Broad project planning.</i> Overall project planning and scheduling, establishment of key project organization and consultation with the A-E and DOE. Performed by highest level of contractor's officers, technical personnel and project manager	15	25
II. <i>Field planning.</i> Mobilization and demobilization of top field organization from the contractor's existing organization and from other sources as necessary. Detailed project planning and scheduling for construction of facilities. Performed by the project manager and top field professional staff	18	28

Management elements	Effort range	
	Minimum	Maximum
III. <i>Labor supervision.</i> Direct supervision of manual employees. Performed by contractor's subprofessional staff, such as superintendents and foremen (some salaried and some hourly rate). This includes the contractor's personnel to coordinate and expedite the work of Subcontractors	12	16
IV. <i>Acquisition and subcontracting.</i> Acquisition of other than special equipment. Selection of subcontractors and execution and administration of subcontracts. Performed by contractor's staff under supervision and direction of elements I and II	12	16
V. <i>Labor relations and recruit-ment (manual).</i> Performed by the contractor's staff under supervision and direction of elements I, II and III. This includes demobilization of work forces	7	11
VI. <i>Recruitment of supervisory staff.</i> Staffing required to supplement the organization under elements I and II, and demobilization during completion of the project. Performed by contractor's permanent staff and recruitment personnel under supervision and direction of management elements I and II	4	6
VII. <i>Expediting.</i> Expediting contracting performed by contractor's staff and by subcontractors. Performed by contractor's staff under supervision and direction of elements I and II	4	6
VIII. <i>Construction equipment operations.</i> This includes mobilization and demobilization. Performed by contractor's staff under supervision, direction and coordination of elements I, II, and IV	4	6
IX. <i>Other services.</i> Timekeeping, cost accounting, estimating, reporting, security, etc., by the contractor's staff under supervision and direction of elements I and II	4	6

(d) Fee considerations dealing with the duration of a project are usually provided by the consideration given to the degree of complexity and magnitude of the work. In only very unusual circumstances should it be necessary to separately weight, positively or negatively, for the period of services or length of time involved in the project when determining fee levels.

(e) The size of the operation is to a considerable degree a continuation of the complexity factor, and the degree and amount of work required to be performed by and with the contractor's own resources. Generally, no separate weighting, positively or negatively, is required for consideration of those factors.

(f) The degree and amount of work required to be performed by and with the contractor's own resources affect the level of fees. Reasonable fees should be based on expectations of complete construction services normally associated with a construction or construction management contract. In the case of a construction contract, reduced services can be in the form of excessive subcontracting or supporting acquisition actions and labor relations interfaces being made by the government. If an unusual amount of

such work is performed by other than the contractor, it will be necessary to make downward adjustments in the fee levels to provide for the reduction in services required.

(g) The type of contract to be negotiated and the anticipated contractor cost risk shall be considered in establishing the appropriate fee objective for the contract.

(h) When a contract calls for the contractor to use its own resources, including facilities and equipment, and to make its own cost investment (i.e., when there is no letter-of-credit financing), a positive impact on the fee amount shall be reflected.

915.404-4-71-5 Fee schedules.

(a) The schedules included in this paragraph, adjusted in accordance with provisions of this section and 48 CFR 915.404-4-71-6, provide maximum fee levels for construction and construction management contracts. The fees are related to the estimated cost (fee base) for the construction work and services to be performed. The schedule in paragraph (d) of this section sets forth the basic fee schedule for construction contracts. The schedule in paragraph (f) of this section sets forth the basic fee schedule for construction management

contracts. A separate schedule in paragraph (h) of this section has been developed for determining the fee applicable to special equipment purchases and to reflect a differing level of fee consideration associated with the subcontractor effort under construction management contracts. (See 48 CFR 915.404-4-71-6(c) and 915.404-4-71-6(d)).

(b) The schedules cited in paragraph (a) of this section provide the maximum fee amount for a CPFF contract arrangement. If a fixed-price type contract is to be awarded, the fee amount set forth in the fee schedules shall be increased by an amount not to exceed 4 percent of the fee base.

(c) The fee schedule shown in paragraphs (d) and (f) of this section assumes a letter of credit financing arrangement. If a contract provides for or requires the contractor to make their own cost investment for contract performance (i.e., when there is no letter-of-credit financing), the fee amounts set forth in the fee schedules shall be increased by an amount equal to 5 percent of the fee amount as determined from the schedules.

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

CONSTRUCTION CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (Percent)	Incr. (Percent)
100,000	5,400	5.40	5.30
300,000	16,000	5.33	5.00
500,000	26,000	5.20	4.80
1,000,000	50,000	5.00	3.55
3,000,000	121,000	4.03	3.00
5,000,000	181,000	3.62	2.62
10,000,000	312,000	3.12	2.38
15,000,000	431,000	2.87	2.01
25,000,000	632,000	2.53	1.79
40,000,000	900,000	2.25	1.58

CONSTRUCTION CONTRACTS SCHEDULE—Continued

Fee base (dollars)	Fee (dollars)	Fee (Percent)	Incr. (Percent)
60,000,000	1,216,000	2.03	1.43
80,000,000	1,502,000	1.88	1.29
100,000,000	1,759,000	1.76	1.15
150,000,000	2,333,000	1.56	0.99
200,000,000	2,829,000	1.41	0.73
300,000,000	3,563,000	1.19	0.63
400,000,000	4,188,000	1.05	0.52
500,000,000	4,706,000	0.94	.....
Over \$500 million	4,706,000	.....	¹ 10.52

¹ 10.52% excess over \$500 million.

(e) When using the Construction Contracts Schedule for establishing maximum payable basic fees, the following adjustments shall be made to the Schedule fee amounts for complexity levels, excessive subcontracting, normal contractor services performed by the government or another contractor:

(1) The target fee amounts, set forth in the fee schedule, shall not be adjusted for a Class A project, which is maximum complexity. A Class B project requires a 10 percent reduction in amounts. Class C and D projects require a 20 percent and 30 percent reduction, respectively. The various classes are defined in 48 CFR 915.404-4-71-4(b).

(2) The target fee schedule provides for 45 percent of the contract work to be

subcontracted for such things as electrical and other specialties. Excessive subcontracting results when such efforts exceed 45 percent of the total contract work. To establish appropriate fee reductions for excessive subcontracting, the negotiating official should first determine the amount of subcontracting as a percentage of the total contract work. Next, the negotiating official should determine a percentage by which the prime contractor's normal requirement (based on a requirement for doing work with its own forces) is reduced due to the excessive subcontracting and, finally, multiply the two percentages to determine a fee reduction factor.

(3) If acquisition or other services normally expected of the contractor (see 48 CFR 915.404-4-71-4(c)) are performed by the government, or another DOE prime or operating contractor, a fee reduction may also be required. The negotiating official should first determine what percentage of the total procurement or other required services is performed by others. Then the negotiating official should apply this percentage reduction to the normally assigned weightings for the management services or effort as discussed in 48 CFR 915.404-4-71-4(c) to arrive at the appropriate reduction factor.

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

CONSTRUCTION MANAGEMENT CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
100,000	5,400	5.40	5.30
300,000	16,000	5.33	5.00
500,000	26,000	5.20	4.80
1,000,000	50,000	5.00	3.55
3,000,000	121,000	4.03	3.00
5,000,000	181,000	3.62	2.62
10,000,000	312,000	3.12	2.38
15,000,000	431,000	2.87	2.01
25,000,000	632,000	2.53	1.79
40,000,000	900,000	2.25	1.58
60,000,000	1,216,000	2.03	1.43
80,000,000	1,502,000	1.88	1.29
100,000,000	1,759,000	1.76	.....
Over \$100 million	1,759,000	.....	¹ 1.29

¹ 1.29% excess over \$100 million.

(g) When applying the basic Construction Management Contracts Schedule for determining maximum payable fees, no adjustments are necessary to such payable fees for contractor Force account labor used for work which should otherwise be subcontracted until such Force account work exceeds, in the aggregate, 20 percent of the base. Excessive use of Force account work results when such

effort exceeds 20 percent of the fee base; and, when this occurs, appropriate fee reductions for such excessive Force account labor shall be computed as follows:

(1) Determine the percentage amount of Force account work to total contractor effort.

(2) Determine the percentage amount of subcontract work reduced due to the use of Force account work.

(3) Multiply the two percentages to determine the fee reduction factor. It is not expected that reductions in the Construction Management Contracts Schedule fee amounts will be made for complexity, reduced requirements and similar adjustments as made for construction contracts.

(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 (percent)	Incr. (percent)
100,000		1,500	1.50	1.50
200,000		3,000	1.50	1.50
400,000		6,000	1.50	1.50
600,000		9,000	1.50	1.50
800,000		12,000	1.50	1.50
1,000,000		15,000	1.50	1.00
2,000,000		25,000	1.25	0.85
4,000,000		42,000	1.05	0.70
6,000,000		56,000	0.93	0.65
8,000,000		69,000	0.86	0.60
10,000,000		81,000	0.81	0.56
15,000,000		109,000	0.73	0.48
25,000,000		157,000	0.63	0.43
40,000,000		222,000	0.56	0.40
60,000,000		301,000	0.50	0.36
80,000,000		372,000	0.47	0.34
100,000,000		439,000	0.44	0.25
150,000,000		566,000	0.38	0.21
200,000,000		670,000	0.34	0.12
300,000,000		793,000	0.26	.....
Over \$300 million		793,000	.....	10.12

¹0.12% excess over \$300 million.

915.404-4-71-6 Fee base.

(a) The fee base shown in the Construction Contracts Schedule and Construction Management Contracts Schedule represents that estimate of cost to which a percentage factor is applied to determine maximum fee allowances. The fee base is the estimated necessary allowable cost of the construction work or other services which are to be performed. It shall include the estimated cost for, but is not limited to, the following as they may apply in the case of a construction or construction management contract:

- (1) Site preparation and utilities.
- (2) Construction (labor-materials-supplies) of buildings and auxiliary facilities.
- (3) Construction (labor-materials-supplies) to complete/construct temporary buildings.
- (4) Design services to support the foregoing.
- (5) General management and job planning cost.
- (6) Labor supervision.
- (7) Procurement and acquisition administration.
- (8) Construction performed by subcontractors.
- (9) Installation of government furnished or contractor acquired special equipment and other equipment.
- (10) Equipment (other than special equipment) which is to become Government property (including a component of Government property).

(b) The fee base for the basic fee determination for a construction contract and construction management contract shall include all necessary and allowable costs cited in paragraph (a) of this section as appropriate to the type of contract; except, any home office G&A expense paid as a contract cost per cost principle guidance and procedures shall be excluded from the fee base. The fee base shall exclude:

- (1) Cost of land.
 - (2) Cost of engineering (A&E work).
 - (3) Contingency estimate.
 - (4) Equipment rentals or use charges.
- (See 48 CFR 936.70.)

(5) Cost of government furnished equipment or materials.

(6) Special equipment as defined in 48 CFR 936.7201.

(c) A separate fee base shall be established for special equipment for use in applying the Special Equipment Purchases or Subcontract Work Schedule (see 48 CFR 915.404-4-71-5(h)). The fee base for determination of applicable fees on special equipment shall be based on the estimated purchase price of the equipment.

(d) The fee base under the Construction Management Contracts Schedule for a maximum basic fee determination for a construction management contract shall be comprised of only the costs of the construction manager's own efforts. However, it is recognized that in the case of construction management contracts, the actual construction work

will be performed by subcontractors. In most cases the subcontract awards for the construction work will be made by the construction management contractor. Occasionally the contract may involve management of construction performed under a contract awarded by the Department or by one of the Department's operating contractors. In these cases, the actual cost of the subcontracted construction work shall be excluded from the fee base used to determine the maximum basic fee (under the Construction Management Contracts Schedule) applicable to a construction management contract. A separate fee base for additional allowances (using the Special Equipment Purchases or Subcontract Work Schedule) shall be established, which shall be comprised of those subcontract construction costs, special equipment purchases, and other items' costs that are contracted for or purchased by the construction manager.

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 in accordance with 48 CFR 916.404-2, several special considerations are appropriate. Fee objectives for management and operating contracts, including those using the Construction or Construction Management fee schedules from section 48 CFR 915.404-4-71-5, shall be developed pursuant to the procedures set forth in section 48

CFR 970.15404-4-8. Fee objectives for other cost-plus-award-fee contracts shall be developed as follows:

(1) The base fee portion of the fee objective of an award fee contract may range from 0% up to the 50% level of the fee amount for a Cost-Plus-Fixed-Fee (CPFF) contract, arrived at by using the weighted guidelines or other techniques (such as those provided in 48 CFR 915.404-4-71 for construction and construction management contracts). However, the base amount should not normally exceed 50% of the otherwise applicable fixed fee. In the event this 50% limit is exceeded, appropriate documentation shall be entered into the contract file. In no event shall the base fee exceed 60% of the fixed fee amount.

(2) The base fee plus the amount included in the award fee pool should normally not exceed the fixed fee (as subjectively determined or as developed from the fee schedule) by more than 50%. However, in the event the base fee is to be less than 50% of the fixed fee, the maximum potential award fee may be increased proportionately with the decreases in base fee amounts.

(3) The following maximum potential award fees shall apply in award fee contracts: (percent is stated as percent of fee schedule amounts).

Base fee percent	Award fee percent	Maximum total percentage
50	100	150
40	120	160
30	140	170
20	160	180
10	180	190
0	200	200

(b) Prior approval of the Procurement Executive, is required for total fee (base plus award fee pool) exceeding the guidelines in 48 CFR 915.404-4-72(a)(3).

Subpart 915.6—Unsolicited Proposals

915.602 Policy.

(a) Present and future needs demand the involvement of all resources in exploring alternative energy sources and technologies. To achieve this objective, it is DOE policy to encourage external sources of unique and innovative methods, approaches, and ideas by stressing submission of unsolicited proposals for government support. In furtherance of this policy and to ensure the integrity of the acquisition process through application of reasonable controls, the DOE:

(1) Disseminates information on areas of broad technical concern whose solutions are considered relevant to the

accomplishment of DOE's assigned mission areas;

(2) Encourages potential proposers to consult with program personnel before expending resources in the development of written unsolicited proposals;

(3) Endeavors to distribute unsolicited proposals to all interested organizations within DOE;

(4) Processes unsolicited proposals in an expeditious manner and, where practicable, keeps proposers advised as discrete decisions are made;

(5) Assures that each proposal is evaluated in a fair and objective manner; and, (6) Assures that each proposal will be used only for its intended purpose and the information, subject to applicable laws and regulations, contained therein will not be divulged without prior permission of the proposer.

(b) Extensions of contract work resulting from unsolicited proposals shall be processed in accordance with the procedures at 48 CFR 943.170.

915.603 General. (DOE coverage—paragraph (e)).

(e) Unsolicited proposals for the performance of support services are, except as discussed in this paragraph, unacceptable as the performance of such services is unlikely to necessitate innovative and unique concepts. There may be rare instances in which an unsolicited proposal offers an innovative and unique approach to the accomplishment of a support service. If such a proposal offers a previously unknown or an alternative approach to generally recognized techniques for the accomplishment of a specific service(s) and such approach will provide significantly greater economy or enhanced quality, it may be considered for acceptance. Such acceptance shall, however, require approval of the acquisition of support services in accordance with applicable DOE Directives and be processed as a deviation to the prohibition in this paragraph.

915.605 Content of unsolicited proposals. (DOE coverage—paragraph (b)).

(b)(5) Unsolicited proposals for nonnuclear energy demonstration activities not covered by existing formal competitive solicitations or program opportunity notices may include a request for federal assistance or participation, and shall be subject to the cost sharing provisions of 48 CFR 917.70.

915.606 Agency procedures. (DOE coverage—paragraph (b)).

(b) Unless otherwise specified in a notice of program interest, all

unsolicited proposals should be submitted to the Unsolicited Proposal Coordinator, Office of Procurement and Assistance, Washington, DC 20585. If the proposer has ascertained the cognizant program office through preliminary contacts with program staff, the proposal may be submitted directly to that office. In such instances, the proposer should separately send a copy of the proposal cover letter to the unsolicited proposal coordinator to assure that the proposal is logged in the Department's automated tracking system for unsolicited proposals.

915.607 Criteria for acceptance of an unsolicited proposal. (DOE coverage—paragraph (c)).

(c) DOE's cost participation policy, at 48 CFR 917.70, shall be followed in determining the extent to which the DOE will participate in the cost for the proposed effort.

PART 916—TYPES OF CONTRACTS [AMENDED]

4. The Subpart heading, 916.5 Indefinite-Delivery Contracts, is added immediately preceding section 916.504.

PART 919—SMALL BUSINESS PROGRAMS [AMENDED]

5. Subsection 919.602-1 is amended in paragraph (a)(2) by revising "Regional" to read "Area".

6. Subsection 919.805-2 is revised to read as follows:

919.805-2 Procedures.

Acquisitions involving section 8(a) competition must comply with source selection procedures set forth in the FAR in accordance with 13 CFR 124.311(e)(1).

PART 935—RESEARCH AND DEVELOPMENT CONTRACTING [AMENDED]

935.016 [Removed]

7. Section 935.016, including subsections 935.016-1, 935.016-2 and 935.016-8, is removed.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS [AMENDED]

8. 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).

9. Subpart 970.15 is revised to read as follows:

Subpart 970.15—Contracting by Negotiation

- 970.15404-4 Fees for management and operating contracts.
- 970.15404-4-1 Fee policy.
- 970.15404-4-2 Special considerations—educational institutions.
- 970.15404-4-3 Special consideration—nonprofit organizations (other than educational institutions).
- 970.15404-4-4 Considerations and techniques for determining fees.
- 970.15404-4-5 Limitations.
- 970.15404-4-6 Fee base.
- 970.15404-4-7 Special equipment purchases.
- 970.15404-4-8 Special considerations—award fee.
- 970.15405 Price negotiation.
- 970.15406-2 Cost or pricing data.
- 970.15407-2 Make-or-buy plans.
- 970.15407-2-1 Policy.
- 970.15407-2-2 Requirements.
- 970.15407-2-3 Contract clause.

Subpart 970.15—Contracting by Negotiation**970.15404-4 Fees for management and operating contracts.****970.15404-4-1 Fee policy.**

(a) DOE management and operating contractors, except educational institutions, may be paid a fee. The fee for a management and operating contract shall be an amount commensurate with the difficulty of the work and the level of required skills, demonstrated excellence in performance, and where applicable, an amount which recognizes contractor contributions or utilizations of their own facilities or other investment capital.

(b) Fee objectives and amounts are to be determined for each contract. Standard fees or across the board agreements will not be used or made. Due to the nature of funding management and operating contracts, it is anticipated that fees shall be established in accordance with the funding cycle; however, a longer period may be used, particularly for production efforts.

(c) Fee amounts payable on contracts for administration, management, operation, and on-site support of Government-owned facilities shall be established in accordance with this part. Amounts payable shall not exceed maximum amounts derived from the appropriate fee schedule established for this purpose. Request to pay fees in excess of the maximum will be sent to the Procurement Executive, for review and approval.

(d) Maximum fees for those management and operating contracts that provide support services shall be

determined using the schedule(s) most closely related to the service(s) to be performed. This may be either the production and/or R&D schedules (in some cases this could be both schedules) or the maximum fee schedules for construction or construction management cited in 48 CFR 915.404-4-71. If architect-engineer services are involved, the weighted guidelines, profit-fee technique cited in 48 CFR 915.404-4-70 shall be applied.

(e) When a contract subject to this part 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 will be given to approval of fee amounts based on assigning weights to appropriate fee factors. The weighted guidelines factors developed in 48 CFR 915.404-4-70 may be applied for this purpose. However maximum fees as are discussed in 48 CFR 970.15404-4-1(c) and (d) shall not be exceeded without the Procurement Executive's approval.

970.15404-4-2 Special considerations—educational institutions.

(a) It is DOE policy to compensate educational institutions consistent with the level of financial and management risk they assume in connection with their work for the Department.

(b) Notwithstanding paragraph (a) of this section it may be, under special circumstances, permissible to reimburse or pay a management allowance to any educational institution provided such allowance can be justified and has the approval of the Head of the Contracting Activity.

970.15404-4-3 Special consideration—nonprofit organizations (other than educational institutions).

(a) Unless there is reason to do otherwise, it is the general policy of DOE to pay fees for a management and operating contract with a nonprofit organization; however, it is a matter of negotiation whether a fee will be paid in a given case.

(b) In computing the amounts to be paid, the tax status of the nonprofit organization should be considered. It is difficult to establish the degree to which the fee contributes to an organization's overall net profit since the fee compensates for certain unallowable costs and certain general and administrative expenses. It should be assumed, however, there is an element of profit in the fees paid under management and operating contracts.

(c) In order to assure consideration of the tax benefits of nonprofit

organizations the maximum payable fixed fee cited in the fee schedules of this subpart should be reduced by at least 25%. However, depending upon the circumstances and with appropriate justification, fees may be paid between this reduced amount and the fee amount established by the fee schedule.

970.15404-4-4 Considerations and techniques for determining fees.

(a) The intent of the fee policy stated in 48 CFR 970.15404-4-1 reflects recognition that a fee is remuneration to contractors for the entrepreneurial function of organizing and managing resources, the use of contractor resources (including capital resources), and the assumption of risk that all incurred costs (operating and capital) may not be reimbursable.

(b) Use of a purely cost-based structured approach for determining fee objectives and amounts for typical 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 judgmental evaluation and consideration of such significant factors, as outlined in this paragraph, and the selection of and assignment of appropriate fee values therefor:

(1) Management risk relating to performance, including:

(i) The quality and diversity of principal work tasks required to do the job.

(ii) The labor intensity of the job,

(iii) The special control problems, and

(iv) The advance planning, forecasting and other such requirements;

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

(3) The relative difficulty of work, including consideration of technical and administrative knowledge, skill, experience and clarity of technical specifications;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, including the extent to which the contractor contributes plant, equipment, computers, or working capital (labor, etc.);

(5) Duration of project;

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

(7) 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).

(8) The relationship of a proposed fee to fees being paid for similar work;

(9) The extent to which the activity contemplated is fundamentally a service being furnished to the Government or is an activity in which the contractor has substantial independent interest, a factor especially pertinent to research work which is closely allied to a contractor's own program and to operations which involve furnishing research facilities which would otherwise not be available because of their large cost;

(10) 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 being enabled to hold or expand a staff whose loyalties are primarily to the contractor; and

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

(c) The fee objective and amount for a particular negotiation is established by judgmental considerations of the factors in paragraph (6) of this subsection, assigning fee values as deemed appropriate for each factor, and totaling the resulting amounts.

(d) In recognition of the complexities of this fee determination process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, the fee schedules in 48 CFR 970.1515404-4-5 set forth the maximum amounts of fee that contracting activities are allowed to award for a particular transaction without obtaining prior approval of the

Procurement Executive. In addition the fee amount established in accordance with 48 CFR 970.15404-4-4 (a), (b) and (c) shall not be exceeded without prior approval of the Procurement Executive. To facilitate application of the schedules to a contract, the payable fee amounts thereunder are related to the total expected level of cost expenditures under the contract which is defined as the fee base.

970.15404-4-5 Limitations.

(a) Fee schedules representing the maximum allowable fee to be paid under operating and management contracts have been established for the following management and operating contract tasks or efforts.

- (1) Production/Manufacturing and
- (2) Research and Development

(b) The applicable schedules and maximum fees are:

PRODUCTION EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to \$1 Million			7.00
1,000,000	70,000	7.00	6.20
3,000,000	194,000	6.47	5.55
5,000,000	305,000	6.10	4.48
10,000,000	529,000	5.29	3.88
15,000,000	723,000	4.82	3.39
25,000,000	1,062,000	4.25	3.06
40,000,000	1,521,000	3.80	2.67
60,000,000	2,054,000	3.42	2.35
80,000,000	2,524,000	3.16	2.14
100,000,000	2,952,000	2.95	1.32
150,000,000	3,613,000	2.41	1.02
200,000,000	4,123,000	2.06	0.56
300,000,000	4,678,000	1.56	0.48
400,000,000	5,162,000	1.29	0.41
500,000,000	5,574,000	1.11	
Over \$500 million	5,574,000		¹ 0.41

¹0.41% excess over \$500 million.

RESEARCH AND DEVELOPMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
25,000	2,500	10.00	10.00
50,000	5,000	10.00	10.00
100,000	10,000	10.00	8.00
200,000	18,000	9.00	8.00
400,000	34,000	8.50	7.50
600,000	49,000	8.17	7.00
800,000	63,000	7.88	7.00
1,000,000	77,000	7.70	6.40
3,000,000	205,000	6.83	6.25
5,000,000	330,000	6.60	5.68
10,000,000	614,000	6.14	5.22
15,000,000	875,000	5.83	4.43
25,000,000	1,318,000	5.27	3.86
40,000,000	1,897,000	4.74	3.38
60,000,000	2,572,000	4.29	2.99
80,000,000	3,170,000	3.96	2.46
100,000,000	3,662,000	3.66	1.54
150,000,000	4,434,000	2.96	1.04
200,000,000	4,955,000	2.48	0.61
300,000,000	5,561,000	1.85	0.53

RESEARCH AND DEVELOPMENT EFFORTS—Continued

	Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
400,000,000		6,095,000	1.52	0.46
500,000,000		6,556,000	1.31	.....
Over \$500 million		6,556,000	.....	¹ 0.46

¹ 0.46% excess over \$500 million.

970.15404-4-6 Fee base.

(a) The fee base is an estimate of necessary allowable costs to which a fee factor has been applied to determine the maximum fee allowance. It represents the cost of the production or R&D work to be performed, 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) The fee base, in addition to the adjustments in paragraph (a) of this subsection, shall exclude:

(1) Any part of the following types of costs which are of such magnitude or nature as to distort the technical and management effort actually required of the contractor:

(i) Estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract;

(ii) Estimated cost or price of subcontracts and other major contractor procurements; and

(iii) Other similar costs.

(2) Special equipment as defined in 48 CFR 970.15404-4-7.

(3) Estimated cost of Government-furnished materials, services and equipment;

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

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

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

(c) In calculating the fee base for application of the production schedule, the estimated cost of research and development work and of process development work which goes beyond normal technical support required to ensure continuity of operation shall be excluded. The maximum fee for such R&D and process development work is calculated separately, starting at the beginning of the R&D schedule.

(d) The schedules in this part are not intended to reflect compensation for

unusual architect-engineer or construction services provided by the management and operating contractor. Such 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 in addition to the operating fees and should be calculated using the provisions of 48 CFR 915.404-4 relating to architect-engineer or construction fees.

(e) The fee schedules provide the maximum fees payable within the authority of the Head of the Contracting Activity. There may be times however, when the fee schedule does not reflect an adequate compensation to the contractor (such as the use of its own facilities and capital). Proposals to compensate a contractor in excess of the maximum fee schedules shall be submitted to the Procurement Executive. Requests should contain documentation and state specifically why the contractor is entitled to additional fees. (See also 48 CFR 970.15404-4-1(c)).

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 and use 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) The maximum allowable fee for such services shall not exceed the fee schedule set forth in 48 CFR 915.404-4-71-5(h) for such services as performed by construction contractors. The fee is based on the estimated price of the equipment being purchased.

(d) For purposes of this part, 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. Generally, special equipment is considered to be a capital-asset-type of equipment (typically equipment costing more than \$1,000 and having a service life of more than two years) for which the cost of installation and handling (including unloading, hauling and warehousing) is 5%, or less, of the purchase price of the equipment. However, 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.

(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—award fee.

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

(b) In management and operating contracts, the basic fee portion of the fee negotiation objective shall be established equal to what would otherwise have been the applicable fixed fee established in accordance with 48 CFR 970.15404-4-4. This basic fee includes a 50% base fee and a 50% "at risk fee." No variations from this objective are authorized without the prior approval of the Procurement Executive. The basic fee shall be paid in equal monthly installments, in accordance with the clause at 48 CFR 970.5204-16, Payments and Advances. However, in the event the contractor's performance is judged by the Fee Determination Official to fall into the performance categories of Marginal or Unsatisfactory, as those terms are

defined in subparagraph (c) of this section, the contractor shall be required to refund to the Government up to 50% of the basic fee paid for that evaluation period at a rate of 5% for each performance point below 76, as shown in the table in paragraph (c) of this section.

(c) The award fee portion of the fee objective for a management and operating contract shall be established for each contract using the formula Basic Fee Amount X (multiplied by the Applicable Award Fee Factor. The applicable award fee factor shall be established according to the following category placements: Defense Facility A; Defense Facility B; Enrichment Plant; Miscellaneous. Individual DOE facilities which are operated under award fee arrangements will be assigned to each category by the Procurement Executive, whose designee shall distribute a list of such assignments to all Heads of the Contracting Activities (HCAs). In assigning facilities to categories, the Procurement Executive will consider the factors listed in this paragraph below, to determine the risks' technical, management, and financial' which the contractor will assume in fulfilling the contract requirements. Contracts which

involve higher levels of risks shall be placed in higher categories and be eligible for higher award fees. The Procurement Executive, or designee, shall review the category assignments on a regular basis or upon request by the HCA for a particular contract.

Reassignments may be made based upon a change in contract requirements or changes in any of the following factors:

(1) Placement of the facility on the EPA's National Priority List (NPL). Facilities which are listed on the NPL shall be considered to involve higher risks.

(2) Nature of the contractor's work at the facility. Contracts involving the management of facilities listed on the NPL or requiring the environmental restoration of NPL sites, shall be considered to involve higher risks, whereas contracts involving unrelated work may be considered of lesser risk, regardless of NPL designations.

(3) Size of the facility in relationship to the areas of risk. Management of a large facility with a minor site designated on the NPL would be considered a lesser risk than management of a small facility which includes several major sites listed on the NPL.

(4) Quantity, complexity and type of Government property for which the contractor is responsible. Contracts requiring control over large quantities of sensitive Government property shall be considered of higher risk than those involving relatively small quantities.

(5) Exposure to Third-Party Liability. Contract activities which expose the contractor to the risk of third-party liability will be considered, and such risk assessed accordingly.

(6) The extent to which the work at the facility presents health and safety risks to the workers at the facility and the public.

(7) In considering these factors, any risks which are indemnified by the Government (for example, by the Price-Anderson Act) will not be considered as risk to the contractor. Where a single contract involves multiple facilities falling into different categories, the basic fee amount shall be divided into amounts applicable to the operation of each facility before applying the award fee pool factor. The following potential award fees shall apply in each category (percent is stated as a percentage of the otherwise applicable maximum fixed fee amount) which is now the basic fee:

Category	Basic fee (percent)	Potential award fee (percent)	Potential maximum total (percent)
Defense Facility-A	100	200	300
Defense Facility-B	100	150	250
Enrichment Plant	100	150	250
Miscellaneous	100	100	200

(d) All management and operating contracts awarded on an award fee basis shall incorporate the following performance grading and fee conversion system into the contract, by including the system in the Performance Evaluation Plan required by the contract clause at 48 CFR 970.5204-54. The performance grading and fee conversion system consists of a set of adjectival grades defined in a narrative form, in terms of performance points, and the percentage of available award fee earned as follows:

FEE CONVERSION TABLE

[The contractor's performance shall be evaluated by the Fee Determination Official at the end of each evaluation period, and graded in accordance with the following scale below]

Performance score	Percent of award fee earned
Outstanding	
Any score in the Outstanding category will earn 100% of the available award fee:	
96 and above	100.0
Good	
95	94.0
94	88.0
93	82.0
92	75.0
91	68.0
90	60.0
89	51.0
88	43.0
87	36.0
86	30.0

FEE CONVERSION TABLE—Continued

[The contractor's performance shall be evaluated by the Fee Determination Official at the end of each evaluation period, and graded in accordance with the following scale below]

Performance score	Percent of award fee earned
Satisfactory	
85	25.0
84	20.0
83	15.0
82	10.0
81	5.0
80	0.0
79	0.0
78	0.0
77	0.0
76	0.0
Marginal	
(Percent of Basic Fee Refunded)	
75	5.0
74	10.0
73	15.0

FEE CONVERSION TABLE—Continued

[The contractor's performance shall be evaluated by the Fee Determination Official at the end of each evaluation period, and graded in accordance with the following scale below]

Performance score	Percent of award fee earned
72	20.0
71	25.0
70	30.0
69	35.0
68	40.0
67	45.0
66	50.0

FEE CONVERSION TABLE—Continued

[The contractor's performance shall be evaluated by the Fee Determination Official at the end of each evaluation period, and graded in accordance with the following scale below]

Performance score	Percent of award fee earned
Unsatisfactory	
Below 65	50.0

Performance scores should be rounded to the nearest tenth of a point and the percent of award fee determined accordingly (e.g., a score of 88.4 equals 46.2% of award fee earned).

NARRATIVE DESCRIPTION OF PERFORMANCE ADJECTIVES

Adjective	Definition (performance description)
Outstanding	Performance substantially exceeds expected levels of performance. Several significant or notable achievements exist. No notable deficiencies in performance.
Good	Performance exceeds expected levels and some notable achievements exist. Although some notable deficiencies may exist, no significant deficiencies exist.
Satisfactory	Performance meets expected levels. Minimum standards are exceeded and "good practices" are evident in contract operations. Notable achievements or notable deficiencies may or may not exist.
Marginal	Performance is less than expected. No notable achievements exist; however, some notable deficiencies exist, or any notable achievements which exist are more than offset by significant or notable deficiencies.
Unsatisfactory	Performance is below minimum acceptable levels. Significant deficiencies causing severe impacts on mission capabilities exist. Performance at this level in any area mentioned in the Performance Evaluation Plan may result in a decision by the Fee Determination Official to withhold all award fees for the period.

Definitions

Significant: This term indicates a major event or sustained level of performance which, due to its importance, has a substantial positive or negative impact on the contractor's ability to carry out its mission.

Notable: This term indicates an event or sustained level of performance which is of lesser importance than a "significant" event, but nonetheless deserves positive or negative recognition.

(e) Prior approval of the Procurement Executive is required for total fee (basic plus award fee pool) exceeding the guidelines in paragraph (c) of this section. Additionally, in the event use of the award fee guidelines in paragraph (c) of this section result in total fees which exceed or are expected to exceed the statutory limitations imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b), prior approval of the Procurement Executive shall be obtained.

(f) When a management and operating contract is to be awarded on an award-fee basis, the contract shall include the clause at 48 CFR 970.5204-54.

(g) Fee Determination Officials must be careful to ensure that all important areas of contract performance are mentioned in the Performance Evaluation Plan, even if such areas are not assigned specific weights or percentages of award fee.

970.15405 Price negotiation.

(a) Management and operating contract prices (fee) and DOE obligations to support contract performance shall be governed by:

(1) The level of activity authorized and the amount of funds appropriated for DOE approved programs by specific program legislation;

(2) Congressional budget and reporting limitations;

(3) The amount of funds apportioned to DOE;

(4) The amount of obligational authority allotted to program officials and Approved Funding Program limitations; and

(5) The amount of funds actually available to the DOE operating activity as determined in accordance with applicable financial regulations and directives.

(b) Funds shall be obligated and made available by contract provision or modification after the funds become available for obligation for payment to support performance of DOE approved projects, tasks, work authorizations, or services.

(c) Management and operating contracts shall contain appropriate provisions to limit contractor expenditures to the overall amount of funds available and obligated. The

clause at 970.5204-15 shall be used for this purpose.

970.15406-2 Cost or pricing data.

(a) The certification requirements of FAR 15.406-2 are not applied to DOE cost-reimbursement management and operating contracts.

(b) The contracting officer shall ensure that management and operating contractors and their subcontractors obtain cost or pricing data prior to the award of a negotiated subcontract or modification of a subcontract in accordance with 48 CFR 15.406-2, and incorporate appropriate contract provisions similar to those set forth at 48 CFR 52.215-10 and 48 CFR 52.215-11 that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of the submission of defective cost or pricing data by a subcontractor at any tier.

(c) The clauses at 48 CFR 52.215-12 and 48 CFR 52.215-13 shall be included in management and operating contracts.

970.15407-2 Make-or-buy plans.**970.15407-2-1 Policy.**

(a) Contracting officers shall require management and operating contractors to develop and implement make-or-buy plans that establish a preference for providing supplies or services (including construction and construction management) on a least-cost basis, subject to program specific make-or-buy criteria. The emphasis of this make-or-buy structure is to eliminate bias for in-house performance where an activity may be performed at less cost or otherwise more efficiently through subcontracting.

(b) A work activity, supply or service is provided at "least cost" when, after consideration of a variety of appropriate programmatic, business, and financial factors, it is concluded that performance by either "in-house" resources or by contracting out is likely to provide the property or service at the lowest overall cost. Programmatic factors include, but are not limited to, program specific make-or-buy criteria established by the Department of Energy, the impact of a "make" or a "buy" decision on mission accomplishment, and anticipated changes to the mission of the facility or site. Business factors pertain to such elements as market conditions, past experience in obtaining similar supplies or services, and overall operational efficiencies that might be available through either in-house performance or contracting out. Among the financial factors that may be considered to determine a least-cost alternative in a make-or-buy analysis are both recurring and one-time costs attributable to either retaining or contracting out a particular item, financial risk, and the anticipated contract price.

(c) In developing and implementing its make-or-buy plan, a contractor shall be required to assess subcontracting opportunities and implement subcontracting decisions in accordance with the following:

(1) The contractor shall conduct internal productivity improvement and cost-reduction programs so that in-house performance options can be made more efficient and cost-effective.

(2) The contractor shall consider subcontracting opportunities with the maximum practicable regard for open communications with potentially affected employees and their representatives. Similarly, a contractor will communicate its plans, activities, cost-benefit analyses, and decisions with those stakeholders likely to be affected by such decisions, including representatives of the community and local businesses.

970.15407-2-2 Requirements.

(a) *Development of program-specific make-or-buy criteria.* DOE program offices responsible for the work conducted at the facility or site shall develop program specific make-or-buy criteria. Program specific make-or-buy criteria are those factors that reflect specific mission or program objectives (including operational efficiency, contractor diversity, environment, safety and health, work force displacement and restructuring, and collective bargaining agreements) and that, upon their application to a specific work effort, would override a decision based on a purely economic rationale. These criteria are to be used to assess each work effort identified in a facility's or site's make-or-buy plan to determine the appropriateness of a contractor's make-or-buy decisions. Program specific make-or-buy criteria shall be provided to the contractor for use in developing a make-or-buy plan for the facility, site, or specific program, as appropriate.

(b) *Make-or-buy plan property and services.* Supplies or services estimated to cost less than one (1) percent of the estimated total operating cost for a year or \$1 million for the same year, whichever is less, need not be included in the contractor's make-or-buy plan. However, adjustments may be made to these thresholds where programmatic or cost considerations would indicate that a particular supply or service should be included in the make-or-buy plan.

(c) *Competitive solicitation requirements.* (1) To the extent practicable, a competitive solicitation for the management and operation of a Department of Energy facility or site should:

(i) Identify those programs, projects, work areas, functions or services that the Department intends for the successful offeror to include in any make-or-buy plan; and

(ii) Require the submission of a preliminary make-or-buy plan for the period of performance of the contract from each offeror as part of its proposal submitted in response to the competitive solicitation.

(2) If the requirement for each offeror to submit a preliminary make-or-buy plan as part of its proposal is impractical or otherwise incompatible with the acquisition strategy, consideration should be given to structuring the evaluation criteria for the competitive solicitation in such a manner as to permit the evaluation of an offeror's approach to conducting its make-or-buy program within the context of the contractual requirements.

(3) The successful offeror's preliminary make-or-buy plan shall be

submitted for final approval within 180 days after contract award, consistent with the requirements of 48 CFR 970.5204-76(c), Make-or-buy Plan.

(d) Evaluation of the contractor's make-or-buy plan. In evaluating the contractor's make-or-buy plan, the contracting officer shall consider the following factors:

(1) The program specific make-or-buy criteria (such as operational efficiency, contractor diversity, environment, safety and health, work force displacement and restructuring, and collective bargaining agreements) with particular attention to the effect of a "buy" decision on the contractor's ability to maintain core competencies needed to accomplish mission-related program and projects;

(2) The impact of a "make" or "buy" decision on contract cost, schedule, and performance and financial risk;

(3) The potential impact of a "make" or "buy" decision on known future mission or program activities at the facility or site;

(4) Past experience at the facility or site regarding "make-or-buy" decisions for the same, or similar, supplies or services;

(5) Consistency with the contractor's approved subcontracting plan, as required by the clause entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan" (FAR 52.219-9), of the contract and implementation of Section 3021 of the Energy Policy Act of 1992.

(6) Local market conditions, including contractor work force displacement and the availability of firms that can meet the work requirements with regard to quality, quantity, cost, and timeliness;

(7) Where the construction of new or additional facilities is required, that the cost of such facilities is in the Government's best interest when compared to subcontracting or privatization alternatives; and

(8) Whether all relevant requirements and costs of performing the work by the contractor and through subcontracting are considered and any different requirements for the same work are reconciled.

(e) Approval. The contracting officer shall approve all plans and revisions thereto. Once approved, a make-or-buy plan shall remain effective for the term of the contract (up to a period of five years), unless circumstances warrant a change.

(f) Administration. The contractor's performance against the approved make-or-buy plan shall be monitored to ensure that:

(1) The contractor is complying with the plan;

(2) Items identified for deferral decisions are addressed in a timely manner; and

(3) The contractor periodically updates the make-or-buy plan based on changed circumstances or significant new work.

970.15407-2-3 Contract clause.

The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204-76, Make-or-Buy Plan, in management and operating contracts.

970.3102 Application of cost principles [Amended]

10. Subsection 970.3102-1 is amended at paragraph (c) by: revising "970.1509-1" to read "970.15404-4-1"; revising "970.1509-4" to read "970.15404-4-4"; and revising "970.1509-5" to read "970.15404-4-5".

11. Subsection 970.3102-15 is amended at paragraphs (b)(1) and (b)(2) by revising "FAR 15.8" to read "48 CFR (FAR) Subpart 15.4".

12. Section 970.5202 is revised to read as follows:

970.5202 Deviations.

Deviations from FAR and DEAR contract clauses and solicitation provisions shall be made only in accordance with the deviation procedures of 48 CFR (FAR) Subpart 1.4 and written internal Departmental procedures.

970.5204 [Amended].

13. Subsection 970.5204-9 is amended in the NOTE following paragraph (a) by revising "52.215-22" to read "52.215-11".

14. Subsection 970.5204-15 is amended in the prescriptive text by revising "970.1508(c)" to read "970.15405(c)".

15. Subsection 970.5204-22 in the clause, paragraph (f)(1), is amended by revising the dollar amount "\$25,000" to read "\$100,000", revising (f)(2), redesignating (f)(3) as (f)(4), and adding new (f)(3) to read as follows:

970.5204-22 Contractor purchasing system.

* * * * *

Contractor Purchasing System (Oct 1995)

* * * * *

(f) * * *

(2) For fixed-price, unit-priced and cost reimbursement construction subcontracts in excess of \$100,000 a payment bond shall be obtained on Standard Form 25A modified to name the contractor as well as the United States of America as obligees. The penal

amounts shall be determined in accordance with 48 CFR (FAR) 28.102-2(b).

(3) For fixed-price, unit-priced and cost-reimbursement construction subcontracts, greater than \$25,000, but not greater than \$100,000, the contractor shall select two or more of the payment protections at 48 CFR (FAR) 28.102-1(b), giving particular consideration to the inclusion of an irrevocable letter of credit as one of the selected alternatives.

* * * * *

16. Subsection 970.5204-44 in the clause, is amended in paragraph (b)(5) by replacing "970.1508-1" with "970.15406-2"; replacing "52.215-22" with "52.215-10"; and replacing "52.215-23" with "52.215-11".

17. Subsection 970.5204-54 is revised in the prescriptive text by replacing "970.1509-8(d)" with "970.15404-4-8(d)".

18. Subsection 970.5204-76 is revised in the prescriptive text by replacing "970.1507-3" with "970.15407-2-3".

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 971015246-7293-02; I.D. 101998M]

Fisheries of the Northeastern United States; Summer Flounder Fisheries; Readjustment to the 1998 Commercial State Quota for North Carolina

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Commercial quota adjustment.

SUMMARY: NMFS announces an adjustment to the 1998 summer flounder commercial quota for North Carolina. The North Carolina adjustment complies with a court order setting aside the 1997 overage, which had been deducted from the 1998 quota earlier this year. The public is advised that the quota adjustment has been made and is informed of the revised quota.

DATES: Effective October 20, 1998, through December 31, 1998.

FOR FURTHER INFORMATION CONTACT: Myles Raizin, Fisheries Management Specialist, 978-281-9326.

SUPPLEMENTARY INFORMATION:

Regulations implementing summer flounder management measures are found at 50 CFR part 648, subparts A and G. The regulations require annual specification of a commercial quota that is apportioned among the Atlantic coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.100. Section 648.100(d)(2) provides that all landings for sale in a state shall be applied against that state's annual commercial quota. Any landings in excess of the state's quota must be deducted from that state's annual quota for the following year.

The final specifications for the 1998 summer flounder fishery (62 FR 66304, December 18, 1997), adopted to ensure achievement of a fishing mortality rate (F) of 0.24 for 1998, set a total commercial quota equal to 11,105,636 lb (5.0 million kg). In the preamble to the rule implementing these specifications, NMFS noted that associated adjustments to states' 1998 quotas would be required as a result of any landings in excess of the 1997 quota. Two adjustments were made to the 1998 state commercial quotas, effective January 16, 1998 (63 FR 3478, January 23, 1998) and April 23, 1998 (63 FR 23227, April 28, 1998) to reflect updated 1997 landings. This resulted in an overage of 399,740 lb (181,319 kg) for North Carolina for 1998.

The adjustment in this notification to the North Carolina quota is required by a court order. In response to a lawsuit filed by the North Carolina Fisheries Association, Inc., Georges Seafood, Inc., and the State of North Carolina, the United States District Court for the Eastern District of Virginia, Norfolk Division, on September 28, 1998, ordered that the 1997 overage for the North Carolina summer flounder fishery be set aside. Therefore, this adjustment subtracts 399,740 lb (181,319 kg) from North Carolina's 1997 overage and adds this amount to the 1998 North Carolina quota for summer flounder, revising it from 2,649,849 lb (1,201,951 kg) to 3,049,589 lb (1,383,270 kg) and total coastwide readjusted quota for summer flounder are revised from 10,558,994 lb (4,789,479 kg) to 10,958,734 lb (4,972,102 kg). Table 1. displays the current 1998 quotas resulting from this readjustment to the North Carolina quota.